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# *Articles*

# Personal Jurisdiction in Federal Question Suits: Toward a Unified and Rational Theory for Personal Jurisdiction over Non-Domiciliary and Alien Defendants

IRENE DEAVILLE SANN*

## I. Introduction

For many years, courts[1] and commentators[2] have struggled with the question of the personal jurisdiction[3] of state courts over defendants who did not come within one of the traditional bases of per-

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1. *See, e.g.,* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Kulko v. Superior Court, 436 U.S. 84 (1978); Hanson v. Denckla, 357 U.S. 235 (1958); McGee v. International Life Ins. Co., 355 U.S. 220 (1957); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952); International Shoe Co. v. Washington, 326 U.S. 310 (1945); Hess v. Pawloski, 274 U.S. 352 (1927); Cannon Mfg. Co. v. Cudahy Packing Co., 267 U.S. 333 (1925); Pennoyer

v. Neff, 95 U.S. 714 (1877); Aycock v. Louisiana Aircraft, Inc., 617 F.2d 432 (5th Cir. 1980); Lakeside Bridge & Steel Co. v. Mountain State Constr. Co., 597 F.2d 596 (7th Cir. 1979); H. Ray Baker, Inc. v. Associated Banking Corp., 592 F.2d 550 (9th Cir. 1979); Capital Dredge & Dock Corp. v. Midwest Dredging Co., 573 F.2d 377 (6th Cir. 1978); Pedi Bares, Inc. v. P & C Food Markets, Inc., 567 F.2d 933 (10th Cir. 1977); Republic Int'l. Corp. v. Amco Eng'rs, Inc., 516 F.2d 161 (9th Cir. 1975); United States Ry. Equip. Co. v. Port Huron & Detroit R.R., 495 F.2d 1127 (7th Cir. 1974); Whittaker Corp. v. United Aircraft Corp., 482 F.2d 1079 (1st Cir. 1973); In-Flight Devices Corp. v. Van Dusen Air, Inc., 466 F.2d 220 (6th Cir. 1972); Ratliff v. Cooper Laboratories, Inc., 444 F.2d 745 (4th Cir.), *cert. denied,* 404 U.S. 948, *reh'g denied* 404 U.S. 1006 (1971); Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc., 239 F.2d 502 (4th Cir. 1956); Royal Globe Ins. Co. v. Logicon, Inc., 487 F. Supp. 1245 (N.D. Ill. 1980); Capitol Indem. Corp. v. Certain Lloyds Underwriters and/or London Cos., 487 F. Supp. 1115 (W.D. Wis. 1980); Ayers v. Copperweld Corp., 487 F. Supp. 593 (S.D. Tex. 1980); Manufacturers' Lease Plans, Inc. v. Alverson Draughon College, 115 Ariz. 358, 565 P.2d 864 (1977); Buckeye Boiler Co. v. Superior Court, 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969); Kailieha v. Hayes, 56 Hawaii 306, 536 P.2d 568 (1975); Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961); Colony Press, Inc. v. Fleeman, 17 Ill. App. 3d 14, 308 N.E.2d 78 (1974); Rath Packing Co. v. Intercontinental Meat Traders, Inc., 181 N.W. 2d 184 (Iowa 1970); O.N. Jonas Co. v. B & P Sales Corp., 232 Ga. 256, 206 S.E. 2d 437 (1974); Compania de Astral v. Boston Metals Co., 205 Md. 237, 107 A.2d 357 (1954), *cert. denied,* 348 U.S. 943 (1955); Marshall Egg Transp. Co. v. Bender-Goodman Co., 275 Minn. 534, 148 N.W.2d 161 (1967); Miller v. Glendale Equip. & Supply, Inc., 344 So. 2d 736 (Miss. 1977); McIntosh v. Navaro Seed Co., 81 N.M. 302, 466 P.2d 868 (1970); Conn v. Whitmore, 9 Utah 2d 250, 342 P.2d 871 (1959); O'Brien v. Comstock Foods, Inc., 123 Vt. 461, 194 A.2d 568 (1963); Smyth v. Twin State Improvement Corp., 116 Vt. 569, 80 A.2d 664 (1951); Zerbel v. H.L. Federman & Co., 48 Wis. 2d 54, 179 N.W. 2d 872 (1970), *appeal dismissed* 402 U.S. 902 (1971). On the closely-related issue of obtaining jurisdiction to determine a particular dispute involving a non-domiciliary or alien defendant by asserting authority over the defendant's real or personal property located in the state, with the judgment thus obtained being limited to the value of the property seized, attached or sequestered (*quasi-in-rem* jurisdiction), see Rush v. Savchuk, 444 U.S. 320 (1980); Shaffer v. Heitner, 433 U.S. 186 (1977); New York Life Ins. Co. v. Dunlevy, 241 U.S. 518 (1916); Harris v. Balk, 198 U.S. 215 (1905); Minichiello v. Rosenberg, 410 F.2d 106 (2d Cir. 1968); Simpson v. Loehmann, 21 N.Y.2d 305, 234 N.E.2d 669, 2387 N.Y.S.2d 633 (1967); Seider v. Roth, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966); *see also* Atkinson v. Superior Court, 49 Cal. 2d 338, 316 P.2d 960 (1957), *cert. denied,* 357 U.S. 569 (1958).

2. *See, e.g.*, Jay, *"Minimum Contacts" as a Unified Theory of Personal Jurisdiction: A Reappraisal,* 59 N.C.L. REV. 429 (1981); Kamp, *Beyond Minimum Contacts: The Supreme Court's New Jurisdictional Theory,* 15 GA. L. REV. 19 (1980); Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis,* 79 HARV. L. REV. 1121 (1966); Woods, Pennoyer's *Demise: Personal Jurisdiction After* Shaffer *and* Kulko *and a Modest Prediction Regarding* World-Wide Volkswagen Corp. v. Woodson , 20 ARIZ. L. REV. 861 (1978); Comment, *Federalism, Due Process, and Minimum Contacts:* World-Wide Volkswagen v. Woodson, 80 COLUM. L. REV. 1341 (1980) [hereinafter cited as Comment, *Federalism*]; *Developments in the Law—State-Court Jurisdiction,* 73 HARV. L. REV. 909 (1960) [hereinafter cited as *Developments in the Law*]; Note, World-Wide Volkswagen Corporation v. Woodson: *Minimum Contacts in a Modern World,* 8 PEPPERDINE L. REV. 783 (1981) [hereinafter cited as Note, *World-Wide Volkswagen*]; Comment, *Minimum Contacts Confused and Reconfused—Variations on a Theme by* International Shoe—*Or, Is This Trip Necessary?,* 7 SAN DIEGO L. REV. 304 (1970); Note, *In Personam Jurisdiction over Foreign Corporations: An Interest-Balancing Test,* 20 U. FLA. L. REV. 33 (1967). On the closely-related issue of obtaining jurisdiction to determine a particular dispute involving a nondomiciliary or alien defendant by asserting authority over the defendant's real or personal property located in the state, with the judgment thus obtained being limited to the value of the property seized, attached or sequestered, see Carrington, *The Modern Utility of Quasi in Rem Jurisdiction,* 76 HARV. L. REV. 303 (1962); Currie, *Attachment and Garnishment in the Federal Courts,* 59 MICH. L. REV. 337 (1961); Silberman, Shaffer v. Heitner: *The End of an Era,* 53 N.Y.U. L. REV. 33 (1978); Riesenfeld, Shaffer v. Heitner: *Holding, Implications, Forebodings,* 30 HASTINGS L.J. 1183 (1979); Smit, *The Enduring Utility of In Rem Rules: A Lasting Legacy of* Pennoyer v. Neff, 43 BROOKLYN L. REV. 600 (1977); Comment, *The* Seider *Era Ends, But the Rush Isn't Over Yet,* 47 BROOKLYN L. REV. 203

(1980); Note, Rush v. Savchuk: *Is the* Seider *Spoiled or Just Getting Harder?*, 9 HOFSTRA L. REV. 247 (1980); Note, Seider v. Roth *Jurisdiction: A Durable Rule Dies a Slow Death With the Advent of* Rush v. Savchuk, 16 NEW ENG. L. REV. 139 (1980); Comment, *Putting the Djinni Back in the Bottle:* Rush v. Savchuk *and the Demise of* Seider *Jurisdiction*, 1981 UTAH L. REV. 637.

3. The ability of a court to assert authority over persons or property usually is denominated basis, and basis can be divided into three categories: personal, or *in personam*, jurisdiction, *in rem* jurisdiction, and *quasi-in-rem* jurisdiction. *In rem* jurisdiction is the authority of a court to determine the rights of everyone in the entire world with respect to a piece of property located within the territorial authority of the court and "brought before the court" in a proper proceeding. *See* RESTATEMENT (SECOND) OF JUDGMENTS §30 comment a (Tent. Draft No. 1, 1973); RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§59-65 (1971). As noted by one commentator, "[t]he result of a proceeding in rem will affect the defendant's personal rights, but its essential function is to determine title to or status of property subject to the court's jurisdiction." *Developments in the Law, supra* note 2, at 948. *In rem* actions include suits to register title to land, *see, e.g.*, American Land Co. v. Zeiss, 219 U.S. 47 (1911); Tyler v. Judges of the Court of Registration, 175 Mass. 71, 55 N.E. 812, *appeal dismissed*, 179 U.S. 405 (1900), condemnation proceedings, *see, e.g.*, Huling v. Kaw Valley Ry. & Improvement Co., 130 U.S. 559 (1889); Housing Authority v. Bjork, 109 Mont. 552, 98 P.2d 324 (1940), confiscation proceedings, *see, e.g.*, The Confiscation Cases, 87 U.S. (20 Wall.) 92 (1874), or actions to administer a decedent's estate, *see, e.g.*, *In re* Estate of Nilson, 126 Neb. 541, 253 N.W. 675 (1934). *See also* von Mehren & Trautman, *supra* note 2, at 1135-36.

*Quasi-in-rem* jurisdiction involves adjudication of claims not related to the defendant's property which is located within the territorial authority of the court and which is attached at the outset of the suit to provide both the basis for the court to adjudicate the particular controversy and the source from which the plaintiff's claim can be satisfied if the plaintiff prevails on the merits. *See* RESTATEMENT (SECOND) OF JUDGMENTS §32 (1982); RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§66-68 (1971). *See also* Rush v. Savchuk, 444 U.S. 320 (1980); Shaffer v. Heitner, 433 U.S. 186 (1977); New York Life Ins. Co. v. Dunlevy, 241 U.S. 518 (1916); Harris v. Balk, 198 U.S. 215 (1905); Freeman v. Alderson, 119 U.S. 185 (1886); Seider v. Roth, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966). Any resulting judgment is only binding between the parties to the adjudication and only to the extent of the property seized; such judgment has no *res judicata* effect. Both *in rem* and *quasi-in-rem* jurisdiction are beyond the scope of this article; thus, the recent blurring of the lines between and among *in rem, quasi-in-rem,* and *in personam* jurisdiction in cases such as Rush v. Savchuk, 444 U.S. 320 (1980), and Shaffer v. Heitner, 433 U.S. 186 (1977), will not be addressed.

Personal jurisdiction is the authority of a court to render a decision binding on the person of the defendant. In order to so bind the defendant, a state court must have some grounds to assert its powers over the defendant, grounds that are not inconsistent with the limitations imposed on the power of the court by the United States Constitution, by Federal legislation, by the state constitution, or by any relevant state legislation. *See Developments in the Law, supra* note 2, at 912. If a state court has not properly exercised this power, its judgment should not be entitled to full faith and credit by sister states; the judgment should not be enforceable in any other state. *See infra* note 9 and accompanying text. *See also* von Mehren & Trautman, *supra* note 2, at 1126; *Developments in the Law, supra* note 2, at 912.

Sometimes, it is helpful for students to consider the personal jurisdiction of a state court in the following way: Hypothetically, any court could assert jurisdiction over any defendant located anywhere, whether or not the defendant had any contacts with the forum state. Wholesale assertions of jurisdiction, however, would step all over the sovereign toes of the state or country in which the defendant was located and could create situations of extreme hardship to the defendant. Thus, to limit abuses and to create national and international harmony, only part of that hypothetically infinite pool of judicial power can be channelled to a particular state. The pool of power passes through four successive funnels, those funnels established by the U.S. Constitution, any relevant federal legislation, the state's constitution, and any relevant state legislation. *See* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.") Each funnel can operate to further reduce the amount of authority being channelled to the state court or can pass through the entire amount of power that enters that funnel, merely adding its particular imprimatur to the propriety of the state court exercise of that power.

sonal jurisdiction: presence in the state,[4] domicile in the state,[5] or consent to suit in the state.[6] The United States Supreme Court has

The limiting factor at the United States Constitutional level has been determined to be the due process clause of the fourteenth amendment. *See infra* notes 73-75 and accompanying text. Thus, while the hypothetically infinite pool of power enters the first funnel, the authority that emerges is only those exercises of state court personal jurisdiction not inconsistent with the fourteenth amendment. As a general rule, federal legislation does not operate to further limit the *personal jurisdiction* of state courts by prohibiting state suits against certain entities or individuals; rather, federal statutes achieve a similar purpose by giving exclusive subject matter jurisdiction to federal courts in some areas. *See infra* note 19. *See, e.g.*, Tucker Act §2, 28 U.S.C. §1346(a) (1976 & Supp. V 1981); 28 U.S.C. §1491 (Supp. V. 1981) (contract actions); Federal Tort Claims Act §410, 28 U.S.C. §1346(b) (1976). Moreover, while article III of the Constitution confers jurisdiction on the federal courts in suits in which the United States is a party, the United States may be sued only when a federal statute authorizes such suit. Williams v. United States, 289 U.S. 553 (1933).

From this point, the remaining authority passes to the states, with each state determining the extent to which it will further limit the personal jurisdiction authority of its own courts. Obviously, a state cannot grant its courts more authority than the U.S. Constitution permits; when the Supreme Court finds that a state has exceeded the Federal Constitutional and Congressional limitations, the Supreme Court will invalidate the State statute authorizing such exercise of jurisdiction, *see* Shaffer v. Heitner, 433 U.S. 186, 219 (1977) ("I . . . agree . . . that the Delaware [sequestration] statute is unconstitutional on its face") (Stevens, J., concurring); Wuchter v. Pizzutti, 276 U.S. 13 (1928) (state nonresident motorist statute invalidated because, inconsistent with the requirements of due process, the statute did not expressly require notice to the nonresident defendant), or will declare the application of the statute to the particular defendant to be unconstitutional. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 299 (1980) (application of Oklahoma "long-arm" statute to defendant who had "no 'contacts, ties, or relations' with the State of Oklahoma" found unconstitutional). Most states have enacted "long-arm" statutes that describe the circumstances in which their courts can assert personal jurisdiction. Some states, such as California and Rhode Island, merely pass through to their courts all the power that has emerged from the fourteenth amendment. The California statute, CAL. CIV. PROC. CODE §410.10, provides: "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." The Rhode Island Statute, R.I. GEN. LAWS §9-5-33 (1956) provides:

> Every foreign corporation, every individual not a resident of this state. . . , and every partnership or association, composed of any person or persons, not such residents, that shall have the necessary minimum contacts with the state of Rhode Island, shall be subject to the jurisdiction of the state of Rhode Island, and the courts of this state shall hold such foreign corporations and such nonresident individuals . . . and such partnerships or associations amenable to suit in Rhode Island in every case not contrary to the provisions of the constitution or laws of the United States.

Other state long-arm statutes attempt to further describe and/or limit personal jurisdiction. *See, e.g.*, N.Y. CIV. PRAC. LAW §302(a) (McKinney 1972) (excluding defamation actions from long-arm jurisdiction authorized by the statute). For discussion of the historical development of the present theories of state court personal jurisdiction, *see infra* notes 60 to 185 and accompanying text. For discussion of the roles of the due process clause and state long-arm statutes in respect of one another, see Bowman v. Curt G. Joa, Inc., 361 F.2d 706, 713-14 (4th Cir. 1966); Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 436-440, 176 N.E.2d 761, 763-65 (1961).

Personal jurisdiction must be distinguished from subject matter jurisdiction, which is the authority of a court to hear a particular type of dispute. For definitions and descriptions of the principal types of federal court subject matter jurisdiction, see infra notes 18 and 19.

4. *See, e.g.*, Pennoyer v. Neff, 95 U.S. 714 (1877); Grace v. MacArthur, 170 F. Supp. 442 (E.D. Ark. 1959); Smith v. Gibson, 83 Ala. 284, 3 So. 321 (1888). *See also infra* note 76 and accompanying text.

At the common law, the earliest and principal basis for personal jurisdiction was the presence of the defendant within the territorial authority of the court. J. Story, Commentaries on the Conflict of Laws § 539 (8th ed. 1883). Several theories have been advanced for this primacy: the limited authority of the sovereign to force a judgment rendered against a non-present defen-

attempted to strike a balance between the theory that each state is a sovereign whose boundaries determine the extent of its authority,[7] which must be respected by other states,[8] and the theory that the Constitution requires states to afford full faith and credit to the valid judgments of sister states[9] while protecting the fourteenth amendment

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dant, *see* Dodd, *Jurisdiction in Personal Actions*, 23 ILL. L. REV. 427, 427-28 (1929), the basis of most common law personal actions in trespass, O.W. HOLMES, THE COMMON LAW 101 (1881); 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 626 (5th ed. 1942), the common-law view that "a judgment . . . is no more than a basis for an immediate levy of execution against the defendant's person or his land." 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §1064, at 206 (1969).

In the United States, presence coupled with valid service of process always has been upheld as a valid exercise of personal jurisdiction, no matter how fortuitous or transitory the defendant's presence in the jurisdiction. *See, e.g.*, Michigan Trust Co. v. Ferry, 228 U.S. 346 (1913) (constructive service by probate court appointing party executor binds party even after he left jurisdiction); Grace v. MacArthur, 170 F. Supp. 442 (E.D. Ark. 1959) (service in airplane flying over the jurisdiction); Smith v. Gibson, 3 So. 321, 83 Ala. 284 (1888) (absent fraudulent inducement, legally served summons constitutes basis for jurisdiction no matter how transient party's presence in jurisdiction); Barrell v. Benjamin, 15 Mass. 354 (1819) (service was held valid even where the party was merely passing through the jurisdiction on route to another country). *See also* J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS §541 (8th ed. 1883). *But see* Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289 (1956); Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 259-72; Posnak, *A Uniform Approach to Judicial Jurisdiction After* World-Wide *and the Abolition of the "Gotcha" Theory*, 30 EMORY L.J. 729, 730-31 (1981) (suggesting that "transient jurisdiction"—assertion of personal jurisdiction over defendants based solely on service coupled with presence in the jurisdiction—be abandoned in favor of a unified approach based upon the analysis established by the Supreme Court for cases involving extra-territorial service of process).

5. Although the primary basis for personal jurisdiction in the Civil Law is domicile, *see generally* F. SAVIGNY, PRIVATE INTERNATIONAL LAW 112 (Guthrie trans. 2d ed. 1880); J. WESTLAKE, A TREATISE ON PRIVATE INTERNATIONAL LAW 24 (7th ed. 1925), the Supreme Court did not establish domicile as a basis for personal jurisdiction in the United States until 1940. Milliken v. Meyer, 311 U.S. 457 (1940). *See* McDonald v. Mabee, 243 U.S. 90, 92 (1917) (dictum). *See also infra* note 78 and accompanying text.

6. *See, e.g.*, National Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311 (1964) (actual consent); Hess v. Pawloski, 274 U.S. 352 (1927) (implied consent). *See infra* notes 85 to 89 and accompanying text (discussing *Hess*). *See also infra* notes 98-103 and accompanying text.

7. Early courts and commentators viewed the several states as independent sovereigns for purposes of personal jurisdiction. *See, e.g.*, Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519 (1839); Pennoyer v. Neff, 95 U.S. 714 (1877); G. HENDERSON, THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW 45 (1918). *See also infra* notes 62, 69 and 73.

8. *See infra* note 73 and accompanying text.

9. U.S. CONST. art. IV, §1. The full faith and credit clause provides, in pertinent part: "Full Faith and Credit shall be given in each State to the Public Acts, Records, and Judicial Proceedings of every other State. . . ."

A judgment rendered by a state court that did not have personal jurisdiction over a defendant would not be entitled to full faith and credit by sister states; a sister state need not enforce such a judgment. *See* Mills v. Duryee, 11 U.S. (7 Cranch.) 481, 486 (1813). *See also* D'Arcy v. Ketchum, 52 U.S. (11 How.) 165 (1850) (full faith and credit did not require enforcement of default judgment obtained without personal service on the defendant).

While a judgement rendered by state *A* is not entitled to full faith and credit in state *B* if state *A* did not have personal jurisdiction over defendant *D* (*i.e.*, state *B* is not required to enforce the judgment of state *A*), the converse is not necessarily true; the concepts of authority to adjudicate and recognition of out-of-state judgments are not coterminous. *See* von Mehren & Trautman, *supra* note 2, at 1126. The Act of May 26, 1790, 1 Stat. 122 (1827), U.S. Rev.

due process rights of defendants[10] from state encroachments. In *International Shoe Co. v. Washington,*[11] the Court established the following test for personal jurisdiction over foreign[12] corporate defendants:

> [D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." Milliken v. Meyer, 311 U.S. 457, 463.
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> . . . .
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> [The] demands [of due process] may be met by such contacts. . .with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there.[13]

This test, however, has been applied consistently to individual as well as to corporate defendants.[14] In subsequent cases, the state and lower

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Stat. §905 (1875), U.S. Comp. Stat. §2431 (1916), enacted by Congress under the full faith and credit clause, provided, in pertinent part:

> And the said records and judicial proceeding . . . authenticated [as stated above], shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken.

The present version appears at 28 U.S.C. §1738 (1976), a version in which "acts" has been inserted before "records and judicial proceedings." As noted by Professor Rheinstein, "[a]t an early date, it was maintained and recognized that this provision could not be literally applied." Rheinstein, *The Constitutional Bases of Jurisdiction*, 22 U. CHI. L. REV. 775, 781 (1955).

10. *See infra* notes 73-75 and accompanying text.

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

12. For purposes of this article, a "foreign corporation" is a corporation incorporated in and having its principal place of business in a state or states other than the forum state, in the case of state court personal jurisdiction, or the state in which the federal court is sitting, in the case of federal court personal jurisdiction; an "alien corporation" is a corporation incorporated in and having its principal place of business in a country or countries other than the United States; a "nondomiciliary" is an individual who is domiciled in a state other than the forum state, in the case of state court personal jurisdiction, or the state in which the federal court is sitting, in the case of federal court personal jurisdiction; an "alien" is an individual who is a citizen of and is domiciled in a country or countries other than the United States.

13. 326 U.S. at 316-17.

14. While many of the seminal cases in this area involved personal jurisdiction over foreign corporations, *see, e.g.*, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); McGee v. International Life Ins. Co., 355 U.S. 220 (1957); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952); International Shoe Co. v. Washington, 326 U.S. 310 (1945); Buckeye Boiler Co. v. Superior Court, 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969); Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961), the language of the Supreme Court in *International Shoe* is broad enough to include individual as well as corporate defendants, and courts have consistently applied the "minimum contacts" test to noncorporate defendants. *See, e.g.*, Kulko v. Superior Court, 436 U.S. 84 (1978); Hanson v. Denckla, 357 U.S. 235 (1958); Calagaz v. Calhoun, 1309 F.2d 248, 254-55 (5th Cir. 1962); San Juan Hotel Corp. v. Lefkowitz, 277 F. Supp. 28, 30 (D.P.R. 1967). Moreover, no court has ruled that *International Shoe* should be read as inapplicable to noncorporate defendants even though reasonable grounds might exist for such a limitation: the case involved a corporate defendant and *International Shoe* was decided in response to the difficult problem

federal courts[15] and the United States Supreme Court[16] have defined and redefined the defendant contacts that would be considered "minimum" within the meaning of the *International Shoe* test. While this refining process of giving content to "minimum contacts" continues, however, a well-accepted unitary approach to the problem clearly has been devised.[17]

The development of a personal jurisdiction doctrine for the federal courts, however, has not received extensive treatment by courts and commentators. No federal long-arm statute purports to prescribe federal standards for assertion of personal jurisdiction in either diversity[18]

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of finding a rational theory upon which to assert personal jurisdiction over nondomiciliary corporations doing business in the state. *See also* Cleary & Seder, *Extended Jurisdictional Bases for the Illinois Courts*, 50 Nw. U. L. Rev. 599, 603 (1955); Foster, *Personal Jurisdiction Based on Local Causes of Action*, 1956 Wis. L. Rev. 522, 544-45; Reese & Galston, *Doing an Act or Causing Consequences as Bases of Judicial Jurisdiction*, 44 Iowa L. Rev. 249, 251 (1959).

15. *See, e.g.*, Wisconsin Elec. Mfg. Co. v. Pennant Products, Inc., 619 F.2d 676 (7th Cir. 1980); Aycock v. Louisiana Aircraft, Inc., 617 F.2d 432 (5th Cir. 1980); Lakeside Bridge and Steel Co. v. Mountain State Constr. Co., 597 F.2d 596 (7th Cir. 1979); H. Ray Baker, Inc. v. Associated Banking Corp., 592 F.2d 550 (9th Cir. 1979); Capital Dredge & Dock Corp. v. Midwest Dredging Co., 573 F.2d 377 (6th Cir. 1978); Pedi Bares, Inc. v. P & C Food Markets, Inc., 567 F.2d 933 (10th Cir. 1977); Republic Int'l. Corp. v. Amco Eng'rs, Inc., 516 F.2d 161 (9th Cir. 1975); United State Ry. Equip. Co. v. Port Huron & Detroit R.R., 495 F.2d 1127 (7th Cir. 1974); Whittaker Corp. v. United Aircraft Corp., 482 F.2d 1079 (1st Cir. 1973); In-Flight Devices Corp. v. Van Dusen Air, Inc., 466 F.2d 220 (6th Cir. 1972); Royal Globe Ins. Co. v. Logicon, Inc., 487 F. Supp. 1245 (N.D. Ill. 1980); Capitol Indem. Corp. v. Certain Lloyds Underwriters and/or London Cos., 487 F. Supp. 1115 (W.D. Wis. 1980); Ayers v. Copperweld Corp., 487 F. Supp. 593 (S.D. Tex. 1980); Mueller v. Steelcase, Inc., 172 F. Supp. 416 (D. Minn. 1959); Manufacturers' Lease Plans, Inc. v. Alverson Draughon College, 115 Ariz. 358, 565 P.2d 864 (1977); Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961); Rath Packing Co. v. Intercontinental Meat Traders, Inc., 181 N.W.2d 184 (Iowa 1970); O.N. Jonas Co. v. B & P Sales Corp., 232 Ga. 256, 206 S.E. 2d 437 (1974); Compagnia de Astral v. Boston Metals Co., 205 Md. 237, 107 A.2d 357 (1954), *cert. denied*, 348 U.S. 943 (1955); Marshall Egg Transport Co. v. Bender-Goodman Co., 275 Minn. 534, 148 N.W.2d 161 (1967); Miller v. Glendale Equip. & Supply, Inc., 344 So. 2d 736 (Miss. 1977); McIntosh v. Navaro Seed Co., 81 N.M. 302, 466 P.2d 868 (1970); S. Howes Co. v. W.P. Milling Co., 277 P.2d 655 (Okla. 1954), *appeal dismissed per stipulation*, 348 U.S. 983 (1955); Zerbel v. H.L. Federman & Co., 48 Wis. 2d 54, 179 N.W.2d 872 (1970), *appeal dismissed*, 402 U.S. 902 (1971).

16. *See, e.g.*, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Kulko v. Superior Court, 436 U.S. 84 (1978); Hanson v. Denckla, 357 U.S. 235 (1958); McGee v. International Life Ins. Co., 355 U.S. 220 (1957). *See also* Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982). For a discussion of the development of the "minimum contacts" test, see *infra* notes 106-80 and accompanying text.

17. *See infra* notes 106-80 and accompanying text.

18. Diversity cases are those cases in which the subject matter jurisdiction of the federal district court arises under 28 U.S.C. §1332 (1976), which section provides, in pertinent part:

> (a) The district court shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interests and costs, and is between—
>
> (1) citizens of different States;
>
> (2) citizens of a State and citizens or subjects of a foreign state;
>
> (3) citizens of different States in which citizens or subjects of a foreign state are additional parties; and
>
> (4) a foreign state . . . as plaintiff and citizens of a State or of different States.

*Id.*

or federal question[19] cases.[20] In cases in which a state claim is at issue between citizens of different states, and the subject matter jurisdiction of a federal court therefore is based on diversity of citizenship, the federal courts generally have accepted the proposition that the fourteenth amendment standard of "minimum contacts with the state" in which the federal court is sitting should be employed to determine the constitutionality of federal court assertions of personal jurisdiction.[21]

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19. Federal question cases are those cases in which the subject matter jurisdiction of the federal district court arises under 28 U.S.C. §1331 (Supp. V 1981), which section provides: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." *Id.* Diversity cases, *see supra* note 18, and federal question cases make up the vast majority of cases over which the federal courts have subject matter jurisdiction. In both types of cases, the subject matter jurisdiction of the federal court is concurrent with that of state courts. The federal courts have been granted, either directly or by implication, *see* Redish & Muench, *Adjudication of Federal Causes of Action in State Court*, 75 MICH. L. REV. 311 (1976); Note, *Exclusive Jurisdiction of the Federal Courts in Private Civil Actions*, 70 HARV. L. REV. 509 (1957), exclusive subject matter jurisdiction in various areas including Admiralty, maritime and prize cases, 28 U.S.C. §1333 (1976) (although "saving to suitors" clauses in the statute has effect of making federal jurisdiction exclusive only in limitation of liability proceedings and in maritime actions *in rem*, C. WRIGHT, THE LAW OF FEDERAL COURTS 36 (4th ed. 1983)); Bankruptcy, 28 U.S.C. §1334 (Supp. V 1981); Patents and copyrights, 28 U.S.C. §1338 (1976); cases involving fines, penalties, forfeitures, or seizures under the laws of the United States, 28 U.S.C. §§1355, 1356 (1976); cases involving crimes against the Untied States, 18 U.S.C. §3231; cases involving counsels and vice-counsels as defendants, 28 U.S.C. 1351 (Supp. V 1981); cases involving the United States as a defendant, 28 U.S.C. §1346 (1976) (exclusive by implication, C. WRIGHT, *supra*); Antitrust actions, 15 U.S.C. §§15, 26 (1976 & Supp. V 1981); cases under the Securities Exchange Act, 15 U.S.C. §78aa (1976); cases involving violations of the Natural Gas Act, 15 U.S.C. §717u (1976); and suits on bonds under the Miller Act, 40 U.S.C. §270b(b) (1976). Finally, certain types of cases have been reserved exclusively for the United States Supreme Court, with that court having original as well as exclusive jurisdiction. *See* C. WRIGHT, *supra*, at 765, 767-69, 773.

Throughout this article, the term "federal question cases" will be used in a broad sense to encompass not only cases arising under 28 U.S.C. §1331 but also those cases arising under exclusive grants of subject matter jurisdiction to federal courts, all "nondiversity" cases that can be heard by lower federal courts. *See also infra* note 195.

20. *See infra* note 218 and accompanying text.

21. The Supreme Court never has spoken directly on the issue. *But see* Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea, 456 U.S. 694, 702-03 (1982) (Supreme Court impliedly adopts *Arrowsmith*) (*see infra* note 481 and accompanying text; 456 U.S. 694, 711-12 (Powell, J., concurring) (concurrence expressly relies on *Arrowsmith*) (*see infra* note 482 and accompanying text)). Most federal courts have followed the analysis of the United States Court of Appeals for the Second Circuit in Arrowsmith v. United Press International, 320 F.2d 219 (2d Cir. 1963), wherein the court determined that, in a diversity of citizenship case, as an implementation of the *Erie* doctrine, the federal court should adopt the state standard to determine whether a foreign corporation would be amenable to suit in the federal court. *See infra* notes 453-77 and accompanying text (discussing *Arrowsmith*). *See also* Jennings v. McCall Corp., 320 F.2d 64 (8th Cir. 1963); Smartt v. Coca Cola Bottling Corp., 318 F.2d 447 (6th Cir. 1963). *But see* Jaftex Corp. v. Randolph Mills, Inc., 282 F.2d 508 (2d Cir. 1960). *See infra* notes 434-52 and accompanying text (discussing *Jaftex*). While this position has some appeal in that federal courts sitting in diversity are deciding state claims, this writer questions the propriety of determining the authority of a federal court on the basis of limitations imposed on state courts. *See* Jaftex Corp. v. Randolph Mills, Inc. 282 F.2d 508, 516 (2d Cir. 1960) ("[h]ence our conclusion is that the question whether a foreign corporation is *present* in a district to permit of service of process upon it is one of federal law governing the procedure of the United States courts and is to be determined accordingly"); von Mehren & Trautman, *supra* note 2, at 1123 n.6 ("[a]rguably, federal courts do not require enabling legislation to

No standard, however, consistently is applied in federal question cases,[22] those "civil actions arising under the Constitution, laws, or treaties of the United States"[23] and under special grants of exclusive subject matter jurisdiction to federal courts.[24] In cases in which a federal statute provides for nationwide or even worldwide service of process,[25] most federal courts agree that a defendant's amenability to suit[26] should be measured by the due process clause of the fifth, rather than the due process clause of the fourteenth, amendment.[27] These courts do not concur, however, in the substance of that standard. Some argue that a "minimum contacts" test similar to that employed under the fourteenth amendment should apply. This test aggregates the defendant's contacts with the United States as a whole, the single federal forum of which the particular federal court is merely an arm, to determine sufficiency of contacts for jurisdictional purposes.[28] Other federal courts in similar situations refuse to aggregate the defendant's national contacts, choosing instead to examine the sufficiency of the defendant's contacts with the state in which the federal court is sitting.[29] Other federal courts do not articulate clearly the standard applied. These courts either find that no federal standard need be determined because the defendant's contacts with the state in which the federal court is sitting satisfy the *International Shoe* test,[30] or fail to find or to announce any basis for an assertion of personal jurisdiction.[31]

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assume adjudicatory jurisdiction under federal standards, even in diversity litigation"); Note, *Alien Corporations and Aggregate Contacts: A Genuinely Federal Jurisdictional Standard*, 95 HARV. L. REV. 470 n.1 (1981) (author acknowledges the possible propriety of adopting a federal standard in diversity cases). For further, more extensive discussion of this point, *see infra* notes 478-92 and accompanying text.

22. *See infra* notes 493-1359 and accompanying text.
23. 28 U.S.C. §1331 (Supp. V 1981). *See supra* note 19.
24. *See supra* note 19.
25. *See infra* statutes cited in note 247.
26. For purposes of this article, a defendant is said to be "amenable to suit" in a particular jurisdiction or "amenable to service of process" pursuant to the procedure established by a particular jurisdiction if the assertion of personal jurisdiction over the defendant would not be considered constitutionally invalid under the particular tests appropriate to the particular assertion of personal jurisdiction.

Professor Foster defined amenability as "a statement of the grounds or conditions that link a defendant to the forum sufficiently to justify entry of a personal judgment against him in the action at hand." Foster, *Long-Arm Jurisdiction in Federal Courts*, 1969 WIS. L. REV. 9, 11. He argued that notice to the defendant, "ordinarily achieved by service of a summons or other process announcing the commencement or pendency of judicial proceedings," and "amenability" are the two requirements for "the exercise of personal jurisdiction over a nonconsenting party." *Id.* at 10-11.

27. *See infra* notes 579-784 and accompanying text.
28. *See infra* notes 687-716 and accompanying text; *see also infra* notes 717-738 and accompanying text.
29. *See infra* notes 748-53 and accompanying text; *see also infra* notes 769-84 and accompanying text.
30. *See infra* notes 739-47 and accompanying text.
31. *See infra* notes 587-608 and accompanying text.

In many federal question cases, no special federal statute authorizes service upon the alien or foreign corporate defendant or the nondomiciliary individual defendant.[32] Service of process upon an individual defendant, provided the defendant is present or domiciled in the state in which the district court is held, can be achieved pursuant to Rule 4(d)(1) of the Federal Rules of Civil Procedure[33] by "delivering a copy of the summons and complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode."[34] Service of process upon certain corporate defendants is authorized by Rule 4(d)(3) of the Federal Rules of Civil Procedure,[35] which provides, in pertinent part, that service be made "by delivering a copy of the summons and complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process. . . ."[36] Some federal courts have ruled that when process is served pursuant to Rule 4(d)(1) or 4(d)(3), amenability to service of process should be measured by a federal, or fifth amendment, standard.[37] Among these courts, however, the applicability of any particular test, such as the aggregation of national contacts, again has not been uniform.[38] Some courts, moreover, do not expressly adopt a fifth amendment standard.[39]

Finally, in some federal question cases in which a federal statute for nationwide or worldwide service of process is not available, such as those cases in which the defendant is not present or domiciled in the state or in which the defendant is a corporation and service cannot be made within the state upon some corporate agent, service cannot be achieved pursuant to Rule 4(d)(1) or Rule 4(d)(3). The plaintiff instead must serve the defendant by using the long-arm statute of the state in which the federal court is sitting. Some courts have interpreted former Rule 4(d)(7) of the Federal Rules of Civil Procedure,[40] recently recodified, with changes, as Rule 4(c)(2)(C)(i),[41]

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32. *See infra* note 263 and accompanying text.
33. *See infra* note 273 and accompanying text.
34. FED. R. CIV. P. 4(d)(1). For the full text of Rule 4, *see infra* note 269.
35. *See infra* note 274 and accompanying text.
36. FED. R. CIV. P. 4(d)(3). For the full text of Rule 4, *see infra* note 269.
37. See *infra* notes 799-887 and accompanying text.
38. *Id.*
39. *See infra* notes 839-51 and accompanying text.
40. *See infra* notes 278-86 and accompanying text. FED. R. CIV. P. 4(d)(7) (1981). For the full text of former Rule 4(d)(7), *see infra* note 267.
41. FED. R. CIV. P. 4(c)(2)(C)(i). For the text of the 1983 amendments to Rule 4, as well as extensive discussion of these amendments, *see infra* note 269 and notes 275 to 286 and accompanying text. All of the cases of importance to this article involved former Rule 4(d)(7) rather than present Rule 4(c)(2)(C)(i). Textual distinction will be made whenever any confusion might arise.

as authorizing such use of the state long-arm statute.[42] Rule 4(d)(7) provided, in pertinent part:

> [I]t is. . .sufficient if the summons and complaint are served. . .in the manner prescribed by the law of the state in which the district court is held for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state.[43]

In federal question cases in which extraterritorial service of process[44] purportedly was made pursuant to Rule 4(d)(7), some federal courts ruled that the amenability of defendants so served to the personal jurisdiction of the federal court should be measured by a state standard,[45] the *International Shoe* "minimum contacts with the state" test or some similar test, because service had been made "in the manner" prescribed by state law. Other federal courts in similar circumstances espoused a federal standard for federal question cases, but for a variety of reasons actually applied[46] the state standard. A few courts adopted and tried to apply a federal standard of amenability under the theory that while the method or mechanics of service were being prescribed by state statute, the defendant's amenability to suit in a federal court on a federal question should be determined by a federal standard.[47]

Rule 4(e) of the Federal Rules of Civil Procedure provides for "service upon a party not an inhabitant of or found within the state" in which the federal court is sitting.[48] Rule (4)(e) provides, in pertinent part:

> Whenever a statute or rule of court of the state in which the district court is held provides. . .for service of a summons. . .upon a party not an inhabitant of or found within the state,. . .service may be made under the circumstances and in the manner prescribed in the statute or rule.[49]

Thus, Rule 4(e) expressly provides that federal courts sitting in federal question cases as well as in diversity cases may employ the long-arm

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42. *See infra* cases discussed at notes 915-1038.
43. FED. R. CIV. P. 4(d)(7) (1981).
44. The term "extra-territorial" will be used throughout this article to describe a federal court's service of process beyond the territorial boundaries of the state in which the federal court is held.
45. *See infra* notes 936-55 and accompanying text; *see also infra* notes 929 and 935 and accompanying text.
46. *See infra* notes 956-1010 and accompanying text; *see also infra* notes 920-28 and accompanying text.
47. *See infra* notes 1011-38 and accompanying text.
48. *See infra* notes 287-88 and accompanying text.
49. FED. R. CIV. P. 4(e). For the full text of Rule 4, see *infra* note 269.

statutes of the states in which the federal courts are sitting.[50] Many federal courts in these circumstances have interpreted Rule 4(e) as requiring that state standards apply both to the question of mechanics of service and to the question of amenability to service of process.[51] Other courts have applied state amenability standards, but for less compelling reasons.[52] A few courts have announced that the fifth amendment should govern amenability even in Rule 4(e) cases,[53] while even fewer courts actually have tried to apply some federal standard to this question.[54] When federal courts sitting on federal question cases feel compelled to apply state amenability standards, an anomalous situation is created in which federal courts sitting in federal question cases must apply state standards to the exercises of their federal court personal jurisdiction.[55]

While the federal courts have been faced with cases arising in each of the categories enumerated above, no coherent or cohesive procedure or theory has emerged either in regard to the entire question of personal jurisdiction in federal courts or in regard to federal question cases in general or any particular category of federal question cases. The cases and courts are in disarray, both as to when a federal standard should apply to the question of amenability to service of process and as to what a federal standard might require. The purpose of this article is to examine the above-outlined problem in the context of the various types of cases in which it might arise and to prescribe some consistent, sensible scheme of personal jurisdiction in federal question cases. This scheme would embody the basic principles of the federal judicial system while recognizing practical limitations where required. Part II of this article examines the historical development of state court personal jurisdiction limitations through the establishment and development of the fourteenth amendment minimum contacts due process standard[56] and the historical development of federal court personal jurisdiction limitations or standards, including any attempts to formulate an independent fifth amendment due process standard.[57] Part III categorizes and examines the various types of federal question cases in which the issue of personal jurisdiction has arisen, analyzing particular cases in each category in light

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50. *See infra* notes 287-88 and accompanying text.
51. *See infra* notes 1153-71 and accompanying text.
52. *See infra* notes 1123-33, 1142-52, 1172-82 and 1213-43 and accompanying text.
53. *See infra* notes 1183-1212 and 1244-1316 and accompanying text.
54. *See infra* notes 1269-1316 and accompanying text.
55. *See infra* notes 872-84 and 968-69 and accompanying text.
56. *See infra* notes 60-185 and accompanying text.
57. *See infra* notes 186-560 and accompanying text.

of the efficacy of employing some federal standard of amenability to suit such as the "aggregation of national contacts" test.[58] Part IV provides the author's prediction as to the direction of the law of personal jurisdiction in federal question cases and her own scheme for resolving some of the current issues in this area.[59]

## II. HISTORICAL DEVELOPMENT[60]

### A. *State Court Personal Jurisdiction[61]—The Fourteenth Amendment*

Generally the authority of a state to render decisions personally binding on a particular defendant, its *in personam* jurisdiction, arises not from any affirmative grant of such authority by the Constitution and/or laws of the United States, but rather from the failure of these formulations to prohibit such exercises.[62] As provided in the tenth amendment, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the

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58. *See infra* notes 561-1355 and accompanying text.

59. *See infra* notes 1356-64 and accompanying text.

60. For a recent, interesting description of the historical development of personal jurisdiction theory, *see generally* von Mehren, *Adjudicatory Jurisdiction: General Theories Compared and Evaluated,* 63 B.U.L. REV. 279 (1983).

61. Many commentators have traced the historical development of state court personal jurisdiction in the United States or various aspects thereof. *See, e.g.,* Jay, *supra* note 2, at 429-50, Jursik; "World-Wide" *Without "Minimum Contacts": An Analysis of Product Sellers Amenability to Suit,* 31 FED'N INS. COUNS. Q. 233, 233-45 (Spring 1981); Kamp, *supra* note 2, at 19-44; Ripple & Murphy, World-Wide Volkswagen Corp. v. Woodson: *Reflections on the Road Ahead,* 56 NOTRE DAME LAW REV. 65, 65-81 (1980); Seidelson, *Jurisdiction Over Nonresident Defendants: Beyond "Minimum Contacts" and the Long-Arm Statutes,* 6 DUQ. L. REV. 221, 221-35 (1967-68); von Mehren & Trautman, *supra* note 2, at 1124-63; Woods, *supra* note 2, at 861-80; *Long-Arm Jurisdiction in Commercial Litigation: When is a Contract a Contact?,* 61 B.U.L. REV. 375, 375-89 (1981); Comment, *Federalism, supra* note 2, at 134-52; Note, *Minimum Contacts as Applied to Products LIability*—World-Wide Volkswagen Corp. v. Woodson, 29 DE PAUL L. REV. 1159, 1159-68 (1980); *Developments in the Law, supra* note 2, at 909-65; Note, *The Role of Foreseeability in Jurisdictional Inquiry:* Tyson v. Whitaker & Sons, Inc., 32 ME. L. REV. 497, 501-06 (1980); Comment, *Asserting Jurisdiction over Nonresident Corporations on the Basis of Contractual Dealings: A Four-Step Proposal,* 12 PAC. L. J. 1039, 1039-49 (1981); Note, *World-Wide Volkswagen, supra* note 2, at 783-94; Comment, *Personal Jurisdiction over Retailers and Regional Distributors in Products Liability Litigation: Sufficiency of a Single Contact,* 18 SAN DIEGO L. REV. 325, 327-32 (1981).

62. Some commentators have viewed this question as one essentially of appropriate and sensible distribution of cases, with questions of sovereignty and protection of the defendant from unreasonable exercises of jurisdiction figuring in not as primary analysis but merely as important ciphers in the distribution equation. To one commentator,

> [Personal jurisdiction] is the allocation of judicial business among the several states of the United States, according to the relationship between the particular action and the state of the forum—the determination of an appropriate geographical location for the trial. . .[It] might be examined in the light of the type of action involved, so as to require but a single determination of jurisdiction, taking into account all those factors relevant to the choice of an appropriate place of trial within a federal system.

*Developments in the Law, supra* note 2, at 911-12.

States respectively, or to the people."[63] This broad authorization is the only available Constitutional source from which state court personal jurisdiction arguably emanates. The tenth amendment provides an excellent starting point for any consideration of the development of state court personal jurisdiction, however, because it includes the two aspects that consistently define such authority: grant and limitation. The basic inquiry, even before *Pennoyer v. Neff,*[64] has been to determine the scope of Constitutional limitations on state court personal jurisdiction.[65] During the course of this search, limitations initially were defined very broadly,[66] subsequently were drawn much more narrowly,[67] and, most recently, were broadened again to some extent.[68] While the limiting language of the Constitution has not changed, the construction of that language has varied, partly from the viscissitudes of developing any definition of language on a case-by-case basis, and partly from the necessity of altering theories that could not survive in the increasingly complex and sophisticated transportation, communication, and industrial systems of the twentieth century.[69]

*Pennoyer v. Neff*[70] often is considered the cornerstone of the law of state court personal jurisdiction.[71] In *Pennoyer,* the Supreme Court limited the jurisdiction of a state court to the territorial boundaries of the state, ruling that a Court had no authority over an individual defendant who was not a resident of the state unless he had been served with process while present therein.[72] This determination clear-

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63. U.S. CONST. amend. X.
64. 95 U.S. 714 (1877).
65. *See infra* notes 70-185 and accompanying text.
66. *See infra* notes 70-75 and accompanying text.
67. *See infra* notes 106-28 and accompanying text.
68. *See infra* notes 129-55 and accompanying text.
69. *See infra* notes 83 and 96 and accompanying text. As noted by one recent commentator:

> The United States is an economically open, highly mobile, industrial society. It is also a federation of fifty distinct polities, each with its own judicial system. Thus, although the federal system allows people to move freely about the country, it also restricts the state's exercise of jurisdiction over them.
>
> The inability of state courts to exercise jurisdiction over nonresident defendants has plagued our federal system since its inception.

Note, *Interstate Jurisdictional Compacts: A New Theory of Personal Jurisdiction,* 49 FORDHAM L. REV. 1097, 1101 (1981) (footnotes omitted).

70. 95 U.S. 714 (1877).
71. *See* 4 C. WRIGHT & A. MILLER, *supra* note 4, §1064, at 208-11; *see generally* authorities cited *supra* note 61.
72. 95 U.S. at 722. The question in *Pennoyer* involved the validity of an Oregon judgment which had resulted in the transfer to Pennoyer of title to Neff's land in Oregon. *Id.* at 719. Notice of the Oregon action against Neff, *Mitchell v. Neff,* had been given by publication in Oregon while Neff was outside the state. *Id.* at 720. Finding that the Oregon court had not obtained personal jurisdiction over Neff, the Supreme Court determined that the Oregon judgment was invalid, even in Oregon. *Id.* at 732-33.

ly was influenced by the theory that each state is a sovereign whose power extends only to the boundaries of its territory.[73]

The actual significance of *Pennoyer,* however, in the development of a unified, workable theory of state court personal jurisdiction, generally is overlooked by courts and commentators. The greatest significance of *Pennoyer* was not in its recognition of traditional strict territorial limitations on personal jurisdiction but rather in its recognition that the validity of any exercise of personal jurisdiction by a state court is to be determined according to the due process clause of the fourteenth amendment.[74] Any exercise of jurisdiction consis-

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73. *Id.* This territorial principle of viewing sister states as separate sovereignties for jurisdictional purposes was embraced early by the United States Supreme Court. Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519 (1839). For a discussion of the territorial theory in England and its subsequent influence on American courts, *see* Hazard, *supra* note 4, at 252-62.

In reaching its conclusion, the Court gave careful elucidation to those jurisdictional principles on which it rested its determination:

> The several States of the Union are not, it is true, in every respect independent, many of the rights and powers which originally belonged to them being now vested in the government created by the Constitution. But, except as restrained and limited by that instrument, they possess and exercise the authority of independent States, and the principles of public law to which we have referred are applicable to them. One of these principles is, that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. As a consequence, every State has the power to determine for itself the civil *status* and capacities of its inhabitants. . . .The other principle of public law referred to follows from the one mentioned; that is, 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. And so it is laid down by jurists, as an elementary principle, that the laws of one State have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions.

95 U.S. at 732-33 (emphasis in original). The Supreme Court explained its decision on a "physical power" ground: a state court had authority over persons and property within its borders and no authority over persons and property outside its borders; thus, the Oregon court had no authority over the person of Neff who was not present in Oregon at the time he had been constructively served by publication in a newspaper.

The above-quoted passage is significant also for its recognition that the states, being bound together in a federation governed by the United States Constitution, were not completely comparable to independent sovereigns. At various times subsequent to this decision, the Court has suggested that notions of federalism affect the appropriate scope of state court personal jurisdiction. *See infra* notes 111-13 and 148 and accompanying text. *But see* McDougal, *Judicial Jurisdiction: From a Contacts to an Interest Analysis,* 35 VAND. L. REV. 1 (1982).

74. 95 U.S. at 733. The fourteenth amendment provides, in pertinent part: "No State shall. . .deprive any person of life, liberty, or property without due process of law. . . ." U.S. CONST. amend. XIV, §1. The Court stated:

> Since the adoption of the Fourteenth Amendment. . .,the validity of. . .judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom the court has no jurisdiction do not constitute due process of law.

95 U.S. at 733. As noted by Professors Wright and Miller, however, this "passage. . .must be viewed as dictum because of the inapplicability of the Fourteenth Amendment to the case—it did not become effective until after the. . .judgment [which was assertedly invalid because of lack of valid personal jurisdiction over the defendant] had been rendered. . . ." 4 C. WRIGHT

tent with the due process clause would be valid; any exercise inconsistent with the due process clause would be invalid and not entitled to full faith and credit.[75] The due process clause, therefore, became one of the sources of limitation by which subsequent courts would measure exercises of personal jurisdiction. According to *Pennoyer*, moreover, any attempt to exercise jurisdiction over a nonpresent nonconsenting nondomiciliary of the state would violate legitimate constitutional limitations.

Certain traditional bases of personal jurisdiction, that had been recognized and employed prior to *Pennoyer*, like presence[76] and consent to suit,[77] did not prove troublesome after that decision. After all, in *Pennoyer* the Supreme Court found that if the defendant were present within the jurisdiction when served with process, then due process was not violated. Moreover, consent to suit, either by appearing to defend or by appointing an agent for service of process, surely would not violate the defendant's due process rights because his consent to suit would be a waiver of any rights he might otherwise have. A final traditional basis of personal jurisdiction, a defendant's domicile in the state, was added by the Supreme Court in 1940 in *Milliken v. Meyer*.[78] This post-*Pennoyer* basis would also seem to provide no troublesome incursions on the defendant's due process rights.

Another early source of limitation, frequently overlooked by com-

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& A. MILLER, *supra* note 4, §1064, at 210. The fourteenth amendment became effective on July 28, 1868. This dictum, however, has been followed and amplified by the Supreme Court and other courts in innumerable subsequent decisions. *See infra* notes 106-85 and accompanying text.

75. U.S. CONST. art. IV, §1 Failure to satisfy the procedural aspects of due process, such as failure to provide a defendant with proper notice of an action which has been instituted against him, *see, e.g.*, Pennoyer v. Neff, 95 U.S. 714 (1878), or failure to serve process on a defendant in the manner prescribed by the appropriate service of process statute, or failure of the statute authorizing such service to provide an adequate method for notifying the defendant, *see, e.g.*, Wuchter v. Pizzutti, 276 U.S. 13 (1928) (judgment declared invalid because service was pursuant to state nonresident motorist statute which did not expressly require notice to non resident defendants, even though defendant actually received timely notice of suit), also will lead to invalidation of a judgment on due process grounds and result in a refusal by a sister state to afford the resulting judgment full faith and credit. Such questions are beyond the scope of this article, except to the extent that a service of process statute is deemed to be more than a mere procedural direction and instead is interpreted as determinative of a defendant's amenability to suit in the jurisdiction.

76. *See, e.g.*, Grace v. MacArthur, 170 F. Supp. 442 (E.D. Ark. 1959) (personal jurisdiction based on service on a nonresident defendant while in an airplane flying over the state in which the action was brought). *See supra* note 4.

77. *See, e.g.*, Adam v. Saenger, 303 U.S. 59 (1938); Western Loan & Sav. Co. v. Butte & Boston Consol. Mining Co., 210 U.S. 368 (1908); York v. Texas, 137 U.S. 15 (1890); *see supra* note 6.

78. 311 U.S. 457 (1940); *see supra* note 5.

mentators, is the commerce clause of the Constitution.[79] As noted by one commentator:

> Even if the due-process requirements as currently set forth are satisfied, a state's exercise of jurisdiction might unduly burden interstate commerce. The expense and inconvenience of defending a suit may tend to increase the cost and limit the scope of commercial operations to a defendant not engaged in substantial operations in the forum state.[80]

In the 1920's and 1930's, the Supreme Court based several invalidations of state jurisdiction on the commerce clause;[81] no recent decision, however, has been so based.[82]

As the United States moved into the twentieth century, the "actual presence" limitation attributed to *Pennoyer* proved frustrating to plaintiffs and state courts. Although at the time of *Pennoyer* most transactions had been confined to a single jurisdiction, improved technology led to increasingly complex multistate transactions.[83] One problem that

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79. U.S. CONST. art. I, §8, cl. 3. The commerce clause gives Congress the power "To regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . ." *Id.* In 1945, the Supreme Court described the nature of the "dormant commerce clause":

> For a hundred years it has been accepted constitutional doctrine that the commerce clause, without the aid of Congressional legislation, thus affords some protection from state legislation inimical to the national commerce, and that in such cases, where congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interest.

Southern Pac. Co. v. Arizona, 325 U.S. 761, 769 (1945). Implicit in this grant of authority to Congress, whether exercised or not, is a denial to states of the authority to regulate interstate commerce. G. GUNTHER, CONSTITUTIONAL LAW 256 (10th ed. 1980).

80. *Developments in the Law, supra* note 2, at 983.

81. Denver & R.G.W.R.R. v. Terte, 284 U.S. 284 (1932); Michigan Cent. R.R. v. Mix, 278 U.S. 492 (1929); Davis v. Farmers Co-op. Equity Co., 262 U.S. 312 (1923). *See* Farrier, *Suits against Foreign Corporations as a Burden on Interstate Commerce*, 17 MINN. L. REV. 381 (1933).

82. In recent cases, which apply the *International Shoe* criteria to determine whether due process has been violated, *see infra* notes 106-85 and accompanying text, burdens on commerce are probably subsumed in the balancing process as burdens or inconveniences to the defendant. At least one recent commentator has suggested that the commerce clause still may have a significant role in prescribing the "permissible reach of long arm jurisdiction" in commercial cases. Comment, *Constitutional Limitations on State Long Arm Jurisdiction*, 49 U. CHI. L. REV. 156, 174-75 (1982). The commentator noted:

> Jurisdictional standards may impair commerce in two ways. First, the threat of liability to suit in a foreign jurisdiction discourages transactions with foreseeable foreign effects. Second, assertion of long arm jurisdiction may frustrate the reasonable expectations of commercial actors, thereby decreasing commercial certainty. . . .
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> . . . .
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> The constitutional interest in facilitating interstate commerce seems to require additional jurisdictional limitations beyond the minimum safeguards of causation, notice, and relevance provided by due process.

*Id.* (footnotes omitted).

83. As noted by one commentator:

> Because of changing social conditions—including increased use of the corporate

was of increasing concern for the states was the nonresident motorist who drove into a state, caused injury, and fled the jurisdiction before he or she could be served with process.[84] In *Hess v. Pawloski*,[85] the United States Supreme Court upheld, as not violative of a defendant's due process rights, a Massachusetts statute[86] providing that any nonresident motorist who drove into the state was deemed to have appointed the Registrar of Motor Vehicles as his agent for service of process in any action arising from operation of the motor vehicle in the state.[87] The Court upheld this prototype long-arm statute with its implied consent provision on the theory that a state has an important interest in safety on its highways. The Court noted:

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> entity in the business world, the development of the automobile and other forms of more rapid transportation, and the invention of far more sophisticated modes of communication—*Pennoyer's* territorial view of a state's judicial jurisdiction soon became unworkable and bore little relation to people's everyday activities.

McDougal, *supra* note 73, at 2. The Supreme Court recognized these changes in the structure of American society. In *McGee v. International Life Ins. Co.*, the Court, noting "the fundamental transformation of our national economy over the years," stated:

> Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a state where he engages in economic activity.

355 U.S. 220, 222-23 (1957). The Court made a similar statement in Hanson v. Denckla, 357 U.S. 235, 250-51 (1958). *See* note 130 *infra*. *See also* Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 442-43, 176 N.E.2d 761, 765-66 (1961). *See generally* 4 C. WRIGHT & A. MILLER, *supra* note 4, §1065, at 211. At least one commentator has noted the artificiality of territorial limitations on state courts:

> People in this country, whether acting as individuals or as members of a group, pay little attention to state boundaries. Moreover, when companies and individuals engage in business activities, state lines are of almost no moment, since these entities often distribute their products in many, if not all, states. . . .Because state lines are of such little importance to the activities of the people in this country, reliance on the territorial boundaries of states as a basic limit on the states' authority to exercise judicial jurisdiction is destructive of relevant interests.

McDougal, *supra* note 73, at 8.

For a survey of the development of post-*Pennoyer* jurisdiction, *see* Kurland, *The Supreme Court, the Due Process Clause and the* In Personam *Jurisdiction of State Courts From* Pennoyer *to* Denckla: *A Review*, 25 U. CHI. L. REV. 569 (1958).

84. *Developments in the Law*, *supra* note 2, at 917.

85. 274 U.S. 352 (1927).

86. *Id.* at 357.

87. *Compare* Wuchter v. Pizzutti, 276 U.S. 13 (1928). *See supra* notes 3 and 75. *Hess* was preceded by Kane v. New Jersey, 242 U.S. 160 (1916), wherein the Supreme Court upheld, as not violative of due process rights, a New Jersey statute which required, prior to a nonresident's use of the state highways, the filing of an instrument actually appointing a New Jersey agent for service of process in actions arising from such use. *Id.* at 169.

*Hess* did not expressly overrule the earlier case of Flexner v. Farson, 248 U.S. 289 (1919), wherein the Supreme Court ruled that a state had no power to exclude a nonresident individual from the state and, thus, could not claim that the individual had impliedly consented to suit by doing business within the state. *Id.* at 293. *Flexner* involved a suit brought in Kentucky against an out-of-state partnership doing business in Kentucky. *Flexner*, however, now is considered to have been overruled by implication. Nelson v. Miller, 11 Ill. 2d 378, 143 N.E.2d 673 (1957). *See* 4 C. WRIGHT & A. MILLER, *supra* note 4, §1065, at 214, n.57.

> Motor vehicles are dangerous machines; and, even when skillfully and carefully operated, their use is attended by serious dangers to persons and property. In the public interest the State may make and enforce regulations reasonably calculated to promote care on the part of all, residents and nonresidents alike, who use its highways. The measure in question operates to require a nonresident to answer for his conduct in the State where arise causes of action alleged against him, as well as to provide for a claimant a convenient method by which he may sue to enforce his rights.[88]

The Court concluded that a state could exclude nonresidents from the use of its highways and thus could require, as a condition of nonexclusion, the consent of the driver to service of process in related suits.[89]

Another small jurisdictional excursion beyond the "presence" doctrine was made in *Henry L. Doherty & Co. v. Goodman,*[90] a case in which the United States Supreme Court upheld a state court assertion of jurisdiction over a nonpresent individual who was doing business in the state through agents.[91] An implied consent theory again was utilized, the court justifying its decision on grounds similar to *Hess*: the defendant's agents were selling securities, a function subject to "special regulation" in the forum state.[92] The Court reasoned, therefore, that the state could require consent to a related suit as a condition of carrying on this business.[93]

Despite these cases, in which traditional bases of personal jurisdiction were exceeded slightly in light of the particular interests of the forum states in regulating certain types of individual activities within their states,[94] the *Pennoyer* doctrine could have continued as the guiding principle of state court jurisdiction if jurisdiction over foreign corporations had not caused conceptual difficulties for state courts.[95]

88. 274 U.S. at 356.

89. *Id.* at 357. The statute upheld in *Hess* is really an early example of a very limited long-arm statute. *See infra* notes 119 to 126 and accompanying text.

90. 294 U.S. 623 (1935).

91. *Id.* at 628. The Court noted: "Doherty voluntarily established an office in Iowa and there carried on business. Considering this fact and accepting the construction given to § 11079, we think to apply it as here proposed will not deprive him of any right guaranteed by the Federal Constitution." *Id.*

92. *Id.* at 627-28. The Court noted, "Iowa treats the business of dealing in corporate securities as exceptional and subjects it to special regulation." *Id.*

93. *Id.* at 628. The Court noted, "The power of the States to impose terms upon nonresidents, as to activities within their borders, recently has been much discussed". *Id.*

94. The Supreme Court decision in *Hess* led to state legislative enactment of implied consent statutes in regard to other "dangerous" activities such as the operation of aircraft, *see, e.g.,* FLA. STAT. ANN. §48.19 (West Supp. 1983); 2 PA. CONS. STAT. ANN. §1410 (Purdon 1963) and the operation of watercraft. *See, e.g.,* FLA. STAT. ANN. §48.19 (West Supp. 1983).

95. As late as 1917, the Supreme Court still stuck firmly to the physical power concept of personal jurisdiction. In *McDonald v. Mabee,* the Court noted:

> The foundation of jurisdiction is physical power, although in civilized times it is

By the early 1940's, many corporations were doing substantial business in states other than those in which they had been incorporated, and the question of state court personal jurisdiction over foreign corporations became very important.[96]

Satisfaction of the need to assert personal jurisdiction over foreign corporations was not accompanied by sound doctrine. The presence formulation, which had worked so well for individual defendants, was difficult to apply to corporations. According to the United States Supreme Court and other learned authorities, a corporation was a creature of the law and had no legal existence outside the state whose law had created the corporation.[97] Even though a corporation might be wreaking havoc in a particular state, therefore, the corporation could not be served with process because it did not exist in that state.

The implied consent theory, which had been so satisfactory in regard to individuals who were engaging in state-regulated acts within a state,[98] also was not satisfying conceptually as a doctrine on which to base personal jurisdiction over foreign corporations. Implied consent, as a basis for personal jurisdiction in *Hess* and in *Henry L. Doherty*, had been grounded on the authority of a state to bar an individual who would not consent to suit.[99] In some quarters, however, the in-

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> not necessary to maintain that power throughout proceedings properly begun, and although submission to the jurisdiction by appearance may take the place of service upon the person. . . .No doubt there may be some extension of the means of acquiring jurisdiction beyond service or appearance, but the foundation should be borne in mind.

243 U.S. 90, 91 (1917).

96. As noted by Judge Clark:

> In the late nineteenth century, and continuing on into our own, increased use of the corporate form, together with the greater mobility afforded by modern means of transportation, brought about an expansion of corporate activity to a nationwide scale; corporations simply refused to remain penned up within their own states of incorporation. The existence of corporations which could—and did—do business on a nationwide scale necessitated revision of older, more limited, notions concerning jurisdiction.

Deveny v. Rheem Mfg. Co., 319 F.2d 124, 126 (2d Cir. 1963).

97. Louisville C. & C. R.R. v. Letson, 43 U.S. (2 How.) 497 (1844); Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 588 (1839) (dictum). *See* Young, *The Nationality of a Juristic Person*, 22 HARV. L. REV. 1 (1908). In *Bank of Augusta v. Earle*, Chief Justice Taney stated:

> [A] corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty.

38 U.S. (13 Pet.) 519, 588 (1839).

For discussion of the history of doctrinal changes in the treatment of assertion of personal jurisdiction over foreign corporations, see Farrier, *Jurisdiction over Foreign Corporations*, 17 MINN. L. REV. 270 (1933); Kurland, *supra* note 83, at 577-86.

98. *See supra* notes 84-94 and accompanying text.

99. *See supra* notes 89 and 93 and accompanying text.

terstate commerce clause of the Constitution[100] was interpreted as not permitting a state to interfere in interstate commerce by excluding corporations from operating in the state.[101] Without the power to exclude, from whence would a state court obtain the authority to imply consent to suit?[102] Moreover, the implied consent doctrine led to anomalous results: foreign corporations that had not followed state statutory requirements in consenting to suit in the state were often in a better position than those complying with the law. Those corporations expressly consenting, for example, were held liable to suits on matters unrelated to their in-state activities while those impliedly consenting by mere transaction of business in the state were held liable only on claims arising out of that particular business.[103]

State courts did assert personal jurisdiction over foreign corporations, however, despite the difficulty in rationalizing such assertions of authority.[104] Regardless of whether a state court claimed to be employing a presence analysis or whether the court claimed to be using an implied consent theory, the measuring standard of "doing

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100. U.S. CONST. art. I, §8, cl. 3.

101. A corporation was not a citizen for purposes of enjoying the protection of the privileges and immunities clause of the constitution. U.S. CONST. art. IV, §2. *See* Blake v. McClung, 172 U.S. 239 (1898); Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1868). In order to avoid violation of the privileges and immunities clause in cases like *Hess* and *Henry L. Doherty,* the Supreme Court had to find that the particular activity in which the defendant was engaging was subject to special state regulation; the state could restrict its own citizens and, therefore, could also restrict noncitizens.

The Supreme Court early held that reasonable restrictions could be imposed on corporations engaged in interstate commerce. Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404 (1855). Subsequently, however, the Court determined that the interstate commerce clause gave corporations a right to do interstate business and that a state constitutionally could not exclude a foreign corporation from engaging in interstate commerce within its territory. International Textbook Co. v. Pigg, 217 U.S. 91 (1910).

102. As noted by Professor Kurland: "It would seem to follow that if the state's power to exact consent to be sued depended on its power to exclude, and it could not exclude, it could not exact such consent." Kurland, *supra* note 83, at 581 (footnote omitted).

103. *See* Smolik v. Philadelphia & Reading Coal & Iron Co., 222 F. 148 (S.D.N.Y. 1915) (Hand, J.); 1 J. BEALE, CONFLICT OF LAWS 377 n.2 (1935).

104. St. Clair v. Cox, 106 U.S. 350 (1882) (implied consent); Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404 (1855) (implied consent); International Harvester Co. v. Kentucky, 234 U.S. 579 (1914) (presence). In *St. Clair,* Justice Field stated:

> The State may. . .impose as a condition upon which a foreign corporation shall be permitted to do business within her limits, that it shall stipulate that in any litigation arising out of its transactions in the State, it will accept as sufficient the service of process on its agents or persons specially designated; and the condition would be eminently fit and just and such condition and stipulation may be implied as well as expressed.

106 U.S. at 356 (footnotes omitted).

In regard to the consent doctrine, Professor Kurland noted that even after the Supreme Court had ruled expressly that a state constitutionally could not exclude a foreign corporation from engaging in interstate commerce within its boundaries, "the Court continued to hold that foreign corporations were subject to the jurisdiction of state courts, even if the business they carried on within the state was interstate commerce." Kurland, *supra* note 83, at 581.

business," was the same:[105] Was the defendant foreign corporation "doing sufficient business" in the jurisdiction to be "present" there? Was the defendant foreign corporation "doing sufficient business" in the jurisdiction to be deemed to have consented impliedly to suit?

In *International Shoe Co. v. Washington,*[106] the Supreme Court devised a jurisdictional theory for foreign corporations that ignored both legal fictions,[107] presence and implied consent, and focused instead on the defendant's contacts with the forum state. The *International Shoe* case, which involved a foreign corporation whose agents solicited orders in the forum state, was the first Supreme Court attempt to establish a test by which a court might determine whether a defendant's due process rights were being violated by the particular assertion of personal jurisdiction.[108] The Court stated:

> [D]ue process requires only that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."[109]

The opinion by the Court in *International Shoe,* moreover, demonstrated a substantial shift in focus from its opinion in *Pennoyer,* a shift from emphasis on the states as independent sovereigns[110] to a recognition of the states as bound together, by the Constitution, into a federal system. The Court said:

> [The] demands [of due process] may be met by such contacts. . .with the state of the forum as make it reasonable, *in the context of our federal system of government,* to require the corporation to defend the particular suit which is brought there.[111]

Thus, *International Shoe* established two criteria that must be satisfied

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105. Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404 (1855) (consent to suit by "doing business"); Philadelphia & R. Co. v. McKibbin, 243 U.S. 264 (1917) (present in state because "doing business"). *See* Kurland, *supra* note 83, at 584; Rothschild, *Jurisdiction of Foreign Corporations in Personam,* 17 VA. L. REV. 129 (1930).

106. 326 U.S. 310 (1945).

107. As stated by Mr. Justice Holmes in 1912, "The Constitution is not to be satisfied with a fiction." Hyde v. United States, 225 U.S. 347, 390 (1912) (Holmes, J., dissenting).

108. *See, e.g.,* Comment, *Federalism, supra* note 2, at 1341; Note, *World-Wide Volkswagen, supra* note 2, at 788-89.

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

110. *See* Comment, *Federalism, supra* note 2, at 1341. As noted by the commentator:

> Under the regime of *Pennoyer v. Neff,* federalism played a key role in the due process limits on state in personam jurisdiction. This federalism was tied directly to rigid concepts of physical power and state sovereignty. Because each state's sovereign power existed only within its own territory, a state court could not exercise personal jurisdiction over a defendant absent his "presence" within the state, his domicile there, or his express or implied consent.

*Id.* at 1343 (footnotes omitted).

111. 326 U.S. at 317 (emphasis added).

in order for the forum state to assert jurisdiction over a defendant: the exercise must be consistent with fundamental fairness to the defendant[112] and must be "consistent with the values of federalism embodied in the due process clause."[113] Unfortunately, because the facts of *International Shoe* provided an easy case for assertion of jurisdiction, the Supreme Court never really applied the test it had developed to the facts at hand. While noting that this kind of analysis might require "[a]n 'estimate of the inconveniences'"[114] between the defendant and other interests, the Court did not demonstrate this process for the state courts. The task of giving content to "contacts", or determining which "contacts" would be sufficient to be "minimum," was left to the state courts.[115]

State courts responded with zeal to this expanded scope of personal jurisdiction.[116] *International Shoe* was read broadly[117] to apply to individual as well as to corporate defendants.[118] State legislatures

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112. Professor von Mehren describes the historical development of personal jurisdiction doctrine as a gradual transition from a "power" theory to a "fairness" theory. von Mehren, *supra* note 60, at 300-07.

113. Comment, *Federalism, supra* note 2, at 1344 (citing Jonnet v. Dollar Sav. Bank, 530 F.2d 1123, 1132, 1140 (3d Cir. 1976) (Gibbons, J., concurring)); Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587, 1589 (1978); RESTATEMENT (SECOND) OF CONFLICT OF LAWS §24 comment b (1971).

The commentator goes on to point out that "[t]he Supreme Court's emphasis on the extent of the forum State's interest [in *McGee, see infra* notes 127-28 and accompanying text] clearly suggests that principles of federalism beyond basic notions of territoriality underlie the due process clause." Comment, *Federalism, supra* note 2, at 1346. *See also supra* note 110.

114. 326 U.S. at 325 (*quoting* Hutchinson v. Chase & Gilbert, 45 F.2d 139, 141 (2d Cir. 1930)).

115. It might be argued that subsequent to the establishment, in *International Shoe,* of the "minimum contacts" test, courts could continue to preserve the traditional bases of jurisdiction—presence, consent, and domicile—as separate and distinct from the *International Shoe* analysis. In other words, a court need not engage in a "minimum contacts" analysis if it could base assertion of jurisdiction on one of these grounds. To this writer, the "minimum contacts" test, as currently defined, *see infra* notes 145-55 and accompanying text, should apply to all state court assertions of personal jurisdiction, with presence, domicile and consent being merely factors, albeit very substantial factors, which weight in the balancing process. In that way, a defendant whose presence is quite transitory might not be subject to personal jurisdiction if sufficient factors weighed against such assertion of jurisdiction.

116. *See supra* state court cases cited at note 1. As one commentator observed:

> By 1975, state long arm jurisdiction. . .had enjoyed three decades of unimpeded growth towards, and arguably sometimes beyond, the limits of due process. Furthermore, this inexorable growth process was one the states inherently favored and were, therefore, unlikely to stunt voluntarily.

Louis, *The Grasp of Long Arm Jurisdiction Finally Exceeds Its Reach: A Comment on* World-Wide Volkswagen Corp. v. Woodson *and* Rush v. Savchuk, 58 N.C.L. REV. 407, 409 (1980) (footnotes omitted).

117. 4 C. WRIGHT & A. MILLER, *supra* note 4, §1067, at 234. *See* Bomze v. Nardis Sportswear, Inc., 165 F.2d 33 (2d Cir. 1948); Lasky v. Norfolk & N. Ry., 157 F.2d 674 (6th Cir. 1946); Dees v. Santa Fe Trail Transp. Co., 71 F. Supp. 387 (D. Mo. 1947); Winkler-Koch Eng'g Co. v. Universal Oil Prods. Co., 70 F. Supp. 77 (S.D.N.Y. 1946); American Cities Power & Light Corp. v. Williams, 74 N.Y.S.2d 374 (1947).

118. *See supra* note 14 and accompanying text.

drafted long-arm statutes[119] authorizing their courts to exercise, to a greater[120] or lesser extent,[121] this new expanded power authorized by the Supreme Court as not violating the fourteenth amendment rights of defendants.[122] Assertions of personal jurisdiction over nonpresent, nondomiciliary, nonconsenting defendants were based (1) on substantial

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119. *See supra* note 3. For further discussion of long-arm statutes, see Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction,* 1980 SUP. CT. REV. 77; Carrington & Martin, *Substantive Interests and the Jurisdiction of State Courts,* 66 MICH. L. REV. 227 (1967); Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois,* 1963 U. ILL. L.F. 633; Homburger, *The Reach of New York's Long-Arm Statute: Today and Tomorrow,* 15 BUFFALO L. REV. 61 (1965); Thode, *In Personam Jurisdiction; Article 2031B, the Texas "Long Arm" Jurisdiction Statute; and the Appearance To Challenge Jurisdiction in Texas and Elsewhere,* 42 TEX. L. REV. 279 (1964); Note, *Nonresident Jurisdiction and the New England Experience,* 48 B.U.L. REV. 372 (1968); *Developments in the Law, supra* note 2, at 1002-06, 1015-17; Note, *A Reconsideration of "Long Arm" Jurisdiction,* 37 IND. L.J. 333 (1962); Comment, *In Personam Jurisdiction Over Nonresident Manufacturers in Product Liability Actions,* 63 MICH. L. REV. 1028 (1965). As noted by one commentator: "Long-arm jurisdiction can be, and has been, made to serve the ends of judicial economy and to promote the goal of fairness and convenience in selecting a place of trial." Foster, *Long-Arm Jurisdiction in Federal Courts,* 1969 WIS. L. REV. 9, 10.

120. Some states, such as California and Rhode Island, empowered their courts to exercise all personal jurisdiction authority not inconsistent with the due process clause of the U.S. Constitution. See *supra* note 3. Where such a long-arm statute is in effect, the established analysis of a personal jurisdiction question—(1) has the state authorized its court to assert jurisdiction over this defendant (statutory interpretation) and (2) if so, would such assertion of jurisdiction violate the due process clause of the fourteenth amendment, *see* Gray v. American Radiator and Standard Sanitary Corp., 22 Ill. 2d 432, 435, 176 N.E.2d 761, 767 (1961)—becomes telescoped into a single determination—would assertion of jurisdiction over this defendant violate due process? Kulko v. Superior Court, 436 U.S. 84, 90 n.4 (1978); Forsythe v. Overmyer, 576 F.2d 779, 782, *cert. denied,* 439 U.S. 864 (1978); *In re* Northern District of California "Dalkon Shield" IUD Products Liability Litigation, 526 F. Supp. 887, 904 n.62 (N.D. Cal. 1981).

Other states, in their long-arm statutes, describe those circumstances in which their courts would be authorized to assert jurisdiction over nonpresent, nonconsenting, nondomiciliary defendants. *See, e.g.,* ARIZ. R. CIV. P. §4(e)(2) (1973); FLA. STAT. ANN. §48.193(1)(f) (West Supp. 1981); ILL. ANN. STAT. ch. 110, §17(1)(a) (Smith-Hurd Supp. 1980-81); N.Y. CIV. PRAC. LAW §302(a) (McKinney 1972 & Supp. 1980-81); OKLA. STAT., tit. 12, §1701.03(a)(4) (1961); WASH. REV. CODE ANN. §4.28.185 (Supp. 1981). *See also supra* note 3.

121. Some states have drafted long-arm statutes which restrict the scope of court jurisdiction more narrowly than the limitations of fourteenth amendment due process. *See, e.g.,* N.Y. CIV. PRAC. LAW §302(a) (describing circumstances in which jurisdiction may be exercised and specifically excluding defamation actions from the scope of long-arm authority). *See also* note 3 *supra.*

122. Other constitutional provisions besides the fourteenth amendment also may restrict the authority of a state to assert personal jurisdiction over a particular defendant. As noted earlier, the commerce clause may limit the reach of long-arm statutes in some commercial contexts. *See supra* notes 79-82 and accompanying text. A similar restriction might be implied from the first amendment in regard to the activities of newspapers and other media in order to avoid "chilling" multistate dissemination of information. *See* New York Times Co. v. Conner, 365 F.2d 567, 572 (5th Cir. 1966) ("First Amendment considerations surrounding the law of libel require a greater showing of contact to satisfy the due process clause than is necessary in asserting jurisdiction of other types of tortious activity"). *See also* Buckley v. New York Post Corp., 373 F.2d 175 (2d Cir. 1967); Buckley v. New York Times Co., 338 F.2d 470, 475 (5th Cir. 1964) (Brown, J., concurring in part and dissenting in part). *But see* Church of Scientology v. Adams, 584 F.2d 893, 899 (9th Cir. 1978); Anselmi v. Denver Post, Inc., 552 F.2d 316, 324 (10th Cir.), *cert. denied,* 432 U.S. 911 (1977); Curtis Publishing Co. v. Golino, 383 F.2d 586 (5th Cir. 1967).

and continuous activity in the state with the claim related[123] or unrelated[124] to that activity, (2) on isolated acts in the state with the claim related to the in-state conduct,[125] and (3) on acts committed outside the state which had consequences within the state.[126]

In 1957, in *McGee v. International Life Insurance Co.*,[127] the Supreme Court again addressed the question of state court personal jurisdiction. The Court determined that the fourteenth amendment due process clause was not violated when a California court asserted jurisdiction over a Texas corporation that had no agents or offices in the state and whose only contacts with the state involved an offer to the petitioner, a California domiciliary, to assume a formerly issued insurance policy and the receipt by it of petitioner's insurance premiums. The Court noted:

> [A] trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other non-residents. In part this is attributable to the fundamental transformation of our national economy over the years. . . .
>
> [W]e think it apparent that the Due Process Clause did not preclude the California court from entering a judgment binding on Respondent. It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State. . . .The contract was delivered in California, the premiums were mailed from there and the insured was a resident of that State when he died. It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims.[128]

A year later, in *Hanson v. Denckla*,[129] the Court seemed to retreat from the position that due process and, therefore, minimum contacts only required that the transaction have a "substantial connection" with the state.[130] The Court invalidated a Florida state court asser-

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123. *See, e.g.*, Time, Inc. v. Manning, 366 F.2d 690 (5th Cir. 1966); Moore-McCormack Lines, Inc. v. Bunge Corp., 307 F.2d 910 (4th Cir. 1962); Pavlovscak v. Lewis, 274 F.2d 523, *cert. denied*, 362 U.S. 990 (1960); Ard v. State Stove Mfrs., Inc., 263 F. Supp. 699 (D.S.C. 1967); Ostow & Jacobs, Inc. v. Morgan-Jones, Inc., 178 F. Supp. 150 (S.D.N.Y. 1959).

124. *See, e.g.*, Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952); Green v. Compagnia De Navigacion Isabella, Ltd., 26 F.R.D. 616 (S.D.N.Y. 1960).

125. *See, e.g.*, Elkhart Eng'g Corp. v. Dornier Werke, 343 F.2d 861 (5th Cir. 1965); Ingravallo v. Pool Shipping Co., 247 F. Supp. 394 (S.D.N.Y. 1965).

126. *See, e.g.*, Phillips v. Anchor Hocking Glass Corp., 100 Ariz. 251, 413 P.2d 732 (1966) (only contact with forum state was injury caused by defendant's product in the state); Gray v. American Radiator and Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961) (same).

127. 355 U.S. 220 (1957).

128. *Id.* at 222-23.

129. 357 U.S. 235 (1958).

130. *McGee* had been interpreted as defining due process requirements as rather easily satisfied, with one commentator stating: "It is at least arguable that as a result of *McGee*

tion of personal jurisdiction over a Delaware corporate trustee in regard to trust property located outside Florida. The *inter vivos* trust in question had been created before the decedent had moved to Florida. After her move, she had purported to exercise a power of appointment as to the remainder in the trust and the Trustee had remitted trust income to her in Florida. The Trustee had no other contacts with the State of Florida. The court stated:

> The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. . . .It is essential in each case that there be some act by which the defendant *purposefully avails* itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.[131]

Under this standard, jurisdiction would still have been sustained in *McGee;* the defendant insurer had solicited the reinsurance contract in California. *Hanson* made it clear, however, that language in *McGee* in regard to "substantial connection" with the forum state was mere *dictum.*[132] The Court also recognized the continued significance of some territorial limits on assertions of personal jurisdiction, stating that "restrictions on the personal jurisdiction of state courts. . . .are more than a guarantee of immunity from inconvenient or distant litigation [; t]hey are a consequence of territorial limitations on the power of the respective states."[133]

The next occasion on which the Supreme Court spoke on the question of personal jurisdiction under the *International Shoe* standard[134] was in the case of *Kulko v. Superior Court.*[135] *Kulko* involved a sup-

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there is now almost no constitutional limitation on a state court's assertion of jurisdiction." Note, *Personal Jurisdiction in Minnesota over Absent Defendants,* 42 MINN. L. REV. 909, 922 (1958).

As in *McGee,* the *Hanson* Court noted the effects of 20th Century technology on theories of personal jurisdiction:

> As technological progress has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome. In response to these changes, the requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of *Pennoyer v. Neff* . . . to the flexible standard of *International Shoe.* . . .

357 U.S. at 250-51 (citations omitted). The Court continued, "But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts." *Id.* at 251.

131. *Id.* at 253 (emphasis added).

132. *Id.* at 252-54.

133. *Id.* at 251.

134. The case of Shaffer v. Heitner, 433 U.S. 186 (1977), was decided before *Kulko.* That case, however, dealt with the question of whether a minimum contacts analysis should be extended to certain assertions of quasi-in-rem jurisdiction and is beyond the scope of this article.

135. 436 U.S. 84 (1978).

port action brought by a California resident against her former spouse, a New York resident. The California Court had purported to assert jurisdiction over the defendant on the ground that he had permitted his daughter to move to California and had purchased a one-way ticket to California for his daughter, thereby engaging in a "purposeful act" which had an effect in California and by which he had availed himself of the benefits of the state and had derived economic benefits in that he no longer had to pay for his daughter's support during the bulk of the year.[136] The Supreme Court reversed, noting that "[w]hile the interest of the forum State and of the plaintiff in proceeding with the cause in the plaintiff's forum of choice are, of course, to be considered. . .an 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."[137] Moreover, the Court rejected the argument that the defendant had purposefully availed himself of the benefits of California:

> We cannot accept the proposition that appellant's acquiescence in [his daughter's] desire to live with her mother conferred jurisdiction over appellant in the California courts in this action. A father who agrees, in the interests of family harmony and his children's preferences, to allow them to spend more time in California than was required under a separation agreement can hardly be said to have "purposefully availed himself" of the "benefits and protections" of California's laws.[138]

This statement does not clearly establish that the Court found the defendant's actions with regard to California not to be "purposeful." The Court did reject any argument that the defendant had benefitted from his daughter's residence in California[139] and seemed to conclude that for due process to be satisfied, the defendant's contact with California would have to be for the purpose of deriving benefits for himself.[140]

*Kulko* probably is not very important in terms of its applicability to other cases; the case involved very attenuated contacts and a very

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136. Kulko v. Superior Court, 19 Cal. 3d 514, 524-25, 564 P.2d 353, 358, 138 Cal. Rptr. 586, 591 (1977) (*en banc*). Three years after the daughter moved to California, the son followed suit, but without the father's permission. Thus, while the support and custody suit involved both children, jurisdiction was based only on the defendant's affirmative acts with respect to his daughter. *Id.*

137. Kulko v. Superior Court, 436 U.S. 84, 92 (1978) (citations omitted).

138. *Id.* at 94 (citations omitted).

139. *Id.* at 94-97. The Court concluded that "any diminution in [defendant's] household costs resulted, not from the child's presence in California, but rather from her absence from [defendant's] house." *Id.* at 95.

140. *Id.* at 94 n.7.

unsympathetic circumstance for the plaintiff.[141] The significance of *Kulko* is twofold: (1) the Supreme Court emphasized concern for fairness to the defendant,[142] in light of increasing emphasis by state courts on the interests of the plaintiff, the forum state, the judicial system, and even society in general,[143] and (2) the Supreme Court recognized that in the "determination of 'reasonableness', the 'minimum contacts' test of *International Shoe*. . ., the facts of each case must be weighed to determine whether the requisite 'affiliating circumstances' are present."[144]

Although the Court in *Kulko* emphasized a case-by-case analysis, in *World-Wide Volkswagen v. Woodson*,[145] the most recent determination of personal jurisdiction of state courts, the Court seemed to establish a new, two-step test for the determination of these cases, a test consistent with its stated emphasis on the interests of the defendant.[146] The plaintiffs in *World-Wide* had been injured seriously when their Audi automobile was struck from behind and burst into flames. The accident occurred in Oklahoma, while the plaintiffs, former New York residents, were traveling to their new home in Arizona. The plaintiffs brought suit in Oklahoma, claiming that their injuries had resulted from a defect in the gas tank, and sought to join as defendants the local New York dealer that had sold the automobile to them, Seaway Volkswagen, Inc., and the regional distributor of Audi for New York, New Jersey and Connecticut, World-Wide Volkswagen Corp. Seaway and World-Wide resisted on the ground that the Oklahoma court lacked personal jurisdiction over them because they lacked sufficient contacts with the state of Oklahoma to satisfy the due process requirements of the fourteenth amendment.[147]

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141. A case like *Kulko* should be distinguished from cases like Gray v. American Radiator and Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961), in which the defendant's out of state conduct resulted in a tortious injury in the state. Moreover, the Court in *Kulko* recognized the sensitivity of any issue involving family relations and expressed its reluctance to make any determination which would "impose an unreasonable burden on family relations. . . ." 436 U.S. at 98. Finally, the Court found the position of the plaintiff-appellee to be particularly unsympathetic:

> [A]n action by [the mother] to increase support payments could now be brought, and could have been brought when [the daughter] first moved to California, in the State of New York. . . . Any ultimate financial advantage to [the father] thus results not from the child's presence in California, but from [the mother's] failure earlier to seek an increase in payments under the separation agreement. . . .

*Id.* at 95 (footnote omitted).

142. *Id.* at 92.
143. *See infra* notes 155 and 182.
144. 436 U.S. at 92.
145. 444 U.S. 286 (1980).
146. *See Kulko*, 436 U.S. at 92.
147. *World-Wide*, 444 U.S. at 286-87.

The Supreme Court agreed, pointing out that it perceived the minimum contacts test as serving "two related, but distinguishable functions, [protecting]. . .the defendant against the burdens of litigating in a distant or inconvenient forum [a]nd [acting] to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as co-equal sovereigns in a federal system."[148] To achieve this goal, the Court seemed to devise a two-step inquiry for due process cases: (1) Did the defendant have any purposeful contacts ("affiliating circumstances") with the forum state?[149] (2) If so, were these contacts sufficient to be "minimum"?[150] The Court answered the first or threshold question in the negative, finding that the defendants had, in no way, affiliated themselves with the state of Oklahoma.[151] The second step of the analysis, therefore, was never reached and how the Court would handle that balancing test remains unclear: Would it balance all factors including the interests of the plaintiff, the forum state, the judicial system and society, as well as the interests of the defendant,[152] or would it merely cumulate those factors affecting the defendant?[153]

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148. *Id.* at 291-92. This statement would seem to indicate that the Court considered federalism as part of its due process analysis. *See supra* note 73. *But see infra* note 175 and accompanying text.

149. *World-Wide,* 444 U.S. at 295. The Court has not expressed its holding in exactly this manner; the Court found no contacts between the defendant and the forum. *See infra* note 150 and accompanying text. The opinion, however, implies that the finding of some "affiliating circumstance" automatically would not subject the defendant to the personal jurisdiction of the court. At that point at least the quality of that contact would be analyzed to determine whether "minimum contacts" were satisfied. *See also* Rush v. Savchuk, 444 U.S. 320 (1980). In *Rush,* the companion case to *World-Wide,* the Court applied a similar analysis to a quasi-in-rem case in which the res attached at the outset of the suit was the defendant's liability insurer's obligation to "defend and indemnify" the defendant on claims arising from automobile accidents. The defendant had no contacts with the forum state, Minnesota, but the defendant's liability insurer was doing business there, and thus, arguably, the "res" was located in Minnesota. *See* Seider v. Roth, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966). The Court denied jurisdiction, noting that "minimum contacts" referred to the contacts between the *defendant* and the forum and not merely the res and the forum. Again, the answer to the threshold question was "no," and, thus, what the Court would have done had the answer been "yes" remains unclear.

150. Although the Court never reached this step in *World-Wide* or *Rush, see supra* note 149, in both cases the Court engaged in some discussion of the various interests involved, thus implying that the second step would be pursued if necessary. *See World-Wide,* 444 U.S. at 292; *Rush,* 444 U.S. at 329-33.

151. *World-Wide,* 444 U.S. at 295.

152. *See infra* notes 155 and 182.

153. Since the Court expressed concern in *Kulko, see supra* notes 137-42 and accompanying text, and in *World-Wide, see supra* notes 148-51 and accompanying text, that due process requires "fairness" to the defendant, this latter analysis would seem more appropriate. The Court stated:

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

After *World-Wide,* for an individual or corporation to so circumscribe its activities as to avoid being "haled into court" in remote jurisdictions seemed possible.[154] The Court, moreover, again was taking some interest in the sovereign rights of the states within the federal system and seemed to be narrowing the scope of state court assertions of personal jurisdiction.[155]

A recent Supreme Court decision, *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee,*[156] seems to reflect another shift in emphasis by the Court, although the case probably leaves intact the basic state court jurisdictional test that has evolved from *Pennoyer.* This case, unlike all of its predecessors in minimum contacts

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> of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.

444 U.S. at 294.

To this writer, however, no real difference exists between the two sorts of analyses because the question becomes merely how one characterizes factors. Under the first analysis, one might argue that the plaintiff is an indigent individual with a substantial interest in proceeding to judgment in his home forum. Under the second analysis, this factor could be considered, but would be characterized as a defendant-interest: the defendant is a large corporation that would not be inconvenienced substantially by defending in the plaintiff's home forum.

154. The expression "haled into court" seems to have derived from the majority and a dissenting opinion in Shaffer v. Heitner, 433 U.S. 186 (1977). The majority stated, "[M]oreover, appellants had no reason to expect to be haled before a Delaware court." *Id.* at 216. In his dissenting opinion, Justice Brennan stated, "Admittedly, when one consents to suit in a forum, his expectation is enhanced that he may be haled into that State's courts." *Id.* at 227 n.6. In *World-Wide* the Court used the phrase "haled into court" in reference to the type of foreseeability necessary for a finding of minimum contacts:

> [T]he foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.

444 U.S. at 297.

155. After the *World-Wide* decision, one commentator maintained:

> The Supreme Court's four most recent cases on . . . jurisdiction . . . have created a new analytical structure for the determination of jurisdictional issues. This new analysis places more emphasis on state sovereignty than on considerations of fairness and convenience. In so doing, it subordinates the most progressive theory of the post-International Shoe jurisdictional era, that of "interstate venue" or "center-of-gravity," to considerations of state sovereignty. The "interstate venue" theory looked to a complex of factors such as convenience to the plaintiff and defendant, the interest of the forum, the location of witnesses, and the choice of substantive law. The present Court looks to a much narrower question: the quantity and quality of the relations of the particular defendant with the forum state.

Kamp, *supra* note 2, at 29. *But see infra* notes 156-82 and accompanying text. From *Pennoyer* through *International Shoe* to *McGee* and back through *Hanson* and *Kulko* to *World-Wide* it seems that state court jurisdiction began as quite restricted (*Pennoyer*), broader considerably (*McGee*), and has now narrowed again (*World-Wide*). The scope of personal jurisdiction under current theory, however, is much broader than that under *Pennoyer* and seems to be stabilizing. *But see* notes 156-82 and accompanying text *infra.* While the application and interpretation of the due process standards must necessarily be on a case-by-case basis, as recognized by the Supreme Court in *Kulko, see supra* note 144 and accompanying text, the standards themselves are by now well established.

156. 456 U.S. 694 (1982). *See Third Circuit Review—Federal Courts and Procedures,* 27 VILL. L. REV. 744 (1982) [hereinafter cited as *Third Circuit Review*].

analysis, involved not a state court attempting to assert personal jurisdiction over a nonpresent, nonconsenting defendant, but rather a federal district court, sitting in diversity, purporting to assert personal jurisdiction over certain alien corporate defendants.[157] The facts of the case, moreover, as well as its procedural posture, exclude it from the mainstream of the *Pennoyer - International Shoe* line of cases.

*Insurance Corp. of Ireland* involved a suit instituted in the United States District Court for the Western District of Pennsylvania by a Delaware Corporation having its principal place of business in the Republic of Guinea, Compagnie des Bauxites de Guinea, against twenty-one alien insurance companies, the "Excess Insurers," to recover on a business-interruption insurance policy. In their answer, some of the defendant companies challenged the personal jurisdiction of the federal court and subsequently moved for summary judgment on this ground.[158] Using discovery procedures authorized by the Federal Rules of Civil Procedure, the plaintiff sought to discover facts that would demonstrate sufficient connections between the defendants and the state of Pennsylvania to establish the defendants' amenability to suit there.[159] For more than two and one-half years, the defendants resisted discovery, failing to provide requested information, to comply with judicial discovery orders, and to object to such requests and orders.[160] At that point, the District Court sanctioned the defendants, pursuant to Rule 37(b)(2)(A) of the Federal Rules of Civil Procedure, which provides that "if a party fails to obey [a discovery] order. . ., the court. . .may. . .order that the matters regarding which the order was made or any other designated facts *shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order. . . .*"[161] The sanction impos-

157. The propriety of applying fourteenth amendment due process standards in a federal court case arising under the diversity jurisdiction of the federal courts, *see supra* note 18, will be discussed below. *See infra* notes 376-492 and accompanying text.

158. *Ins. Corp. of Ireland,* 456 U.S. at 698. The complaint was actually in two counts, one count against Insurance Company of North America, which had provided the first 10 million dollars of insurance coverage on the 20 million dollar business interruption policy obtained by the plaintiff, and the other count against the 21 alien insurance companies, the "excess insurers," which had provided the remaining or "excess" 10 million dollars of insurance coverage. *Id.* at 696. Insurance Company of North America, as well as four of the 21 "excess insurers," did not challenge the court's personal jurisdiction. *Id.* at 696, 697 n.3. Moreover, the United States Court of Appeals for the Third Circuit had dismissed the plaintiff's complaint as to three other "excess insurers." Compagnie des Bauxites de Guinea v. Insurance Co. of N. Am. 651 F.2d 877, 886 (1981). Thus, only fourteen of the "excess insurers" were involved in the matter before the Supreme Court.

159. For a discussion of the propriety of requiring satisfaction of state amenability standards when a federal court sits in diversity, *see infra* notes 483-92 and accompanying text.

160. *Ins. Corp. of Ireland,* 456 U.S. at 698-99.

161. FED. R. CIV. P. 37(b)(2)(A) (emphasis added).

ed was a finding that "for the purpose of this litigation the Excess Insurers are subject to the *in personam* jurisdiction of this Court due to their business contacts with Pennsylvania."[162] In effect, as a sanction for the defendants' failures to comply with the discovery order of the court, the court took as established facts that would be necessary to support a constitutionally permissible exercise of personal jurisdiction over the defendants.

While the District Court also found two bases of personal jurisdiction independent of the Rule 37 sanction, in its affirmance the Court of Appeals[163] relied entirely on the sanction. The appellate court held that the discovery orders were not an abuse of discretion by the district court, that imposition of the sanction came within the discretion of the district court under Rule 37(b), and that the imposed sanction had not violated the defendants' due process rights.[164] The defendants appealed to the United States Supreme Court, arguing that their due process rights had been violated because a court that did not have personal jurisdiction over them would have neither the power to require compliance with discovery orders nor the authority to impose Rule 37 sanctions.[165]

The Supreme Court affirmed the assertion of personal jurisdiction, pointing out that while the subject matter jurisdiction of federal courts is limited by article III of the Constitution and those limitations cannot be waived by the parties, "[t]he requirement that a court have personal jurisdiction flows not from Art. III, but from the Due Process Clause."[166] The Court continued:

> The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter sovereignty, but as a matter of individual liberty. . . .Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived. . . .[167]

Finally, the Court concluded:

> [T]he requirement of personal jurisdiction may be intentionally waived, or for various reasons a defendant may be estopped from raising the issue. These characteristics portray it for what it is—a legal right protecting the individual. . . . The expression of legal

162. *Ins. Corp. of Ireland*, 456 U.S. at 699 (*citing* the Joint Appendix of the parties to the litigation).
163. Compagnie des Bauxites de Guinea v. Insurance Co. of N. Am., 651 F.2d 877 (3d Cir. 1981).
164. *Ins. Corp. of Ireland*, 456 U.S. at 700.
165. *Id.* at 701.
166. *Id.* at 702.
167. *Id.* at 702-03 (footnote omitted).

> rights is often subject to certain procedural rules: The failure to follow those rules may well result in curtailment of the rights. Thus, the failure to enter a timely objection to personal jurisdiction constitutes, under Rule 12(h)(1), a waiver of objection. A sanction under Rule 37(b)(2)(A) consisting of a finding of personal jurisdiction has precisely the same effect. As a general proposition, the Rule 37 sanction applied to a finding of personal jurisdiction creates no more of a due process problem than the Rule 12 waiver. . . .[168]

The Court noted the *International Shoe* test for assertions of personal jurisdiction that do not violate due process[169] and compared the Rule 37(b)(2)(A) procedure followed by the District Court with a standard established in another fourteenth amendment case[170] "for the Due Process limits on such rules."[171] Finally, the Court concluded that the Due Process Clause[172] had not been violated.

In his concurring opinion, Justice Powell observed that the opinion for the Court did not require minimum contacts as a prerequisite to imposition of Rule 37 sanctions and thus might be read as rejecting minimum contacts as a constitutional requirement for assertion of personal jurisdiction.[173] Moreover, he argued:

168. *Id.* at 704-05.

169. *Id.* at 702-03.

170. Hammond Packing Co. v. Arkansas, 212 U.S. 322 (1909).

171. *Ins. Corp. of Ireland*, 456 U.S. at 705.

172. While Justice Powell, in his concurring opinion, carefully distinguished between the due process clause of the fourteenth amendment and the due process clause of the fifth amendment, *id.* at 712-13, *see infra* note 482 and accompanying text, Justice White, in his opinion for the Court, seemed deliberately to avoid any discussion of the standard to be applied to exercises of personal jurisdiction by federal courts sitting in diversity cases—fourteenth amendment or fifth amendment—by referring, throughout the opinion, to "the Due Process Clause." Apparently, however, his reliance on cases interpreting the fourteenth amendment, *see supra* text at notes 169-71, indicates that he felt a fourteenth amendment standard, a standard established in cases involving state court interference with individual rights, should apply. For further discussion of this issue, *see infra* notes 480-82 and accompanying text.

173. *Ins. Corp. of Ireland*, 456 U.S. at 713. At least one commentator put a similar interpretation on the Court of Appeals opinion:

> The stark logic of Judge Aldisert's holding establishes the rule that in personam jurisdiction may be predicted on noncompliance with a discovery order directed to that issue. *No showing of minimum contacts is required.* The power of the district court rests solely in the initial authority to inquire into jurisdiction and authority under the federal rules to police the discovery process.

*Third Circuit Review*, *supra* note 156, at 759 (emphasis added, footnotes omitted).

Subsequently, Justice Powell noted that the opinion of the Court could be given an alternative reading, "not as affecting state jurisdiction, but simply as asserting that Rule 37 of the Federal Rules of Civil Procedure represents a congressionally approved basis for the exercise of personal jurisdiction by a federal district court." *Ins. Corp. of Ireland*, 456 U.S. at 714. Justice Powell went on to reject such a construction of Rule 37, basing his concurrence instead on the "narrow basis" that the plaintiff had based his assertion of personal jurisdiction on the Pennsylvania long-arm statute, *id.* at 710, that "in the absence of a federal rule or statute establishing a federal basis for the assertion of personal jurisdiction, the personal jurisdiction of the district courts is determined in diversity cases by the law of the forum state," *id.* at 711 (citations omitted), *see infra* notes 376-476 and accompanying text, and that the

> By eschewing reliance on the concept of minimum contacts as a "sovereign" limitation on the power of States—for, again, it is the State's long-arm statute that is invoked to obtain personal jurisdiction in the District Court—the Court today effects a potentially substantial change of law. For the first time it defines personal jurisdiction solely by reference to abstract notions of fair play.[174]

Justice White, in his opinion for the Court, countered in a footnote:

> It is true that we have stated that the requirement of personal jurisdiction, as applied to state courts, reflects an element of federalism and the character of state sovereignty vis-a-vis other States. . . . Contrary to the suggestion of Justice Powell, . . . our holding today does not alter the requirement that there be "minimum contacts" between the nonresident defendant and the forum state. Rather, our holding deals with how the facts needed to show those "minimum contacts" can be established when a defendant fails to comply with court-ordered discovery. The restriction on state sovereign power described in *World-Wide Volkswagen Corp.*, however, must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns. Furthermore, if the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement. Individual actions cannot change the powers of sovereignty, although the individual can subject himself to powers from which he may otherwise be protected.[175]

This author does not agree with Justice Powell's suggestion that

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plaintiff had made a prima facie showing that the defendants had sufficient contacts with the State of Pennsylvania to satisfy the "minimum contacts" requirements of the fourteenth amendment. *Ins. Corp. of Ireland*, 456 U.S. at 716. Justice Powell concluded:

> Where the plaintiff has made a prima facie showing of minimum contacts, I have little difficulty in holding that its showing was sufficient to warrant the District Court's entry of discovery orders. And where a defendant then fails to comply with those orders. I agree that the prima facie showing may be held adequate to sustain the court's finding that minimum contact exist, either under Rule 37 or under a theory of "presumption" or "waiver."

*Id.*

174. *Id.* at 714.

175. 456 U.S. 702 n.10. At least one commentator, relying on prior Supreme Court opinions, would interpret this as a reversal of prior theory:

> In one sense, basic territorial restrictions underlie the minimum contacts doctrine. Suit in a neighboring state with which a defendant has had no contact at all will often be more convenient and less unfair for him than suit in a distant corner of his own state, yet the due process clause of the fourteenth amendment would forbid it. Furthermore, the identically worded due process clause of the fifth amendment has been construed to permit legislation providing for the nationwide competence of federal suits, a clear indication that where sister states are involved, fairness to the defendant is not the sole criterion of due process.

Comment, *Federalism, supra* note 2, at 1344.

the Court has rejected minimum contacts as a prerequisite to constitutional assertions of state court personal jurisdiction. First, in the course of its due process analysis, the Court cites *International Shoe*, albeit for the proposition that due process requires that "the maintenance of the suit . . . not offend traditional notions of fair play and substantial justice."[176] This, however, does not mean that the Court has rejected minimum contacts as the manner of determining whether fair play and substantial justice have been offended. Second, the majority opinion can be read fairly as merely prescribing that in some circumstances, facts necessary to establish minimum contacts can be presumed as a Rule 37 sanction.[177] The Court, therefore, merely may be authorizing an alternative method for establishing minimum contacts when the defendants refuse to permit discovery on this issue. Third, the Court was not faced squarely with the question of the due process standard applicable under the manner and circumstances of service of process utilized in this case but with the related but different question of whether a judicial presumption of facts sufficient to establish personal jurisdiction, in and of itself, would violate the defendants' due process rights.

The Court, however, does reject explicitly the principle, which reasonably could have been inferred from some of its earlier opinions, that "the federalism concept operate[s] as an independent restriction on the sovereign power of [a state court]."[178] The reasons of the Court for this rejection, that limitations on state court personal jurisdiction spring from the due process clause, which "makes no mention of federalism concerns," and that if personal jurisdiction involved limitations based on sovereignty, those limitations could not be waived,[179] are questionable.[180] Even if one accepts the assertions by the Court

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176. *Ins. Corp. of Ireland*, 456 U.S. at 703.

177. The Court asserted: "[O]ur holding deals with how the facts needed to show . . "minimum contacts" can be established when a defendant fails to comply with court-ordered discovery." *Id.* at 703 n.10.

178. *Id.*

179. *Id.*

180. While the due process clause of the fourteenth amendment has evolved into the measure of the constitutionality of state court assertion of jurisdiction over a particular defendant, *see supra* notes 70-155 and accompanying text, state court assertions of personal jurisdiction were restricted even before the adoption of the fourteenth amendment. *See supra* notes 4-6 and accompanying text and note 74. If, as the Supreme Court now states, "the Due Process Clause . . . is the only source of the personal jurisdiction requirement," why didn't state courts run amok before adoption of the fourteenth amendment? In fact, as the personal jurisdiction theory of the Supreme Court evolved from *Pennoyer v. Neff*, the due process clause seems to broaden the bases of personal jurisdiction permissible in state courts. *See supra* notes 70-155 and accompanying text. Moreover, even if some limitations on personal jurisdiction spring from the due process clause, strong arguments can be made that the orderly administration of justice in this federation of states, in which state courts are generally courts of unlimited subject matter jurisdiction, requires that some effort be made to allocate cases throughout the system in

on this point, however, only the source or rationale for restricting the personal jurisdiction of state courts would be affected. The standards by which those restrictions are measured, standards that have evolved from *Pennoyer* to *World-Wide*, should not change. As the Court hastened to respond to Justice Powell's concurrence, its intention was not to eliminate minimum contacts with the state as the basis for assertion of state court personal jurisdiction.[181] *Insurance Corp. of Ireland* might be viewed as a special circumstance, in which the Court did not require a minimum contacts analysis, it might be criticized by commentators who will adopt the concurring opinion as more reasonable and consistent with prior doctrine, and it might be touted as a clarification of the doctrinal basis for the personal jurisdiction tests established to date, but it probably will not be treated as substantially altering those tests. If anything, the Supreme Court seemed determined to avoid any issues that required new substantive law or reevaluation of established tests.[182]

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a reasonable manner and that this effort must come through limitations on the location of suit (venue—controlled by the states) and on the defendants who may be haled into a particular court (personal jurisdiction—controlled, ultimately, by Supreme Court decisions).

This assertion, however, raises the other argument of the Court: If part of the reason for limiting personal jurisdiction of federal courts is to allocate business among state courts in a rational manner and to protect the interests of the various state sovereigns, then why can defendants waive personal jurisdiction objections? One simple answer might be that, even before the fourteenth amendment came on the scene, defendants always could subject themselves to the personal jurisdiction of the state court by coming into the jurisdiction and accepting service of process. Thus, even when physical power was the only recognized basis for personal jurisdiction, surely a principle that grew from notions of sovereignty, *see supra* note 4, a defendant had the "right" to empower the court to assert its jurisdiction over him.

Moreover, a strong argument can be made that personal jurisdiction includes both a right of the defendant arising from his personal liberty interest and a restriction on the sovereign power of the court arising from concepts of federalism. The defendant has the right to insist that the power of the particular court be limited, but, if the defendant chooses to waive this right, he is, in effect, consenting to the exercise of power. Why should he be required to step into the territory of the forum? If he can achieve the result of empowering a particular court to assert jurisdiction over his person by stepping into the jurisdiction, won't a symbolic act, consent, also be sufficient?

Most statements by the Supreme Court to date have revealed a two-pronged purpose to be served by limiting personal jurisdiction of state courts: protecting a defendant from unfair assertions of jurisdiction and doing what makes sense in a federal system. Usually, both prongs are served by the same limitation. But just because some notions of sovereignty have been preserved doesn't mean that the power of the sovereign or limitations on its power are absolute. Limitations give structure to the system even if the limitations are not absolute. Most plaintiffs will not serve process on a defendant on the mere hope that the defendant will not object even though an ironclad objection exists.

Whether the courts read the Supreme Court language as rejecting concepts of sovereignty or federalism as bases for restrictions on state court personal jurisdiction or not, sovereignty concepts will steal back into opinions, in discussions of personal jurisdiction or venue, because state courts cannot function in a federal system that does not, in some way, recognize their separateness from the courts of other states.

181. *Ins. Corp. of Ireland*, 456 U.S. at 702 n.10.

182. Considering the recurring emphasis by the Supreme Court on federalism concepts, *see supra* notes 73, 111-13, and 148 and accompanying text, and the prior-expressed views of

Unlike the question of federal court jurisdiction, most elements of analysis in state court personal jurisdiction are predictable and certain. Although the scope of state court jurisdiction may increase or decrease slightly in the future, the basic tenets have been developing gradually since *Pennoyer* and are now well-rooted in jurisdictional theory.[183] In short, the present doctrine is the product of decades of careful consideration and analysis, and the possibility that the scope-pendulum will swing wildly to substantially narrow or substantially broad state court jurisdiction seems unlikely.[184] Instead, only further refinements should be anticipated.[185]

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some commentators that federalism might be a more fundamental underpinning of due process than any notions of basic territoriality or personal liberty, *see* Reese, *supra* note 113 (forum state interest analysis as nonliteral reading of due process clause); Comment, *Federalism, supra* note 2, at 1346, *Insurance Corp. of Ireland* is more likely to draw criticism than accolades. As noted by one commentator: "The Supreme Court's emphasis on the extent of the forum state's interest clearly suggests that principles of federalism beyond basic notions of territoriality underlie the due process clause." Comment, *Federalism, supra* note 2, at 1346. *See also* McDougal, *supra* note 73. Professor McDougal has urged that the "purposefully availing minimum contacts approach" be abandoned in favor of a "comprehensive form of interest analysis" that would include consideration of the interests of various states as well as those of the plaintiff and the defendant. *Id.* at 7, 26. *But see* Lewis, *The "Forum State Interest" Factor in Personal Jurisdiction Adjudication: Home-Court Horses Hauling Constitutional Carts,* 33 MERCER L. REV. 769 (1982) (urging that forum interest should be irrelevant in state court personal jurisdiction analysis). Professor Lewis stated his primary thesis in the following paragraph:

> The chief contention here is that interests of government should not figure at all in decisions on personal jurisdiction. This conclusion builds on the premise that the sole proper concern of due process in the personal jurisdiction context is to assure the parties a fair forum. This fairness, in turn, should be exclusively a function of the defendant's forum contacts, as leavened by the plaintiff's need for a convenient place to sue. Giving any weight to the interests of a forum or of any other state will inevitably disturb the correct equation of fairness between the parties.

*Id.* at 771.

183. *See supra* notes 70-155 and accompanying text. *But see* Lewis, *supra* note 182, at 769 (urging that current minimum contacts analysis improperly considers factors such as forum interest); McDougal, *supra* note 73, at 7, 26 (urging that minimum contacts analysis be abandoned in favor of an analysis based solely on assessment of various interests); Posnak, *supra* note 4, at 729 (urging abolition of transient theory of jurisdiction and adoption of a new, two-tiered test for personal jurisdiction considering the defendant's claim-related contacts with the forum and the reasonableness of allowing jurisdiction in the particular case); Comment, *supra* note 82, at 160-61 (urging that the factors now balanced in a minimum contacts analysis have no constitutional relevance and suggesting a new, more relevant set of factors). These and other writings suggest both that the present formulation is subject to varying interpretations and that many legal scholars are dissatisfied with the test as it stands. Clearly, the "minimum contacts" test is fact-dependent—it can only be applied on a case by case basis. The point this writer is urging, however, is not that the test is rigid, uniform, and easily applied, but rather that the constitutional underpinnings of the present test have been examined clearly by a number of courts and commentators and that the formulation of that test has been developing over time through a vast number of cases in which the question of personal jurisdiction in state courts has been examined carefully.

184. *See supra* note 155.

185. *Id.*

### B. Federal Court Personal Jurisdiction—Diversity Cases, Federal Question Cases, the Fourteenth Amendment, and (Perhaps) the Fifth Amendment

#### 1. Introduction

Unlike state courts, which were viewed originally as judicial arms of independent sovereigns, the separate states, federal courts always have been considered arms of one judicial jurisdiction, the federal forum.[186] Thus, any limitations that may exist on a particular federal court assertion of personal jurisdiction over a particular defendant would arise not from any doctrine of territorial limitations on power or from any need to promote federalism but only from constitutional limitations, Congressional limitations, and considerations of the peculiarities of the case at hand, which probably is judged by Constitutional standards and/or Congressional interpretations or limitations of these standards.[187] Moreover, one might argue strongly that most difficulties caused by issues of fairness to the defendant could be resolved by transferring the case within the federal system to a courtroom that would be more conveniently located.[188] Finally, one might hypothesize that whereas most jurisdictional problems in state courts are problems of personal jurisdiction rather than subject matter jurisdiction, jurisdictional problems in the federal courts primari-

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186. *See, e.g.,* Foster, *supra* note 26, at 28 ("systematic unity of the federal judiciary is commonly overlooked"); Comment, *Fifth Amendment Due Process Limitations on Nationwide Federal Jurisdiction,* 61 B.U.L. REV. 403, 421 (1981) ("[f]ederal law uniformly controls every district in the country") [hereinafter cited as Comment, *Fifth Amendment*]; Comment, *National Contacts As a Basis for In Personam Jurisdiction over Aliens in Federal Question Suits,* 70 CALIF. L. REV. 686, 686 (1981) ("the jurisdictional determination might be expected to focus upon the alien defendant's 'minimum contacts' with the federal forum, namely, the United States") [hereinafter cited as Comment, *National Contacts*]; Note, *supra* note 21, at 482 ("unlike the state courts, the district courts are part of a unified system"). In Internatio-Rotterdam, Inc. v. Thoman, 218 F.2d 514, 517 (4th Cir. 1955), Judge Parker remarked that "courts of the United States comprise one great system for the administration of justice."

187. *See supra* note 3.

188. *See, e.g.,* Foster, *supra* note 26, at 28-29; Note, *Corporate Amenability to Process in the Federal Courts: State or Federal Jurisdictional Standards?* 48 MINN. L. REV. 1131, 1147 (1964). Professor Foster cites 28 U.S.C. §1404(a), which authorizes transfer of venue "[f]or the convenience of parties and witnesses, in the interest of justice. . .to any. . .district. . .where [the suit] might have been brought," arguing that "any injustice or inconvenience to a particular defendant which is insufficient to warrant a change of venue is certain to fall far short of raising any serious constitutional question about requiring him to stand trial in the original district." Foster, *supra,* note 26 at 29 (footnote omitted). Moreover, as noted by the Minnesota commentator:

> An independent federal jurisdictional standard would mean, of course, geographically broadening corporate amenability to suit. Any unfairness and inconvenience to the corporate defendant, insofar as they are not eliminated by the jurisdictional standard itself, should be prevented by the venue provision of section 1391 and the transfer provision of section 1404 of title 28.

Note, *supra,* at 1147.

ly would arise because of the limited subject matter jurisdiction of the federal courts,[189] with few questions involving assertions of jurisdiction over the persons of defendants.[190] Unfortunately, the above hypothesis does not describe the situation accurately. In federal practice, many questions have arisen with regard to subject matter jurisdiction. Personal jurisdiction questions are even more difficult, partly because these issues have received very little sustained, organized treatment by the courts. The question, however, has received increasing attention by scholars[191] and sporadic, case-by-case treatment by courts,[192] but has not been resolved into any readily-described, rationally-based, uniform rule or rules of relatively simple application. As noted by one recent commentator: "Exploration of the methods for acquiring personal jurisdiction . . . demonstrates a lack of uniformity in the federal courts. . . . Federal courts have also added to the uncertainty about personal jurisdiction in federal question cases because of their disagreement on whether and how state due process limits should be imposed."[193] Problems of nonuniformity

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189. *See supra* notes 18-19 and accompanying text.

190. *See supra* note 186.

191. For articles addressing the problem of acquiring personal jurisdiction in federal question cases, *see, e.g.*, Berger, *Acquiring in Personam Jurisdiction in Federal Question Cases; Procedural Frustration Under Federal Rule of Civil Procedure 4,* 1982 UTAH L. REV. 285; Green, *Federal Jurisdiction in Personam of Corporations and Due Process,* 14 VAND. L. REV. 967 (1961); Note, *Fifth Amendment Due Process Limitations on Nationwide Federal Jurisdiction,* 61 B.U.L. REV. 403 (1981); Note, *supra* note 21; Comment, *supra* note 186, at 686. For articles addressing the problem of acquiring personal jurisdiction in diversity cases, *see, e.g.*, Foster, *Judicial Economy; Fairness and Convenience of Place of Trial: Long-Arm Jurisdiction in District Courts,* 47 F.R.D. 73 (1968).

Most federal courts have now adopted the position of the United States Court of Appeals for the Second Circuit in Arrowsmith v. U.P.I., 320 F.2d 219 (1963), that when a federal court is sitting in diversity, *see supra* note 18 and *infra* notes 376-99 and accompanying text, the validity of that exercise of personal jurisdiction is to be measured by the fourteenth amendment due process clause and the standards which have arisen thereunder. *See infra* notes 376-492 and accompanying text. For a discussion of the development of the fourteenth amendment standard, *see supra* notes 60-185 and accompanying text. The validity of this position, which has the effect of relegating to state law the determination of whether a federal court sitting in that state will open its doors to a particular matter (and which, in turn, leads to nonuniformity among federal courts sitting in different states) has been questioned seriously. *See infra* notes 376-492 and accompanying text. Moreover, even if the law is considered settled with regard to diversity suits in which service is made pursuant to a state long-arm statute, questions of amenability standards still should abound when service of process is made pursuant to some federal statute or a wholly-federal Rule 4 procedure.

In the area of federal question jurisdiction, even less uniformity exists and even more open questions abound. Amenability standards are at issue regardless of how service of process is achieved. *See infra* notes 493-1355 and accompanying text.

192. For a discussion of cases involving the problem of acquiring personal jurisdiction in federal question cases, *see infra* notes 493-1355 and accompanying text. For a discussion of cases involving the problem of acquiring personal jurisdiction in diversity cases, *see infra* notes 376-492 and accompanying text.

193. Berger, *supra* note 191, at 336-37.

and uncertainty also have developed in diversity cases.[194] Although the primary focus of this article is personal jurisdiction in federal question cases,[195] some space will be devoted to the related, and perhaps unseverable, topic of personal jurisdiction in diversity cases.

### 2. *General Historical Development*

Examination of the historical development of personal jurisdiction in the federal courts must begin with article III, section 2, of the Constitution, which limits the subject matter jurisdiction of the lower federal courts[196] "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; . . . to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States; . . ." and other cases involving federal issues.[197] The exercise of this limited judicial power constitutionally is vested only "in such inferior Courts as the Con-

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194. *See infra* notes 376-492 and accompanying text.

195. For purposes of this discussion, the important distinction is between cases in which the subject matter jurisdiction of the federal court rests solely on the ground of diversity of citizenship and those cases in which its subject matter jurisdiction rests on some ground other than, or in addition to, diversity of citizenship. This latter group of cases should be referred to as "nondiversity" cases, including both federal question cases arising under the general federal question jurisdiction authorized by 28 U.S.C. §1331 (Supp. V 1981) and cases arising under special grants of authority to federal courts. *See, e.g.,* 28 U.S.C. §1333 (1976) (Admiralty, maritime and prize cases); 28 U.S.C. §1334 (Supp. V 1981) (Bankruptcy matters and proceedings); 28 U.S.C. §1338 (1976) (Patents, plant variety protection, copyrights, trade-marks and unfair competition). *See supra* note 19. For simplicity, throughout this discussion the term "federal question cases" has been used broadly to encompass all nondiversity federal cases. *See also supra* note 19.

196. Restrictions on federal subject matter jurisdiction serve to limit the circumstances in which a federal court can open its doors. As noted below, *see infra* notes 196-210 and accompanying text, the First Congress was reluctant to give broad authority to federal courts; some members sought to block completely the creation of lower federal courts.

Restrictions on personal jurisdiction *also* limit access to federal courts. The development of federal court personal jurisdiction rules paralleled, in some regards, the reluctant, nondirected attention accorded subject matter jurisdiction. *See infra* notes 205-72 and accompanying text.

197. U.S. CONST. art. III, §2, cl. 1. Clause 1 of section 2 provides, in full:

> 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;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the Untied States shall be a Party;—to Controversies between two or more States;—between a State and Citizen of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, §2, cl. 1.

Included in this grant of power to lower federal courts is what has become diversity jurisdiction under 28 U.S.C. §1332 (1976) and federal question jurisdiction under 28 U.S.C. §1331 (Supp. V 1981). *See supra* notes 18-19. Neither of these statutory authorizations is coterminus with the authority which article III permits. *See infra* note 200.

gress may from time to time ordain and establish."[198] This Constitutional language was interpreted as giving Congress the prerogative to create lower federal courts.[199] Once Congress had decided to create federal district and circuit courts, moreover, article III was not interpreted as requiring that these courts be vested with the full complement of subject matter jurisdiction authorized by the Constitution.[200] As noted by the Supreme Court in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*,[201] "[j]urisdiction of the lower

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198. U.S. CONST. art. III, §1.

199. In Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816), Justice Story based his decision that the Supreme Court had the jurisdiction and authority to review all state acts under the Constitution, laws and treaties of the United States on the assumption that article III of the Constitution was "not mandatory, and that Congress may constitutionally omit to vest the judicial power in courts of the United States." 14 U.S. (1 Wheat.) at 337. From that position, one might argue that Congress was not required to create lower federal courts at all. In his opinion, however, Justice Story also included several paragraphs suggesting that article III was intended to be "mandatory upon the legislature," 14 U.S. (1 Wheat.) at 328, thus requiring that Congress establish lower federal courts vested with all jurisdiction authorized by article III.

The Supreme Court subsequently resolved the question of Congressional duty to create lower federal courts by ruling that although the power of the courts of the United States is granted by the Constitution, Congress had the prerogative to create courts to exercise some or all of that power. Cary v. Curtis, 44 U.S. (3 How.) 236, 245 (1845). Congress "could have declined to create any such courts, leaving suitors to the remedies afforded by state courts, with such appellate review by this Court as Congress may prescribe." Lockerty v. Phillips, 319 U.S. 182, 187 (1943).

200. While many commentators have taken the position that "Congress. . .was required to establish" the lower federal courts, *Symposium Proceedings*, 27 VILL. L. REV. 1042 (1981-82) (Professor Rice); *see also supra* note 199, and some have argued that article III requires that Congress establish lower courts with the full complement of subject matter jurisdiction authorized in article III, *see* G. GUNTHER, *supra* note 79, at 57; Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 328 (1816) (Story, J.) (dictum suggesting that article III was "mandatory upon the legislature"), Congress has never done so. Congress' grant to lower federal courts of original diversity jurisdiction, now codified at 28 U.S.C. §1332 (1976), for example, is more narrow than the authority authorized by article III of the Constitution. Exercise of diversity jurisdiction is limited to those "civil actions where the matter in controversy exceeds the sum or value of $10,000," 28 U.S.C. §1332 (1976), a jurisdictional threshold amount not required by article III, and the diversity jurisdiction authorized by Congress in 28 U.S.C. §1332 (1976) requires "complete diversity" (that no plaintiff be a co-citizen of any defendant), Strawbridge v. Curtiss, 7 U.S. (Cranch.) 267 (1806), while the grant of article III requires only "minimum" diversity (that at least one plaintiff be of a different citizenship from that of at least one defendant). *See* 28 U.S.C. 1335(a)(1) (1976) (requiring only minimum diversity in interpleader actions).

When the First Congress established the lower federal courts, it did not vest any general federal question jurisdiction in these courts. *See infra* notes 205-30 and accompanying text. And even when Congress vested general federal question authority in the federal courts, this authority was not coterminus with the maximum power permitted by the article III "arising under" language. *See infra* note 230 and accompanying text. Until recently, a jurisdictional threshold of $10,000 "amount in controversy" was required in federal question as well as diversity cases. 28 U.S.C. §1331 (Supp. V 1981). Moreover, Congress by separate statute has granted federal courts jurisdiction over certain "federal" matters, *see, e.g.*, 28 U.S.C. §1338 (1976) (Patents, plant variety protection, copyrights, trade-marks and unfair competition); 28 U.S.C. §1343 (Supp. V 1981) (Civil rights and elective franchise), thus indicating that the general federal question jurisdiction of 28 U.S.C. §1331 might not include matters that clearly fall under the "arising under" language of article III. In a recent opinion, the Supreme Court noted: "Although the language of §1331 parallels that of the 'arising under' clause of Article III, this Court never has held that statutory 'arising under' jurisdiction is identical to Article III 'arising under'

federal courts is further limited to those subjects encompassed within a statutory grant of jurisdiction."[202] Thus, while such an interpretation was not required constitutionally, the subject matter jurisdiction of federal courts is limited to those parts of the article III grant that Congress has vested in the lower federal courts.[203] As will be demonstrated below, some courts and commentators have sought a similar structure in personal jurisdiction authority of federal courts, that is, some constitutional expression of authority coupled with affirmative legislation authorizing federal courts to exercise this grant.[204]

The Judiciary Act of 1789[205] created the first federal trial courts, and the authority of those district courts and circuit courts, which in some instances also were courts of original jurisdiction,[206] was limited to admiralty cases, some criminal cases, cases in which the United States was a party, and diversity cases.[207] These courts were not vested with any authority over cases and controversies described in article III of the Constitution as "arising under" the Constitution or laws of the United States—general federal question cases. Federal question jurisdiction resided solely in the state courts, and the only possibility of consideration by a federal court was by appeal to the United States Supreme Court from a decision of the highest court of the state.[208] In view of one of the original purposes of creating a federal

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jurisdiction. Quite the contrary is true." Verlinden v. Central Bank of Nigeria, 103 S. Ct. 1962, 1972 (1983), (*citing* Romers v. International Terminal Operating Co., 358 U.S. 354, 379 (1959)). In *Romers*, the Court had asserted: "Of course, the many limitations which have been placed on jurisdiction under §1331 are not limitations on the constitutional power of Congress to confer jurisdiction on the federal courts." 358 U.S. at 379 n.51. *See also* Powell v. McCormack, 395 U.S. 486, 515 (1969); Shoshone Mining Co. v. Rutter, 177 U.S. 505, 506 (1900).

While "[t]he Constitution. . .and statements in court opinions suggest a broad congressional authority over lower federal court jurisdiction," G. GUNTHER, *supra* note 79, at 59; *see also* Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1869) (which has been read to support broad power of Congress to limit the jurisdiction of lower federal courts, *see, e.g.*, National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 655 (1948) (Frankfurter, J., dissenting); Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1005 (1965)), the Constitution limits Congress control of lower court jurisdiction. G. GUNTHER, *supra*, at 59-60. *See generally* Van Alstyne, *A Critical Guide to* Ex parte McCardle, 15 ARIZ. L. REV. 229, 263-69 (1973). For example, the fifth amendment due process clause would preclude Congress from exercising "its Article III power over the jurisdiction of the court in order to deprive a party of a right created by the Constitution." J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 44 (1978).

201. 456 U.S. 694 (1982). *See supra* notes 165-87 and accompanying text.

202. *Ins. Corp. of Ireland*, 465 U.S. at 701.

203. *See supra* notes 199-202 and accompanying text.

204. *See, e.g. infra* notes 1215 and 1258-59 and accompanying text.

205. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73 (now codified in scattered sections of Title 28 of the United States Code). *See infra* note 211.

206. Bartels, *Recent Expansion in Federal Jurisdiction: A Call For Restraint*, 55 ST. JOHN'S L. REV. 219, 224 (1981).

207. *Id.*

208. Act of Sept. 24, 1789, ch. 20, §25, 1 Stat. 73. *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 352-53 (1816). Those few federal questions that could be heard by federal

court system, to provide a special forum for the vindication of federally created rights,[209] this inaction probably is explained best as a compromise in the struggle between the Federalists and the anti-Federalists in the First Congress.[210]

Section 11 of the Judiciary Act of 1789 governed the questions of service of process and venue in the federal courts,[211] but did not address directly the issue of a defendant's amenability to suit, traditionally one of the key factors in asserting personal jurisdiction over a defendant.[212] Under Section 11, valid service of process could be

courts prior to the 1875 vesting in those courts of federal question jurisdiction, Act of March 3, 1875, ch. 137, §1, 18 Stat. 470 (codified in 28 U.S.C. §1331 (1976)), concerned matters that were peculiarly federal in nature or that involved political exigencies. *See* P. BATOR, P. MISCHKIN, D. SHAPIRO & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 844 (2d ed. 1973).

209. *See* 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE §3561 (1975); Chadbourn & Levin, *Original Jurisdiction of Federal Questions,* 90 U. PA. L. REV. 639 (1942).

210. As noted by Professor Snepp:

> When the First Congress met, the national struggle between the Federalists and the anti-Federalists was reflected in the debates over the jurisdiction to be conferred upon the federal courts. One group of anti-Federalists wanted no system of lower courts at all, and would have left the enforcement of federal laws to the tribunals of the states. . . .The Federalists, on the other hand, favored the establishment of a system of federal courts clothed with all the powers granted by the Constitution.

Snepp, *The Law Applied in the Federal Courts,* 13 LAW & CONTEMP. PROBS. 165, 165 (1948). Professor Warren, in his work which was given such deference by the majority opinion in Erie R.R. Co. v. Tompkins, 304 U.S. 64, 72-73 (1938), and in which he analyzed the debates on the 1789 Act, Warren, *New Light on the History of the Federal Judiciary Act of 1789,* 37 HARV. L. REV. 49 (1923), made similar observations: the final form of the Act was a compromise necessary to obtain the votes of those who "were insistent that the Federal Courts be given minimum powers and jurisdiction." *Id.* at 62.

211. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73, 79. Section 11 of the Judiciary Act of 1789 provided, in pertinent part:

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

*Id.* According to Professor Foster, such an affirmative legislative grant is generally considered essential for the exercise of personal jurisdiction:

> As with other aspects of its jurisdiction, the exercise of personal jurisdiction by the district court is legislatively grounded. The generally prevailing view is that the district court cannot, sua sponte, assert personal jurisdiction merely on the ground that to do so would be constitutionally possible; the basis for personal jurisdiction must be found in a statute or in a procedural rule having the force of a statute.

Foster, *supra* note 26, at 11 (footnotes omitted).

212. *See* Foster, *supra* note 191, at 83; Green, *supra* note 191, at 968. As noted by Professor Foster:

> The second concept in the *Pennoyer* dictum is today thought of as "amenability," or as a condition which "subjects" a defendant to a personal judgment. As Justice Field saw it, a state could make a nonresident amenable to a personal judgment in actions arising out of certain kinds of business activities within the state. Today the constitutional scope of amenability involves an inquiry into the reasonableness of trying the particular action against the particular defendant in the case at hand.
> . . .

Foster, *supra* note 191, at 83.

made when the defendant was "an inhabitant" or when he could "be found" at the time of service, and venue was not proper except where valid service of process had been made.[213] One recent commentator has maintained:

> Because process could follow a defendant and no provisions set forth a basis for asserting personal jurisdiction, the process and venue language suggests that the amenability basis under the Act was physical presence. Using presence as the amenability basis, federal district courts could assert jurisdiction over any person found within their boundaries.[214]

One might argue, instead, that amenability was to exist at least in those circumstances in which valid service of process could be made, where the defendant resided or where he was found. Whether amenability would somehow be more extensive was irrelevant because a court could not proceed unless process had been served validly.[215] Under either interpretation, the effect of Section 11 of the Act was to allow for suit wherever the defendant could be found, but not for nationwide service of process; a defendant could be served where he was found, but only by the federal court sitting in the particular federal district in which he had been found.[216] The Supreme Court fre-

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213. *See supra* note 211.

214. Berger, *supra* note 191, at 320. Federal courts did not seem nonplussed by the specific relation of Section 11 only to service of process and venue; they used Section 11 "as a statutory foundation for a federal law of corporate amenability." Comment, *Federal Jurisdiction Over Foreign Corporations and the Erie Doctrine,* 64 COLUM. L. REV. 685, 690 (1964). *See, e.g.,* St. Louis Wire-Mill Co. v. Consolidated Barb-Wire Co., 32 F. 802 (C.C.E.D. Mo. 1887); Gray v. Quicksilver Mining Co., 21 F. 288 (C.C.D. Cal. 1884); Merchants' Mfg. Co. v. Grand Truck Ry., 13 F. 358 (C.C.S.D.N.Y. 1882); Robinson v. National Stockyard Co., 12 F. 361 (C.C.S.D.N.Y. 1882); Stout v. Sioux City Pac. R.R., 8 F. 794 (C.C.D. Neb. 1881).

215. In other words, while presence would be an adequate amenability basis for circumstances covered by the Judiciary Act, other bases also might exist but would be unnecessary because the Act restricts venue and service so that no amenability basis other than presence would be necessary; other actions could not be brought because the defendant could not be served and/or venue would not lie.

Another commentator, in the context of the *Arrowsmith-Jaftex* controversy, *see infra* notes 434-92 and accompanying text, has suggested a different interpretation:

> Whatever significance there may be in the original conjunction of the process and venue statutes, it is difficult to ascertain how these provisions, if they have relevance to amenability at all, provide any more than a ceiling upon the exercise of jurisdiction; the terms of both sections restrict the federal courts. They indicate when jurisdiction is not to be asserted and are silent as to when it is to be asserted. The problem remains one of finding an affirmative mandate, because the traditional base of jurisdiction, physical power, is inapplicable to the abstract corporate entity.

Note, *supra* note 188, at 1141.

216. In United States v. Union Pac. R.R., 98 U.S. 569 (1878), the Court commented on the Judiciary Act of 1789:

> It is true that Congress has declared that no person shall be sued in a circuit court of the United States who does not reside within the district for which the court was established, or who is not found there. But a citizen residing in Oregon may be sued in Maine, if found there, so that process can be served on him.

*Id.* at 604. In Toland v. Sprague, 37 U.S. (12 Pet.) 300, 328 (1838), the Court made clear

quently has expressed the opinion that "Congress has power . . . to provide that the process of every district court shall run into every part of the United States."[217] Although the Court, therefore, apparently

that "the process. . .is in terms limited to the district within which it is issued." *See also* Ex parte Graham, 10 F. Cas. 911, 913 (C.C.E.D. Pa. 1818) (No. 5,657) ("The manifest policy of the judicial system of the United States, was to render the administration of Justice as little oppressive to suitors and others as possible; and it corresponds entirely with that conclusion, which confines the process of the courts within the limits of the district in which the court is, and from which it issued").

One commentator has concluded that "the [Judiciary] Act, in practice, allowed nationwide personal jurisdiction." Berger, *supra* note 191, at 320-21. This seems to be an overstatement of the situation. No single federal court had nationwide personal jurisdiction, but only personal jurisdiction within its own federal territory. If a defendant were served with process in a federal district in Montana, suit could proceed in a federal court in Montana, not in any other state. Thus, the federal system paralleled the state systems, with each state court being able to assert personal jurisdiction over individuals found within its borders. Surely, no one would characterize that authority as "nationwide personal jurisdiction."

217. Robertson v. Railroad Labor Bd., 268 U.S. 619, 622 (1925). *See* Mississippi Publishing Co. v. Murphree, 326 U.S. 438, 442 (1945) ("Congress could provide for service of process anywhere in the United States"); United States v. Union Pac. R.R. Co., 98 U.S. 569, 603 (1878) ("It would have been competent for Congress to organize a judicial system analogous to that of England. . ., and confer all original jurisdiction on a court or courts. . .with authority to exercise that jurisdiction throughout the limits of the Federal government. . . ."); *id.* at 604 ("There is. . .nothing in the Constitution which forbids Congress to enact that, as to a class of cases or a case of special character, a circuit court—any circuit court—in which the suit may be brought, shall, by process served anywhere in the United States, have the power to bring before it all the parties necessary to its decision"); *id.* ("Whether parties shall be compelled to answer in a court of the United States wherever they may be served, or shall only be bound to appear when found within the district where the suit has been brought, is merely a matter of legislative discretion, which ought to be governed by considerations of convenience, expense, & C., but which, when exercised by Congress, is controlling on the courts"); Toland v. Sprague, 12 U.S. (Pet.) 300, 328 (1838) ("Congress might have authorized civil process from any circuit court, to have run into any state of the Union"); *see also* RESTATEMENT (SECOND) OF JUDGMENTS §4(2) and comment (1982). *But see* Abraham, *Constitutional Limitations Upon Territorial Reach of Federal Process,* 8 VILL. L. REV. 520 (1963); Seeburger, *The Federal Long-Arm: The Uses of Diversity, or "Tain't So, McGee,"* 10 IND. L. REV. 480 (1977). In each of these cases, however, the statements merely were part of an analysis concluding with recognition that Congress had not so empowered the courts, Robertson v. Railroad Labor Bd., 268 U.S. 619, 622 (1925) ("But [Congress] has not done so either by any general laws or in terms by §310 of Transportation Act, 1920"); Toland v. Sprague, 12 U.S. (Pet.) 300, 328 (1838) ("[Congress] has not done so[;] [i]t has not in terms authorized any original civil process to run into any other district; with the single exception of subpoenas for witnesses, within a limited distance"), or that Congress in the circumstances before the Court, had made limited use of its extensive authority. In *United States v. Union Pacific R.R. Co.,* the Court concluded:

> Statutes [removing certain restrictions on personal jurisdiction in specific cases], if not so common as to be called ordinary legislation, are yet frequent enough to justify us in saying that they are well-recognized acts of legislative power uniformly sustained by the courts. It may be said. . .that such statutes when they have been held to be valid by the courts, do not infringe the substantial rights of property or of contract of the parties affected, but are intended to supply defects of power in the courts, or to give them improved methods of procedure in dealing with existing rights.

98 U.S. at 606. *See also* Mississippi Publishing Co. v. Murphree, 326 U.S. 438, 443 (1945) (Congress could, through Federal Rule 4(f), authorize that federal process extend beyond the particular federal district and run to the borders of the state in which the court was held). Utilizing these recognized broad powers to extend the personal jurisdiction of a federal court beyond the boundaries of the federal district in which the court sits (in effect, its territorial boundaries), Congress has enacted many special federal statutes, *see infra* note 247 and accom-

finds no constitutional limitations on the territorial reach of a particular federal court in terms of service of process and, perhaps implicitly, in terms of amenability to suit, Congress has never authorized, as a general matter, such a broad reach for federal courts.[218]

As noted by Professors Hart and Wechsler, under the formulation of Section 11 of the Judiciary Act of 1789, "[v]enue and personal jurisdiction were scarcely distinguishable conceptions in federal practice. . . ."[219] In 1789, such coextensiveness probably was quite sensible for at least two reasons: (1) venue, restriction on the location of a trial, always has been considered a restriction to protect defendants from being sued in inconvenient locations[220] and, in 1789, the most convenient sites for trial, from a defendant's point of view, would have been the location of his residence or a location where he was "present,"[221] and (2) service of process within the district in which suit was sought was consistent with both the convenience protected by venue and the limited authority with which the First Congress sought to invest the federal district and circuit courts.[222]

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panying text, and certain provisions of the Federal Rules of Civil Procedure, *see infra* note 290 and accompanying text, authorizing federal courts to exercise personal jurisdiction in circumstances in which a court of the state in which the federal court was sitting could not so act. Even in diversity cases, this federal extraterritorial reach has been approved. As noted above, however, Congress never has granted to the federal courts the full personal jurisdiction power authorized by article III of the Constitution.

In a 1936 House Report on its grant of nationwide service of process in shareholder derivative suits, Act of Apr. 16, 1936, ch. 230, 40 Stat. 1213 (codified at 28 U.S.C. §112 (1940)), the Representatives maintained:

> The power of the federal courts to maintain a suit cognizable under the judicial power of the United States in any district and to issue process for service anywhere in the United States is a matter of legislative discretion, controlled by Acts of Congress based upon considerations of convenience to litigants, expense, and promotion of justice.

H.R. REP. No. 2257, 74th Cong., 2d Sess. 1 (1936). This statement is noteworthy in at least two respects: (1) it indicated a Congressional attitude that authority for nationwide service of process was a serious matter and that such authority would not be granted incautiously, and (2) it listed factors affecting its decision to grant nationwide service, "considerations of convenience to litigants, expense and promotion of justice", factors similar to those weighed by courts in exploring the fourteenth amendment due process limitations on state court exercises of personal jurisdiction. *See supra* notes 106-85 and accompanying text.

218. *See* Robertson v. Railroad Labor Bd., 268 U.S. 619, 622 (1925); Toland v. Sprague, 12 U.S. (Pet.) 300, 328 (1838). *See also supra* note 217. Congress has authorized nationwide service of process in certain specific circumstances. *See infra* note 247 and accompanying text. In some circumstances, Congress has the power to provide for service of process in foreign countries. *See* FED. R. CIV. P. 4(i); 4 C. WRIGHT & A. MILLER, *supra* note 4, §§1133-36.

219. H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 948 (1953).

220. *See* F. JAMES, JR. & G. HAZARD, JR., CIVIL PROCEDURE 603 (2d ed. 1977).

221. As noted by one commentator:

> As cast in 1789, Section 11 probably served the needs of the late 18th Century reasonably well. The business organizations of the day were generally small, not corporate in form, and their activities—and most other activities likely to lead to litigation—tended to be local in character.

Foster, *supra* note 191, at 76.

222. *See supra* note 210 and 220 and accompanying text.

As interstate contacts and travel increased and became less harrowing and hazardous, and as state boundaries became less formidable barriers to such activities,[223] the requirements for venue, service of process, and amenability to suit, all prerequisites for maintenance of a suit in a federal court of competent subject matter jurisdiction,[224] diverged,[225] with venue remaining the most restrictive requirement.[226] The pattern established in the Judiciary Act of 1789, however, of dealing expressly with the purely procedural matters of service and location of trial, while dealing by inference or implication with the question of amenability to suit in federal courts, has continued to be the pattern followed in subsequent jurisdictional enactments.[227]

In the 1860s, Congress began to expand the subject matter jurisdiction of the federal courts.[228] Congress acted in a piecemeal way, granting, bit by bit, some of the power authorized by article III of the Constitution.[229] General federal question jurisdiction, as authorized by the "arising under" language of article III, finally was vested by Congress in the lower federal courts in 1875.[230] Congress did not,

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223. *See supra* note 83 and accompanying text.

224. *see supra* note 212 and accompanying text.

225. *See* H. HART & H. WECHSLER, *supra* note 219, at 948-49.

226. At present, the general venue requirements for the federal courts are codified in 28 U.S.C. §1391 (1976). For actions "wherein jurisdiction is founded *only* on diversity of citizenship," venue lies "*only* in the judicial district where all plaintiffs or all defendants reside, or in which the claim arose." 28 U.S.C. §1391(a) (1976) (emphasis added). In federal question cases, venue lies "*only* in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by [special venue statutes]." 28 U.S.C. §1391(b) (1976) (emphasis added). First, it is noteworthy that venue in federal question cases is more limited than venue in simple diversity cases, a real puzzle since the primary purpose of creating federal courts was to provide a forum with particular expertise in federal matters. As observed by Professors Hart and Wechsler, "Neither the legislative history nor the decisions yield any answer to the enigma." H. HART & H. WECHSLER, *supra* note 219, at 949. Moreover, under modern provisions, a defendant may be served with process wherever he is present; venue would not lie, however, unless he and all other defendants reside there, the action arose there, or (in diversity cases) all of the plaintiffs reside there. Thus, venue often seriously restricts the plaintiff's choice of forum unless the defendant is willing to waive objections to venue.

227. *See infra* notes 228-72 and accompanying text. *See also* Berger, supra note 191, at 321.

228. *See* Bartels, *supra* note 206, at 224.

229. *See, e.g.,* Act of March 3, 1863, ch. 81, §5, 12 Stat. 756 (enlarging removal jurisdiction in some cases involving federal officers); Act of April 9, 1866, Ch. 31, §3 14 Stat. 27 (codified at 28 U.S.C. §1443 (1976)) (extending removal jurisdiction in certain cases involving civil rights of the newly freed slaves); Act of Feb. 5, 1867, Ch. 28, §1, 14 Stat. 385 (codified at 28 U.S.C. §2241 (1976)) (granting federal courts certain review authority through writs of habeas corpus); Act of March 1, 1875, Ch. 114, §3, 18 Stat. 336 (codified at 28 U.S.C. §1343(4) (Supp V. 1981) and 42 U.S.C. §2000(a) (granting district courts jurisdiction over civil rights suits alleging denial of equal access to public accommodations); Act of April 20, 1871, Ch. 22, §1, 17 Stat. 13 (codified at 28 U.S.C. §1343(3) (Supp. V 1981) (granting district courts jurisdiction over civil rights suits alleging deprivation of rights by State action); Act of May 31, 1870, Ch. 114, §8, 16 Stat. 142 (codified at 28 U.S.C. §1343(4) (Supp. V 1981) (granting district courts jurisdiction over civil rights suits alleging interference with voting rights).

230. Act of March 3, 1875, Ch. 137, §1, 18 Stat. 470. The current version of this enactment appears at 28 U.S.C. §1331 (Supp. V 1981): "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." *Id.*

however, give the matter extended consideration,[231] thus again demonstrating a seeming reluctance or perhaps even a lack of interest, which has been illustrated both by its haphazard treatment of the question of amenability in the federal courts[232] and by its consistent failure to address carefully and directly the federal question subject matter jurisdiction of the federal courts.[233] The nonchalance of Congress with respect to both of these questions seems to reveal a strong desire to limit the authority of federal courts. Federal court power can be limited by failing to grant federal courts the authority to hear certain types of cases and controversies, restrictions on subject matter jurisdiction, or by failing to permit federal courts to exercise authority over large classes of defendants, restrictions on personal jurisdiction and amenability.

In 1872, Congress enacted the Conformity Act, which provided:

> [t]hat the practice, pleadings, and forms and modes of proceeding . . . in the circuit and district courts . . . shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held. . . .[234]

The federal courts thus were bound to follow state practice in regard to most modes of proceeding such as forms of process and methods of service.[235] The Conformity Act, however, did not apply to questions of personal jurisdiction,[236] and, as noted by one commentator, "the independence of the federal judiciary was frequently asserted in the maxim that federal jurisdiction could not be enlarged or abridged by state statute."[237]

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231. Chadbourne & Levin, *supra* note 209, at 643-45.

232. *See supra* notes 211-27 and accompanying text.

233. *See supra* notes 205-31 and accompanying text. Perhaps Congress' failure to engage in extended debate or discussion of the 1875 Act's grant of federal question jurisdiction was caused by time pressure or by some general agreement that federal question jurisdiction should be granted. On the other hand, perhaps debate was limited in order not to reopen the earlier arguments in favor of limiting federal court authority. *See supra* notes 205-10 and accompanying text. Perhaps it was thought better to treat the general grant of federal question jurisdiction as essentially a *fait accompli*.

234. Act of June 1, 1872, Ch. 255, §5, 17 Stat. 196.

235. *See, e.g.*, Amy v. Watertown, 130 U.S. 301, 304 (1889); *see also* Barrett, *Venue and Service of Process in the Federal Courts—Suggestions for Reform*, 7 VAND. L. REV. 608, 611 n.17 (1954).

236. *See, e.g.*, Munter v. Weil Corset Co., 261 U.S. 276 (1923); Mechanical Appliance Co. v. Castleman, 215 U.S. 437 (1910); Mexican Cent. Ry. v. Pinkney, 149 U.S. 194 (1893); Southern Pac. Co. v. Denton, 146 U.S. 202 (1892).

237. Comment, *supra* note 214, at 692. *See, e.g.*, Mechanical Appliance Co. V. Castleman, 215 U.S. 437, 443 (1910); Barrow S.S. Co. v. Kane, 170 U.S. 100, 111 (1898); Goldey v. Morning News, 156 U.S. 518, 523 (1895); Insurance Co. v. Morse, 87 U.S. (20 Wall.) 445, 453 (1874); Hyde v. Stone, 61 U.S. (20 How.) 170, 175 (1858); Union Bank v. Jolly's Adm'rs., 59 U.S. (18 How.) 503, 507 (1856); Suydam v. Broadnax, 39 U.S. (14 Pet.) 67, 74-75 (1840).

In 1887, Congress extensively amended the Judiciary Act of 1789,[238] eliminating service of process based solely on a defendant's presence[239] and creating a new venue provision for cases in which subject matter jurisdiction was based solely on diversity of citizenship.[240] Suit was now authorized only in the district in which the defendant resided unless subject matter jurisdiction was based solely on diversity of citizenship; in such cases, suit also could be brought in the district in which the plaintiff resided. Examination of the legislative history of the amendment reveals that a motivating Congressional concern was "to diminish the jurisdiction of the circuit courts and the Supreme Court of the United States, to promote the convenience of the people, and to lessen the burden and expense of litigation."[241] Again, neither in the amendments nor in its debates did Congress address the question of amenability to suit or even the effect that the severe limitation on service of process would have on the personal jurisdiction of the federal courts.[242] The substantial curtailment of service of process, coupled with limitations on venue in all federal question cases, clearly resulted in dramatic limitations on the effectiveness of the federal courts under their new federal question subject matter jurisdiction. Suit only could be maintained where the defendant resided, and, in the case of multiple defendants who did not all reside in the same federal district, no federal court would be an appropriate forum. Such federal question cases necessarily would be relegated to the state courts.

Following the pattern established in its enactment of the Judiciary Act of 1789,[243] Congress did not respond with any comprehensive treatment of federal court personal jurisdiction. Instead, it dealt with particular jurisdictional problems by stopgap, piecemeal amendments and enactments.[244] As Judge Hufstedler has observed:

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238. Act of Mar. 3, 1887, ch. 373, §1, 24 Stat. 552.

239. *Id.* The amended section provided that "no civil suit shall be brought before either of [the lower federal courts] against [an inhabitant of the United States] by any original process. . .in any other district than that where of he is an inhabitant." *Id. Compare* Act of Sept. 24, 1789, ch. 20, §11 1 Stat. 73, 79, *quoted supra* at note 211.

240. Act of Mar. 3, 1887, ch. 373, §1, 24 Stat. 552. The new venue statute provided: "[W]here the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." *Id.*

241. 18 CONG. REC. 613, 613 (1887) (Rep. Culbertson).

242. *See* Berger, *supra* note 191, at 321.

243. *See supra* notes 205-22 and accompanying text.

244. *See, e.g.,* Act of Sept. 19, 1922, ch. 345, 42 Stat. 849 (War frauds cases: service of process "from the district court of the district wherein such suit is brought shall run in any other district and service . . . upon any defendant may be made in any district within the United States or the territorial or insular possessions thereof. . . ."; venue wherever a single defendant resided or where "the cause of action or any part thereof arose"); Credit Mobilier Act, ch. 226, §4, 17 Stat. 485, 509 (1873) (Credit Mobilier scandal: service of process

> [C]ongressional reaction to issues of federal jurisdiction has always been fitful and . . . the fits are usually induced by strong pressures imposed by particular events or by powerful constituencies that seek to influence results in particular causes that concern them. Congress has rarely undertaken a comprehensive reexamination of federal jurisdiction. Indeed, it has not made the attempt for almost 100 years.[245]

In addition to the general grant of federal personal jurisdiction authority included in the Judiciary Act, as amended and as supplemented,[246] Congress has enacted specific statutes that authorize nationwide or even worldwide service of process in regard to certain areas of particular federal concern.[247] As with the Judiciary Act, most

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as the court in which the action was pending "shall deem necessary to bring in new parties or the representatives of parties deceased, or to carry into effect the purposes of this act," such service to "run into any district;" venue "in the circuit court in any circuit"); Act of Apr. 16, 1936, ch. 230, 49 Stat. 1213 (codified at 28 U.S.C. §112 (1940) (current version at 28 U.S.C. §1695 (1976)) (stockholders' derivative suits: service of process in any district "wherein such corporation resides or may be found").

245. Hufstedler, *Comity and the Constitution: The Changing Role of the Federal Judiciary*, 47 N.Y.U. L. REV. 841, 842-43 (1972) (footnote omitted).

246. *See supra* notes 228-45 and accompanying text. The Judiciary Act of 1789 and its amendments was displaced as a general jurisdiction and venue statute when the Judicial Code was revised formally in 1948. Act of June 25, 1948, ch. 646, 62 Stat. 945 (codified as amended at 28 U.S.C. §§1391, 1693, 1695 (1976)). 28 U.S.C. §1693 (1976) provides: "Except as otherwise provided by Act of Congress, no person shall be arrested in one district for trial in another in any civil action in a district court." This language virtually is identical to the service of process language of the Judiciary Act of 1789, *see supra* note 211, and Judge Clark argued, with substantial support from legislative history, that 28 U.S.C. §1693 is a codification of the process and venue provisions of the 1789 Act. Arrowsmith v. United Press Int'l, 320 F.2d 219, 234 (2d Cir. 1963) (Clark, J., dissenting); Jaftex Corp. v. Randolph Mills, Inc., 282 F.2d 508, 512 (2d Cir. 1960). *But see* Comment, *Personal Jurisdiction Over Foreign Corporations in Diversity Actions: A Tiltyard for the Knights of Erie*, 31 U. CHI. L. REV. 752, 759-60 (1964). Current general venue provisions, codified at 28 U.S.C. §1391, *see supra* note 226, are more generous than those under the 1789 Act, as amended; suit now also may be brought in the district "in which the claim arose." This has eliminated some of the difficulties in finding a suitable federal forum for federal question cases in which the defendants did not all reside in the same federal district. *See supra* note 226.

247. Credit Mobilier Act, 17 Stat. 485, ch. 226 (1873) (current version at 45 U.S.C. §88 (1976) (mandamus actions against Union Pacific Railroad); Commodity Exchange Act of 1974, 7 U.S.C. §13a-1 (1976) (action brought by Commodities Futures Trading Commission); Plant Quarantine Act, 7 U.S.C. §150dd(c) (action brought by Secretary of Agriculture); Federal Arbitration Act, 9 U.S.C. §9 (1976) (confirmation of arbitrator's award); Bankruptcy Act, 11 U.S.C. §105(a) (1982) (bankruptcy court jurisdiction); Federal Home Loan Mortgage Corporation Act, 12 U.S.C. §1455(b) (1976) (action brought by Federal Home Mortgage Corporation); National Housing Act, 12 U.S.C. §1725(c)(4) (creation of Federal Savings & Loan Insurance Corporation); Sherman Act, 15 U.S.C. §§5, 10 (1976) (joinder of additional parties); Clayton Act, 15 U.S.C. §22 (1976) (action brought by United States against a corporation); Clayton Act, 15 U.S.C. §25 (action to restrain violation of the Act); Federal Trade Commission Act, 15 U.S.C. §49 (1976) (action by Federal Trade Commission to enforce a subpoena); Securities Act of 1933, 15 U.S.C. §77v(a) (action to prosecute violation of the Act); Trust Indenture Act of 1939, 15 U.S.C. §77vvv(b) (action to enforce the Act or to prosecute violation of the Act); Securities Exchange Act of 1934, 15 U.S.C. §§78u(b)(C) (subpoena of witnesses); Securities Exchange Act of 1934, 15 U.S.C. §78aa (1976) (action to enforce the Act or to prosecute violation of the Act); Investment Company Act of 1940, 15 U.S.C. §80a-43 (1976) (action to en-

of these statutes do not address directly the question of amenability, but instead prescribe the circumstances that would trigger expanded authority to serve process.[248] Often, the service of process, venue, and amenability provisions are so intertwined as to be indistinguish-

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force the Act or to prosecute violation of the Act); Investment Advisors Act of 1940, 15 U.S.C. §80b-14 (1982) (action to enforce the Act or to prosecute violation of the Act); Antitrust Civil Process Act, 15 U.S.C. §1312(d)(1), (2) (1982) (demand by the United States Attorney for antitrust investigation); Interstate Land Sales Full Disclosure Act, 15 U.S.C. §1719 (action to enforce the Act or to prosecute violation of the Act); Indian Self-Determination and Education Assistance Act, 25 U.S.C. §375 (1976) (determination of heirship of deceased members of certain Indian Tribes); Foreign Sovereign Immunities Act, 28 U.S.C. §1330 (1976) (nonjury civil action against non-immune foreign country); Mandamus and Venue Act of 1962, 28 U.S.C. §1391(e) (1976) (action against federal officers); Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §1608 (1976) (actions against foreign sovereign); 28 U.S.C. §1655 (1976) (lien enforcement); 28 U.S.C. §1695 (1976) (shareholder derivative action); Interstate Commerce Enforcement Act, 28 U.S.C. §2321 (1976) (action by United States under Interstate Commerce laws); Interstate Commerce Enforcement Act, 28 U.S.C. §2413 (1976) (execution in favor of United States); Employment Retirement Income Security Act of 1974, 29 U.S.C. §1132(e)(2) (1976) (actions to enforce pension plans); Patent Act, 35 U.S.C. §293 (1976) (worldwide service in patent suit if suit is filed in District of Columbia); 38 U.S.C. §784(a) (1976) (action on United States government insurance); Miller Act, 40 U.S.C. §270(b) (1976) (action on payment bond for private contractor's labor on public project); Atomic Energy Damages Act, 42 U.S.C. §2210(n)(2) (1976) (public liability action by Nuclear Regulatory Commission).

248. Section 2 of the Mandamus and Venue Act of 1962, 28 U.S.C. §1391(e) (1976), for example, provides:

> A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action. Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party.
>
> The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.

*Id.* This statute has been interpreted as authorizing the court to assert personal jurisdiction over the defendant if he has been served within the United States pursuant to the statute. *See, e.g.,* Driver v. Helms, 577 F.2d 147 (1st Cir. 1978), *rev'd sub nom. on other grounds,* Colby v. Driver, 444 U.S. 527 (1980) (statute permits jurisdiction based on defendant's presence in federal district where served (*see infra* notes 641-74 and accompanying text)); United States v. McAninch, 435 F. Supp. 240, 244 (E.D.N.Y. 1977) (statute permits jurisdiction based on defendant's having "requisite 'minimum contacts' with the United States"). *But see* Kipperman v. McCone, 422 F. Supp. 860, 871 (N.D. Cal. 1976) (28 U.S.C. §1391(e) describes only the mechanics of effective extra-territorial service but does not provide an amenability basis for exercise of personal jurisdiction). Section 12 of the Clayton Act, 15 U.S.C. §22 (1982) provides:

> Any suit, action or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

*Id.*

able.[249] In other circumstances, venue or personal jurisdiction expressly depend on proper service of process and the satisfaction of subject matter jurisdiction criteria, in effect rendering the additional requirements of personal jurisdiction and venue quite valueless.[250]

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249. Section 27 of the Securities Exchange Act of 1934, for example, provides:

> The district courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and 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. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, 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. . . .

15 U.S.C. §78aa (1976). This provision has been interpreted as authorizing nationwide service of process and amenability to suit if defendant is present in or is a resident of the federal district in which he is served. *See, e.g.,* Fitzsimmons v. Barton, 589 F.2d 330, 332 (7th Cir. 1979) (*infra* notes 630-36 and accompanying text); Mariash v. Morill, 496 F.2d 1138, 1139-40 (2d Cir. 1974) (*infra* notes 622-29 and accompanying text); Stern v. Gobeloff, 332 F. Supp. 909, 911 (D. Md. 1971) (*infra* notes 616-21 and accompanying text).

250. Section 2 of the Foreign Sovereign Immunities Act, 28 U.S.C. §1330 (1976) provides:

> (a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under section 1605-1607 of this title or under any applicable international agreement.
>
> (b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

*Id.* In a recent opinion, Verlinden v. Central Bank of Nigeria, 103 S. Ct. 1962 (1983), the Supreme Court found that the subject matter authority granted by Congress in subsection (a) did not exceed the scope of article III of the Constitution, even though, on its face, it authorized a suit by a foreign (alien) plaintiff against a foreign sovereign in federal court, so long as the substantive requirements of the Act were satisfied. *See infra* notes 520-46 and accompanying text. The Court did not directly address the question of personal jurisdiction under subsection (b) but noted, in a footnote, that if the criteria for subject matter jurisdiction are not satisfied, then neither are the criteria for personal jurisdiction. *Id.* at 1967, n.5.

Moreover, the Court stated, in the midst of its discussion of the subject matter authority available under article III:

> By reason of its authority over foreign commerce and foreign relations, Congress has the undisputed power to decide, as a matter of federal law, whether and under what circumstances foreign nations should be *amenable to suit* in the United States.

*Id.* at 1971 (emphasis added). The Court also noted that Congress had protected against the danger of federal courts being "turned into 'small international courts of claims'" in which non-U.S. citizens could routinely bring suit by "enacting substantive provisions requiring some form of substantial contact with the United States." *Id.* at 1969. Thus, although the Court never directly addressed the "world-wide" amenability to suit programmed into subsection (b) of the Act, it did make some references, in its analysis of the subject matter question, to personal jurisdiction concepts—amenability and contacts. The opinion by the Court is subject to several distinct interpretations on the personal jurisdiction question, including the following: (1) that the Court included the personal jurisdiction analytical references in its discussion because the statute conditions personal jurisdiction on subject matter jurisdiction plus service of process and, thus, some consideration of amenability standards should be made; (2) that the Court did not intend those references to support any conclusion that personal jurisdiction would be

Not until the 1938 adoption of the Federal Rules of Civil Procedure,[251] which "superseded . . . the practice under the Conformity Act of adhering to different state procedures,"[252] did Congress attempt to give more general latitude to federal courts on the question of service of process.[253] Professors Wright and Miller maintain that Rule 4, which "governs service of process in the federal courts . . . , was designed to provide maximum freedom and flexibility in the procedures for giving all defendants . . . notice of the commencement of the action and to eliminate unnecessary technicality in connection with service of process."[254] Rule 4 provides the only general statement of federal policy with regard to those defendants over which the federal courts are empowered to assert their authority. Yet, even though Rule 4 is often cited as "govern[ing] the assertion of personal jurisdiction in most civil actions brought in federal court"[255] or as being "the principal guide to the exercise of personal jurisdiction by the District Courts"[256] or even as containing "[t]he general federal measure of amenability. . . ,"[257] Rule 4 does not address directly the issue of amenability, but rather is concerned expressly with "the *methods of service* through which personal jurisdiction may be obtained."[258] In his concurring opinion in *Insurance Corp. of Ireland*

appropriate, concluding that a remand was required in order to determine whether the subject matter criteria (nonimmunity) were satisfied; (3) that the Court intended, in its discussion of amenability, to reassert its position that Congress constitutionally can provide for extraterritorial service of process by the federal courts; or (4) that the Court, deliberately or otherwise, fused elements of personal jurisdiction into its discussion of subject matter jurisdiction. For further discussion of the *Verlinden* case in regard to its significance on the question of personal jurisdiction in federal question cases, *see infra* notes 520-60 and accompanying text.

251. The Federal Rules of Civil Procedure were first promulgated under the authority of the Act of June 19, 1934, 48 Stat. 1064 (codified as amended at 28 U.S.C. §2072 (1976)) (Rules Enabling Act). The Rules became effective September 16, 1938. *See* H. HART & H. WECHSLER, *supra* note 219, at 586-89.

252. Comment, *supra* note 214, at 692.

253. *See generally* 4 C. WRIGHT & A. MILLER, *supra* note 4, §1061; Berger, *supra* note 191, at 286.

254. 4 C. WRIGHT & A. MILLER, *supra* note 4, §1061, at 198.

255. Berger, *supra* note 191, at 286.

256. Foster, *supra* note 191, at 92.

257. Note, *supra* note 21, at 471 n.6.

258. Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 715 n.6 (1982) (Powell, J., concurring) (emphasis added). In Arrowsmith v. United Press Int'l, 320 F.2d 219 (2d Cir. 1963), *see infra* notes 453-82 and accompanying text, Judge Friendly countered the argument that in a diversity case the constitutionality of service which provides for a purely federal method of service, was to be measured by a federal amenability standard by pointing out that "F.R. Civ. Proc. 4(d)(3) . . . relate[s] to the manner of service and leave[s] open the question whether the foreign corporation was subject to service in any manner." *Id.* at 224. Amenability, he maintained, was "[to be] determined in accordance with the law of the state where the [federal] court sits. . . ." *Id.* at 223. *See also* Note, *supra* note 188, at 1142 ("Rule 4 . . . is not concerned with amenability"). *But see* Mississippi Publishing Corp. v. Murphree, 326 U.S. 438, 444-45 (1945) ("the service of summons is the procedure by which a court having venue and jurisdiction of the subject matter of the suit asserts jurisdiction over the person of the party served").

*v. Compagnie des Bauxite de Guinee,*[259] Justice Powell addressed this issue in the following footnote:

> Although Rule 4 deals expressly only with service of process, not with the underlying jurisdictional prerequisites, jurisdiction may not be obtained unless process is served in compliance with applicable law. . . . For this reason Rule 4 frequently has been characterized as a jurisdictional provision. . . . [260]

The question of the extent to which Rule 4 codifies a congressional position on the question of *amenability*[261] to service of process in suits initiated in federal courts is central to many of the problems to which this article is addressed. As will become clear, Rule 4 may have increased "freedom and flexibility" in service of process in the federal courts, but it has not aided in the establishment of uniform standards of personal jurisdiction in diversity and/or federal question cases. Instead, it has operated as an obstacle to any such goals.[262]

In original form, Rule 4 expanded the territorial reach of federal process from the federal district within which the federal court was sitting to the boundaries of the state in which the federal court was held.[263] The Rule also permitted a federal court, in some circumstances,

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259. 456 U.S. at 709.

260. *Id.* at 715 n.6. In a recent opinion, Justice Stewart addressed a related question—whether 28 U.S.C. §1391(e), *see supra* note 248, which authorizes extraterritorial service of process in some circumstances, affects personal jurisdiction:

> The petitioners . . . argue . . . that §1391(e) does not confer personal jurisdiction. It is the petitioners' position that §1391(e) was designed only to govern venue and service of process, not to confer personal jurisdiction. The flaw in this argument is that, as a general rule, service of process is the means by which a court obtains personal jurisdiction over a defendant, and in the cases before us the petitioners have failed to demonstrate that there was any defect in the means by which service of process was effected.

Stafford v. Briggs, 444 U.S. 527, 553 n.5 (1979) (dissenting opinion). Justice Stewart failed to address the issue of amenability, preferring, instead, to rely on the formula that jurisdiction is obtained by non-defective service of process. Perhaps his analysis depends on an assumption that a valid service is one that would not violate the defendant's due process rights and that the protection of those rights was programmed into the provisions for service of process, Congress only has authorized that process be served in circumstances in which assertion of personal jurisdiction would not violate the defendant's constitutional rights. For further discussion of *Stafford, see infra* notes 665-75 and accompanying text.

261. As noted over 25 years ago by one writer:

> The Federal Rules of Civil Procedure provide the manner in which service of process may be made on a foreign corporation. . . . However, there is no rule or statute which informs the courts when foreign corporations are amenable to process so that in personam jurisdiction may be had over them in diversity and most nondiversity suits.

Note, *Jurisdiction of Federal District Courts over Foreign Corporations,* 69 HARV. L. REV. 508, 508 (1956). While Rule 4 twice has been substantially amended since the publication of the article quoted above, *see infra* notes 265-72 and accompanying text, the statement remains true.

262. *See, e.g.,* Berger, *supra* note 191, at 286-98.

263. FED. R. CIV. P. 4(f) provided:

> All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and, when a statute of the United

to adopt service procedures utilized by the courts of the particular state in which service was to be made.[264] In 1963, Rule 4 was amended, and the service of process rules were made more liberal. Professors Wright and Miller note:

> These changes were in large part a codification of liberal interpretations given to the original provisions of Rule 4 by the federal courts and a recognition of the important changes that had taken place since 1938 in state practices regarding jurisdiction and service of process. They also incorporated some of the reforms suggested by various writers over the years and made an attempt to meet some of the exigencies of litigation in a modern and mobile society.[265]

The amendments authorized the following: service outside the borders of the state in which the federal court was sitting but within 100 miles of the courthouse;[266] service "under the circumstances and in the manner prescribed" by a statute of the state "in which the district court is held,"[267] and several procedures for service in a foreign

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> States so provides, beyond the territorial limits of that state. A subpoena may be served within the territorial limits provided in Rule 45.

In Mississippi Publishing Corp. v. Murphree, 326 U.S. 438 (1945), the Supreme Court upheld this statewide authorization of service of process, arguing (1) that "Congress could [constitutionally] provide for service of process anywhere in the United States," *id.* at 442, (2) that Rule 4(f) did not violate the Rule 82 proscription of enlargement of federal court venue or subject matter jurisdiction by a Federal Rule but only "serve[ed] 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 at the place where Congress has declared that the suit may be maintained," *id.* at 445, and (3) that Rule 4(f) was "in harmony with the Enabling Act which, in authorizing [the Supreme] Court to prescribe general rules for the district courts governing practice and procedure in civil suits in law and equity, directed that the rules 'shall neither abridge, enlarge, nor modify the substantive rights of any litigant.'" *Id.*

264. FED. R. CIV. P. 4(d)(7) provided that service could be made "in the manner prescribed by the law of the state in which the service is made. . . ." This provision was amended in 1963 to authorize service according to the law of that state in which the "district court is held" rather than the state "in which the service is made. . . ." FED. R. CIV. P. 4(d)(7) (1963).

265. 4 C. WRIGHT & A. MILLER, *supra* note 4, §1061, at 199.

266. The amended Rule 4(f) provided:

> All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state. In addition, persons who are brought in as parties pursuant to Rule 14, or as additional parties to a pending action or a counter-claim or cross-claim therein pursuant to Rule 19, may be served in the manner stated in paragraphs (1)-(6) of subdivision (d) of this rule at all places outside the state but within the United States that are not more than 100 miles from the place in which the action is commenced, or to which it is assigned or transferred for trial; and persons required to respond to an order of commitment for civil contempt may be served at the same places. A subpoena may be served within the territorial limits provided in Rule 45.

*Id.*

267. The amended Rule 4(e) provided:

> Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed

country.[268]

Further, extensive amendments to Rule 4 became effective on

by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment, or garnishment or similar seizure of his property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule.

*Id.* Rule 4(e) was captioned, "Service Upon Party Not Inhabitant of or Found Within State." Rule 4(d)(7), under the 1963 amendments, apparently described an alternative method of service for individuals and corporations that were inhabitants or found within the state in which the district court was held. The amended Rule 4(d)(7) provided:

Upon a defendant of any class referred to in paragraph (1) [individual] or (3) [corporation] of this subdivision of this rule, it is also sufficient if the summons and complaint are served in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state in which the district court is held for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state.

*Id.* Professor Kaplan, Reporter for the 1963 amendments, felt that 4(d)(7) and 4(e) really were not intended to be mutually exclusive (with 4(e) applying only to "nonpresent" individuals and corporations and 4(d)(7) applying only to "present" individuals and corporations), but that the two sections merely were intended to encompass state law on service of process. Kaplan, *Amendments of the Federal Rules of Civil Procedure, 1961-1963(I)*, 77 HARV. L. REV. 601, 619-23 (1964). Rule 4(d)(7) is noteworthy, however, because it authorized service "in the manner prescribed by the law of the state," thereby suggesting to some commentators that the state law was not being incorporated into the federal rule but that the federal rule merely prescribed the adoption of the state "technique" for service of process, *see, e.g.*, Comment, *Choice of Law in the Federal Courts: Use of State or Federal Law to Determine Foreign Corporation's Amenability to Suit*, 1964 DUKE L. J. 351, 357 [hereinafter cited as Comment, *Choice of Law*] (better view is that 4(d)(7) provides "only for the more mechanical aspects of service of process, rather than containing, by inference, differing indicia as to *when* a defendant becomes amenable to such service"); Note, *supra* note 188, at 1135 ("absence of . . . language ['under the circumstances'] in Rule 4(d)(7) may indicate that when service is made within the state in a state-prescribed manner, the federal courts need not imply a state standard for in personam jurisdiction from 'manner' or be concerned with the appropriateness of the situation for use of the state service, but only the mechanics of state service"); *but see* Walker v. General Features Corp., 319 F.2d 583 (10th Cir. 1963) (state standard applied to service under Rule 4(d)(7)), while Rule 4(e) authorized service "under the circumstances *and* in the manner prescribed in the [state] statute or rule," thereby suggesting that the state law *was* being incorporated into the federal rule, including all substantive elements of the state statute such as state court interpretations of the criteria necessary to trigger the statute. *See, e.g.*, Comment, *Return to the Twilight Zone—Federal Long-Arm Jurisdiction and Amenability to Federal Rule of Civil Procedure 4(f) Bulge Service of Process:* Sprow v. Hartford Insurance Co., 41 OHIO ST. L. J. 685, 701 (1980) [hereinafter cited as Comment, *Return to the Twilight Zone*] ("[s]ince state long-arm jurisdiction is subject to the fourteenth amendment due process constraints of the *International Shoe* minimum contacts doctrine, it follows that a federal court borrowing the state long-arm power is also bound by the dictates of *International Shoe*"). *But see* Arrowsmith v. United Press Int'l, 320 F.2d 219, 223-24 (2d Cir. 1963) (whether service is made under Rule 4(d)(3) or Rule 4(d)(7), question of amenability is separate and does not depend on language of the Rule).

268. Rule 4(i), Alternative Provisions for Service in a Foreign Country, provided:

(1) Manner. When the federal or state law referred to in subdivision (e) of this rule authorizes service upon a party not an inhabitant of or found within the state in which the district court is held, and service is to be effected upon the party in a foreign country, it is also sufficient if service of the summons and complaint is made: (A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or (B) as directed

February 26, 1983.[269] Most changes involved issues outside the scope

by the foreign authority in response to a letter rogatory, when service in either case is reasonably calculated to give actual notice; or (C) upon an individual, by delivery to him personally, and upon a corporation or partnership or association, by delivery to an officer, a managing or general agent; or (D) by any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or (E) as directed by order of the court. Service under (C) or (E) above may be made by any person who is not a party and is not less than 18 years of age or who is designated by order of the district court or by the foreign court. On request, the clerk shall deliver the summons to the plaintiff for transmission to the person or the foreign court or officer who will make the service.
(2) Return. Proof of service may be made as prescribed by subdivision (g) of this rule, or by the law of the foreign country, or by order of the court. When service is made pursuant to subparagraph (1)(D) of this subdivision, proof of service shall include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court.

*Id.*

269. Pub. L. No. 97-462, 96 Stat. 2527. On January 15, 1982, the Advisory Committee on Federal Civil Rules submitted its proposed amendments to Rule 4. Siegel, *Practice Commentary on Amendment of Federal Rule 4 (Eff. Feb. 26, 1983) With Special Statute of Limitations Precautions*, 96 F.R.D. 88, 90 (1983). The Supreme Court adopted the proposal, which was then to take effect August 1, 1982 unless Congress acted to delay or amend the proposal. *Id.* at 91. In response to many objections to the proposed amended Rule 4, Congress postponed the effective date to October 1, 1983 (Pub. L. No. 97-227, 96 Stat. 246). 96 F.R.D. at 91-92. Congress substantially revised the proposal. The amendment was signed by the President on January 12, 1983 and became effective, according to the enactment, on February 26, 1983 (Pub. L. No. 97-462). 96 F.R.D. at 92. Rule 4, as effective on February 26, 1983, is reproduced in its entirety below.

Rule 4.
PROCESS
(a) Summons: Issuance. Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver the summons to the plaintiff or the plaintiff's attorney, who shall be responsible for prompt service of the summons and a copy of the complaint. Upon request of the plaintiff separate or additional summons shall issue against any defendants.
(b) Same: Form. The summons shall be signed by the clerk, be under the seal of the court, contain the name of the court and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within these rules require the defendant to appear and defend, and shall notify him that in case of his failure to do so judgment by default will be rendered against him for the relief demanded in the complaint. When, under Rule 4(e), service is made pursuant to a statute or rule of court of a state, the summons, or notice, or order in lieu of summons shall correspond as nearly as may be to that required by the statute or rule.
(c) Service.
(1) Process, other than a subpoena or a summons and complaint, shall be served by a United States marshal or deputy United States marshal, or by a person specially appointed for that purpose.
(2)(A) A summons and complaint shall, except as provided in subparagraphs (B) and (C) of this paragraph, be served by any person who is not a party and is not less than 18 years of age.
(B) A summons and complaint shall, at the request of the party seeking service or such party's attorney, be served by a United States marshal or deputy United States marshal, or by a person appointed by the court for that purpose, only —
(i) on behalf of a party authorized to proceed in forma pauperis pursuant to Title 28, U.S.C. § 1915, or a seaman authorized to proceed under Title 28, § 1916,
(ii) on behalf of the United States or an officer or agency of the United States, or
(iii) pursuant to an order issued by the court stating that a United States marshal or deputy United States marshal, or a person specially appointed for that purpose,

is required to serve the summons and complaint in order that service be properly effected in that particular action.
(C) A summons and complaint may be served upon a defendant of any class referred to in paragraph (1) or (3) of subdivision (d) of this rule —
(i) pursuant to the law of the State in which the district court is held for the service of summons or other like process upon such defendant in an action brought in the courts of general jurisdiction of that State, or
(ii) by mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to form 18-A and a return envelope, postage prepaid, addressed to the sender within 20 days after the date of mailing, service of such summons and complaint shall be made under subparagraph (A) or (B) of this paragraph in the manner prescribed by subdivision (d)(1) or (d)(3).
(D) Unless good cause is shown for not doing so the court shall order the payment of the costs of personal service by the person served if such person does not complete and return within 20 days after mailing, the notice and acknowledgment of receipt of summons.
(E) the notice and acknowledgment of receipt of summons and complaint shall be executed under oath or affirmation.
(3) The court shall freely make special appointments to serve summonses and complaints under paragraph (2)(B) of this subdivision of this rule and all other process under paragraph (1) of this subdivision of this rule.
(d) Summons and Complaint: Person to be Served. The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:
(1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.
(2) Upon an infant or an incompetent person, by serving the summons and complaint in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state.
(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.
(4) Upon the United States, by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court and by sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia, and in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered or certified mail to such officer or agency.
(5) Upon an officer or agency of the United States, by serving the United States and by sending a copy of the summons and of the complaint by registered or certified mail to such officer or agency. If the agency is a corporation the copy shall be delivered as provided in paragraph (3) of this subdivision of this rule.
(6) Upon a state or municipal corporation or other governmental organization thereof subject to suit, by delivering a copy of the summons and of the complaint to the chief executive officer thereof or by serving the summons and complaint in the manner prescribed by the law of that state for the service of summons or other like process upon any such defendant.
(e) Summons: Service Upon Party Not Inhabitant of or Found Within State. Whenever

a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment of garnishment or similar seizure of his property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule.
(f) Territorial Limits of Effective Service. All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state. In addition, persons who are brought in as parties pursuant to Rule 14, or as additional parties to a pending action or a counterclaim or cross-claim therein pursuant to Rule 19, may be served in the manner stated in paragraphs (1)-(6) of subdivision (d) of this rule at all places outside the state but within the United States that are not more than 100 miles from the place in which the action is commenced, or to which it is assigned or transferred for trial; and persons required to respond to an order to commitment for civil contempt may be served at the same places. A subpoena may be served within the territorial limits provided in Rule 45.
(g) Return. The person serving the process shall make proof of service thereof to the court promptly and in any event within the time during which the person served must respond to the process. If service is made by a person other than a United States marshal or deputy United States marshal, such person shall make affidavit thereof. If service is made under subdivision (c)(2)(C)(ii) of this rule, return shall be made by the sender's filing with the court the acknowledgment received pursuant to such subdivision. Failure to make proof of service does not affect the validity of the service.
(h) Amendment. At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.
(i) Alternative Provisions for Service in a Foreign Country.
(1) Manner. When the federal or state law referred to in subdivision (e) of this rule authorizes service upon a party not an inhabitant of or found within the state in which the district court is held, and service is to be effected upon the party in a foreign country, it is also sufficient if service of the summons and complaint is made: (A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or (B) as directed by the foreign authority in response to a letter rogatory, when service in either case is reasonably calculated to give actual notice: or (C) upon an individual, by delivery to him personally, and upon a corporation or partnership or association, by delivery to an officer, a managing or general agent; or (D) by any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or (E) as directed by order of the court. Service under (C) or (E) above may be made by any person who is not a party and is not less than 18 years of age or who is designated by order of the district court or by the foreign court. On request, the clerk shall deliver the summons to the plaintiff for transmission to the person or the foreign court or officer who will make the service.
(2) Return. Proof of service may be made as prescribed by subdivision (g) of this rule, or by the law of the foreign country, or by order of the court. When service is made pursuant to subparagraph (1)(D) of this subdivision, proof of service shall include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court.
(j) Summons. Time Limit for Service. If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and

of this article.[270] The amendment, however, might have some effect on the question of federal court service of process as it relates to personal jurisdiction of the federal courts: certain language from subsection 4(d)(7) was dropped from the statute and other language inexplicably was changed; the section also was moved to subsection (c) of Rule 4 and renumbered as 4(c)(2)(C)(i).[271] These changes will be discussed below where appropriate.[272]

### 3. *Current Rule 4*

Before discussing the issue which has been so studiously ignored by Congress—amenability standards in the federal courts, and, more particularly, in federal question cases in the federal courts—this writer must examine the various methods by which federal courts may effect service of process under Rule 4. After considering the amenability issue in general, the writer will turn to the particular cases on which this article is focused: federal question cases in federal courts.

Rule 4(d)(1) authorizes a federal court to serve individual defendants who are either domiciled in, or present in, the state in which the federal court is held by personal service on the defendant or by substituted service "at his dwelling house or usual place of abode . . .or by deliver[y]. . .to an agent authorized by appointment or by law to receive service of process."[273] Rule 4(d)(3) provides a similar

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> the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. This subdivision shall not apply to service in a foreign country pursuant to subdivision (i) of this rule.

*Id.*

270. The primary stated purposes of the 1983 amendments to Rule 4 included "taking the federal marshalls almost entirely out of summons service, allowing mail as a service method with some qualifications, and introducing for the first time a limit for serving the summons after the filing of the complaint." *Changes in Federal Summons Service Under Amended Rule 4 of the Federal Rules of Civil Procedure*, 96 F.R.D. 81, 81 (1983) [hereinafter cited as *Changes in Federal Summons Service*]. The only changes of significance for the question of personal jurisdiction in the federal courts is the elimination of references in old Rule 4(d)(7) (new Rule 4(c)(2)(C)(i)) to service pursuant to federal statutes, *compare* Rule 4(d)(7), F.R.C.P. (1963) (*quoted supra* in note 267) *with* Rule 4(C)(2)(C)(i) (1983) (*quoted supra* in note 269), and the change in the text of Rule 4(d)(7) which authorized service "in the manner prescribed by the law of the State in which the district court is held," *see supra* note 267, to the language "pursuant to the law of the State in which the district court is held." *See supra* note 269. These changes were not addressed in the practice commentary provided by Professor Siegel, *see generally Changes in Federal Summons Service, supra* at Appendix A—Congressional Record. For further discussion of this issue, *see infra* notes 1094-1102 and accompanying text.

271. *See supra* note 270 and *infra* notes 1094-1102 and accompanying text.

272. *See infra* notes 1094-1102 and accompanying text.

273. *See supra* note 269. As noted by Professors Hart and Wechsler, this rule "tells how service of process is to be made upon a corporation which is subject to service, but it does not tell when the corporation is so subject." H. HART AND H. WECHSLER, *supra* note 219,

federal procedure for service upon domestic or foreign corporations, partnerships or other unincorporated associations: "by deliver[y within the state in which the district court is held]. . .to any. . .agent authorized by appointment or by law to receive service of process. . . ."[274] New Rule 4(c)(2)(C)(ii) provides an alternative federal method for serving 4(d)(1) and 4(d)(3) defendants: mailing service and an acknowledgment form by first class mail if "such form is received by the sender within 20 days after the date of mailing. . . ."[275] Other federal means of service are authorized for service upon the United States (Rule 4(d)(4)), service upon an officer or agency of the United States (Rule 4(d)(5)), and service upon a state or municipal corporation or other governmental organization (Rule 4(d)(6)).[276] The remaining provisions for service of process involve incorporation into the federal rule of some procedure authorized by state rule or statute or by some federal statute. Under Rule 4(d)(2), for example, federal service upon an infant or incompetent is to be "in the manner prescribed by the law of the state in which service is made for service. . .upon any such defendant in an action brought in the courts of general jurisdiction of that state."[277] As an alternative to the federal methods of service provided in Rules 4(d)(1), 4(d)(3) and 4(c)(2)(C)(ii), such defendants also may be served "pursuant to the law of the State in which the district court is held for. . .service. . .upon such defendant in an action brought in the courts of general jurisdiction of that state" (Rule 4(c)(2)(C)(i)).[278] The version of this subsection that was in effect prior to the 1983 amendments, former Rule 4(d)(7) (now omitted), also provided that "it is also sufficient if [service is made] . . .in the manner prescribed by any statute of the United States" and described the alternative state service as "in the *manner prescribed* by the law of the state, etc."[279] The legislative history on these recent amendments does not shed any light on these particular

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at 959. Must the court then utilize state law to determine amenability, or is amenability implicit in the grant of authority to serve process?

274. *See supra* note 269.

275. *Id.* One of the primary reasons for amending Rule 4 was to enact a federal method for making valid service of process by mail. *See Changes In Federal Summons Service, supra* note 270, at Appendix A—Congressional Record. The changes in Rule 4 approved by the Supreme Court permitted service by certified mail, return receipt requested. *Id.* This proposal was criticized on the grounds that certified mail is not an effective method of providing actual notice to defendants of claims against them because signatures may be illegible or may not match the name of the defendant, or because it may be difficult to determine whether mail has been "unclaimed" or "refused", the letter providing the sole basis for a default judgment. *Id.*

276. *See supra* note 269.

277. *Id.*

278. *Id.*

279. *See supra* note 267.

changes.[280] The incorporation of other federal methods of service probably was dropped because the new federal procedure of service by mail was considered a sufficient federal alternative for service upon defendants "of any class referred to in" 4(d)(1) or 4(d)(3).[281] The change from "in the manner prescribed by" state law to "pursuant to" state law is both puzzling and provocative.[282] The draftsmen possibly intended that this change eliminate emphasis on the word "manner", which had been interpreted as limiting former Rule 4(d)(7) to incorporation of the *procedure* or *technique* utilized by the courts of the state but not to incorporation of the fourteenth amendment due process standards by which such state service was measured.[283] By changing this language to the ambiguous phrase "pursuant to" state law, however, no real clarification has been achieved. Moreover, the change from "in the manner" to "pursuant to" has not aided in the construction of the related Rule 4(e) which, in certain circumstances, authorizes service "under the circumstances and in the manner prescribed" in a state statute or rule.[284] Rule 4(e), by employing quite different language from Rule 4(c)(2)(C)(i), now might be interpreted to mean that when a federal court utilizes a state long arm statute to serve process on a nonpresent defendant, the federal court is not acting *under* the state statute, as if it were a state court using the statute, but is instead adopting only the technique and circumstances of such service.[285] On the other hand, because of the silence of the

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280. *See generally Changes In Federal Summons Service, supra* note 270. This writer has found no references in the legislature history or Professor Siegel's commentary to these changes.

281. At least, one can argue rather forcefully that the part of Rule 4(d)(7) that permitted utilization of available federal statutory methods for service on nonpresent defendants was rendered unnecessary by the adoption of a workable general federal method—service by first class mail. Dropping reference to other federal methods of service would seem to promote uniformity among the federal courts with respect to the question of techniques for making valid service. *See* Berger, *supra* note 191, at 286-98 (disturbing lack of uniformity among federal courts on the question of personal jurisdiction).

282. *Compare* text of Rule 4(d)(7), *supra* note 267, *with* text of Rule 4(c)(2)(C)(i), *supra* note 269. *See supra* note 279 and accompanying text.

283. Many courts and commentators have suggested that the language in former Rule 4(d)(7), permitting service "in the manner prescribed by" state law, was to be interpreted as permitting the federal court to adopt any technique of service used by the state in which the federal court was held but not requiring the federal court to apply state substantive law to the question of amenability." *See infra* note 267 and accompanying text.

284. *See supra* note 269.

285. This might be too fine a distinction. Under prior law, by comparing the language in former Rule 4(d)(7) with that in Rule 4(e), *see supra* note 267, however, courts and commentators argued that when a federal court made service of process by using the state long-arm statute, the language of Rule 4(e)—"under the circumstances" (which was added to Rule 4(e) in the 1963 amendments)—established that the court was bound to follow not only the technical tenets of the statute in regard to manner of service and to the persons on whom such service could be made, but also was bound by any state substantive law interpreting the statute and by any state standards of determining whether a particular defendant would be amenable to suit—fourteenth amendment due process analysis. *See, e.g.*, 4 C. WRIGHT AND A. MILLER,

legislative history on this question, one might argue that the change in language was unintentional or nonpurposive or that a similar change to Rule 4(e) erroneously was omitted from the amendment. The question of the relationship among former Rule 4(d)(7), new Rule 4(c)(2)(C)(i), and Rule 4(e) will be reexamined in the discussion of amenability standards in federal question cases.[286]

Rule 4(e) deals with the problem of serving "a party not an inhabitant of or found within the state in which the district court is held." This section authorizes the federal court to make service "under the circumstances and in the manner prescribed by" any pertinent federal statute providing for extraterritorial service of process.[287] If no federal statute exists, then Rule 4(e) authorizes the federal court to utilize any state long-arm statute for extraterritorial service, again "under the circumstances and in the manner prescribed" by the state statute.[288]

Rule 4(i) provides several methods for service in a foreign country and reiterates that the Rule 4(e) procedure of adopting a federal or state statutory procedure includes any such authorization to make service outside the country.[289] Rule 4(f) provides that, as a general matter, federal process runs to the borders of the state in which the federal court is sitting or, in some procedural settings, outside those borders within a radius of 100 miles from the courthouse in which the case is to be heard, unless extraterritorial service is "authorized by a statute of the United States or by these rules."[290]

While, as noted above, Rule 4 provides many different procedures for validly serving process on a defendant, the Rule does not deal expressly with the question of amenability.[291] This lack of an amenability standard raises a number of questions, including the following: Does the mere fact that Rule 4 authorizes a particular type of service automatically subject the person or corporation thus served to the personal jurisdiction of the federal court? Or, must the at-

*supra* note 4, § 1075, at 312-13; Edward J. Moriarity & Co. v. General Tire & Rubber Co., 289 F. Supp. 381, 390-92 (D. Ohio 1967) (*see infra* notes 1253-65 and accompanying text); U.S. v. Montreal Trust Co., 35 F.R.D. 216, 219 (S.D.N.Y. 1964). The change in Rule 4(c)(2)(C)(i) to the language "pursuant to" state statute might be interpreted as demonstrating that Congress knew how to express the concept of a federal court actually acting *under* a state statute as opposed to the court merely adopting some procedural aspects of the statute. Under this analysis, that Congress did not amend Rule 4(e) to change "in the manner and under the circumstances" language to the "pursuant to" language included in 4(c)(2)(C)(i) would be significant.

286. *See infra* notes 893-914, 1062-73, and 1094-1102 and accompanying text.
287. *See supra* note 269.
288. *Id. See also supra* notes 282-86 and accompanying text.
289. *See supra* note 269.
290. *Id.*
291. *See supra* notes 251-62 and accompanying text.

tempted assertion of jurisdiction survive some additional test similar to the fourteenth amendment due process standard imposed on state court assertions of personal jurisdiction? And, if some standard of amenability must be satisfied, would that standard be the same regardless of the manner of service? Moreover, what would be the source of any standard or standards? Because of Congress' unwillingness to directly address the question of amenability,[292] courts and commentators have been required to make law in this area,[293] and the law that they have made is often nonuniform and not always rational in terms of the purported underpinnings of the federal court system.[294]

#### 4. *Amenability Standards in the Federal Courts*

##### a. *The Problem*

As noted above, the Supreme Court often has expressed the opinion that Congress, consistent with the United States Constitution, could authorize nationwide or even worldwide service of process.[295] The Court, however, has not dealt directly with the question of whether such authority also would include amenability to suit.[296] The argument can be made that the ability of Congress to authorize service would be useless if the service cannot meet amenability standards. On the other hand, however, a federal statute authorizing nationwide service of process might be quite appropriate in the abstract. Each purported exercise of personal jurisdiction pursuant to the statute might be examined by some standard of amenability just as state exercises of judicial power authorized by state long arm statutes still are examined to determine whether the defendant is amenable to suit. Would assertion of personal jurisdiction over this defendant violate the due process clause of the fourteenth amendment?[297]

Commentators and courts generally have taken a number of different positions and have made varying generalizations concerning the question of amenability to suit in federal courts. In a recent article proposing a shift from a "contacts" analysis to an "interest" analysis in state court personal jurisdiction cases, Professor McDougal noted:

> [A]lthough the discussion in this Article is about the states' authority, it also applies, in most cases, to a federal court's authority to exer-

292. *See supra* notes 205-50 and accompanying text.
293. *See infra* notes 295-1355 and accompanying text.
294. *Id. See also* Berger, *supra* note 191, at 286-98.
295. *See supra* note 217 and accompanying text.
296. *See infra* notes 400-92, 515-55, 579-86, and 637-75 and accompanying text.
297. *See supra* notes 106-85 and accompanying text.

> cise jurisdiction over a defendant who is not a resident of the state in which the federal court sits.[298]

Professor McDougal also noted some circumstances in which Congress had expanded federal court jurisdiction by authorizing service of process beyond the boundaries of the state in which the district court was held.[299] He did not, however, distinguish between federal question and diversity cases, nor did he consider any standard that might apply in general to federal court assertions of personal jurisdiction or, at least, to those situations of expanded federal court jurisdiction. On the contrary, he implied that the fourteenth amendment analysis generally would be determinative in federal courts.

In another recent article, Professor Weintraub asserted: "The outer limits of personal jurisdiction are marked by the due process clause of the fifth (federal courts) and fourteenth (state courts) amendments of the United States Constitution."[300]

Although failing to distinguish between diversity and federal question cases, Professor Weintraub raised the question whether a federal court using a state long-arm process also must follow state limits on amenability imposed when the statute was used by state courts and argued that a "suggestion that [the] federal court need not follow state limits on personal jurisdiction. . .seems very questionable."[301] He also mentioned the possibility of "a special federal statute grant-

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298. McDougal, *supra* note 73, at 7-8 (footnotes omitted). *See also* Kamp, *supra* note 2, at 53-54 (stating that limitations on the jurisdictional reach of state courts also apply to federal courts employing the long-arm of the state court pursuant to Federal Rule 4(e) and suggesting, by citation of both diversity and nondiversity cases, that these limitations would apply to *all* cases in which service had been made according to the state statute).

299. McDougal, *supra* note 73, at 8 n.49.

300. Weintraub, *Jurisdiction Over the Foreign Non-Sovereign Defendant*, 19 SAN DIEGO L. REV. 431, 432 (1982). *See also* Comment, *supra* note 82, at 163 n.43 ("fifth amendment's due process clause should limit federal jurisdiction . . . and the fourteenth amendment's due process clause should limit state jurisdiction. . . .); Foster, *supra* note 26, at 31 ("In theory, at least, the due process clause of the fifth amendment, not the fourteenth, should control the exercise of personal jurisdiction by a district court"). As Professor Green observed more than 20 years ago:

> A great deal has been written about the personal jurisdiction of state courts and particularly about the applicable due process requirements. Much less has been contributed by commentators on the subject of due process requirements applying in personam jurisdiction of a United States district court. Perhaps the reason is the difficulty of finding a rationale in the pertinent decisions. These fail to distinguish between the conditions necessary for valid service of federal court process as contrasted with those essential to the proper service of state process. They also fail to explain why the constitutional provision brings about the result which they announce.

Green, *supra* note 191, at 967 (footnotes omitted). From the time of his writing to the present, very little has changed: commentators and courts still make bald, unsupported assertions in regard to personal jurisdiction in federal courts, with few even making a genuine effort to sort out the significant questions, let alone setting about, in an organized fashion, to resolve some or all of these issues. *See infra* note 329 and accompanying text.

301. Weintraub, *supra* note 300, at 437.

ing jurisdiction over the defendant,"[302] but did not discuss standards in those situations. Thus, while asserting that the fifth amendment and the fourteenth amendment would apply in federal and state courts, respectively, Professor Weintraub did not define any fifth amendment standard nor describe when such a standard would be appropriate.

Justice Traynor of the California Supreme Court touched on the question in a different way in *Atkinson v. Superior Court,*[303] in which he employed a "center-of-gravity" test to assert jurisdiction over a nonresident trustee of a California employees' trust fund. In the course of his opinion, he argued that if federal courts were constitutionally entitled to nationwide service of process in some cases, state courts also should have such an entitlement:

> It is doubtful whether today the United States Supreme Court would deny to a state court the interstate interpleader jurisdiction that federal courts may exercise. A remedy that a federal court may provide without violating due process of law does not become unfair or unjust because it is sought in a state court instead.[304]

In this statement which displays a definite rejection of any doctrine requiring recognition of the separate sovereignties of separate states,[305] Justice Traynor apparently recognized no distinction between "due process of law" as it would be applied in federal courts or state courts. He suggested, moreover, that limitations on states should be coextensive with those imposed on federal courts. Furthermore, like the commentators noted above, he did not distinguish between diversity and federal question cases.

Professor Peterfreund recognized one aspect of the federal court personal jurisdiction problem:

> Unfortunately, the courts have not yet decided what the due process limits of federal jurisdiction are. As applied to foreign corporations, does the International Shoe formula, prescribing the limits of state jurisdiction, likewise control federal jurisdiction? Here, too, basic

302. *Id.*

303. 49 Cal.2d 338, 316 P.2d 960 (1957), *appeal dismissed sub nom.* Columbia Broadcasting System, Inc. v. Atkinson, 357 U.S. 569 (1958).

304. *Id.* at 348, 316 P.2d at 966.

305. Professors James and Hazard have described such a concept of "reverse" sovereignty:

> Instead of thinking of the states as independent sovereigns between which peaceful relations must be maintained through the Due Process Clause, the state court systems taken as a whole can be conceived as the primary mechanism for adjudicating cases domestic to the country as a whole, other than those based on federal law. As such, they have not only the power but the duty to extend their process, in the form of notice, to all parties who should or might be joined under modern concepts of party joinder.

F. JAMES & G. HAZARD, CIVIL PROCEDURE §12.30, at 661-62 (2d ed. 1977). *Cf.* Note, *Interstate Jurisdictional Compacts: A New Theory of Personal Jurisdiction*, 49 FORDHAM L. REV. 1097 (1981) (suggesting expansion of the personal jurisdiction of state courts by interstate compacts).

> considerations are different. State sovereignty is limited by its boundaries, and minimum contacts with the forum state may properly be required under the fourteenth amendment; but for federal actions Congress could, consistent with the fifth amendment, provide for nationwide service as it has done in various special situations. The solutions to such problems are none too clear. . . .[306]

Since this statement was written, little or no ground has been gained in the establishment[307] of a fifth amendment standard different from the standard applied in state courts under the fourteenth amendment.[308] As Professor Peterfreund sensibly noted, such a distinction seems justified because the positions taken by various courts are nonuniform.[309]

Professors Hart and Wechsler have asserted that state law might control some aspects of federal court personal jurisdiction:

> When federal service is sought to be justified. . .by reference to state law, it is clear, is it not, that the limitations of state law are controlling?. . .By the same token, federal constitutional limitations upon the acquisition of jurisdiction by state courts may also be considered relevant, not because they apply directly to federal courts, but because federal consequences cannot properly be attached to an unconstitutional state law.[310]

They noted, however, that "[t]he cases. . .seem largely to have proceeded on the assumption that state law, and the due process restrictions on acquisition of jurisdiction by state courts, are controlling upon the federal district courts in all situations."[311] Finally, they suggested that uniform federal standards might be appropriate in all cases in federal courts or, at least, in federal question cases.[312]

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306. Peterfreund, *Federal Jurisdiction and Practice*, 32 N.Y.U. L. REV. 491, 499 (1957) (footnotes omitted). this position assumes that state courts are restricted by notions of sovereignty and would not be entitled, as federal courts could be, to national service of process. This is contrary to the position taken by Justice Traynor. *See supra* notes 303-05 and accompanying text.

307. *See infra* notes 329-1255 and accompanying text. Some commentators and courts have, implicitly or explicitly, taken the position that the due process clauses are coterminus. *See, e.g., supra* notes 298-99 and accompanying text and *infra* notes 739-47, 823-38, and 866-71 and accompanying text. Others have argued that while some distinction should exist, fourteenth amendment standards would be more strict than fifth amendment standards and since the case in point satisfied fourteenth amendment standards no fifth amendment test needed to be formulated therein. *See, e.g., infra* notes 969-71, 1199-1200, and 1209-10 and accompanying text. Finally, others have urged that different standards apply to state and federal courts, but then have failed to formulate any such standards. *See, e.g., infra* notes 834-38 and 920-28 and accompanying text.

308. *See infra* notes 329-1355 and accompanying text. *See also supra* note 300.

309. *Id.*

310. H. HART & H. WECHSLER, *supra* note 219, at 959.

311. *Id.* at 960.

312. *Id.*

Professors Wright and Miller recognized many of the distinctions that are important for the question of personal jurisdiction in the federal courts:

> As a general rule the broad principles [applying to state courts] apply with equal force to the United States district courts in the absence of a federal statute extending or contracting the jurisdiction of the federal courts. An interesting issue. . .is whether in the absence of an applicable federal statute a federal court is limited by and is obliged to follow the particular jurisdictional principles of the state in which it sits or whether it is free to develop a federal test of amenability to suit. . . . The law is quite clear that when suit is brought in a federal court on a federally created right, the terms of any applicable federal statute, general federal law, and the concepts of due process. . .provide the guidelines as to whether a foreign corporation is amenable to process. However, if the right sued on is state-created and subject matter jurisdiction rests on diversity of citizenship, the question becomes more complex. When the federal court is sitting in a state that has extended its jurisdictional reach to or near the limits permitted by the Constitution, it probably makes little difference whether state or federal law controls, since the two will be virtually identical. . .[T]he states are not required to assert jurisdiction to the extent permitted by the Due Process Clause if they do not choose to do so. Thus, when suit is brought in a federal court sitting in a state that has decided to stop short of the constitutional limits, the question whether a federal court is at liberty to go further than the state standard would permit a state court to go in exercising jurisdiction is a matter of somewhat greater significance.[313]

This statement falls far short, however, of distinguishing all significant issues. First, the writers assume that the due process clauses are coextensive and that any territorial limitation to be recognized when a federal court relies on state methods of service would be that of the state in which the federal court is held. Second, they maintain that the "law is quite clear" with regard to federal rights, with "applicable federal statute[s], general federal law, and the concepts of due process" providing amenability guidelines.[314] This assertion fails to recognize that most applicable federal statutes are silent on the issue of amenability, providing only for service of process beyond the borders of the state in which the federal court is sitting.[315] This

313. 4 C. Wright & A. Miller, *supra* note 4, §1075, at 302-04 (footnotes omitted).

314. The cases cited for this proposition support an assertion that some federal standard should apply, but the perimeters and parameters of that standard are not established in those cases.

315. *See supra* notes 247-49 and accompanying text.

gives rise to a conflict as to whether amenability is implicit if process can be served on the defendant or whether an amenability standard also must be satisfied.[316] Third, little, if any, "general federal law" seems to exist on the question of amenability, which hardly is startling considering the nonchalant and haphazard way in which Congress and, by necessity, the courts, have dealt with all aspects of federal court jurisdiction.[317] Reliance on "the concepts of due process," moreover, begs the question of whether these concepts are the same when applied in federal courts as they are when applied in state courts. Finally, while Professors Wright and Miller recognize that diversity cases might be treated differently from nondiversity cases, these writers neglect to distinguish between those diversity cases in which service is achieved pursuant to some state long-arm statute and those in which service is made pursuant to a federal procedure.

Professor Wright, in his treatise on the federal courts, has recently taken the following position:[318]

> The due process limitations on the amenability of a foreign corporation to suit within a state are not peculiarly, nor even particularly, a problem for the federal courts. . . .
>
> There is an aspect of the problem, however, that is peculiar to the federal courts. The principles discussed so far [—procedure for service of process under Rule 4,[319] presence and/or domicile in a state as a basis for state court personal jurisdiction and for federal court jurisdiction "if the procedure for service satisfies due process requirements by providing a means reasonably calculated to give him notice of the proceeding and an opportunity to be heard,"[320] and the development of limitations on state court assertions of jurisdiction over foreign corporations[321]—] represent federal constitutional limitations. If suit in federal court is on a federally-created right, these federal general law concepts are the sole guide as to whether a foreign corporation is amenable to process.[322] The matter is not so simple, however, where the right sued on is state-created and jurisdiction rests on diversity. The landmark jurisdictional decisions of the Supreme Court show the extent to which the states may go,

316. *See infra* notes 561-798 and accompanying text.
317. *See supra* notes 205-50 and accompanying text.
318. C. Wright, Federal Courts §64, at 419-20 (1983) (footnotes omitted).
319. *Id.* at 411-15.
320. *Id.* at 415.
321. *Id.* at 417-19.
322. Many other commentators have made similar bald, unsupported assertions. *See infra* note 329. Courts also have followed the procedure of "pronouncing" the law to be as described by Professor Wright. *See, e.g.,* Singleton v. Atlantic Coast Line R.R. Co., 20 F.R.D. 15, 17 (1956) (dictum: "It seems clear that, where a federally-created right is being asserted in a federal court, federal law governs whether a foreign corporation is doing business within the district in which that federal court is sitting."). *See also infra* note 497.

> consistent with due process, in making foreign corporations suable in their courts, but due process does not compel the states to go this far if they do not choose to do so. If a corporation cannot be sued in state court, because the state has not gone as far as the Constitution permits, is it consistent with the Erie doctrine for a federal court to entertain a diversity action against the corporation in that state?

While Professor Wright recognizes a possible distinction between diversity and federal question cases, he fails to address any possible difficulties with federal question cases, assuming both that a federal standard would apply and that a federal standard does exist. Contrary to his assertion that he had discussed "federal general law concepts" which "represent federal constitutional limitations," Professor Wright merely addressed cases involving limitations on state court assertions of personal jurisdiction and Federal Rule 4 procedures for serving process.[323] He therefore never reached the significant and troubling issue of the definition of a truly federal standard. Moreover, he failed to recognize that methods of serving process, whether state or federal, might affect the personal jurisdiction of the federal court in question.[324] Instead, he separated federal question cases from diversity cases, pronouncing personal jurisdiction in federal question cases a purely federal

323. One might argue that implicit in his analysis is the assumption that Rule 4 includes federal amenability standards as well as procedures for service of process. This simplistic and conclusory approach, however, obscures the difficult issue involved and creates the false impression that some well-defined federal standard has been established. An examination of the cases cited in support of Professor Wright's assertion that "federal general law concepts are the sure guide" of amenability in federal question cases reveals that the question was anything but settled. *See* Fraley v. Chesapeake & O. Ry, 397 F.2d 1 (2d Cir. 1968) (*discussed infra* at notes 823-33 and accompanying text), *and* Lone Star Package Car Co. v. Baltimore & O. R.R., 212 F.2d 147 (5th Cir. 1954) (*discussed infra* at notes 856-65 and accompanying text).

324. Often in federal question cases no special federal statute authorizes extraterritorial service of process, and process must be served, pursuant to Rule 4(e), "under the circumstances and in the manner prescribed" in a statute or rule of the state in which the court is held. *See, e.g.,* United States v. First Nat'l City Bank, 379 U.S. 378 (1915) (Rule 4(e) applies to federal question as well as diversity cases); United States v. Montreal Trust Co., 35 F.R.D. 216 (S.D.N.Y. 1964) (same). Did Professor Wright include these as cases in which "federal general law concepts [would be] the sole guide?" Of course, one might argue that Rule 4(e) has "absorbed" or "incorporated" the state statute into federal law and that, therefore, the state statute, with or without its various substantive interpretations, has become part of "federal general law." Professor Wright, however, does not raise such a possibility. This question does not arise too frequently because of the substantial limitations, under 28 U.S.C. §1391(b), on venue in federal question cases. Moreover, in some diversity cases, service of process is achieved by wholly federal means such as service upon an individual "by leaving copies . . . at his dwelling house or usual place of abode" (FED. R. CIV. P. 4 (d)(1)) or upon a corporation "by delivering a copy . . . to an officer" of the corporation (FED. R. CIV. P. 4(d)(3)) or upon either "by mailing a copy . . . to the person to be served, together with two copies of a notice and acknowledgement." (FED. R. CIV. P. 4(c)(2)(C)(ii)). Should the exercise of personal jurisdiction by a federal court be limited to those exercises granted by state legislatures to state courts of the state in which the federal court is held even though no state statute for service of process had been utilized? Again, Professor Wright did not address this distinction.

matter of simple solution and personal jurisdiction in diversity cases "not so simple."

Finally, in an article written almost twenty years ago, Professors von Mehren and Trautman commented:[325]

> We do not deal separately with problems of adjudicatory jurisdiction in the federal courts of the United States, but nothing in the situation of these courts renders our analysis inapplicable in principle to them. The analysis does not take into account the perplexities and the opportunities that derive from the ambiguous situation of our federal courts which, in one aspect, function as parts of a unitary legal system but, in another, are fragmented and function as organs of the distinct legal orders of the several states. Insofar as the federal judiciary functions as a unitary system, the problem of adjudicatory jurisdiction disappears internally, and determination of the place of trial might well be handled administratively. . . .[326] At least with respect to diversity jurisdiction, however, it is hard to imagine such a development within the foreseeable future. Instead, the federal system is likely to continue to combine elements of unity and diversity.

They continued:

> In any event, in enforcement of claims arising under federal law, there is little reason for a federal court to refuse to proceed merely because the courts of the state in which it is sitting would not claim jurisdiction.
>
> Perhaps because of a traditional reluctance to prescribe federal standards in the case of diversity litigation as well as an instinct for symmetry, federal law does not today directly prescribe general and comprehensive jurisdictional regulations for the federal courts in either type of litigation. Rule 4(e) of the Federal Rules of Civil Procedure. . .applies without distinction to federal-question and diversity litigation. The rule provides for the use of federal jurisdictional standards to the extent these are furnished by "a statute of the United States." The rule further adopts jurisdictional provisions contained in "statute[s] or rule[s] of court of the state in which the district court is held. . . ."
>
> This approach incorporating state jurisdictional provisions is fully understandable for diversity cases. . . .In the absence of a complete jurisdictional scheme provided by a federal statute, the approach also seems clearly necessary and proper for federal question cases. . . .Rule 4(e)'s incorporative approach can, however, produce perplexities when federal claims are to be litigated. The difficulties derive

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325. von Mehren & Trautman, *supra* note 2, at 1123.

326. As observed by Justice Harlan in his dissenting opinion in U.S. v. First Nat'l City Bank, 379 U.S. 378, 387-88 (1964), "But 'jurisdiction' is not synonymous with naked power. It is a combination of power and policy."

> from the fact that any given state necessarily views the jurisdictional problem from the perspective of its community, but, insofar as federal-law questions are concerned, the appropriate community may become the nation as a whole. Jurisdiction to adjudicate may well be properly assumed from the latter perspective though refused from the former.[327]

Professors von Mehren and Trautman discussed a federal question case in which the defendant's connections with the entire United States were far more significant, for the federal claim, than its connections with the state under whose long-arm statute service had been made. They continued:

> Perhaps it would be useful when state provisions are used, as it were by default, in the enforcement of federal claims, to recognize that some aspects of the state law can be disregarded. . . .That clearly should occur with restrictions in the state-law provisions that are irrelevant in the federal context. . . .[328]

These statements reveal a clear understanding of some of the problems of personal jurisdiction in federal courts, recognizing possible distinctions between federal question and diversity cases and between state and federal court assertions of personal jurisdiction. Although the authors suggest the inappropriateness of employing a state amenability standard in federal courts in some circumstances, they do not, nor do they intend to, address the issue of exactly what federal standard would be sufficient. They nevertheless clearly recognize significant distinctions between state and federal courts and the ways in which those distinctions might affect the analysis of personal jurisdiction questions.

*b. The Fifth Amendment*

Most courts and commentators generally agree that federal courts are limited in their assertions of personal jurisdiction by the fifth amendment due process clause of the Constitution and that state courts are subject to fourteenth amendment proscriptions.[329] Almost no one,

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327. von Mehren & Trautman, *supra* note 2, at 1123-24 n.6.

328. *Id.* at 1125 n.6.

329. Commentators: *See, e.g.,* Green, *supra* note 191, at 968 (*quoting* (Tent. Draft No. 3 1956) Restatement (Second) of Conflicts of Laws §38: "The rendition of a judgment by a federal court when the United States has no judicial jurisdiction is a violation of the due process clause of the Fifth Amendment to the Constitution; similar action on the part of the state violates the due process clause of the Fourteenth Amendment"); Weintraub, *supra* note 300, at 432 ("The outer limits of personal jurisdiction are marked by the due process clauses of the fifth (federal courts) and fourteenth (state courts) amendments of the United States Constitution")); Note, *Federal Jurisdiction Over Our Foreign Corporations*, 35 COLUM. L. REV. 591, 598-99 (1935) ("[j]urisdiction of a particular district court over foreign corporations may

however, seems to be able to enunciate a fifth amendment standard.[330] The assumption is that the limitation would be less restrictive than that on state courts,[331] because state territorial boundaries should be less significant in a federal context than in a state context.[332] Finding

become flexible in the hands of Congress [but] there are . . . intimations that this power is restricted by the Fifth Amendment"); Note, *supra* note 261, at 516-17 ("Whereas inconvenience may be relevant in determining whether the territorial power of a state has been exceeded, it can only be a fifth amendment criterion, applicable to the federal courts, if there is some limit to arbitrary assignment of jurisdiction within a single national sovereignity"). *See also* Abraham, *supra* note 217, at 531 ("Aside from Erie, another possible source of constitutional limitations upon the territorial reach of federal process is the due process clause of the Fifth Amendment"); Victor & Good, *Personal Jurisdiction, Venue and Service of Process in Antitrust Cases Involving International Trade: Amenability of Alien Corporations to Suit,* 46 ANTITRUST L.J. 1063, 1076 (1977) ("In federal question cases, such as those under the antitrust laws, the Due Process Clause of the Fifth Amendment technically controls") Comment, *National Contacts, supra* note 186, at 697-98 ("The due process clause of the fifth amendment represents the only constraint upon a federal court's in personam power where the claim arises under federal law"); Comment, *Choice of Law, supra* note 267, at 355 n.18 ("One possible explanation for the deference given to *International Shoe* by the [federal] courts . . . is that the constitutional proscriptions set forth there may be binding on the federal courts under the fifth amendment due process clause"); Note, *The Limits of Federal Diversity Jurisdiction Under Rule 4(f) of the Federal Rules of Civil Procedure,* 48 Geo. Wash. L. Rev. 268, 296-97 (1979) ("Fifth amendment due process limitations on personal jurisdiction of the federal courts import the same considerations of fairness as those applicable to the states by virtue of the fourteenth amendment [hereinafter cited as Note, *Limits of Federal Diversity Jurisdiction*]); Note, *supra* note 261, at 516 ("it can only be a fifth amendment criterion, applicable to the federal courts"); 10 SETON HALL L. REV. 699, 717 (1980) [hereinafter cited as Note, *Jurisdiction*] ("Although it is clear that Congress has extensive power in designing the federal judicial system, it is not clear what exact limitations the due process clause of the fifth amendment place on the exercise of that power"); Comment, *Return to the Twilight Zone, supra* note 267, at 697 ("The due process considerations controlling on the federal courts are those found in the fifth amendment"). Courts: *See infra* note 497 and accompanying text. *But see* Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982). In *Insurance Corp. of Ireland*, a diversity case, the Supreme Court failed or refused to distinguish between the fifth and fourteenth amendments, stating: "The requirement that a court have personal jurisdiction flows not from Art. III, but from the Due Process Clause." *Id.*

330. As one recent commentator noted:

> Given [the] distinction between the constitutional due process authority of state and federal courts to exert personal jurisdiction, the question remains what due process standard is to govern federal courts' power. In the context of state in personam jurisdiction, the *International Shoe* minimum contacts doctrine has evolved as the standard by which fourteenth amendment due process is to be measured. No comparable due process doctrine has been unequivocally developed for implementation of the fifth amendment's constraints on the federal courts, presumably because Congress generally has not structured the federal judicial power in a manner that would allow federal court assertion of personal jurisdiction to the nationwide limits permitted by the Constitution.

Comment, *Return to the Twilight Zone, supra* note 267, at 699. Professor Berger describes some of the different judicial approaches to this question:

> Some federal courts duplicate the state court fourteenth amendment due process analysis. Others purport to apply a fifth amendment due process test, while in reality applying fourteenth amendment standards. Still others apply a fifth amendment test, examining the sufficiency of the defendant's contacts with the United States. Although federal courts all espouse one of those three approaches, several courts actually rely on federal venue or transfer of venue statutes to ensure fairness to a defendant.

Berger, *supra* note 191, at 310-11 (footnotes omitted).

331. *See, e.g., infra* notes 969-71, 1199-1200 and 1209-10 and accompanying text.

332. *See supra* note 186 and accompanying text.

that federal limitations should be "looser" than those on the states, courts and commentators often fall back on the state standard, arguing that if a particular assertion of personal jurisdiction satisfies the fourteenth amendment, or the even more restrictive grant of personal jurisdiction by the states to their courts, the fifth amendment also must be satisfied.[333] Clearly, such "definition by overinclusion" has not helped resolve the question of an appropriate, workable fifth amendment standard.

In seeking to define a fifth amendment limitation, others have attempted to parallel the test developed for fourteenth amendment due process limitations on state courts.[334] An immediate problem in any consideration arises, however, because earlier limitations on state courts were purely territorial in nature, allowing states to assert jurisdiction over anybody or anything within their borders. People or things outside state borders were off-limits to the early state court.[335] To truly parallel the development of the fourteenth amendment standard, a territorial limitation of federal courts first must be defined. As suggested by Professor Barrett:[336]

> On the one hand, [Congress] might have treated the continental United States as a single jurisdiction. On this basis service of process would have been permitted throughout the United States. . . .On the other hand, Congress might have treated the individual federal districts as independent states. On this basis service of process would have been restricted to the district in which suit was brought. . . .[337]

The Judiciary Act of 1789,[338] as construed,[339] adopted the second alter-

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333. *See, e.g., infra* notes 969-71, 1199-1200, and 1209-10 and accompanying text.

334. *See, e.g., infra* notes 683-784 and accompanying text.

335. *See supra* notes 4 and 76 and accompanying text. As noted by one early writer, reliance on any territorial notions may be wholly inappropriate: "The power of state courts is limited by territorial sovereignty; the distribution of power among the federal district courts, however, is derived from the will of Congress." Note, *supra* note 261, at 509.

336. Barrett, *supra* note 235, at 608.

337. As to venue, Professor Barrett argued that, under the first alternative, "venue rules would have been designed to channel litigation into the most convenient district, and provision would have been made for a motion for change of venue to be granted wherein the suit was commenced in a district which did not have venue," while, under the second alternative, "venue of transitory actions would have been made proper in any district in which the defendant could be found for service of process." Barrett, *supra* note 235, at 608.

338. *See supra* notes 205-22 and accompanying text.

339. *See, e.g.,* Ex parte Graham, 10 F. Cas. 911 (C.C.E.D. Pa. 1818) (No. 5657). In *Graham*, Mr. Justice Washington commented:

> The absence of . . . power [to issue process outside the district], would seem necessarily to result from the organization of the courts of the United States. . . . This division and appointment of particular courts, for each district, necessarily confines the jurisdiction of the local tribunals, within the bounds of the respective districts, within which they are directed to be holden.

*Id.* at 912. *See also* Picquet v. Swan, 19 F. Cas. 609, 612 (C.E.D. Mass. 1828) (No. 11,134) (effectiveness of writ limited to judicial district because of "organization" of the federal court system).

native by treating the judicial districts as separate jurisdictions.[340] This choice clearly limited the personal jurisdiction of federal courts even more substantially than did similar limitations on state courts; often, federal judicial districts were smaller than the states in which the federal district courts sat.[341] With the adoption of the Federal Rules of Civil Procedure in 1938, the authority of federal courts to serve process was extended to the boundaries of the states in which the federal district courts were situated.[342] Therefore, the territorial reach of a federal court in 1938 was coextensive with that of the courts of the state in which it sat, and, in any analysis based on paralleling development of fourteenth amendment standards, the parallel lines converged.[343] Meanwhile, however, Congress had authorized federal courts to serve process extraterritorially in certain limited circumstances[344] and to exceed territorial boundaries when necessary to resolve some multiple party problems.[345] Apparently, therefore, the fifth amendment does not impose territorial limits other than, perhaps, the boundaries of the United States, on the federal courts; otherwise, Congress would have exceeded those limits in enacting the aforementioned statutes.

The inference cannot be made, however, that the fifth amendment imposes no limitations on federal court exercises of personal jurisdiction. At least one commentator maintains, for example, that nationwide service of process for federal courts in all circumstances might not go unchallenged; that is, present Congressional authorizations of nationwide service of process have not been seriously challenged because the statutes have been very narrowly drawn.[346] This reasoning, in turn, ties in with the goal of "reasonableness" that has been pursued so fervently in the development of fourteenth amendment due process standards.[347]

Others have sought to parallel fourteenth amendment *analysis* by applying a "minimum contacts" test to determine the reasonableness

340. Foster, *supra* note 26 at 9; Note, *supra* note 188, at 1143. *See* Philadelphia & Reading Ry. v. McKibben, 243 U.S. 264 (1917).

341. *See* Foster, *supra* note 26, at 9.

342. *See infra* note 363 and accompanying text. Thus, federal process was still generally limited by state lines.

343. As one commentator noted: "Thus in a sense the federal courts have remained local courts, and a jurisdictional standard such as *International Shoe* evolved for the territorially limited jurisdiction of the state, is not without relevance for the federal courts." Note, *supra* note 188, at 1144.

344. *See supra* notes 247-49 and accompanying text.

345. 28 U.S.C. §2361 (1976) (Interpleader); 28 U.S.C. §1695 (1976) (Shareholder's derivation suits); 49 U.S.C. §11705(d)(2) (Supp. V 1981) (Interstate Commerce Commissions Act).

346. Foster, *supra* note 26, at 37.

347. *See supra* notes 106-85 and accompanying text.

of an assertion of jurisdiction by a federal court over a particular defendant.[348] In turn, this leads back to the question of territoriality. If a defendant's contacts are to be examined in order to determine whether they are sufficient to satisfy a "minimum contacts" analysis, the territorial entity with which the defendant's contacts are to be measured must be identified. In some recent cases,[349] particularly those in which process was served according to a federal statute authorizing nationwide service of process,[350] the territorial entity—the sovereign—has been defined as the United States, with the defendant's contacts with the country as a whole being examined for sufficiency.[351]

In sum, those commentators and courts that actually have attempted to describe or define some Fifth Amendment standard of due process usually have argued: (1) that Congress can authorize nationwide service of process, and (2) where Congress has done so, the defendant's contacts with the United States should be examined under a minimum contacts analysis. This solution, however, falls short of resolving the entire fifth amendment question. First, one might argue that such reliance on notions of territoriality would be misplaced. Instead of rotely following the fourteenth amendment minimum contacts test into a larger jurisdiction, some argue that, "[i]n the context of the fifth amendment,. . .due process should limit the exercise of federal in personam jurisdiction to what is fair and reasonable."[352] Aggregation of a defendant's contacts with the United States as a whole, moreover, might not be "fair and reasonable," especially since a defendant would be amenable to suit in every federal district which could serve him with process, no matter how inconveniently located, if he had sufficient contacts with the United States as a whole.[353] As noted below, any unfairness in this regard could be eliminated by limita-

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348. *See, e.g.,* Time, Inc. v. Manning, 366 F.2d 690, 694 (5th Cir. 1966) ("the constitutional limitation upon service of process from a state court . . . provides a helpful and often-used guideline").

349. *See infra* cases discussed at notes 687-738, 872-87, and 1269-1316.

350. *See infra* cases discussed at notes 687-738.

351. *See, e.g.,* Note, *Limits of Federal Diversity Jurisdiction, supra* note 329, at 297 ("due process requires minimum contacts with the territory of the sovereign exercising judicial power [, and w]hen process is served pursuant to the bulge provision of Rule 4(f), the sovereign exercising judicial power, even in a diversity case, is the United States") (footnotes omitted); Comment, *Return to the Twilight Zone, supra* note 267, at 699-700 ("In the few cases that have addressed a standard of fifth amendment due process constraints on the federal courts, the majority of lower federal courts have analogized to the *International Shoe* fourteenth amendment minimum contacts doctrine and held that a federal court can assert personal jurisdiction over a party if that party is present within the territorial limits of the United States or has a sufficient nexus (*i.e.* minimum contacts) with the United States").

352. Note, *Jurisdiction, supra* note 329, at 718. *See* Foster, *supra* note 26, at 36; Oxford First Corp. v. PNC Liquidating Corp., 372 F. Supp. 191, 198-204 (1974) (appropriate test of fifth amendment due process should be based on fundamental fairness to the defendant).

tions on the location of trial.[354] One writer has suggested a modification of the "national minimum contacts" test which might be more fair to defendants:[355]

> Defining [the fifth amendment] standard in the realities of the federal system should not. . .result in the same test which has been established for the exercise of state court jurisdiction—minimum contacts. On the other hand, the fair and reasonable standard in the federal context should not be satisfied solely by the procedural due process requirement of notice. While notice should be one of the factors considered, other factors worthy of consideration are: (1) the defendant's contacts with the forum; (2) the inconvenience to the defendant resulting from distant litigation; (3) the likelihood of multiplicious litigation; (4) the probable situs of discovery; and, (5) the nature of the activity upon which the litigation is based, especially in regard to the scope of the activity outside of the particular forum.[356]

A second problem with the "national minimum contacts" test as a measure of fifth amendment due process requirements is that it might be limited to cases in which a defendant had been served with process pursuant to some federal statute authorizing nationwide service.[357] The test most aptly parallels the fourteenth amendment test in only those circumstances. If that were the result, it is clear that the goal of devising a single fifth amendment amenability standard would not be achieved.

Efforts to define a workable fifth amendment test for federal court exercises of personal jurisdiction have been far from satisfactory. This

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353. The only amenability standard would be "presence where served."

354. *See infra* notes 657, 693, 880-82, and 1086 and accompanying text.

355. Note, *Jurisdiction, supra* note 329, at 718-19 (footnotes omitted).

356. One commentator has recently proposed as a federal amenability standard the defendant's presence in the jurisdiction in which valid process is served pursuant to one of the methods available to a federal court. *See* Berger, *supra* note 191. Professor Berger's suggestion deals rather neatly with the difficulties of rationalizing federal cases involving all of the myriad methods for service of process available to federal courts. The amenability standard moreover, could be employed in diversity as well as federal question cases because the test is completely independent of the grounds on which the subject matter jurisdiction of the federal court is based and the means by which service is made. While proposing a plan which would go a long way toward making order out of the federal court personal jurisdiction chaos which she so aptly describes in her article, Professor Berger does not address the question of a fifth amendment due process standard. *See* Berger, *supra* at 286-98. If such standard is based, in part, on fairness or reasonableness to the defendant, her proposal completely ignores these issues, for what she suggests really eliminates any requirement of a separate evaluation of amenability; personal jurisdiction would exist whenever the defendant could be validly served. Using "presence" as an amenability standard would really be redundant with the requirement that the defendant be served; the bottom line of such a proposal would be that implicit in the authority of a federal court to serve process is the authority to assert personal jurisdiction over the person so served.

357. *See infra* notes 687-738 and accompanying text.

is understandable in the context of the following circumstances: (1) Congress has expended little concentrated, organized effort in defining the personal jurisdiction of federal courts;[358] (2) no federal statute comparable to state long-arm statutes exists;[359] (3) federal statutes that specifically authorize extraterritorial service of process usually cover only service of process and do not include any affirmative grant of personal jurisdiction authority to accompany proper service of process, nor do these statutes refer, in any way, to amenability;[360] (4) the only federal rule dealing with personal jurisdiction speaks specifically to service of process alone and, like the statutes, does not include any affirmative grant of personal jurisdiction authority to accompany proper service of process nor does it refer, in any way, to amenability;[361] (5) the methods of service of process available to a federal court under Rule 4 include both purely federal methods and state methods; depending, therefore, on interpretation of Rule 4 and the subsection of Rule 4 under which service is made, the service methods, including any due process limitations imposed on state courts utilizing the same statutes, either are incorporated into federal law or merely provide the technique for achieving service of process with amenability to be determined in an independent federal analysis;[362] (6) the Supreme Court, in its majority opinion in a recent diversity case, *Insurance Corp. of Ireland, Ltd v. Compagnie des Bauxites de Guinee,*[363] refused to distinguish between the fifth and fourteenth amendments or discuss the appropriate amenability standard in this diversity case involving service pursuant to a state long arm statute in which the District Court, in response to repeated failures of the defendants to comply with discovery orders in regard to jurisdictional facts, sanctioned the defendants by assuming such facts. The Supreme Court referred throughout its opinion to "the Due Process Clause"[364] and cited *International Shoe,*[365] a case establishing a fourteenth amendment due process standard for state courts.[366]

Obviously, a workable and theoretically sound fifth amendment standard can be devised only after careful consideration of all of the different contexts in which federal courts are called upon to assert per-

358. *See supra* notes 205-50 and accompanying text.
359. *See supra* notes 246-50 and accompanying text.
360. *See supra* notes 247-49 and accompanying text.
361. *See supra* notes 273-94 and accompanying text.
362. *See supra* note 267.
363. 456 U.S. 694 (1982). *See supra* notes 156-85 and accompanying text.
364. *See supra* note 329.
365. 456 U.S. at 703.
366. *See supra* notes 106-15 and accompanying text.

sonal jurisdiction. The examination of these contexts begins with diversity cases.

*c. Federal Court Cases.*

When Professor Green suggested that federal court personal jurisdiction should be measured by a standard different from state court personal jurisdiction,[367] the courts were still divided on the question of amenability standards in diversity cases.[368] Professor Green thought the federal courts should be judged according to the fifth amendment[369] which, in his analysis, required only that a particular corporate defendant have sufficient contacts with the United States in order that assertion of personal jurisdiction over the defendant be constitutionally permissible.[370] Professor Green therefore could analyze all federal court

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367. Green, *supra* note 191, at 967-68. As an earlier commentator observed, "In the absence of congressional guidance [on the issue of amenability], the federal courts have traditionally held that the constitutional limits on the jurisdiction of state courts are relevant to the standard for federal jurisdiction." Note, *supra* note 261, at 508. Many federal courts accepted the *International Shoe* formula as applicable to questions of federal court personal jurisdiction. *See supra* notes 106-85 and accompanying text. Diversity cases: *See, e.g.*, Latimer v. S&A Industries Reunidas F. Matarazzo, 175 F.2d 184 (2d Cir.), *cert. denied*, 338 U.S. 823 (1958); Back v. Friden Calculating Mach. Co., 167 F.2d 679 (6th Cir. 1948), Clover Leaf Freight Lines, Inc. v. Pacific Coast Wholesalers Ass'n., 166 F.2d 626 (7th Cir.), *cert. denied*, 335 U.S. 823 (1948); Hanley Co. v. Buffalo Forge Co., 89 F. Supp. 246 (W.D. Pa. 1950); Smith v. Hall, 79 F. Supp. 473 (N.D. Tex. 1948). Federal question cases: Lone Star Package Car Co. v. Baltimore & O.R.R., 212 F.2d 147 (5th Cir. 1954) (Carmack Amendment); Consolidated Cosmetics v. D-A Pub. Co., 186 F.2d 906 (7th Cir. 1951) (trademark action); Winkler-Koch Eng'g Co. v. Universal Oil Prods. Co., 70 F. Supp. 77 (S.D.N.Y. 1946) (antitrust action). This enthusiastic adoption of a standard developed in a state court context might be explained by the lack of any congressional or judicial direction to federal courts to develop different standards. *See infra* notes 476-77 and accompanying text. While *International Shoe* was not binding precedent on federal courts, it did provide a jurisdictional formula which had been developed and approved by the Supreme Court.

368. As Professor Green observed in a footnote, as of the date of publication of his article, "[t]he lower courts [were] in conflict as to whether state law determines what constitutes doing business." Green, *supra* note 191, at 980 n.86. This was really a question of whether state or federal law would govern amenability in diversity cases in which process had been served pursuant to a state long-arm statute which required that the defendant be "doing business" in the state in order to be amenable to suit.

369. Green, *supra* note 191, at 968.

370. Green, *supra* note 191, at 969-70. Professor Green argued:

> The principle laid down in the International Shoe case . . . when applied to the service of federal process in the light of the fifth amendment appears to require only that the defendant have contacts of the described character with some part of the United States.

*Id.* at 970. In another line of reasoning, he concluded:

> If due process does not require presence in the state where suit is brought nor in the state where service is made as a basis for personal jurisdiction of a state court it certainly does not for a national court. What it requires for service of a summons from a federal court are sufficient contacts with the territory of the United States.

*Id.* at 972. Professor Green is usually credited as the progenitor of the "National Contacts" or the "Aggregate Contacts" test or theory of federal court personal jurisdiction, a theory "under which a defendant's contacts throughout the United States are considered in the analysis

personal jurisdiction cases together, arguing that "[t]he Supreme Court has never said that the *Erie* doctrine affects the in personam jurisdiction of the district courts."[371] Many subsequent cases have addressed the particular question of personal jurisdiction in diversity cases as a distinct issue.[372] More recent commentators have focused either on personal jurisdiction in diversity cases[373] or on personal jurisdiction in federal question cases.[374] While many basic principles may overlap, therefore, the discussion must be divided according to the grounds for subject matter jurisdiction in the particular case. The treatment of diversity jurisdiction necessarily will be brief because it is produced here more for historical than for analytical purposes. Wherever possible, particular issues such as service of process pursuant to particular provisions of Rule 4 of the Federal Rules of Civil Procedure and the amenability standards appropriate in each of those cases will be addressed in the discussion of federal question cases,[375] even though such procedures for service of process also might be followed in diversity cases. Many of the same issues, however, are significant in the context of diversity cases in which service of process is achieved in some manner other than pursuant to the long-arm statute of the state in which the federal court is situated.

*i. Diversity Cases*

Diversity cases are those cases in which federal subject matter jurisdiction is based under 28 U.S.C. § 1332 on the diversity of citizenship of the parties to the suits.[376] This discussion is concerned only with those cases in which there exists no other ground for the federal court assertion of subject matter jurisdiction.[377]

A primary reason for conferring diversity jurisdiction on the federal courts was to protect, in suits involving citizens of different states, against "home court advantage," or local prejudice against

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of personal jurisdiction." Note, *supra* note 21, at 470. *See* Comment, *National Contacts, supra* note 186; Comment, *Fifth Amendment, supra* note 186. *See also* Berger, *supra* note 191.

371. Green, *supra* note 191, at 980.

372. *See infra* notes 434-92 and accompanying text.

373. *See, e.g.,* Foster, *supra* note 26; Comment, *supra* note 214; Note, *Diversity Jurisdiction of the Foreign Courts over Foreign Corporations,* 49 Iowa L. Rev. 1224 (1964); Note, *supra* note 188; Comment, *supra* note 246.

374. *See, e.g.,* Berger, *supra* note 191; Note, *supra* note 21; Note, *Fifth Amendment, supra* note 186; Comment, *National Contacts, supra* note 186.

375. *See infra* notes 561-1355 and accompanying text.

376. *See supra* note 18.

377. Those cases involving more than one ground of federal subject matter jurisdiction necessarily will involve a federal question, either under 28 U.S.C. § 1331, or under some special federal jurisdictional statute. *See supra* note 19.

nonresident.[378] Thus, if plaintiff (*P*), a citizen of State *A*, sued defendant (*D*), a citizen of state *B* in state *B* because *P* could only get personal jurisdiction over *D* in *B*, *P* might be prejudiced by the hostility of the *B* judge and jury to an *A*-ite. Contrariwise, if *P* was able to bring suit against *D* in *A*, *D* might be prejudiced by the hostility of the *A* judge and jury to a *B*-ite. To protect against potential injustices, federal courts were created as a neutral alternative. If *P* could get personal jurisdiction over *D* only in *B*, *P* could institute suit in the federal district court held in *B*.[379] If, on the other hand, *P* could and did get personal jurisdiction over *D* in *A* and instituted suit in the *A* courts, *D* could remove the action to the federal district court held in *A*.[380] Of course, diversity jurisdiction also applied if *P* brought suit

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378. *See* Pease v. Peck, 59 U.S. (18 How.) 595, 599 (1856); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 347 (1816); Bank of the United States v. Deveaus, 9 U.S. (5 Cranch) 61, 87 (1809); Brown v. Flowers Indus., Inc. 688 F.2d 328, 330 n.1 (5th Cir. 1982); Aerojet-General Corp. v. Askew, 511 F.2d 710, 716 n.6 (5th Cir.), *cert. denied*, 423 U.S. 968 (1975). *See also* Parker, *Dual Sovereignty and the Federal Courts*, 51 Nw. U.L. Rev. 407, 409 (1956); Yntema & Jaffin, *Preliminary Analysis of Concurrent Jurisdiction*, 79 U. Pa. L. Rev. 869, 880 (1931).

379. This assertion entails the assumption that, if personal jurisdiction can be obtained over *D* by a *B* court, a federal district court sitting in *B* could also obtain personal jurisdiction over *D*. This assumption is really not at issue: if *D* is present in state *B* when served with state process, Rule 4(d)(1) would authorize federal service on *D* by delivery to *D* of a summons issued by the federal court sitting in *B*; if *D* is not present, service by *B* courts would be pursuant to *B*'s long-arm statute and Rule 4(e) authorizes the federal court sitting in *B* to adopt the *B* long-arm statute. Of course, amenability in the federal court suit would still be required. Assuming *D* is present in *B*, however, federal courts also have used presence in the federal district (and, later, the state in which the federal court is sitting), as an amenability basis, and, assuming *D* was served extraterritorially pursuant to the *B* long-arm statute, because such service satisfies the amenability standards of *B* it should also satisfy whatever standards apply to the federal courts sitting in *B* using the *B* long-arm statute. In other words, the consensus is that if state amenability standards are satisfied, federal standards also would be satisfied.

The question at issue in this article is whether, if the amenability standards of the state in which the federal court is sitting are not satisfied, federal amenability standards still might be satisfied, thus allowing a federal court sitting in state *B* to assert personal jurisdiction over persons and/or entities not amenable to suit in the *B* courts: Can a federal court assert personal jurisdiction where a state court could not? In Barrow S. S. Co. v. Kane, 170 U.S. 100 (1898), a New York statute would have barred a foreign cause of action against an English corporation on ground that the defendant was not amenable to suit in New York. The Supreme Court upheld the jurisdiction of the federal court, apparently negating the then current notion that amenability in state courts was essential to federal court jurisdiction. 170 U.S. at 110. *See, e.g.*, Maxwell v. Atchison, T. & S.F.R.R., 34 F. 286 (C.C.E.D. Mich. 1888); United States v. American Bell Tel. Co., 29 F. 17 (C.C.S.D. Ohio 1886); Boston Elec. Co. v. Electric Gas Lighting Co., 23 F. 838 (C.C.D. Mass. 1885); Easton v. St. Louis Shakespear Mining & Smelting Co., 7 F. 139 (C.C.E.D. Mo. 1881). The Supreme Court ruled that the personal jurisdiction of federal courts "is not created by, and does not depend upon, the statutes of the several states." *Barrow*, 170 U.S. at 110. After the Supreme Court decision in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), the question of federal court personal jurisdiction in diversity cases was reopened, with the apparent current result that federal courts sitting in diversity are limited by the amenability standards of the states in which they are sitting. *See infra* notes 407-92 and accompanying text.

This is only one of several ways in which the question arises as to whether state door-closing should also close federal doors. The problem has also surfaced where state courts bar certain individuals as plaintiffs, *see, e.g.*, Woods v. Interstate Realty Co., 337 U.S. 535 (1949)

against *D* in states *X*, *Y*, or *Z*. In those circumstances, potential state court unfairness to nonresidents probably would not favor one party over the other,[381] and, therefore, no real policy reason exists for this

(state statute barred out-of-state corporations which had failed to comply with local requirements for qualification to do business from instituting suits in state courts), and where states refuse to permit certain types of remedies. *See, e.g.,* Angel v. Bullington, 330 U.S. 183 (1947) (state statute barred recovery in state courts for deficiency judgments on foreclosure sales). In both *Woods* and *Angel*, the Supreme Court, arguing from the *Erie* decision, ruled that the doors of the federal court also should remain closed. Venue restrictions, on the other hand, may *close* federal court doors where state court doors would remain open.

380. The action could be removed to a federal court sitting in state *A*, pursuant to 28 U.S.C. §1441(a) & (b), so long as the defendant was not a citizen of state *A* (an impossibility under the proposed hypothetical facts).

§1441(a) provides:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

28 U.S.C. §1441(a) (1976).

§1441(b) provides:

> Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

28 U.S.C. §1441(b) (1976). The limitation on removal in potential diversity cases to situations in which no defendant is a citizen of the state in which the case was instituted presumably is a recognition that diversity jurisdiction is intended to protect nonresidents from local prejudice, a situation not pertaining when a defendant is sued in his home state. The plaintiff, who has selected the state *B* forum rather than a federal forum, clearly does not fear local prejudice. *See supra* text at note 379. This creates an anomalous lack of symmetry, however, between the original jurisdiction of federal courts and the removal jurisdiction of federal courts because *P*, a citizen of *A*, may institute a diversity action against *D*, a citizen of *B*, in a federal court sitting in *B*.

Removal jurisdiction is really a particular type of federal court subject matter jurisdiction which derives from the state court's subject matter jurisdiction over the case. A case therefore cannot be removed to the federal court unless the state court had proper jurisdiction over the subject matter of the case. Most commentators, moreover, take the position that because authority of the federal court in removed diversity cases derives directly from the state, state amenability standards must be applied when considering personal jurisdiction questions. That result, however, is not required by any doctrine of removal jurisdiction. While federal subject matter jurisdiction *is* derivative and the defendant presumably was served with process pursuant to state law, a federal amenability standard still might apply to the question of the defendant's federal liability to service of process. Since federal courts generally may assert personal jurisdiction in all circumstances in which courts of the states in which they are sitting may assert personal jurisdiction, with the only real question being whether federal courts might have a broader reach, and since the defendant chooses to remove to federal court, there seems no reason why a less strict federal standard of amenability should not apply to him. If the defendant wished to challenge the personal jurisdiction of the state court, he could have done so in that forum. He selected instead to remove the case to what he perceived to be a more favorable forum. That choice entailed submission to the particular rules and procedures of the federal forum and one of those rules and procedures might be a federal amenability standard. In sum, there seems no reason to treat removal cases any differently than those cases originally brought in federal courts in which service of process is achieved by some state method.

381. In Barrow S.S. Co. v. Kane, 170 U.S. 100, 111 (1898), the Supreme Court stated:

> The object of the provision of the constitution and statutes of the United States,

broader scope of diversity jurisdiction.[382]

When a federal court is sitting on a diversity case, the matter in controversy between the parties involves state-created rights and liabilities.[383] Courts and commentators have expressed the opinion that a federal court sitting in diversity is actually just a state court because it is performing a state court function.[384] This premise leads to the following argument and conclusion: federal courts sitting in diversity perform the same function as state courts, adjudication of state-created rights; therefore, federal courts sitting in diversity in state X should not adjudicate any action which a state court could not adjudicate because of lack of personal jurisdiction over the defendant; therefore, federal courts sitting in diversity should apply state amenability standards. In other words, whenever a state court would close its doors

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> in conferring [diversity jurisdiction] . . . was to secure a tribunal presumed to be more impartial than a *court of the state in which one of the litigants resides.*

*Id.* (emphasis added).

382. Diversity jurisdiction under 28 U.S.C. §1332 sweeps more broadly than is necessary to achieve the purpose of protecting nonresidents from local prejudice. One might suppose, for example, that a state *C* judge and jury would be equally hostile and/or indifferent to *P* and *D*, citizens of states *A* and *B*, respectively, if *P* brought suit against *D* in a *C* state court. Yet, the *P* v. *D* litigation could be brought in a federal court sitting in state *C*. On the other hand, of course, one might argue that unless *P* and *D* are citizens of the same state, the judge and jury of state *C*'s court might, for reasons of prejudice based on citizenship, be more favorably disposed to one litigant than to the other.

The original institution of diversity jurisdiction also might reflect a certain federal skepticism about the quality of justice afforded in state tribunals. In most circumstances which did not involve a purely parochial dispute, like a suit between citizens of the same state on a state-created right, the defendant was afforded the choice of a federal forum if the plaintiff had brought suit in a state court. The exception to this would be a "diversity action" instituted in the defendant's home state. *See supra* note 380. Even under this suggestion, some cases just do not fit, like those cases involving residents of state *A* where suit is brought in state *B*. This case could not be removed by the defendants because there is no diversity of citizenship, regardless of any hypothetical incompetence of the *B* court. Any local prejudice, however, would be directed equally at the plaintiff and the defendant.

383. If it involved substantial federally-created rights and liabilities, the case would involve a "federal question", and the case would be a federal question rather than a diversity case. For a discussion of federal question cases, *see infra* notes 493-1355 and accompanying text.

384. *See, e.g.,* Guaranty Trust Co. v. York, 326 U.S. 99, 108-09 (1945). *See also* Comment, *supra* note 214, at 705. The Columbia commentator noted:

> The organization of federal districts along state lines and the notion that the federal courts are localized forums for the adjudication of state-created rights suggest that they should not extend their jurisdiction beyond the limits imposed on the states in which they sit, in the absence of a valid federal statute or rule; constitutional guarantees that could be invoked in a state court should not be forfeited merely because the action is brought in an alternative federal tribunal.

*Id.* (footnote omitted).

What these statements fail to recognize is that, except for areas of exclusive federal jurisdiction, *see supra* note 19, state courts may adjudicate cases based on federally created rights and liabilities and yet no one argues that the state courts so acting are, in effect, extra federal courts.

because of lack of personal jurisdiction, a federal court sitting in the state should be required to do likewise.[385]

Although most federal courts now have taken the position that federal courts sitting in diversity should apply the amenability standards of the state in which the federal court is situated,[386] the matter is not so simple. First, the lack of a readily definable federal court standard of amenability[387] makes one wonder whether the determination to app-

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385. Relying on the *Erie* decision, the Supreme Court has so determined in some other "door-closing" contexts. *See supra* note 379. On the other hand, federal courts sitting in diversity have opened their doors to parties who could not be included in similar actions brought in a state court. Under Rule 4(f), a third party defendant who bears an appropriate relationship to the territory of the federal district in which service is made may be served with process within 100 miles of the federal courthouse in which the case is being heard even though the third party defendant is served in a state other than the state in which the federal court is sitting. *See supra* note 269. A state court hearing the same action would not be able to join the third party defendant unless he was amenable to the process of the state in which the suit was brought. Therefore, although a federal court sitting in diversity might be adjudicating a state-created right, because of Rule 4(f) the federal court can adjudicate a third party claim which a state court could not adjudicate. This creates some uniformity among federal courts but not between federal and state courts sitting in the same state.

Moreover, in a federal interpleader action brought pursuant to the Federal Interpleader Act, 28 U.S.C. §1335, a particular type of diversity action in which only "minimum diversity" is required, *see supra* note 200, nationwide service of federal process is authorized by 28 U.S.C. §2361 (1976), which provides:

> In any civil action of interpleader or in the nature of interpleader under section 1335 of this title, a district court may issue its process for all claimants and enter its order restraining them from instituting or prosecuting any proceeding in any State or United States court affecting the property, instrument or obligation involved in the interpleader action until further order of the court.

*Id.* Again, a federal court may extend its jurisdictional reach beyond the territorial limits of the state in which it is sitting even though the grounds of its subject matter jurisdiction is diversity of citizenship and a state court could not necessarily, because of limitations on the extent of its personal jurisdiction, entertain the same action with the same configuration of parties. Again, while in interpleader the federal court is usually adjudicating some state created right, it is not an alter-ego of state courts; it can open its doors when state courts cannot.

From the above it is clear that federal courts sitting in diversity may, in some circumstances, exert personal jurisdiction over individuals over whom state courts may not exert personal jurisdiction. Such extensions of federal court jurisdiction clearly implement federal policy favoring adjudication of an entire case or controversy in one lawsuit. *See* Note, *Federal Courts*, 77 HARV. L. REV. 559, 561 (1964). They also, however, preclude the argument that, in all circumstances, federal courts sitting in diversity can have no more extensive jurisdictional reach than can state courts sitting on similar matters; where federal policy is clear, Congress and courts have not required identity of jurisdiction between state courts and federal courts sitting in diversity in those states. Whatever basis is urged for the proposition that federal courts sitting in diversity should, as a general matter, follow the amenability standards of the state in which they are sitting, such a result, as demonstrated above, is not required by the United States Constitution. Otherwise, Rule 4(f) and other federal "outreach" statutes could not be used in diversity cases.

386. *See infra* notes 434-92 and accompanying text.

387. *See supra* notes 295-351 and accompanying text. The argument that "[t]he absence of a fully developed federal standard . . . should not preclude a ruling in favor of the applicability of federal law [in diversity cases]" is persuasive. In the absence of such a standard, however, courts have seemed reluctant to rule that one should be prescribed and then devise it, preferring, instead, to rely on the well-developed state standard. Even most courts and commentators that urge an independent federal standard under the fifth amendment fall back on

ly state amenability standards was induced partly by the absence of a federal standard.[388] Second, while the authority of the federal courts generally has been circumscribed by territorial boundaries,[389] such limitations do not flow from the nature of federal courts as do such limitations on state courts,[390] and Congress could eliminate territorial limitations on federal courts even in diversity cases. Third, adoption of state amenability standards in diversity actions leads to nonuniformity in the federal system.[391] Fourth, while the Supreme Court early took the position, in a diversity case, that federal court personal jurisdiction "is not created by, and does not depend upon, the statutes of the several States,"[392] the Court has, in a recent case, impliedly adopted the position that amenability standards in diversity cases are established by the due process clause of the fourteenth amendment.[393] Fifth,

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the state standard of "minimum contacts" and "fundamental fairness" as describing the federal standard as well. *See, e.g.,* K. Shapiro, Inc. v. New York Central R.R., 152 F. Supp. 722 (E.D. Mich. 1957) (suggesting that the Supreme Court, in Riverbank Labs v. Hardwood Prods. Corp., 350 U.S. 1003 (1956), directed federal courts to apply *International Shoe* as a federal amenability standard in diversity cases).

388. The analysis really should involve two questions: (1) whether federal courts sitting in diversity should apply a federal rather than a state amenability standard, and (2) what the provisions of such a federal standard would be. Often, however, courts have answered question (1) in favor of a state standard because such a standard existed and Congress and the courts had not devised a federal standard. At least one commentator has pointed out the fallacy of this analysis:

> It would seem that the question whether jurisdictional rules have been formulated by Congress is not relevant. If such rules do not now exist, they can be made, and a determination of what standards apply is not beyond the scope of judicial consideration. . . . The absence of a fully developed federal standard . . . should not preclude a ruling in favor of the applicability of federal law. The crucial issue is whether a federal standard, if it were to exist, should be applied to diversity cases or whether the policy of Erie R.R. v. Tompkins precludes its use.

Note, *Federal Courts*, 49 CORNELL L. Q. 320, 322 (1964) (footnotes omitted).

389. *See supra* note 263 and accompanying text.

390. *See supra* note 186 and accompanying text.

391. *See, e.g.,* Berger, *supra* note 191, at 286-98; comment, *supra* note 214, at 706; Note, *supra* note 385, at 561. *See also* Note, *supra* note 188, at 148 (advocating development of a federal amenability standard to enhance federal court uniformity). *But see* Note, *supra* note 388, at 324 (application of federal law in diversity cases "would tend to discriminate against those not qualified to bring a diversity action, accentuate conflicts between federal and state policy, and only to a small degree promote uniformity. . .").

392. Barrow S.S. Co. v. Kane, 170 U.S. 100, 108 (1898).

393. Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982). *See supra* notes 156-85 and accompanying text. *Insurance Corp. of Ireland*, although an unusual case on its facts, was a diversity case, and the Supreme Court, in discussing the "test for personal jurisdiction" applicable in such a case quoted the *International Shoe* test of "minimum contacts." *Insurance Corp. of Ireland*, 456 U.S. at 702-03. The Court studiously avoided the direct question of an amenability standard, using the term "Due Process Clause" throughout its opinion without specifying whether the reference was to the fifth amendment or the fourteenth amendment clause. By citing *International Shoe* and by its strenuous argument, in a footnote, that its holding "[did] not alter the requirement that there be 'minimum contacts' between the nonresident defendant and the forum state [but rather dealt] with how

while *Erie R.R. Co. v. Tompkins*[394] was decided in 1938, and several subsequent Supreme Court cases have "clarified" the *Erie* doctrine,[395] the question remains whether *Erie* requires a federal court sitting in diversity to apply state amenability standards or whether those standards might be incorporated into the federal law by Rule 4(e), which authorizes federal courts to serve non-resident defendants "*under the circumstances* and in the manner prescribed in the" state long-arm statute.[396] Sixth, although in many diversity cases process is served pursuant to Rule 4(e), by using the long-arm statute of the state in which the federal court is sitting,[397] some involve service under a purely federal rule such as 4(d)(3).[398] Should state amenability standards apply in both circumstances?[399]

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the facts needed to show those 'minimum contacts' can be established when a defendant fails to comply with court-ordered discovery," *id.* at 702 n.10, the Court seemed to imply that is was applying the state amenability standard to the question of establishing personal jurisdiction in a diversity case. In his concurring opinion, Justice Powell maintained:

> [I]n the absence of a federal rule or statute establishing a federal basis for the assertion of personal jurisdiction, the personal jurisdiction of the district courts is determined in diversity cases by the law of the forum State.

*Id.* at 711 (citing Intermeat, Inc. v. American Poultry Co., 575 F.2d 1017 (2d Cir. 1975); Wilkerson v. Fortune Corp., 554 F.2d 745 (5th Cir.), *cert. denied,* 434 U.S. 939 (1977); Poyner v. Erma Werke GMBH, 618 F.2d 1186 (6th Cir. 1980); Lakeside Bridge & Steel Corp. v. Mountain State Constr. Co., 597 F.2d 596 (7th Cir. 1979), *cert. denied,* 445 U.S. 907 (1980); Lakota Girl Scout Council v. Havey Fundraising Mgmt., Inc., 519 F.2d 634 (8th Cir. 1975); Arrowsmith v. United Press Int'l., 320 F.2d 219 (2d Cir. 1963); Forsythe v. Overmyer, 576 F.2d 779 (9th Cir.), *cert. denied,* 439 U.S. 864 (1978); Quarles v. Fuqua Indus., Inc., 504 F.2d 1358 (10th Cir. 1974)). In footnote 6 of his concurrence Justice Powell made it clear that he did not feel that Federal Rule 4 was itself a jurisdictional provision. Justice Powell therefore adopted *Arrowsmith* with almost no discussion. *See infra* notes 453-92 and accompanying text. As Justice Powell's citations indicate, the Supreme Court has declined to review the question of amenability in diversity cases. Now, Justice Powell, directly, and the Court's opinion, by implication, accept the *Arrowsmith* result almost as a fait accompli.

A recent case has cited Justice Powell's concurrence for the proposition that, "[i]n the absence of a federal rule or statute establishing a federal basis for the assertion of personal jurisdiction, the personal jurisdiction of the district courts is determined in diversity cases by reference to the law of the state in which the federal court sits." Kendall v. Overseas Dev. Corp., 700 F.2d 536, 538 (9th Cir. 1983).

394. 304 U.S. 64 (1938). *See infra* notes 407-14 and accompanying text.

395. *See infra* notes 415-33 and accompanying text.

396. *See supra* note 267 and accompanying text and *infra* note 1156 and accompanying text.

397. *See infra* notes 1103-1316 and accompanying text.

398. *See infra* notes 799-887 and accompanying text.

399. The language of Justice Powell's concurrence in Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 709 (1982), suggested that state amenability standards might not apply where "a federal rule or statute establish[es] a federal basis for the assertion of personal jurisdiction." *Id.* at 711. He went on to note, however, that Rule 4 does not prescribe any amenability basis, *id.* at 715 n.6, and, as described above, *see supra* notes 247-49 and accompanying text, federal statutes authorizing extra-territorial service of process never include amenability standards. Was Justice Powell merely ruminating that if Congress were to establish federal standards of amenability by Rule or statute, such standards might take precedence even in diversity cases? In other words, was he merely recognizing the authority of Congress to establish such standards in the future, or was he suggesting that some such

In order to unravel this problem to some extent, to describe the present state of the law, and to comment thereon, perhaps it is best to trace the chronological development of personal jurisdiction standards in diversity cases. As noted above, the Supreme Court, in *Barrow S.S. Co. v. Kane*,[400] adopted the position that personal jurisdiction of federal courts did not depend on the existence or non-existence of state statutes.[401] In a circumstance in which a state court would have applied a "door-closing" statute precluding the state court from asserting jurisdiction over the defendant, the Supreme Court ruled that the federal courts were still free to open their doors. One should note, however, that the Court merely authorized the lower federal courts to ignore a state statute which barred assertion of personal jurisdiction; the Court did not define some federal standard for amenability[402] nor did it comment on the efficacy, in federal courts, of any state statutes affirmatively authorizing personal jurisdiction.[403] One must remember, moreover, that, at the time of the *Barrow* decision, states did not have long-arm statutes. State court assertions of jurisdiction were limited severely by territoriality, with the most significant amenability questions involving whether a foreign corporation could be sued on a consent or presence theory.[404] The situation after *Barrow* is well-described, in the context of corporate amenability, in the following passage:[405]

> [T]he independence of the federal judiciary was frequently asserted in the maxim that federal jurisdiction could not be enlarged or abridged by state statute. Thus, determination of the scope of jurisdiction over foreign corporations devolved upon the federal courts. In the absence of congressional direction and binding restrictions of state law, the organization of districts along state lines with no general provision for extraterritorial process apparently suggested reference to the due process limitations binding under the fourteenth

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standards did exist, implicit in federal statutes, or was he merely "hedging his bets" because no such federal rule or statute was applicable here? Why, moreover, did he limit the creation of such a standard to Congress? After all, the Supreme Court and other judicial bodies established the state amenability standards now generally applicable. *See supra* notes 60-185 and accompanying text. *See also* Note, *supra* note 388, at 322 (suggesting that lack of federal standard of amenability can be remedied by judicial action).

400. 170 U.S. 100 (1898).

401. *Id.* at 108.

402. *Id.* at 108.

403. *See generally* 170 U.S. 100 (1898).

404. *See supra* notes 60 to 105 and accompanying text.

405. Comment, *supra* note 214, at 692 (footnotes omitted).

406. Again, a possible argument is that only one standard of amenability was available, and, since federal courts looked so much like state courts, no reason existed not to adopt the available standard.

amendment on the states. Thus, the same standard of corporate amenability was applied without discrimination to circumscribe the state and federal courts.[406]

With the 1938 promulgation of the Federal Rules of Civil Procedure[407] came several federal methods of service of process but no particular amenability standards.[408] In the same year, however, the Supreme Court decided the landmark case of *Erie R.R. Co. v. Tompkins*,[409] in which the Court reversed 100 years of federal practice by ruling that federal courts were to apply state law in diversity cases rather than applying "federal common law" to the substantive issues of the case.[410] In 1938, therefore, prior practice in diversity cases was almost totally reversed. Under the Conformity Act, the federal courts had been required to "conform, . . . to the practice, pleadings, and forms and modes of proceeding" of the states in which they had sat.[411] The federal courts now were required to follow the uniform federal procedure provided in the Federal Rules. Under the earlier decision of *Swift v. Tyson*,[412] the federal courts sitting in diversity had been free to apply "general federal common law" to substantive issues. They were now required, under *Erie*, to follow the substantive law of the states in which they sat.

In *Erie*, the question at issue was clearly "substantive," whether the plaintiff, who had been walking on a footpath adjacent to railroad tracks, was a "trespasser" and therefore entitled to recover only for willful or wanton conduct on the part of the defendant, or whether he was a "licensee," entitled to recover for negligence.[413] Subsequent cases, however, posed more difficult questions which could not be resolved by reference to the "talismanic" labels of "substance" and "procedure."[414]

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407. *See supra* notes 251-53 and accompanying text.
408. *See supra* notes 253-94 and accompanying text.
409. 304 U.S. 64 (1938). For comprehensive discussion of *Erie* and its progeny, *see* Clark, *State Law in the Federal Courts: The Brooding Omnipresence of* Erie v. Tompkins, 55 YALE L.J. 267 (1946); Corbin, *The Laws of the Several States*, 50 YALE L.J. 762 (1941); Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489 (1954); Hill, *The Erie Doctrine and the Constitution*, 53 NW. U.L. REV. 427 (1958); Keeffe, Gilhooley, Bailey & Day, *Weary Erie*, 34 CORNELL L. Q. 494 (1949); Meador, *State Law and the Federal Judicial Power*, 49 VA. L. REV. 1082 (1963); Shulman, *The Demise of* Swift v. Tyson, 47 YALE L.J. 1336 (1938); Comment, *supra* note 214.
410. *Erie*, 304 U.S. at 78.
411. *See supra* notes 234-37 and accompanying text.
412. 41 U.S. (16 Pet.) 1 (1842).
413. *Erie*, 304 U.S. at 69-71.
414. In Hanna v. Plumer, 380 U.S. 460 (1965), Chief Justice Warren, writing for the Court, noted, " 'Outcome determination' analysis was never intended to serve as a talisman." *Id.* at 466-67. *See also infra* notes 434-35 and accompanying text.

In *Guaranty Trust Co. v. York*,[415] the Court came very close to describing a weighing process,[416] similar to that later settled on in *Byrd v. Blue Ridge Rural Electric Co-op.*,[417] but instead relied on a "shorthand" description of its decision: state law, including state procedural rules, must be followed if "outcome-determinative" because "the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State Court."[418] This decision substantially seemed to make federal courts into state courts, for any rule which differed from a state rule in any genuine manner could affect the outcome of a litigation.[419]

The effect of *Erie* on questions of personal jurisdiction was raised in *Pulson v. American Rolling Mill Co.*[420] In *Pulson*, the First Circuit laid down the following two-step analysis to determine whether a federal court had personal jurisdiction over a foreign corporation:[421] (1) whether the state had "provided for bringing the foreign corporation into its courts under the circumstances of the case presented;" and (2) if so, whether such an assertion of personal jurisdiction by a state court would violate federal due process. The *Pulson* court did not cite *Erie* or *Guaranty Trust*. The Court, therefore, did not clarify whether the rule flowed from the *Erie* doctrine and was a

415. 326 U.S. 99 (1945).

416. *Id.* at 108. The court stated:

> Matters of "substance" and matters of "procedure" are much talked about . . . as though they defined a great divide cutting across the whole domain of law. But, of course, "substance" and "procedure" are the same keywords to very different problems. Neither "substance" nor "procedure" represents the same invariants. Each implies different variables depending upon the particular problems for which it is used.

*Id.*

417. 356 U.S. 525 (1958). *See infra* notes 430-33 and accompanying text.

418. *Guaranty Trust*, 326 U.S. at 109.

419. Whenever a procedural rule, such as manner of service of process, would bar suit in the state because the rule had not been satisfied, whereas the method utilized was sufficient under federal procedure so that a federal court suit would not be barred, the "outcome" of the litigation would be affected if the federal court employed its own seemingly procedural rule; the suit could continue in the federal court but could not continue in the state court. To satisfy the "outcome determinative" language of *Guaranty Trust*, therefore, the federal courts would have to defer to state court practice whenever a distinction existed. *See, e.g.*, Bernhardt v. Polygraphic Co. of America, 350 U.S. 198 (1956); Ragan v. Merchants, Transfer & Warehouse Co., 337 U.S. 530 (1949); Woods v. Interstate Realty Co., 337 U.S. 535 (1949); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949). As one commentator noted: "If the *York* outcome-determinative test is applied . . . to its literal extreme, very few Federal Rules of Civil Procedure would have any effect in a federal court action in which subject-matter jurisdiction is grounded on diversity of citizenship." Comment, *Return to the Twilight Zone, supra* note 267, at 705.

420. 170 F.2d 193 (1st Cir. 1948).

421. *Id.* at 194.

constitutionally-required result,[422] or whether *Pulson* represented a decision that when service was made under former Rule 4(d)(7) according to some state method, then the state jurisdictional standard also should be applied.[423] As noted by one commentator:

> In the great majority of appellate decisions that have chosen between federal and state jurisdictional standards, service has been made

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422. In *Erie*, the majority took the position that the result was mandated by the Constitution. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 77-78 (1938). Many scholars have struggled to determine the Constitutional source of the Court's assertion. *See generally* C. Wright, Law of Federal Courts 359-364 (4th ed. 1983). If *Erie* is constitutionally required, and if, as reasoned by Justice Powell in his concurring opinion in Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 709-16 (1982), *Erie* requires the result in *Arrowsmith, id.* at 711-12, then one might argue that a different federal standard of amenability for diversity cases is precluded by the Constitution.

This argument, however, sweeps too broadly. Justice Powell recognized the potential for application in diversity of "a federal basis for the assertion of personal jurisdiction," such basis being established by "a federal rule or statute." *Id.* at 711. Under Byrd v. Blue Ridge Rural Elec. Co-op., 356 U.S. 525, (1958), *see infra* notes 430-33 and accompanying text, a federal court may balance the state interests in application of the state rule against federal interests in application of a conflicting federal rule or statute. Justice Powell therefore recognized the possibility of a federal amenability standard for diversity cases, which standard would be established by Congress. He did not, however, recognize the equally justifiable possibility of a judicially created federal standard which would conflict with a state standard. *Erie* did not, as many believe, eliminate federal common law. *See* Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938). It merely eliminated the prior federal practice of applying "general federal common law" in defining state-created rights and liabilities, a practice which had caused nonuniformity in vindication of state-created rights and obligations as well as creating a substantial problem of state-federal forum-shopping within the borders of a particular state. *See, e.g.,* Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518 (1928).

The creation of new federal common law by federal courts also did not terminate upon the decision in *Erie*. *See, e.g.,* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (federal law governed application of act-of-state doctrine in a federal diversity case); Clearfield Trust Co. v. United States, 318 U.S. 363 (1943) (federal law governed issue regarding effectiveness of guarantee of prior endorsements on a government check). *See also* Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 798-800 (1957). A federal court therefore need not rely on some established federal law, statute, or rule in order to *Byrd* balance but may actually determine first whether some uniform federal law would be preferable to application of the state rule before it and then set about to establish that federal common law. The question of personal jurisdiction would not seem to be, as a general matter, so bound up in the vindication of state-created rights and liabilities that *Erie* requires application of state law without resort to *Byrd* balancing. This writer believes that the reasons federal courts have not taken the initiative to develop a separate federal amenability standard are because state standards had already been well-established, no federal standard had been suggested by the Supreme Court, and federal rules and statutes do not expressly provide for an amenability standard. Reliance on well-established state amenability standards that have received extensive Supreme Court treatment is easier than pioneering a separate federal standard. For a discussion of the types of state interests that should supervene federal interests absolutely as opposed to those state interests that should merely be considered in the *Byrd* balancing process, *see* Comment, *supra* note 214, at 703-06; Note, *supra* note 385, at 561-62.

Finally, this discussion presumes that the *Arrowsmith* case and result flow from the *Erie* doctrine. If, instead, they arise from some incorporation of state amenability standards, under former Rule 4(d)(7) and Rule 4(e), into federal law, then the above analysis would not pertain.

423. *See infra* notes 893-1102 and accompanying text.

pursuant to Rule 4(d)(7), and in those cases the choice was overwhelmingly in favor of the state standard, although the cases are unclear as to whether state standards were used because of Rule 4(d)(7) or because of Erie.[424]

*Angel v. Bullington*[425] and *Woods v. Interstate Realty Co.*[426] were two cases subsequent to *York* that involved jurisdictional questions, although not the issue of amenability, to which the Supreme Court applied the *Erie* doctrine in following state "door-closing" policies. In *Angel*, recovery would have been unavailable in a state court because of a state statute that barred certain types of relief.[427] In *Woods*, the suit would have been barred from a state court because of a state statute that precluded suits by foreign corporations that had not complied with state qualification requirements.[428]

After *Woods*, federal courts sitting in diversity were truly becoming the alter-egos of state courts.[429] In *Byrd v. Blue Ridge Rural Electric Co-op.*,[430] however, the Supreme Court picked up again the thread that it had been pursuing in *Guaranty Trust* prior to its "shorthand" statement of the "outcome determinative" test. In *Byrd*, a case involving the question of whether a judge or jury should decide the issues of whether the plaintiff had been an "employee" of the defendant within the meaning of the Workmen's Compensation Act, the Supreme Court decided in favor of the "federal" method of decision by jury.[431] The Court ruled that except in those areas where the state rule is "bound up with [the state-created rights and obligations sought

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424. Note, *supra* note 188, at 1134.

425. 330 U.S. 183 (1947). *See also supra* note 379.

426. 337 U.S. 535 (1949). *See also supra* note 379.

427. The Supreme Court also closed the doors of the federal court sitting in diversity, doors which ordinarily would have been open to such a litigation, on the ground that *Erie* had "drastically limited the power of the federal courts to entertain suits in diversity cases that could not be brought in the respective state courts. . . ." *Angel*, 330 U.S. at 192.

The dissenting justices responded: "[I]n diversity litigation the federal courts are not simply courts of the state. They are so far as the enforcement of the substantive laws of the state are concerned, but not when procedure or power to act is involved." *Id.* at 200 (Reed, J., dissenting).

428. Again the majority of the court found the result compelled by *Erie* and the "outcome determinative" test of *Guaranty Trust* in order to preserve uniformity among the state and federal courts sitting in the state. *Woods*, 337 U.S. at 538. Again the dissent argued that the upshot of *Erie* and *Guaranty Trust* was *not* that federal courts in diversity cases were merely other courts of the states in which they sat. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 560 (1949) (Rutledge, J., dissenting in both *Woods* and *Cohen*). Moreover, Justice Rutledge argued that the "outcome determinative" test should be replaced, in these quasi-procedural areas, by some sort of weighing test. *Id.*

429. *See supra* dissenting opinions cited in notes 427 and 428; Merrigan, Erie *to* York *to* Ragan—*A Triple Play on the Federal Rules*, 3 VAND. L. REV. 711, 720-21 (1950).

430. 356 U.S. 525 (1958). For discussion of the effect of *Byrd*, *see* Smith, Blue Ridge *and Beyond: A* Byrd's-*Eye View of Federalism in Diversity Litigation*, 36 TUL. L. REV. 443 (1962).

431. *Byrd*, 356 U.S. at 536.

to be enforced] in such a way that its application in the federal court is required,"[432] the federal court must consider the interests of the state in having its rule applied, including the effect of application on the outcome of the suit, against any "affirmative countervailing considerations" which would favor application of the federal rule or procedure.[433] The technique for deciding "borderline" questions after *Byrd*, therefore, was to "*Byrd* balance" state and federal interests.

Subsequent to the decision in *Byrd* but before the Supreme Court decision in *Hanna v. Plumer*,[434] which, in effect, established the precedence of the Federal Rules of Civil Procedure over any conflicting state procedures regardless of "outcome" or "policy,"[435] the United States Court of Appeals for the Second Circuit, in *Jaftex Corp. v. Randolph Mills, Inc.*[436] and in *Arrowsmith v. United Press International*,[437] considered the question of amenability standards in diversity cases. Although early cases had applied a federal standard,[438] almost all diversity cases subsequent to *Erie* had applied a state amenability standard, although not all such courts had based their decisions on the *Erie* doctrine.[439] In *Jaftex*, a diversity action for personal injuries, the third party defendant, a North Carolina corporation on which service had been made by serving its "selling agent"

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432. *Id.* at 535.

433. *Id.* at 537-38.

434. 380 U.S. 460 (1965). For discussion of the effect of *Hanna, see* McCoid, Hanna v. Plumer: *The Erie Doctrine Changes Shape*, 51 VA. L. REV. 884 (1965); Note, *Choice of Procedure in Diversity Cases*, 75 YALE L.J. 477 (1966).

435. *Hanna*, 380 U.S. at 470-74.

436. 282 F.2d 508 (2d Cir. 1960). For favorable commentary on *Jaftex, see* Comment, *supra* notes 214; Note, *supra* note 373; Note, *supra* note 188; Comment, *supra* note 246.

437. 320 F.2d 219 (2d Cir. 1963).

438. *See, e.g.,* Philadelphia & Reading Ry. v. McKibbin, 243 U.S. 264 (1917); Barrow S.S. Co. v. Kane, 170 U.S. 100 (1898).

439. *See, e.g.,* Jennings, v. McCall Corp., 320 F.2d 64 (8th Cir. 1963); Walker v. General Features Corp., 319 F.2d 583 (10th Cir. 1963); Smartt v. Coca-Cola Bottling Corp., 318 F.2d 447 (6th Cir. 1963); Mutual Int'l. Export Co. v. Napeo Indus., Inc., 316 F.2d 393 (D.C. Cir. 1963); Connor v. New York Times Co., 310 F.2d 133 (5th Cir. 1962); Waltham Precision Instrument Co. v. McDonnell Aircraft Corp., 310 F.2d 20 (1st Cir. 1962); Moore-McCormack Lines, Inc. v. Bunge Corp., 307 F.2d 910 (4th Cir. 1962); Ark-La Feed & Fertilizer Co. v. Marco Chem. Co., 292 F.2d 197 (8th Cir. 1961); Edwin Raphael Co. v. Maharam Fabrics Corp., 283 F.2d 310 (7th Cir. 1960); Iliff v. American Fire Apparatus Co., 277 F.2d 360 (4th Cir. 1960); Stanga v. McCormick Shipping Corp., 268 F.2d 544 (5th Cir. 1959); Westcott-Alexander, Inc. v. Dailey, 264 F.2d 853 (4th Cir. 1959); Roberts v. Evans Case Co., 218 F.2d 893 (7th Cir. 1955); Smith v. Ford Gum & Mach. Co., 212 F.2d 581 (5th Cir. 1954); Partin v. Michaels Art Bronze Co., 202 F.2d 541 (3d Cir. 1953); Canvas Fabricators, Inc. v. William E. Hooper & Sons Co., 199 F.2d 485 (7th Cir. 1952); Steinway v. Majestic Amusement Co., 179 F.2d 681 (10th Cir. 1949); Pulson v. American Rolling Mill Co., 170 F.2d 193 (1st Cir. 1948). *But see* Berlanti Constr. Co. v. Republic of Cuba, 190 F. Supp. 126 (S.D.N.Y. 1960) (applying federal standard); Kennedy v. Long Island R. Co., 26 F.R.D. 589 (S.D.N.Y. 1960) (same). *See also* Hart, *supra* note 409 (favoring federal standard); Hill, *supra* note 409 (same); Meador, *supra* note 409 (same).

in New York, sought to vacate service for lack of proper service, arguing that it was not "doing business" in New York and hence was not amenable to suit in the federal district court sitting in New York.[440] The district court had granted the dismissal of the third party defendant on the following reasoning:[441] while Randolph Mills was "doing business" in New York so that service would be valid under federal law, it was not "doing business" under state law to permit valid state service, and, under *Erie*, the state law must be applied. The district court determined, therefore, that in a diversity action *Erie* required that amenability to suit be measured by a state rather than federal standard.

Writing for the United States Court of Appeals for the Second Circuit, Judge Clark, the chief draftsman of the Federal Rules of Civil Procedure, found two alternative grounds for refusal to dismiss the third-party complaint: (1) ". . . service was valid under either New York or federal law,"[442] and (2) ". . . the question whether a foreign corporation is *present* in a district to permit service of process upon it is one of federal law governing the procedure of the United States courts. . . ."[443] In his argument developing the second alternate ground, Judge Clark noted that federal rule 4(d)(3) and former federal rule 4(d)(7) "deal with the manner of service upon corporate defendants, rather than with their amenability to process" and found "the manner of service . . . was sufficient under either rule."[444] After finding

440. *Jaftex*, 282 F.2d at 508-11.

441. *Id.* at 509-10.

442. *Id.* at 510.

443. *Id.* at 516. Judge Clark apparently seized the opportunity to make clear his position on the issue of amenability in diversity cases. Judge Friendly, in Arrowsmith v. United Press International, 320 F.2d 219 (2d Cir. 1963), seemed even more anxious to have a "go" at the matter, framing his response as advice to the district court on a remand to consider, *ab initio*, amenability of a particular foreign corporation to service of process in a diversity action in a federal district court sitting in Vermont. *See infra* note 461 and accompanying text.

444. *Jaftex*, 282 F.2d at 511-12. Many commentators have noted the absence of an amenability standard in either the federal rules or in federal statutes authorizing extraterritorial (beyond the territory of the state in which a federal court is sitting) service of process. One commentator has argued for a presence standard (presence where service is authorized), a position that in effect, makes amenability coextensive with valid service of process and therefore, implicit in the authorization for extraterritorial service of process. *See supra* note 356 and accompanying text. Other commentators have argued that where a federal court is authorized by Federal Rule 4 to adopt methods of service of process available to the state courts of the state in which the federal court sits, the effect is to incorporate into the federal rule not only the state procedure or technique for service of process but also any state amenability standards pertaining to the procedure or technique. Justices Black and Douglas commented with disapproval on the apparent reliance, under the then-proposed Rule 4(e), on state long-arm statutes:

> Mr. Justice Black and Mr. Justice Douglas object to the changes in Rule 4, which for the first time permit a Federal District Court to obtain jurisdiction over a defendant by service of process outside the State . . . under the circumstances and in the manner prescribed by state law. We . . . see no reason why the extent of a

no Supreme Court direction on the question, Judge Clark found, in the historical development of federal process and venue statutes, "a deliberate and long-avowed federal practice with reference to the basis of federal judicial action."[445] Using the *Byrd* approach, he examined the state and federal rules on amenability, finding them "not so mutually at odds that the federal decision will seriously damage state policy."[446] He argued, moreover, that "so long as Congress opens the national courts to cases 'between citizens of different States,'

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> Federal District Court's personal jurisdiction should depend upon the existence or nonexistence of a state "long-arm" statute.

Statement of Mr. Justice Black and Mr. Justice Douglas, 374 U.S. 865, 869 (1963). Implicit in this statement is recognition that federal courts should have some separate grant of personal jurisdiction authority and that the authority of federal courts over defendants, whether in diversity or federal question cases, should depend on some uniform federal law. If one rejects presence as federal amenability standard yet recognizes no standard implicit in federal authorizations for extraterritorial service of process, one must admit that no *federal* amenability standard has yet been devised and that federal courts, faced with this absence, have understandably turned for guidance to state standards.

445. *Jaftex*, 282 F.2d at 513. On the historical point, Judge Clark argued:

> The requirement of personal service in the district (except for the special exceptions made by Congress) is an old one going back to the Judiciary Act of 1789, §11, 1 Stat. 79, and continued in Rev. Stat. §739, Judicial Code §51, and the former 28 U.S.C. §112. During all this period the requirements as to service and venue were treated together, a not unnatural course in view of their close connection. With the revision of Title 28, United States Code, the provisions were separated, the venue requirements going to 28 U.S.C. §1391 and the service requirements going to 28 U.S.C. §1693. The latter act seems particularly important as bringing the original requirements of 1789 down into modern law [by preserving the wording of Section 11 of the Judiciary Act of 1789]. At any rate the requirement has been steadily applied and as yet has been changed by Congress and the Rules in only limited and particular ways. . . . Wholly consistent and apparently required by this background is the parallel condition that a corporation must be "present," i.e., doing business, within the district in order to be subject to suit there.

*Id.* at 512 (footnotes and citations omitted). Judge Clark used this as evidence of a continuing federal policy in regard to amenability to suits in federal courts. He did not, however, describe the federal amenability standard nor did he note how it differed, if at all, from the state standard.

Still, Judge Clark's argument is convincing. Before *Erie*, federal courts were charged with the determination of federal court jurisdiction according to federal standards, including decisions as to when a foreign corporation (one not incorporated in the state in which the federal court was sitting) would be "doing business" within the federal district so as to be amenable to suit in the federal courts. While these courts may have relied on state standards, they did so not because compelled by law so to do but as an independent choice of standard by a federal court.

Many of the problems discussed here clearly would have been obviated if Congress had not chosen to organize the federal judicial system territorially, first with each lower court having authority within a single federal district that was either coextensive with a single state or that lay entirely within a single state and later by extending general authority of these courts only to the boundaries of the state in which they sat. If the federal system had not been structured on a territorial basis similar to that of the states, a wholly federal standard of amenability would have been easier to establish. On the other hand, Congress permitted the federal courts, in certain limited circumstances, to reach beyond the territorial boundaries of the state in which they were held and to do so in ways not available to those state courts. Therefore, exclusive reliance by federal courts on state amenability standards also would be inappropriate.

446. *Id.* at 513.

. . . it would seem that they are entitled to the essentials of a trial according to federal standards."[447] He also urged federal uniformity of procedure rather than state-federal uniformity, noting authority against the position that federal courts sitting in diversity are merely extra state courts.[448]

Judge Friendly, in his concurring opinion, took issue with the alternate ground of the opinion, noting that he knew "of no . . . federal standard [of corporate presence] except the Constitutional one,"[449] citing *Pulson* and other circuit court opinions in favor of the proposition that a federal court needed federal statutory authority to apply a federal amenability standard.[450] He found no such grant of authority either in federal statutes or in the Federal Rules of Civil Procedure nor did he find any "practice of considering this question as one of federal law [which has] become so well established that it must be deemed to be sanctioned by the Judicial Code or the Federal Rules, even though both are silent on the subject."[451] He concluded, therefore, that *Erie* required the federal court to adopt the state amenability standard.[452]

Three years later, in *Arrowsmith v. United Press International*,[453] the positions of Judges Clark and Friendly were reversed, with Judge Friendly writing the majority opinion which overruled the alternative ground in *Jaftex* and with Judge Clark writing a strong dissent. The issue was whether, in a diversity action, the presence of a foreign corporation in a district for purposes of amenability to suit was to be determined by a state or federal standard.[454] The underlying suit was for defamation, clearly instituted in a federal court sitting in Ver-

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447. *Id.* This argument could proceed directly from *Byrd v. Blue Ridge Elec. Co-op., see supra* notes 430-33 and accompanying text, in which the Supreme Court ruled that one of the "essentials" of a federal trial, an "essential" which had its roots in the seventh amendment, was that certain questions of fact, in a jury trial, were triable to a jury rather than a judge.

448. *Jaftex*, 282 F.2d at 513-14.

449. *Id.* at 516.

450. *Id.* at 516-17. Judge Friendly continued:

> [T]his matter falls in the zone where, subject to the due process guarantee of the Fifth Amendment, Congress may validly direct, or authorize the Supreme Court to direct, the federal courts to fashion their own standards even in diversity of citizenship cases. . . . Valid inferences from article III, §8, support action by Congress or the rule-making power within this "twilight zone," . . . in derogation of state law, even when federal jurisdiction rests solely on diversity of citizenship. The question is whether such a direction has been given as to the subject here at issue; I think it has not.

*Id.* at 518.

451. *Id.* at 520.

452. *Id.*

453. 320 F.2d 219 (2d Cir. 1963).

454. *Id.* at 221.

mont because Vermont had a particularly long statute of limitations in regard to such matters.[455] The defendant's contacts with Vermont had been insubstantial. The defendant wire service, U.P.I., had eleven subscribers in Vermont and one employee in Vermont.[456] Service of process had been made upon the employee pursuant to Rule 4(d)(3), as service upon an "agent" of the defendant corporation.[457] The defendant made a Rule 12(b) motion to dismiss, *inter alia*, for lack of personal jurisdiction, improper venue, and failure to state a claim upon which relief could be granted.[458] The district court dismissed for failure to state a claim upon which relief could be granted and did not rule on the personal jurisdiction or venue issues.[459]

The Court of Appeals remanded, finding that the District Court had erred in ruling on the sufficiency of the complaint before first determining the procedural questions of personal jurisdiction and venue.[460] The Court, however, in what might be described as an "excess of zeal," proceeded to "decide what standard should govern the judge's determination as to the jurisdiction of the District Court for Vermont over the person of the foreign corporation defendant—in particular, whether a 'state' or a 'federal' standard should here be applied."[461]

After citing an overwhelming number of cases in which circuit courts

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455. *Id.* and n.2.
456. *Id.* at 222.
457. *Id. See supra* note 269.
458. *Arrowsmith*, 320 F.2d at 221.
459. *Id.*
460. *Id.*
461. *Id.* One cannot resist the inference that Judge Friendly had been merely biding his time, anxiously awaiting an opportunity to "correct" the error he perceived in the alternative ground in *Jaftex*. Clearly, *Jaftex* was the law of the Second Circuit at the time when the *Arrowsmith* case first arose. The court of appeals had been called upon to decide one matter: whether the district court had erred in determining that the complaint was legally insufficient before the district court had decided whether it had personal jurisdiction over the defendant and whether venue had been properly laid. Only about a page of the opinion was devoted to that question. The court of appeals then proceeded, in approximately 13 pages of analysis, to determine the standard by which such personal jurisdiction would be judged. This would have been appropriate if no standard had been established in the Second Circuit. *Jaftex*, however, clearly presented the lower court with a Second Circuit position on the question of whether a state or federal amenability standard should apply. The more appropriate time for the court of appeals to speak, therefore, would have been on appeal from the district court decision on personal jurisdiction.

At least two possible explanations can be offered for this rather singular procedure: (1) Judge Friendly wished to overrule the alternative ground in *Jaftex* and was afraid that the opportunity might not be presented on appeal; (2) Judge Friendly, as noted in his opinion, felt that no federal amenability standard existed, and, thus, he was determined to correct *Jaftex* rather than present the district court with the paradoxical problem of being required by *Jaftex* to apply a federal standard but having no clue as to what that standard might be. Either way, it seems the court of appeals (Judge Friendly) wanted "first licks" at the problem rather than being required to begin from a district court opinion.

had advocated state standards[462] and dismissing Judge Clark's argument that all but two of those cases were inapposite because service had been achieved, pursuant to Rule 4(d)(7), by state long-arm statute,[463] Judge Friendly proceeded to overrule the alternate ground in *Jaftex*.[464] First, he noted that no federal statute or federal rule provided an express or implied amenability standard.[465] Despite *Erie*, he recognized the authority of Congress to establish such a standard but found "no federal policy that should lead federal courts in diversity cases to override valid state laws as to the subjection of foreign corporations to suit, in the absence of direction by federal statute or rule."[466] The court, moreover, found little relevancy of *Byrd* because it was "aware of no federal policy of similar strength or constitutional basis [to that at issue in *Byrd*] that would justify disregard of state laws as to when a foreign corporation may be held to answer in a suit like the present."[467]

In a lengthy and comprehensive dissenting opinion, Judge Clark reiterated and elaborated on his arguments in *Jaftex*.[468] He criticized the majority for incorrectly applying *Erie* to require application of state law to questions such as "how the federal courts shall be organized and how one is brought before them."[469] He continued, "[I]ndeed to put this in the hands of the states would be to destroy all reason for having a federal tribunal (in which the litigant has more confidence ) enforce a litigant's rights accorded by state law."[470] Judge Clark argued that *Erie* would be satisfied in either case because the ultimate issues of the libel action would be determined according to

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462. *Id.* at 222-23.
463. *Id.* at 224.
464. *Id.* at 224-25.
465. *Id.* at 225. Judge Friendly therefore rejected implication of any federal amenability standard from a federal statute or rule. This rejection served the purposes of his major theme, that federal courts sitting in diversity should apply state amenability standards. His rejection, however, provided a problem in federal question cases in which process is served pursuant to a federal statute authorizing extraterritorial service of process. He found no stated or implicit amenability standards in such statutes yet he admitted that in federal question cases "the considerations favoring the overriding of state policy would be far more persuasive than in an ordinary diversity suit." *Id.* at 228 n.9. Perhaps the material result of Judge Friendly's remarks are that he found no federal amenability standard but considered it not inappropriate to establish—create—devise—formulate such a standard for federal question cases.
466. *Id.* at 226. One inference from this statement might be that Judge Friendly assumed that federal amenability standards properly incorporated in federal statutes or rules would supersede state amenability standards, even in diversity cases. *Byrd*-balancing, *see supra* notes 430-33 and accompanying text, however, would still require a balancing of state and federal policies favoring application of their respective rules or statutes. *But see infra* text at note 467.
467. *Arrowsmith*, 320 F.2d at 230. *See also supra* notes 430-33 and accompanying text.
468. 320 F.2d at 234-44.
469. *Id.* at 235.
470. *Id.*

Vermont law.[471] He again found historical support for a federal standard of corporate amenability,[472] which standard was "quite well known and reasonably precise."[473] He noted that state law might easily apply in cases in which service of process had been achieved under Rule 4(d)(7),[474] but that in a case like the one before the court, where service had been made through a wholly federal method, a federal standard would be appropriate.[475] Avoiding any real articulation of the "quite well known and reasonably precise" federal standard, Judge Clark settled on the following formulation:

> [T]he federal law is shaped by statutory enactment based on easily understood principles, which reflect still important and widely held views of common sense and fairness that a person should not be forced into litigation at a distance from his home.[476]

One commentator has called this articulation "little more than a paraphrase of *International Shoe.*"[477]

Although many commentators have been in sympathy with Judge Clark's position,[478] federal courts sitting in diversity have followed *Arrowsmith*[479] overwhelmingly, and the Supreme Court, in its majority

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471. *Id.*
472. *Id.* at 238-39.
473. *Id.* at 239.
474. *Id.*
475. *Id.* Because process had been served in this case pursuant to Rule 4(d)(3), which provides for a wholly federal method of service of process upon a foreign corporation, the *Arrowsmith* decision might be interpreted as necessarily grounded on *Erie.* If application of a state standard is justifiable merely as an incorporation into federal law of the state standard pertaining to the state statute under which service is made, such an argument would apply only to cases in which service had been made pursuant to a state rule or statute. *Arrowsmith* was not such a case.
476. *Arrowsmith,* 320 F.2d at 238.
477. Note, *supra* note 388, at 321.
478. *See, e.g.,* Boner, Erie v. Tompkins: *A Study in Judicial Precedent,* 40 TEX. L. REV. 509, 619, 635-38 (1962) (federal courts should control own organization and procedure); Carrington, *supra* note 2, at 318-21 (same); Green, *supra* note 191, at 979 (same); Smith, *supra* note 430 (same).
479. *See, e.g.,* Raffaele v. Compagnie Generale Maritime, S.A. Paris, 707 F.2d 395, 396 (9th Cir. 1983); Chatanooga Corp. v. Klinger, 704 F.2d 903, 905-06 (6th Cir. 1983); Pearrow v. National Life & Accident Ins. Co., 703 F.2d 1067, 1068 (8th Cir. 1983); Talbot Tractor Co., Inc. v. Henomoto Tractor Sales, USA, 703 F.2d 143, 144-47 (5th Cir. 1983); Kendall v. Overseas Dev. Corp., 700 F.2d 536, 538 (9th Cir. 1983); Hahn v. Vermont Law School, 698 F.2d 48, 51 (1st Cir. 1983); Froning & Deppe, Inc. v. Continental Ill. Nat'l Bank & Trust Co., 695 F.2d 289, 291-92 (7th Cir. 1982); Adden v. Middlebrooks, 688 F.2d 1147, 1155-56 (7th Cir. 1982); Brown v. Flowers Indus., Inc., 688 F.2d 328, 331-32 (5th Cir. 1982); Wyatt v. Kaplan, 686 F.2d 276, 279 (5th Cir. 1982); Mississippi Interstate Express, Inc. v. Transpo, Inc., 681 F.2d 1003, 1006 (5th Cir. 1982); Lakeside Bridge & Steel Co. v. Mountain State Constr. Co., 597 F.2d 596, 600 (7th Cir. 1979), *cert. denied,* 445 U.S. 907 (1980); Southern Machine Co. v. Mohasco Indus., Inc., 401 F.2d 374, 377-78 (6th Cir. 1968); Pujol v. U.S. Life Ins. Co., 396 F.2d 430, 431-32 (1st Cir. 1968); Tetco Metal Prods., Inc. v. Langham, 387 F.2d 721, 723 (5th Cir. 1968); Drapulse Corp. of America v. Birtcher Corp., 362 F.2d 736, 740 (2d Cir. 1966); Edwards v. St. Louis-San Francisco R.R. Co., 361 F.2d 946, 956-57 (7th Cir. 1966); Atwood Hatcheries v. Heisdorf & Nelson Farms, 357 F.2d 847, 852-54 (5th

opinion in *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*,[480] recently adopted by implication the *Arrowsmith* result[481] while Justice Powell, in his concurring opinion, expressly adopted that position.[482] Federal courts sitting in diversity, therefore, will apply state amenability standards, at least to corporate defendants, unless or until Congress enacts a statute or rule creating a federal amenability standard.

Unfortunately, for almost twenty years after *Arrowsmith*, the Supreme Court refused to address the issue of amenability standards in diversity cases and now the Court seems to adopt the result without analysis.[483] Many issues raised in *Jaftex* and *Arrowsmith* could stand closer examination. For example, as one commentator argues, why did Judge Friendly base his argument on the lack of a federal standard rather than focusing on whether such a standard is required?[484] If a federal standard would be required, such a standard could always be devised. Since Judge Friendly admitted the possibility of federal case law that would supervene state amenability standards, then why did he concentrate so stolidly on the absence of affirmative Congressional authority? Moreover, although he based his decision on *Erie*, Judge Friendly cited *Pulson* with approval, a case that was not

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Cir. 1966); Aftansa v. Economy Boiler Co., 343 F.2d 187, 189 (8th Cir. 1965); Mechanical Contractors Ass'n of America, Inc. v. Mechanical Contractors Ass'n of N. Cal., Inc., 342 F.2d 393, 398 (9th Cir. 1965); Gelfand v. Tanner Motor Tours, Ltd., 339 F.2d 317, 319, (2d Cir. 1964); Velandra v. Regie Nationale des Usines Renault, 336 F.2d 292, 294 (6th Cir. 1964); Simpkins v. Council Mfg. Corp., 332 F.2d 733, 736 (8th Cir. 1964); Cook v. Bostitch, 328 F.2d 1, 2-3 (2d Cir. 1964); Japan Air Lines Co., Ltd. v. Tarnowski, No. 82 Civ. 1815 (S.D.N.Y. Apr. 23, 1983); Maiocca v. Walt Disney World Co., Slip Op. Civ. Act. No. 80-958-S (D. Mass. Apr. 22, 1983); V.I.P. Personal Systems Int'l v. Luce & Co., No. 82 Civ. 7550 (S.D.N.Y. Apr. 21, 1983); Robb Container Corp. v. Sho-Me Co., No. 82 Civ. 6313 (N.D. Ill. 1983); Kass, Goodkind, Wechsler & Labaton v. Finkel & Martwick, P.C., No. 83 Civ. 1226 (S.D.N.Y. 1983); Bromfield Systems Corp. v. Schuler & Assoc., Inc., No. 82 Civ. 1174-75 (D. Mass. 1983); Pederson Fisheries, Inc. v. Patti Indus., Inc., 563 F. Supp 72 (W.D. Wash. 1983); Empire Kosher Poultry, Inc. v. Hebrew Nat'l Kosher Foods, Inc., 555 F. Supp. 917, 919 (E.D. Pa. 1983); Trafalgar Capital Corp. v. Oil Producers Equip. Corp., 555 F. Supp. 305, 308 (S.D.N.Y. 1983); Rockwell Int'l Corp. v. Costruzioni Aeronautiche Giovanni Agusta, 553 F. Supp. 328, 331 (E.D. Pa. 1982); Gianna Enterprises v. Miss World (Jersey) Ltd., 551 F. Supp. 1348, 1356 (S.D.N.Y. 1982); Lacovara v. Merrill Lynch, Pierce, Fenner and Smith, Inc., 551 F. Supp. 601, 603-04 (E.D. Pa. 1982); Western Union Tel. Co. v. T.S.I., Ltd., 545 F. Supp. 329, 332-36 (D.N.J. 1982); Carter Oil Co., Inc. v. Apex Towing Co., 532 F. Supp. 364, 367-68 (E.D. Ark. 1981); In re Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig., 526 F. Supp. 887, 903-05 (N.D. Cal. 1981). *Cf.* Cowan v. Ford Motor Co., 694 F.2d 104, 105-06 (5th Cir. 1982) (court states that "[i]n a diversity action, the reach of federal jurisdiction over persons is measured by the law of the forum state subject, however, to Federal Due Process claims" and applies, to the Due Process issue, only cases involving state court exercise of its personal jurisdiction).

480. 456 U.S. 694 (1982). *See supra* notes 156-85 and accompanying text.
481. *Insurance Corp. of Ireland*, 456 U.S. at 702-03.
482. *Id.* at 711-12.
483. *See supra* note 481 and accompanying text.
484. Note, *supra* note 388, at 322.

necessarily based on *Erie* at all.[485] Further Judge Friendly admitted that *Erie*, under the *Byrd* refinements, would permit federal law of some form to control. Factors that preclude application of a uniform federal standard, like service pursuant to a federal rule that incorporates state amenability standards, might lead to such a result. In *Arrowsmith*, where process was served by a wholly federal method, Judge Friendly could not have relied on any incorporation theory but had to rely on *Erie* for his analysis.

One must also ask to what extent the result in *Arrowsmith* and subsequent cases can be explained by the absence of a genuine federal amenability standard.[486] Judge Friendly found no federal standard, thus preordaining his resulting application of state law if only from lack of choice. Moreover, Judge Clark, for all his enthusiastic assertions, seemed ill put to describe a standard.[487]

In sum, despite *Arrowsmith* and *Insurance Corp. of Ireland,* little reason exists to apply state amenability standards in diversity cases, particularly where process is served by a wholly federal method. The absence of an articulable federal standard is hardly a compelling ground for adoption of a policy which leads to nonuniformnity among the federal courts. Several commentators have suggested that a uniform federal standard be developed and that is applicability be determined by the *Byrd* balancing technique.[488] When the state has substantial policy reasons for limiting personal jurisdiction, such as some policy on corporate activity,[489] then federal courts might be required to respect that policy. When, however, state limitations seem designed only to reduce court congestion[490] or to preclude suits in which the doctrine of *forum non conveniens* might be raised,[491] federal courts should be free to implement important federal concerns, such as federal court uniformity and protection of out-of-staters, by employing its own amenability standard. In *Byrd*, the Supreme Court rejected the view that a federal court sitting in diversity is just another state court.[492] Moreover, federal courts sitting in diversity can employ special federal amenability standards in specific situations in which implementation of strong federal policy so requires. No compelling reason, therefore,

485. *See supra* notes 420-24 and accompanying text.
486. *See supra* notes 476-77 and accompanying text.
487. *See id.*
488. *See, e.g.,* Foster, *supra* note 191, at 96-97 n.76; Comment, *supra* note 214, at 702-09; Note, *supra* note 188, at 1147-48; Note, *supra* note 385, at 562-63; 25 OHIO ST. L.J. 119, 121-22 (1964).
489. *See* Comment, *supra* note 214, at 704.
490. *Id.*
491. *Id.* at 704-05.
492. *Byrd*, 356 U.S. 525. *See* Comment, *supra* note 214, at 703.

precludes development of a general federal standard when appropriate under a *Byrd* analysis.

### *ii. Federal Question Cases*

The applicable amenability standard in cases in which federal subject matter jurisdiction is not based entirely on diversity of citizenship—for purposes of this article, federal question cases[493]—should not be determined according to the *Arrowsmith* doctrine. That standard necessarily followed from the interpretation of the Second Circuit of the requirements of *Erie R.R. v. Tompkins*;[494] the decision in *Erie* applies only to diversity cases.[495] Even Judge Friendly admitted in *Arrowsmith* that "the considerations favoring the overriding of state policy would be far more persuasive [in a federal question case] than in an ordinary diversity suit."[496] Innumerable courts[497] and

493. *See supra* notes 19 and 195.

494. 304 U.S. 64 (1938). *See supra* notes 415-77 and accompanying text.

495. *See, e.g.,* Holt v. Klosters Rederi A/S, 355 F. Supp. 354, 356 (W.D. Mich. 1973); Japan Gas Lighter Ass'n v. Ronson Corp., 257 F. Supp. 219, 232, 236 n.34 (D.N.J. 1966). *See also* Foster, *supra* note 191, at 96-97 n.76. *Cf.* 4 C. WRIGHT & A. MILLER, *supra* note 4, §1075, at 302-06 (personal jurisdiction question no problem in federal question cases; *Erie* creates problems in diversity cases).

496. *Arrowsmith*, 320 F.2d at 228 n.9.

497. The majority of courts making an unconditional statement to this effect have been deciding nondiversity cases in which process was served pursuant to a federal statute authorizing nationwide or worldwide service of process under the circumstances of the case. *See, e.g.,* Stafford v. Briggs, 444 U.S. 527, 554 (1980) (service pursuant to the Mandamus and Venue Act of 1962, 28 U.S.C. §1391(e), *see supra* note 248) (application of "Due Process Clause of the Fifth Amendment [to] limit the exercise of congressional power to provide for nationwide *in personam* jurisdiction") (Stewart, J., dissenting); Federal Trade Comm'n v. Jim Walter Corp., 651 F.2d 251, 255-56 (5th Cir. 1981) (service pursuant to Section 9 of the Federal Trade Commission Act, 215 U.S.C. §49) (court recognizes fifth amendment standard to determine amenability); Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 313-14 n.36 (2d Cir. 1981) (service pursuant to §1608 of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §1608, *see supra* note 250) (court implies that the due process standard to be satisfied is that of the fifth amendment); Driver v. Helms, 577 F.2d 147, 157 (1st Cir. 1978) (service pursuant to the Mandamus and Venue Act of 1962, 28 U.S.C. §1391(e), *see supra* note 248) ("Congress is, of course, limited in the actions it can take by the Due Process Clause of the Fifth Amendment . . ."); Mariash v. Morrill, 496 F.2d 1138, 1143 (2d Cir. 1974) (service pursuant to Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. §78aa, *see supra* note 249) ("Congress in providing for nationwide service of process, remains subject to the constraints of the Due Process clause of the Fifth Amendment"); Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1340 (2d Cir. 1972) (service pursuant to both Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. §78aa, *see supra* note 249, and the New York State long-arm statute, N.Y. CIV. PRAC. LAW §§301 and 302(a)(1), (2) and (3)) ("it is reasonable to infer that Congress meant to assert personal jurisdiction over foreigners not present in the United States to but, of course, not beyond the bounds permitted by the due process clause of the Fifth Amendment"); Driver v. Helms, 74 F.R.D. 382, 391 (D.R.I. 1977), *aff'd in part and rev'd in part on other grounds*, 577 F.2d 147 (1st Cir. 1978) (service pursuant to the Mandamus and Venue Act of 1962, 28 U.S.C. §1391(e), *see supra* note 248) ("the due process limitation on national service of process is found by . . . an inquiry mandated by the Fifth Amendment Due Process Clause"); Oxford First Corp. v. PNC Liquidating Corp., 372 F. Supp. 191, 198-205 (E.D. Pa. 1974) (service pursuant to Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. §78aa, *see supra* note 249) (after reviewing various authorities,

commentators[498] have expressed the position that "whatever the view

court concluded that fifth amendment due process clause limits congressional grant of nationwide service of process and that those limitations are not necessarily coextensive with the *International Shoe* test); Alco Standard Corp. v. Benalal, 345 F. Supp. 14, 24-25 (E.D. Pa. 1972) (service pursuant to Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. §78aa, *see supra* note 249) ("Citizens of foreign countries are entitled to . . . protection under the Fifth Amendment"); Securities and Exch. Comm. v. Myers, 285 F. Supp. 743, 748 (D. Md. 1968) (service pursuant to Section 214 of the Investment Advisers Act of 1940, 15 U.S.C. §806-14) ("the assertion of jurisdiction over nonresidents by the district courts considering federal questions is limited by the due-process clause of the Fifth Amendment"). *See also* Engineering Equip. Co. v. S.S. Selene, 446 F. Supp. 706, 709 & n.12 (S.D.N.Y. 1978) (service of complaint pursuant to Rule B(1) of the SUPPLEMENTAL RULES FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS to obtain quasi-in-rem jurisdiction by attachment) ("Rule B(1) grants us power to render a judgment binding on the parties to the extent of [the] value of the attached property [and t]he constitutionality of the Act of Congress must be tested under the due process clause of the Fifth Amendment"). Even where service of process was not made pursuant to a federal statute authorizing nationwide or worldwide service of process, some federal courts have asserted that the Fifth Amendment should govern amenability in their particular federal question cases. *See, e.g.,* Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distributors Pty. Ltd., 647 F.2d 200, 203 n.4 (D.C. Cir. 1981) (trademark infringement action; service, under Rule 4(e), pursuant to District of Columbia long-arm statute) ("the outer boundaries of a court's authority to proceed against a particular person or entity is set for federal tribunals by the due process clause of the Fifth Amendment"); Honeywell, Inc. v. Metz Apparatewerke, 509 F.2d 1137, 1143 (7th Cir. 1975) (patent infringement action; service, under Rule 4(e), pursuant to Illinois long-arm statute) ("[i]n this litigation . . . a federally created right is at issue, and due process is properly a matter for examination in light of the fifth amendment"); Vest v. Waring, 1983-1 Trade Cas. (CCH) ¶ 65,419 (N.D. Ga. 1983) (antitrust action; service, under former Rule 4(d)(7) and Rule 4(e), pursuant to Georgia long-arm statute) ("[w]hen this court's subject matter jurisdiction is predicated . . . upon the presence of a federal question . . . , a nonresident defendant's amenability to personal jurisdiction is a matter of federal law . . .[;] 'the appropriate inquiry lies with the due process clause of the Fifth Amendment,'" *quoting* Laplyrouse v. Texaco, Inc. 693 F.2d 581, 585 (5th Cir. 1982)); Graham Eng'g Corp. v. Kemp Prods. Ltd., 418 F. Supp. 915, 920 n.6 (N.D. Oh 1976) (patent infringement action; service, under Rule 4(e), pursuant to Ohio long-arm statute) ("[s]ince this case presents a federal question in a federal court, technically it is the Due Process Clause of the Fifth . . . Amendment that requires construction"); Holt v. Klosters Rederi A/S, 355 F. Supp. 354, 356-57 (W.D. Mich. 1973) (admiralty action; service, under Rule 4(e), pursuant to Michigan long-arm statute) ("the court must examine the facts in light of the constitutional proscriptions of the due process clause of the Fifth rather than the Fourteenth Amendment"). *See also* Japan Gas Lighter Ass'n v. Ronson Corp., 257 F. Supp. 219, 232 (D.N.J. 1966) (declaratory judgment action for patent invalidity and nonenfringement; service, under Rule 4(e), pursuant to New Jersey Rule 4:4-4(d)) ("[i]nsofar as due process is concerned, this Court's power to assert jurisdiction in a Federal question matter is tested, technically speaking, under the Fifth rather than the Fourteenth Amendment").

In cases in which federal process was served, under Rule 4(e), pursuant to the long-arm statute of the state in which the court was sitting, some federal courts have taken the position that, while a federal standard should, as a general matter, govern federal court personal jurisdiction in federal question cases, use of state long-arm statutes requires a fourteenth amendment rather than a fifth amendment analysis. *See, e.g.,* DeJames v. Magnificence Carriers, Inc., 654 F.2d 280, 282, 284 (3d Cir. 1981) (admiralty action; service, under Rule 4(e), pursuant to New Jersey long-arm statute) ("In any event, even in nondiversity cases, if service of process must be made pursuant to a state long-arm statute . . . , the defendant's amenability to suit in federal district court is limited by that statute . . . [since in] enacting its long-arm rule, . . . New Jersey is limited by the due process constraints of the fourteenth amendment. Therefore, we believe that [the defendant's] amenability to suit in the District of New Jersey must be judged by fourteenth amendment standards.") *See also* Hartley v. Sioux City & New Orleans Barge Lines, Inc., 379 F.2d 354, 356 (3d Cir. 1967) (admiralty action; service, under Rule 4(d)(7), pursuant to Pennsylvania long-arm statute) (fifth amendment analysis only appropriate for federal means of service of process).

498. *See, e.g., supra* note 329 and accompanying text.

one takes toward diversity, . . . Fifth Amendment considerations would appear to be the appropriate ones for testing amenability where subject matter jurisdiction rests on a federal question or other head of federal jurisdiction."[499] While this position seems uniform, various judicial and scholarly responses or attempts to "practice what they preach" have been disconcertingly nonuniform in practice and in rationale.[500] One stumbling block has been, of course, the absence of an articulable fifth amendment standard that has been accepted generally.[501] Partially or wholly inseparable from this problem—perhaps, one might say, "inextricably intertwined" with this problem of definition—are the difficulties entailed by the various ways in which a federal court is authorized to serve process on individual and/or corporate defendants.[502] The result has been nonuniform treatment of cases, both intercategory and intracategory.[503]

Before embarking on a detailed consideration of lower federal court and scholarly treatment of the issue of federal court personal jurisdiction in federal question cases, this would be an appropriate point at which to consider Supreme Court treatment of this question. That any federal amenability standard or limitation in federal question cases springs from the fifth amendment due process clause generally is accepted.[504] The Court, moreover, consistently has acknowledged in dictum the authority of Congress to authorize nationwide service of process for all federal courts in all matters over which those courts would have subject matter jurisdiction.[505] No court or commentator has taken serious issue with the proposition that the Constitution would not preclude Congress from so extending the process of federal courts. Some courts and commentators have gone further, accepting this dictum as established law,[506] and others even have given this dictum such expansive reading as to establish the capacity of Congress not only to authorize "extraterritorial" reach for federal process, but also to render defendants served, pursuant to such statutes, amenable to the personal jurisdiction of the federal court serving process.[507] These

499. Foster, *supra* note 191, at 96-97 n.75.
500. *See infra* notes 573-1355 and accompanying text.
501. *See supra* notes 476-77 and accompanying text.
502. *See supra* notes 273-94 and accompanying text and *infra* notes 561-72 and accompanying text.
503. *See infra* notes 573-1355 and accompanying text.
504. *See supra* notes 329 and 497 and accompanying text.
505. *See supra* note 217 and accompanying text.
506. *See, e.g.,* Berger, *supra* note 191, at 320-21.
507. *See, e.g.,* Hilgeman v. National Ins. Co. of N. Am., 547 F.2d 298 (5th Cir. 1977) (*infra* notes 602-08 and accompanying text); Sohns v. Dahl, 392 F. Supp. 1208 (W.D. Va. 1975) (*infra* notes 592-601 and accompanying text); Arpet, Ltd. v. Homans, 390 F. Supp. 908 (W.D. Pa. 1975) (*infra* notes 587-91 and accompanying text).

authorities go too far. The Supreme Court has never equated authority to serve process with amenability to suit. In fact, in his concurring opinion in *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee,*[508] Justice Powell painstakingly distinguished between authority to serve process and authority to assert jurisdiction over the defendant so served.[509] While both are limited by either a fifth or fourteenth amendment due process clause, service of process is a technical procedure necessary to apprise the defendant of the pendency of litigation against him[510] and due process requires that process be served in the manner calculated to maximize the possibility that the defendant will have *actual notice* of the suit.[511] Proper service of process is thus necessary to "trigger" the personal jurisdiction of a court over a defendant if the court properly may assert jurisdiction over such defendant. Proper service of process, however, does not render the defendant amenable to suit; a separate amenability basis, such as presence, must exist. Justice Powell observed that because personal jurisdiction cannot be asserted without proper service of process, commentators and judges often incorporate amenability into service.[512] Amenability, however, is a separate requirement. Therefore, even if the prior Supreme Court cases definitely established the constitutional power of Congress to authorize federal district court process to run nationwide, or even worldwide, some additional inquiry as to whether due process standards were satisfied would be required.

In some federal cases the question of whether a corporation will be amenable to the personal jurisdiction of a federal court sitting in a particular state depends on whether the defendant corporation is

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508. 456 U.S. 694 (1982).

509. Justice Powell stated:

> Jurisdiction over the person generally is dealt with by Rule 4, governing the methods of service through which personal jurisdiction may be obtained. Although Rule 4 deals expressly only with service of process, not with the underlying jurisdictional prerequisites, jurisdiction may not be obtained unless process is served in compliance with applicable law. . . . For this reason Rule 4 frequently has been characterized as a jurisdictional provision. . . .

*Id.* at 715 n.6 (citation omitted).

510. As one court stated:

> Personal jurisdiction refers to the Court's ability to assert judicial power over the parties and bind them by its adjudication. Service of process is the corollary requirement which sets the Court's personal jurisdiction in gear. That is, someone amenable to the assertion of jurisdiction cannot be subject to its exercise until he has been properly served. Both that assertion of power and the subsequent service must be statutorily and constitutionally permissible.

Japan Gas Lighter Ass'n v. Ronson Corp., 257 F. Supp. 219, 224 (D.N.J. 1966).

511. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

512. *See supra* note 509.

"doing business" in the state.[513] *Arrowsmith* and its progeny established that in diversity cases the question of whether a corporation *is* doing business for purposes of personal jurisdiction is to be determined by the law of the state in which the federal court sits.[514] The Supreme Court, however, has not addressed any question of a federal standard to be pursued in federal question cases.

In *United States v. Scophony Corporation of America*,[515] a suit in which process had been served pursuant to Section 12 of the Clayton Act,[516] the Court determined that the defendant corporation had "transact[ed] business" within the Southern District of New York as required by the venue provision of Section 12 and had been "found" within that district as required by the service of process provision of Section 12.[517] The Court, however, declined to rule as to the circumstances under which a defendant corporation that had been properly served pursuant to Section 12 would be amendable to suit. The Court stated:

> We deal here with a problem of statutory construction, not one of constitutional import. Nor do we have any question of the exercise of Congress' power to its farthest limit. The issue is simply how far Congress meant to go, and specifically whether it intended to create venue and liability to service of process through occurrence within a district of the kinds of acts done here on Scophony's behalf.[518]

In a footnote, the Court refused to apply *International Shoe* to the case, not because it found the standard inappropriate, but because "[T]here [was] no necessity for doing so."[519] When provided with the opportunity to establish a federal amenability standard, the Supreme Court declined to do so.

A very recent Supreme Court case, *Verlinden v. Central Bank of*

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513. *See, e.g.*, United States v. Scophony Corp. of Am., 333 U.S. 795 (1948); *Arrowsmith*, 320 F.2d 219; *Jaftex*, 282 F.2d 508.

514. *See supra* notes 434-87 and accompanying text.

515. 333 U.S. 795 (1948).

516. *Id.* at 796. For the text of Section 12 of the Clayton Act, *see supra* note 248.

517. *Scophony*, 333 U.S. at 818.

518. *Id.* at 804.

519. *Id.* at 804 n.13. The court stated:

> Appellee makes no suggestion of a constitutional issue. The Government, however, suggests that, in view of our recent decision in International Shoe Co. v. Washington, 326 U.S. 310, which was concerned with the jurisdiction of a state over a foreign corporation for purposes of suit and service of process, and in view of aspects of similarity between that problem and the one now presented, we extend to this case and to § 12 the criteria there formulated and applied. There is no necessity for doing so. The facts of the two cases are considerably different and, as we have said, we are not concerned here with finding the utmost reach of Congress' power.

*Id.*

*Nigeria*,[520] provided a limited context in which to address this issue. The decision, however, has contributed little to the question, at least little that is not susceptible of differing interpretations. Verlinden, a Dutch Corporation, instituted suit in the United States District Court for the Southern District of New York against the Central Bank of Nigeria, "an instrumentality of Nigeria," for anticipatory breach of a letter of credit.[521] The only connection between the parties, the matter in litigation, and the Southern District of New York was that in connection with a contract with Verlinden to deliver cement to Nigeria, the Central Bank of Nigeria "improperly established an unconfirmed letter of credit payable through Morgan Guaranty Trust Company in New York."[522] Both subject matter and personal jurisdiction were asserted under §2 of the Foreign Sovereign Immunities Act of 1976 (FSIA).[523] This section provides that district courts shall have subject matter jurisdiction over any nonjury civil suit against a foreign state that is not entitled to immunity under certain sections of the FSIA or "under any applicable international agreement" and shall have personal jurisdiction over the foreign state so sued so long as the court has subject matter jurisdiction under the FSIA and "service has been made under section 1608 of this title."[524] Section 1608 of Title 28 of the United States Code prescribes methods of serving process "upon a foreign state or political subdivision of a foreign state" or "upon an agency or instrumentality of a foreign state."[525] If properly served pursuant to section 1608, therefore, "a foreign state is subject to district court in personam jurisdiction only in those instances where it is not entitled to sovereign immunity as specified in sections 1605-1607 of the Act."[526] Central Bank moved to dismiss the action, *inter alia*, "for (1) lack of subject matter jurisdiction; [and] (2) lack of personal jurisdiction over Central Bank based upon sovereign immunity and the act of state doctrine."[527] According to the district

520. 103 S. Ct. 1962 (1983).
521. *Id.* at 1965-66 (1983). The district court opinion appears at 488 F. Supp. 1284 (S.D.N.Y. 1980).
522. 103 S. Ct. at 1966.
523. Pub. L. No. 94-583, 90 Stat. 2891 (codified at 28 U.S.C. §§ 1330; 1332(a)(2)-(a)(4); 1391(f); 1441(d); and 1602-1611 (1976)). For further discussion of the history and provisions of the Foreign Sovereign Immunities Act of 1976 (FSIA), *see generally* Kane, *Suing Foreign Sovereigns: A Procedural Compass*, 34 STAN. L. REV. 385 (1982); Note, *Minimum Contacts Jurisdiction Under the Foreign Sovereign Immunities Act*, 12 GA. J. INT'L & COMP. L. 211 (1982). *See also* Alberti v. Empresa Nicaraguense De La Carne, 705 F.2d 250, 252-53 (7th Cir. 1983) (brief discussion of development of FSIA).
524. 28 U.S.C. §1330 (1976). For the text of this statutory provision, *see supra* note 250.
525. 28 U.S.C. §§1608(a), (b), and (c) (Supp. 1983).
526. *Verlinden*, 488 F. Supp. at 1293.
527. *Id.* at 1288.

court, Central Bank did not challenge personal jurisdiction because of any constitutional defect but merely because Central Bank did not come within the statutory grounds for assertion of personal jurisdiction under the FSIA. The court of appeals characterized this as a motion to dismiss "for lack of jurisdiction under FSIA."[528] This makes analysis of the opinions difficult because the court makes no distinction between lack of subject matter jurisdiction, a nonwaivable defect in the power of the court over the particular matter before it,[529] and lack of personal jurisdiction, a waivable defect in the authority of the court to render a decision binding on the defendant.[530] While the FSIA ties together subject matter jurisdiction and personal jurisdiction in an unprecedented manner, the structure of section 2 of the FSIA should require that the initial procedural inquiry be into subject matter jurisdiction. If subject matter jurisdiction exists, then, according to the FSIA, personal jurisdiction also will exist so long as process is served in the appropriate manner.

Central Bank first argued that a district court could not assert authority, under the FSIA, over a "dispute between foreign entities" involving a nonfederal question, an objection to the subject matter jurisdiction of the court.[531] The district court, the court of appeals, and the Supreme Court each ruled that the FSIA by its language was not limited to suits initiated by U.S. citizens or corporations.[532] The Supreme Court rejected the argument that such an interpretation would turn federal district courts into "small international courts of claims," noting that sovereign immunity from suits on commercial matters would be granted to the defendant foreign state by the FSIA unless the defendant had "some form of substantial contact with the United States."[533]

The district court determined that article III of the Constitution

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528. *Verlinden*, 647 F.2d 320, 323 (2d Cir. 1981).

529. *See supra* notes 3, 18 and 19.

530. *See supra* note 3.

531. *Verlinden*, 488 F. Supp. at 1288. The court of appeals framed the issue in the following way:

> This case, one of seven decided today involving the FSIA, presents a sharp issue under the Act: may a foreign plaintiff sue a foreign state in a federal court for breach of an agreement not governed by federal law?

647 F.2d at 322 (footnotes omitted).

532. 488 F. Supp. at 1292; 647 F.2d at 324; 103 S. Ct. at 1969-70. The district court had noted that such broad reading of the language of the FSIA was necessary to effectuate "the Congressional purpose of concentrating litigation against sovereign states in the federal courts in order to aid the development of a uniform body of federal law governing assertions of sovereign immunity." 488 F. Supp. at 1292.

533. 103 S. Ct. at 1969-70.

would authorize subject matter jurisdiction over a suit by a foreign or alien corporation against a foreign state,[534] but, relying on its interpretation of the FSIA, found that the matter before it did not come within one of the exceptions to sovereign immunity provided by the statute; the Court, therefore, dismissed the complaint "for lack of personal jurisdiction."[535] The Supreme Court noted, in a footnote, that conclusion by the district court also included a finding that the court lacked subject matter jurisdiction:

> Under the Act . . . both statutory subject matter jurisdiction (otherwise known as "competence") and personal jurisdiction turn on application of the substantive provisions of the Act. . . . [I]f none of the exceptions to sovereign immunity set forth in the Act applies, the District Court lacks both statutory subject matter jurisdiction and personal jurisdiction. The District Court's conclusion that none of the exceptions to the Act applied therefore signified an absence of both competence and personal jurisdiction.[536]

The court of appeals did not reach the issue of whether the defendant came within one of the stated exceptions of the FSIA to sovereign immunity. Instead, after "concluding that both plaintiff and defendant are within the class of parties contemplated by" the FSIA,[537] the court of appeals addressed the question of whether the subject matter jurisdiction granted district courts by the language of the FSIA over suits by foreign (alien) plaintiffs against foreign states came within the authority granted to lower federal courts by Article III of the Constitution.[538] The court of appeals considered and quickly dismissed the possibility of constitutional authority under the diversity grant of article III: "The phrase nowhere mentions a case between two aliens."[539] After a more detailed analysis, the court of appeals concluded that such authority also was not available under 28 U.S.C. §1331[540] or the more broad "arising under" language of article III.[541] Therefore, "find[ing] federal courts to be without power to hear suits such as the one before us," the court of appeals affirmed the dismissal of Verlinden's complaint, but on a different ground—"that the court lacks subject matter jurisdiction over the controversy."[542]

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534. 488 F. Supp. at 1292.
535. *Id.* at 1302.
536. 103 S. Ct. at 1967 n.5.
537. 647 F.2d at 324.
538. *Id.* at 324-30.
539. *Id.* at 325.
540. *Id.* at 327.
541. *Id.* at 329.
542. *Id.* at 330.

The Supreme Court reversed, concluding that "the grant of jurisdiction in the Foreign Sovereign Immunities Act is consistent with the Constitution,"[543] and remanded to the court of appeals for its determination of whether the action fell within any of the exceptions to sovereign immunity spelled out in the FSIA.[544] If the court of appeals would agree with the district court that no exception applied, the case would not come within the congressional grant of the subject matter jurisdiction in Section 2 of the FSIA and would be dismissed.[545] The Supreme Court concluded: "If, on the other hand, the Court of Appeals concludes that jurisdiction does not exist under the statute, the action may then be remanded to the District Court for further proceedings."[546]

The treatment by the Supreme Court of this case leaves in doubt its position on the question of amenability standards in federal question cases in general, of amenability standards in cases in which a federal statute authorizes nationwide or worldwide service of process, or even the amenability standards in cases arising under the FSIA,[547] an unusual federal statute purporting to prescribe circumstances in which a federal court will have personal jurisdiction—satisfaction of the requirements for subject matter jurisdiction plus proper service of process pursuant to a particular federal statute.[548] Lower federal courts have required that if the FSIA criteria for personal jurisdiction are satisfied, a separate due process analysis must be conducted to determine the defendant's amenability to suit, therefore regarding the FSIA criteria much as courts have regarded state long arm statutes.[549] This additional analysis, as stated in one oft-cited Second

543. 103 S. Ct. at 1973.

544. *Id.*

545. *Id.* at 1974.

546. *Id.*

547. As one commentator noted in 1982: "The Court has not had the opportunity to address the role of minimum contacts in international disputes under the FSIA. That task has been left to the lower federal courts." Note, *supra* note 523, at 224. *Verlinden* provided the Court with the opportunity, but the Court chose not to employ it.

548. See *supra* notes 524-26 and accompanying text.

549. *See, e.g.,* Maritime Int'l Nominees Establishment v. Republic of Guinea, 693 F.2d 1094, 1105 n.18 (D.C. Cir. 1982) ("a finding of FSIA personal jurisdiction, which would rest in part on a finding of non-immunity, must comport with the demands of due process"); Harris Corp. v. National Iranian Radio & Television, 691 F.2d 1344, 1352 (11th Cir. 1982) (in determining personal jurisdiction under the FSIA, "we must assess the exercise of authority against the standards of due process"); Texas Trading & Milling Corp. v. Federal Republic of Nig., 647 F.2d 300, 308 (2d Cir. 1981) ("the [FSIA] cannot create personal jurisdiction where the constitution forbids it"); Gibbons v. Udaras ne Gaeltachta, 549 F. Supp. 1094, 1116-17 (S.D.N.Y. 1982) ("statutory aspects of the Court's analysis of defendants' personal jurisdiction argument are controlled by the FSIA. . . .[;] the Court must still determine whether an exercise of the personal jurisdiction conferred by the FSIA is permissible under the due process clause of the Fifth Amendment"). *See also* Chicago Bridge & Iron Co. v. Islamic Republic of Iran,

Circuit opinion, is based on the premise that "the Act cannot create

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506 F. Supp. 981 (N.D. Ill. 1980) (court examined contacts of the defendant with the forum, concluding such contacts were insufficient to support personal jurisdiction under the FSIA). Evidence also exists in the House Reports that accompanied the FSIA that Congress intended judicial reliance on some sort of contacts analysis in determining personal jurisdiction questions under the FSIA:

> For personal jurisdiction to exist under section 1330(b), the claim must first of all be one over which the district courts have original jurisdiction under section 1330(a), meaning a claim for which the foreign state is not entitled to immunity. . . . These immunity provisions, therefore, prescribe the necessary contacts which must exist before our courts can exercise personal jurisdiction.

H.R. Rep. No. 1487, 94th Cong., 2d Sess. 55, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 6604, 6612. The immunity provisions referred to in the Congressional Report include sections 1605(a)(2) and (3) of the FSIA, which provide, in pertinent part:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case —
>
> . . . .
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;
> (3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States. . . .

28 U.S.C. §§1605(a)(2), (3) (1976).

At least one court has taken the position that the above-quoted Congressional statement did not "mean that the statutory standard for determining non-immunity is coextensive with the due process standard governing personal jurisdiction, *see World-Wide Volkswagen Corp. v. Woodson* . . . ; *International Shoe v. Washington*. . . ." Maritime Int'l Nominees Establishment v. Republic of Guinea, 693 F.2d 1094, 1105 (D.C. Cir. 1982) (citations omitted). The court continued, in a footnote:

> Of course, a finding of FSIA personal jurisdiction, which would rest in part on a finding of non-immunity, must comport with the demands of due process, and Congress intended that the Act satisfy those demands. . . . But the immunity determination involves considerations distinct from the issue of personal jurisdiction, and the FSIA's interlocking provisions are most profitably analyzed when these distinctions are kept in mind.

*Id.* at 1105 n.18 (citations omitted). On the other hand, the district court in *Verlinden* found that the "substantive criteria [of the immunities provisions] were intended to embody the constitutional requirements of due process, which may only be satisfied if there are sufficient contacts between the litigant and the forum state." 488 F. Supp. 1284, 1293 (S.D.N.Y. 1980). Neither the court of appeals nor the Supreme Court made any reference to this aspect of the district court opinion.

The legislative history is subject to at least two other interpretations. One might argue that the FSIA includes not only statutory authority for service of process but also an amenability standard built into the immunity provisions, sufficient contacts with the *United States*. Or, on the other hand, the immunity provisions might be read as, in effect, a special long-arm statute that prescribes those circumstances in which the government has authorized extraterritorial service of process, and the validity of application of that statute to any particular defendant still would be analyzed in terms of its constitutional validity under the fifth amendment due process clause. If the last interpretation were accepted, one might argue that the immunity provisions indicate the entity with regard to which any due process minimum contacts type analysis would be conducted—the United States as a whole rather than any particular federal district or the particular state in which the federal court is sitting.

personal jurisdiction where the Constitution forbids it."[550] In determining whether such due process requirements are satisfied, some courts have examined the defendant's contact with the United States[551] while others have required sufficient contacts with the state in which the federal court is sitting[552] or even actual "presence" of the defendant in the United States.[553] One court of appeals established a four step approach to determine amenability: first, to what extent did the defendant avail itself of the benefits and privileges of American laws; second, to what extent could the defendant have foreseen the instigation of litigation in the United States; third, how inconvenient would it be for the defendant to litigate in the United States; and fourth, what interests would the United States have in hearing the case.[554]

The Supreme Court opinion in *Verlinden*, as well as the opinions of the district court and the court of appeals, were silent on the question of whether a separate due process analysis would be required if, on remand, the court of appeals found that the defendant was

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550. Texas Trading & Milling Corp. v. Federal Republic of Nig., 647 F.2d 300, 308 (2d Cir. 1981). In its analysis of the FSIA, the court of appeals noted:

> In structure, the F.S.I.A. is a marvel of compression. . . . [I]t purports to provide answers to three crucial questions in a suit against a foreign state: the availability of sovereign immunity as a defense, the presence of subject matter jurisdiction over the claim, and the propriety of personal jurisdiction over the defendant. . . . This economy of decision has come, however, at the price of considerable confusion in the district courts.

*Id.* at 306. *See also supra* note 549.

551. *See, e.g.,* Harris Corp. v. National Iranian Radio & Television, 691 F.2d 1344, 1352-53 (11th Cir. 1982) (court applied *International Shoe—World-Wide Volkswagen* minimum contacts analysis, but evaluated the defendant's contacts with the United States); *Texas Trading*, 647 F.2d at 314 (established four-step test for amenability, which test focused on the relationship of the defendant to the United States, *see infra* note 554 and accompanying text); Gibbons v. Udaras na Gaeltachta, 549 F. Supp. 1094, 1117 (S.D.N.Y. 1982) (court announced that fifth amendment applied, cited *International Shoe* for "minimum contacts" test, used the *Texas Trading* four-step inquiry as a "guide [to] the Court's application of *International Shoe*'s minimum contacts test", and evaluated the defendant's contacts with the United States). *See also* Maritime Int'l Nominees Establishment v. Republic of Guinea, 693 F.2d 1094, 1105-06 (D.C. Cir. 1982) (court implied, in dictum, that in a due process analysis it would consider the defendants' contacts with the United States).

552. *See, e.g.,* Thomas P. Gozales Corp. v. Consejo Nacional de Production de Costa Rica, 614 F.2d 1247, 1254 (9th Cir. 1980) (using California long-arm statute, court found defendants' contacts with California insufficient to "qualify as purposeful activity invoking the benefits and protections of the state"); Waukesha Engine Div., Dresser Americas, Inc. v. Banco Nacional de Fomento Cooperatino, 485 F. Supp. 490 (E.D. Wis. 1980) (using Wisconsin long-arm statute to support its holding, court denied jurisdiction where the defendant's direct contact with the forum state amounted to a single inspection visit by bank officers).

553. *See, e.g.,* East Europe Domestic Int'l Sales Corp. v. Terra, 467 F. Supp. 383, 387-88 (S.D.N.Y. 1979) (no personal jurisdiction because no continuous and systematic relationship with the forum and no physical presence within the forum); Carey v. National Oil Corp., 453 F. Supp. 1097, 1101 (S.D.N.Y. 1978) (only contact with forum was oil shipments to the United States and court ruled that embargo of shipments was not a sufficient contact).

554. *Texas Trading*, 647 F.2d at 314.

not entitled to sovereign immunity and that, therefore, federal subject matter jurisdiction existed under the FSIA. The Supreme Court also gave no clue as to the appropriate standard under which such analysis would be conducted. The silence of the Court is surprising particularly in light of the substantial number of lower federal court cases in which some sort of separate due process analysis has been employed;[555] its opinion could have provided an appropriate vehicle for guiding the subsequent determinations of the lower courts. Perhaps, however, the Court was reluctant to provide guidance on an issue that might not arise.

In view of the silence by the Court on this issue, several inferences are possible. First, one might conclude that the Supreme Court felt that no due process inquiry would be required if the defendants satisfied the statutory criteria for personal jurisdiction.[556] Or, one might hypothesize that the Court, always seemingly reluctant to address the issue of amenability standards in federal courts,[557] declined to raise the issue and resolve it because the decision on remand might eliminate the need to decide that issue.[558] Finally, one might argue, from its references to the "United States contacts" requirements necessary for exclusion from sovereign immunity,[559] that the Supreme Court considered that some "minimum contacts" analysis had been programmed into the statute regarding the subject matter jurisdiction question.[560] In sum, however, in its most recent opportunity to address the issue, the Supreme Court seems to studiously have avoided any line of discussion that might raise the question of federal amenability standards in federal question cases.

555. *See supra* note 549.

556. The Court gave no directions to the district court in regard to this contingency, and the opinion might be read as implying that satisfaction of statutory criteria was sufficient, especially in circumstances in which the statute provided express authorization for assertion of personal jurisdiction upon the satisfaction of certain criteria. The Court never has ruled on the question of whether a separate amenability inquiry must be conducted in federal question cases beyond the inquiry of whether process has been served properly. *See supra* notes 295-96 and accompanying text. The Court has, however, albeit impliedly, adopted an amenability standard and analysis for diversity cases. *See supra* notes 480-81 and accompanying text. Those cases, however, involved state rather than federal statues, and therefore, the fact that a special due process analysis was required in such cases does not imply that such an analysis would be essential in federal question cases in which service of process was made pursuant to a special federal statute.

557. *See supra* notes 295-96 and accompanying text.

558. *See supra* notes 543-46 and accompanying text.

559. *See supra* note 549 and accompanying text.

560. *See supra* note 549. In fact, one might view the FSIA as a legislative attempt to codify all procedural aspects of a particular type of litigation, including the constitutional requirement that the defendant be afforded due process of law.

## III. Categorization and Analysis of Federal Question Cases

### A. *Categorization of Federal Question Cases*

To facilitate analysis of personal jurisdiction standards in federal question cases, federal question cases may be categorized according to the manner in which process is served. Service may be made: pursuant to the federal statute that authorizes nationwide or even worldwide service of process as authorized by Rule 4(e);[561] pursuant to the wholly federal procedures authorized by Rules 4(d)(1) and 4(d)(3)[562] and new Rule 4(c)(2)(C)(ii);[563] "pursuant to the law of the State in which the district court is held" as authorized by new Rule 4(c)(2)(C)(i);[564] "in the manner prescribed by the law of the state in which the district court is held" as authorized by former Rule 4(d)(7);[565] and, upon a party not found within a state, "under the circumstances and in the manner prescribed in [a long-arm statute]" of the state in which the district court is held, as authorized by Rule 4(e).[566] Even if a general uniform approach to the question of amenability standards in federal question cases would not be possible because of the wide range of methods by which proper service of process may be accomplished, one would hypothesize that a uniform approach would have developed within each of the above-described categories of cases. This, however, has not come to pass.[567] The best way to become familiar with the problem of nonuniformity and lack of definite standards and with the various approaches that courts have taken is to consider separately each category of cases. Some federal question cases do not fit neatly into this structured analysis, either because the method of service utilized never is noted by the court or because the court discusses more than one method for service; each of the former will be considered in regard to the category into which the case would most likely fit, and each of the latter will be considered in regard to one category and noted in regard to the other category or categories mentioned in the opinion.

561. *See supra* note 287 and accompanying text and *infra* notes 573-74 and accompanying text.

562. *See supra* notes 273-74 and accompanying text and *infra* notes 799-809 and accompanying text.

563. *See supra* note 275 and accompanying text.

564. *See supra* note 278 and accompanying text and *infra* notes 900-02 and accompanying text.

565. *See supra* notes 279-86 and accompanying text and *infra* notes 893-913 and accompanying text.

566. *See supra* note 288 and accompanying text and *infra* notes 1107-70 and accompanying text.

567. *See, e.g., infra* notes 579-784, 810-87, 920-1038, and 1123-1316 and accompanying text.

In the consideration of the question of personal jurisdiction in federal question cases, several often conflicting realities must be kept in mind. These realities must, to some extent, dictate result and rationale: (1) federal district courts have always been organized territorially around the territorial boundaries of the states in which the district courts were held and any authorization for a federal district court to reach beyond these territorial limitations has been viewed as an exceptional act requiring some congressional authorization by statute or federal rule;[568] (2) the notions of sovereignty that early required such territorial restrictions on state courts cannot be applied sensibly to federal courts sitting in federal question cases;[569] (3) Congress, consistent with the Constitution, could have authorized nationwide service of process for all federal district courts;[570] (4) Congress has not done so;[571] (5) Congress, in statutes and the Federal Rules, has prescribed methods for service of process in particular circumstances but has never explicitly addressed the question of federal court amenability standards.[572]

*B. Analysis of Federal Question Cases Arising in the Various Categories*

*1. Amenability Standards in Federal Question Cases in which Special Federal Statutes Authorize Nationwide Service of Process*

In areas of particular federal concern, Congress has enacted scores of statutes that authorize that federal district court process reach nationwide or even worldwide.[573] Rule 4(e) of the Federal Rules of Civil Procedure authorizes service upon a party not found or domiciled in the state under the circumstances and in the manner prescribed by a federal statute.[574] Among these statutes, the Foreign Sovereign Immunities Act of 1976 is unique in purporting to lay down those circumstances in which the federal court will have personal jurisdiction over the defendant;[575] the other federal statutes that authorize extraterritorial service of process are silent on the question of personal jurisdiction. A few courts have asserted personal jurisdiction over defendants solely on the authority of the federal statutes.[576] Most

568. *See supra* notes 196-294 and accompanying text.
569. *See supra* notes 4 and 73 and accompanying text.
570. *See supra* note 217 and accompanying text.
571. *See supra* note 218 and accompanying text.
572. *See supra* notes 295-96 and accompanying text.
573. *See supra* note 247 and accompanying text.
574. *See supra* note 288 and accompanying text.
575. *See supra* note 524 and accompanying text.
576. *See infra* notes 579-682 and accompanying text.

courts, as in the FSIA cases discussed above,[577] have ruled that the federal statute may be utilized to obtain personal jurisdiction over a nonpresent, nonconsenting defendant served pursuant to the statute only if this would not violate some constitutional limitation on federal court exercises of personal jurisdiction.[578] Most courts agree that the due process standard for federal question cases in which process is served by the wholly federal means of a federal statute authorizing nationwide or worldwide service of process should be the due process clause of the fifth amendment. The greatest divergence occurs in this area in the formulation and application of that standard.

*Cases in Which Courts Have Not Required Separate Amenability Analysis—Physical Power or Sovereignty Doctrine*

Review of these various cases should begin with those in which federal courts did not articulate or attempt to apply any genuine amenability standards except, in some cases, presence or domicile within the United States. In one pre-*International Shoe* opinion, *Eastman Kodak Company of New York v. Southern Photo Materials Co.,*[579] the Supreme Court faced the question of personal jurisdiction of the United States District Court for the Northern District of Georgia over a defendant New York corporation that had been served with process in New York pursuant to the service of process provisions of Section 12 of the Clayton Act.[580] The plaintiff, Southern Photo Materials Co., had alleged that the defendant, Eastman Kodak Company, in violation of antitrust laws, "had engaged in a combination to monopolize the interstate trade in the United States in photographic materials and supplies, and had monopolized the greater part of such interstate trade."[581] One issue on appeal to the Supreme Court was "whether there was local jurisdiction or venue in the District Court. . . ."[582] under Section 12 of the Clayton Act. This section provided that "any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found

577. *See supra* notes 549-54 and accompanying text.

578. *See infra* notes 687-784 and accompanying text.

579. 273 U.S. 359 (1926). For discussion of the *International Shoe* case and its progeny, *see supra* notes 106-55 and accompanying text. Clearly, a case decided prior to *International Shoe* would not include any reference to a "minimum contacts" test of amenability, many variations of which have been tested by federal courts in later cases involving nationwide or worldwide service of process statutes. *See infra* notes 687-784 and accompanying text.

580. *Eastman Kodak*, 273 U.S. at 367.

581. *Id.* at 368.

582. *Id.* at 369-70.

or transacts business, and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found."[583] After stating that the issue of "[w]hether or not the jurisdiction of the District Court was rightly sustained. . .resolves itself into a question whether the venue of the suit was properly laid in that court,"[584] the Supreme Court analyzed the facts of the case in light of the elements necessary to establish venue. The Court concluded that the defendant "was transacting business in that district, within the meaning of Section 12 of the Clayton Act, in such sense as properly established the venue of the suit."[585] Without further analysis, the Court held that the defendant "was duly brought before the court by the service of process in the New York district. . .and that its jurisdictional defenses were rightly overruled."[586] The Supreme Court therefore found that if venue was satisfied and process had been served properly, personal jurisdiction would be established. In other words, personal jurisdiction flowed directly from the statute without the requirement of any additional amenability analysis.

The result reached by the Supreme Court, of course, could be ascribed to the fact that the case predated *International Shoe.* Subsequent to *International Shoe,* however, some federal courts have applied the *Eastman Kodak* approach to cases involving nationwide service of process statutes.

*Arpet, Ltd. v. Homans*[587] was a suit brought by an alien corporation to recover damages from several defendants under the Securities Act of 1933 and the Securities Exchange Act of 1934 (hereinafter referred to as Securities Acts). The plaintiff entered into settlement agreements with all but two individual defendants. These defendants moved to dismiss the complaint, *inter alia,* for lack of venue and personal jurisdiction.[588] Suit had been initiated in the Western District of Pennsylvania, although both defendants were residents of New York and each previously had little or no contact with Pennsylvania.[589] The defendants alleged that the District Court for the Western District of Pennsylvania lacked venue under the Securities Acts and, thus, the statutory authority for service of process "in any other district of which the defendant is an inhabitant or wherever the defendant

583. Act of October 15, 1914, c. 323, §12, 38 Stat. 730 (codified at 15 U.S.C. §22 (1982)).
584. *Eastman Kodak,* 273 U.S. at 370. The Supreme Court therefore concluded that if the requirements of venue were satisfied, personal jurisdiction could be obtained by the method employed by the Georgia district court.
585. *Id.* at 374.
586. *Id.*
587. 390 F. Supp. 908 (W.D. Pa. 1975).
588. *Id.* at 910.
589. *Id.*

may be found"[590] could not be utilized. Finding that venue was proper under the 1934 Act, the court concluded:

> Given the finding that venue properly lies in this district, the court has personal jurisdiction over defendants. . .who were served pursuant to the nationwide service of process provisions of. . .the Securities Act of 1933 and. . .the Securities Exchange Act of 1934.[591]

The court did not indulge in any amenability analysis, apparently concluding that the statute itself conferred personal jurisdiction.

*Sohns v. Dahl,*[592] a case instituted in the United States District Court for the Western District of Virginia and decided shortly after *Arpet,* was similar to *Arpet* in several regards. In *Sohns,* the plaintiff brought suit against the defendants, alleging violation of the Securities Acts, common law fraud and deceit. The district court asserted subject matter jurisdiction over the state law claims on a theory of pendent jurisdiction. The defendants moved to dismiss, *inter alia,* on the grounds of improper venue and lack of personal jurisdiction because both individual defendants resided in Florida, not the Western District of Virginia, and one defendant alleged that he had no contacts with the Western District of Virginia.[593] The court reviewed the law of federal court venue, concluding that if venue could be established "under the broader venue provision of the 1934 Act,"[594] venue also would be established for the claims arising under the 1933 Act and for the

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590. 15 U.S.C. §77v (1982) (Section 22(a) of the Securities Act of 1933); 15 U.S.C. §78aa (1982) (Section 27 of the Securities Exchange Act of 1934). Service of process pursuant to these provisions is contingent upon proper venue being laid.

591. *Arpet,* 390 F. Supp. at 912. Two different conclusions might be drawn from this judicial statement. The first would be that the defendants had based their motion to dismiss on lack of venue and that their allegation of lack of personal jurisdiction was based solely on the ground that the special service of process provisions of the 1933 and 1934 Acts would be unavailable unless the venue provisions of those statutes had been satisfied. Thus, if the court found venue proper, the defendants' personal jurisdiction objections had been resolved. Such an interpretation is supported by the description by the court of the defendants' motions to dismiss: "Defendants . . . have filed motions to dismiss claiming that venue does not properly lie in the Western District of Pennsylvania and, *therefore,* this court lacks *in personam* jurisdiction." *Id.* at 910 (emphasis added).

On the other hand, the language of the court in denying the motions to dismiss might be interpreted as presenting the conclusion of the court that venue permits service and proper service establishes personal jurisdiction. This writer favors the second interpretation because both the parties and the court apparently thought personal jurisdiction an automatic result of proper application of the statute.

592. 392 F. Supp. 1208 (W.D. Va. 1975).

593. According to the opinion, while both defendants had moved to dismiss for lack of venue and for failure to state claim upon which relief could be granted, as well as to transfer to a more convenient venue, only one defendant had moved to dismiss for lack of personal jurisdiction. *Id.* at 1212. Later in the opinion, however, the Court stated: "Defendants have also filed a motion to quash service of process because of lack of *in personam* jurisdiction. . . ." *Id.* at 1217. Finally, the conclusion of the court in respect of personal jurisdiction included both defendants. *Id.* at 1218.

594. *Id.* at 1214.

pendent claims.[595] Accepting the plaintiff's concession that the defendants were not "found" or "transacting business" in the Western District of Virginia,[596] the court found "that the acts and transactions that plaintiff has alleged to have occurred in the Western District have substantial relation to these alleged violations" of the Securities Acts,[597] thus coming within the venue requirements of Section 27 of the 1934 Act.[598] In response to the defendants' "motion to quash service of process because of lack of *in personam* jurisdiction,"[599] the court quoted the portion of Section 27 of the 1934 Act that permits, in cases of proper venue, service of process "in any. . .district of which the defendant is an inhabitant or wherever the defendant may be found."[600] The court concluded: "Since venue properly lies in this district, this Court has in personam jurisdiction over the defendants with the power to serve them properly outside the forum."[601]

The United States Court of Appeals for the Fifth Circuit followed a similar conclusory analysis in *Hilgeman v. National Insurance Company of North America*,[602] decided two years after *Arpet* and *Sohns*. The suit again involved alleged violations of federal securities acts and process had been served, pursuant to Section 27 of the 1934 Act, on two defendants who resided within the United States but outside of Alabama, the state in which the suit was initiated and in which the federal district court was sitting. The district court had found service insufficient because neither defendant was "found or [was] an inhabitant or transacts business in Alabama nor is the suit based upon an offer or sale that took place in Alabama."[603] The court of appeals disagreed on the grounds that "[s]ervice of process under the

595. *Id.*
596. *Id.* at 1215. *See infra* note 607.
597. 392 F. Supp. at 1216.
598. 15 U.S.C. §78aa (1976). *See supra* note 247.
599. 392 F. Supp. at 1217. *See supra* note 593.
600. 15 U.S.C. §78aa (1976). *See supra* note 247.
601. 392 F. Supp. at 1218. The court then found that this *in personam* jurisdiction also extended to the pendent state law claims. *Id.*
602. 547 F.2d 298 (5th Cir. 1977). *See also* Blackburn v. Goodwin, 608 F.2d 919, 921 (2d Cir. 1979) (court decided that Section 2 of the Mandamus and Venue Act of 1962, 28 *U.S.C.* §1391(e), did not apply in this case and never reached the issue "whether section 1391(e) provides a district court with . . . nationwide *in personam* jurisdiction"); D.H . Blair & Co. v. Art Emporium, Inc., [1982-83 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶99,152 (S.D.N.Y. 1983) (court did not decide personal jurisdiction issue because case transferred to a more convenient forum in which all but one of the defendants were residents and to which the nonresident defendant had moved to transfer, but court implied, in Part III of its opinion, that personal jurisdiction over defendants served under Section 27 of the Securities Exchange Act of 1934 flowed directly from the statute); Bertozzi v. King Louie International, Inc., 420 F. Supp. 1166, 1171 (D.R.I. 1976) (court found "jurisdiction and venue are properly laid in this district . . . under §27" of the Securities Exchange Act of 1934 and thus did not need to consider questions as to whether defendants transacted business in the forum).
603. *Hilgeman*, 547 F.2d at 301 (*quoting* the district court opinion).

1933 and 1934 Acts is nationwide. . ."[604] and that "*personal jurisdiction.* . .[is] governed by Section 27 of the Securities Exchange Act of 1934. . ."[605] The court found that the defendants had satisfied the requirements of Section 27 and concluded that "jurisdiction and venue are proper."[606] Like the district courts in *Arpet* and *Sohns,* the court of appeals in *Hilgeman* apparently concluded that the authority for nationwide service of process on a defendant also included the power to extend personal jurisdiction over that defendant without any consideration of constitutional requirements. Perhaps the judges found that the defendant contacts required for a finding of venue were sufficient to satisfy some defendant-contact due process requirement for personal jurisdiction[607] and, therefore, since a case could not be heard in the absence of venue, establishing venue also would satisfy any contacts requirement.[608] If the courts did come to such conclusions, however, they did not explicate these determinations or illuminate their cryptic findings of personal jurisdiction.

*Kramer v. Scientific Control Corp.,*[609] a class action suit against multiple corporate and individual defendants alleging violations of the Securities Acts, rules and regulations under the 1934 Act, as well as common law fraud, was instituted in the United States District Court for the Eastern District of Pennsylvania and decided two years earlier than *Arpet* and *Sohns.* Various defendants moved to dismiss on several grounds including improper venue and lack of personal jurisdiction. As to venue, the district court found that the more restrictive venue requirements of Section 22(a) of the 1933 Act were satisfied with regard to the objecting defendants and therefore venue was satisfied with respect to all claims.[610] The defendants who objected to personal

604. *Id.*

605. *Id.* (emphasis added).

606. *Id.* at 302.

607. Section 27 of the Securities Exchange Act of 1934 establishes venue for any suit under the Act in any federal district "wherein any act or transaction constituting the violation occurred . . . or in the district wherein the defendant is found or is an inhabitant or transacts business." 15 U.S.C. §78aa (1976). Thus, a suit can be instituted properly only in federal districts in which the defendants' conduct violating the securities laws actually occurred or had some impact. This requirement would function to protect defendants from suits in federal districts with which they had no contacts.

608. The problem with such an interpretation is that the traditional purpose served by venue provisions is to establish a convenient place of trial in terms of evidence and the like. In the case of special federal statutes such as the 1933 and 1934 Acts, the broad venue provisions serve to ensure that the suit can be brought in a single forum. The venue provisions might function as protections for the defendant from suits in inconvenient fora, but these provisions were not designed to protect due process rights. Thus, if the court wanted to rely on the protections built into the venue provisions, it would have to resolve the difficult question of whether constitutional rights can be protected by effect rather than by intent.

609. 365 F. Supp. 780 (E.D. Pa. 1973).

610. *Id.* at 786-87.

jurisdiction had been "'served' with process beyond the borders of Pennsylvania."[611] The court rejected all objections based on (1) a defendant's nonresidence in the Eastern District of Pennsylvania, (2) a defendant's failure to "purposefully avail. . .himself of the privilege of conducting activities within Pennsylvania," and (3) a defendant's failure to be found in the Eastern District of Pennsylvania or to have consented to service in that district. It declared that "[s]ince none of the objecting defendants has asserted that he was neither an inhabitant nor found in the district in which he was eventually 'served' with process, this Court does not lack jurisdiction over the person of any defendant on the basis of either grounds 1, 2, or 3."[612] Regarding the assertions by some defendants that they lacked "sufficient minimum contacts with this district and, consequently, the maintenance of the action. . .here will offend traditional notions of fair play and substantial justice,"[613] the court noted that since the United States is a single jurisdiction, "Congress has the power to provide for the reach of service of process to the outer limits of the reach of its legislative power which, of course, is anywhere in the United States or its territories."[614] Since Section 22(a) of the 1933 Act and Section 27 of the 1934 Act authorize nationwide service of process, the court concluded that "[t]he issue here is not one of constitutional due process. . . ."[615] Again, a district court faced with the nationwide service provisions of the Securities Acts found that proper service provided the basis for personal jurisdiction without any additional amenability tests. This court, however, unlike those in *Arpet, Sohns,* and *Hilgeman,* dealt with the question of a minimum contacts amenability standard, finding such standard inappropriate, essentially for reasons of territorial sovereignty of the federal system.

The argument made in *Kramer* had been advanced by another district court two years earlier in *Stern v. Gobeloff,*[616] a suit brought in the District of Maryland for violations of the Securities Acts. Defendants, residents of New York served in New York pursuant to the nationwide service of process provisions of the Securities Acts, moved to dismiss for lack of venue and personal jurisdiction. The court first

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611. *Id.* at 787.
612. *Id.*
613. *Id.*
614. *Id.*
615. *Id.* The court found instead that the issue was "one of compliance with the statute and the Federal Rules of Civil Procedure." *Id.* The court apparently was referring to the provision in Rule 4(e), Federal Rules of Civil Procedure, for service pursuant to a federal statute in cases in which the defendant is not domiciled nor found in the state in which the federal court is sitting.
616. 332 F. Supp. 909 (D. Md. 1971).

noted a "fundamental principle of the Anglo-American law of jurisdiction [that] a sovereignty has personal jurisdiction upon any defendant within its territorial limits, and that it may exercise that jurisdiction by any of its courts able to obtain service over the defendant."[617] The United States, it continued, was such a sovereign. In response to the defendants' argument that they lacked sufficient "minimum contacts with [the district of Maryland] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice,"[618] the court noted that the *International Shoe* approach dealt only with state court power over nonpresent, nonconsenting defendants "served out-of-state pursuant to a state long-arm statute" while this "case. . .in no way deals with [such] power. . . ."[619] The court went on to distinguish cases in which service was made outside the territorial United States, and concluded:

> Absent the fairness considerations inherent in requiring a non-resident foreigner to defend suits in the federal courts of the United States, the weight of authority sustains the *in personam* jurisdiction of the forum district where, venue requirements having been satisfied, service is made in distant districts of which defendants are inhabitants or where they are found.[620]

Finally, as an afterthought, or as an amulet against reversal, the court noted that, "[i]f the due process tests of *International Shoe Company v. Washington* are applicable to the case at bar," the defendants had sufficient contacts with the District of Maryland to satisfy those criteria.[621]

A position similar to that in *Stern* and *Kramer* was taken by the United States Court of Appeals for the Second Circuit in the oft-cited case of *Mariash v. Morrill*,[622] another suit in which the plaintiff alleged that the defendant had violated the provisions of the Securities Exchange Act of 1934. *Mariash* was decided in 1974, before *Arpet* and *Sohns* but after *Kramer*. Suit had been initiated in a federal district court sitting in New York. The district court had dismissed for lack

617. *Id.* at 912 (*quoting* First Flight Co. v. National Carloading Corp., 209 F. Supp. 730, 736 (E.D. Tenn. 1962)).

618. 332 F. Supp. at 910.

619. *Id.* at 912-13.

620. *Id.* at 913.

621. *Id.* at 914. Thus, even though the court could have rested its decision on the ground that the defendants satisfied a more strict standard, "minimum contacts with the federal district" asserting jurisdiction, the court chose to rely on its sovereignty argument. *Id.*

622. 496 F.2d 1138 (2d Cir. 1974). *See* S-G Securities, Inc. v. Fuqua Inv. Co., 466 F. Supp. 1114, 1122 (D. Mass. 1978) (in securities suit involving service on the defendants' attorney in the federal district seeking to assert jurisdiction, the court rejected the defendants' argument that they lacked "minimum contacts" with the district, citing *Mariash* for the proposition that Section 27 provides for nationwide service of process).

of personal jurisdiction over defendants who had been served in Massachusetts, allegedly pursuant to Section 27 of the 1934 Act, stating:

> Section 27 is no more than a grant of subject matter jurisdiction to the federal district courts—competence to hear a suit arising under the Act—and a statement of the venue requirements to be followed when such suits are brought. It does not deal with jurisdiction of the persons named as defendants in a given case.[623]

The court of appeals rejected this interpretation of Section 27 of the 1934 Act. The court recognized that "Congress, in providing for nationwide service of process, remains subject to the constraints of the Due Process clause of the Fifth Amendment,"[624] but found that the constitutional requirement would be satisfied so long as "the service authorized by statute [is] reasonably calculated to inform the defendant of the pendency of the proceedings in order that he may take advantage of the opportunity to be heard in his defense."[625] In response to the defendants' argument that due process also requires that the defendants have certain "'minimal contacts' with *the State* which would exercise its jurisdiction,"[626] the court of appeals asserted:

> Mere statement of this contention reveals its fatal flaw: It is not the State of New York but the United States "which would exercise its jurisdiction. . . ." Here, the defendants reside within the territorial boundaries of the United States, the "minimal contacts" required to justify the federal government's exercise of power over [the defendants] are present. Indeed, the "minimal contacts" principle does not, in our view, seem particularly relevant in evaluating the constitutionality of in personam jurisdiction based on nationwide, but not extraterritorial, service of process. It is only the latter, quite simply, which even raises a question of the forum's power to assert control over the defendant.[627]

In a footnote, the court of appeals distinguished situations in which a federal statute authorizes "worldwide" service of process and in

623. *Mariash*, 496 F.2d at 1142 (*quoting* district court opinion).
624. *Id.* at 1143.
625. *Id.* In other words, so long as service of process supplied notice that satisfied the requirements established by the Supreme Court in Mullane v. Central Hanover Bank & Trust Co., 399 U.S. 306 (1950), *see supra* note 511 and accompanying text, due process requirements would be met. While adequate notice to the defendant of the pendency of the suit and an opportunity to be heard in that suit are both essentials of the process due a defendant under either the fourteenth or the fifth amendment, courts usually have required more before a court constitutionally could assert personal jurisdiction over a defendant. Perhaps the "more" is supplied here by the defendant's presence or domicile within the United States. *See supra* notes 4-5 and accompanying text.
626. *Mariash*, 496 F.2d at 1143 (*quoting* Appellees' Brief) (emphasis in quotation).
627. *Id.*

which service, pursuant to the statute, is made outside the territory of the United States. In those circumstances, the court recognized that some minimum contacts analysis might be appropriate because the forum, the United States, was seeking to assert authority over a defendant located outside its territory.[628] On the basis of territorial sovereignty, therefore, the Second Circuit found that the nationwide service of process provision of Section 27 of the 1934 Act provided valid personal jurisdiction over a nonresident defendant provided he was served according to the statute, in a manner calculated to notify him of the pending litigation. No additional amenability test was required and the minimum contacts test specifically was rejected. Perhaps an amenability standard is implicit in this analysis: presence or domicile within the territory of the sovereign, the United States.[629] Such an analysis, however, leads to the conclusion that any statute authorizing nationwide service of process carries with it a grant of personal jurisdiction because service can be made only if the defendant is present or an inhabitant of the district in which process is served.

A result similar to that in *Mariash* was reached, in a case decided five years later, by the Court of Appeals for the Seventh Circuit in *Fitzsimmons v. Barton.*[630] In *Fitzsimmons,* an action for alleged violations of the Securities Exchange Act of 1934, process had been served on defendant in Oklahoma pursuant to the nationwide service of process provisions of Section 27 of the 1934 Act. The United States District Court for the Northern District of Illinois had dismissed the case for lack of personal jurisdiction on the ground that the defendant lacked sufficient contacts with the state of Illinois to justify use of the Illinois long-arm statute.[631] The court of appeals considered Illinois law inappropriate in light of the special service provisions of the 1934 Act.[632]

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628. *Id.* at 1143 n.9.

629. *See supra* notes 4-5 and accompanying text and note 625. At least one commentator has suggested construing Rule 4 of the Federal Rules of Civil Procedure as "providing for presence as an amenability basis." Berger, *supra* note 191, at 291.

630. 589 F.2d 330 (7th Cir. 1979). *See* Federal Trade Comm'n v. Jim Walker Corp., 651 F.2d 251, 255-57 (5th Cir. 1981) (rejecting *International Shoe* analysis because "the district court's jurisdiction is always potentially, and, in this case, actually co-extensive with the boundaries of the United States;" minimum contacts with the United States is required but service within the United States satisfied that requirement).

631. 589 F.2d at 331-32.

632. *Id.* at 332. The court of appeals noted:

> The district court apparently dismissed Barton from this suit in reliance on the part of Rule 4(e) of the Federal Rules of Civil Procedure requiring that if no statute of the United States provides for the manner of service, service is governed by the law of the state in which the district court sits. Reference to Illinois law, however, was inappropriate in this case. . . . Given the existence of [Section 27's] Congressional authorization of nationwide service of process, Rule 4(e) provides that this method of service is sufficient.

*Id.*

The court noted substantial authority for the proposition that the United States Constitution does not forbid Congress from enacting nationwide service of process statutes with regard to particular classes or types of cases.[633] In responding to the defendant's objections that he lacked sufficient contacts with the state of Illinois to satisfy the fairness requirements of due process, the court argued that any fairness standard "relates to the fairness of the exercise of power by a particular sovereign, not the fairness of imposing the burdens of litigating in a distant forum."[634] The court concluded:

> Here the sovereign is the United States, and there can be no question but that the defendant, a resident citizen of the United States, has sufficient contacts with the United States to support the fairness of the exercise of jurisdiction over him by a United States court.[635]

The court refused to apply any "fairness test" that considered factors such as "inconvenience to the defendant."[636]

*Fitzsimmons* was cited as support by the dissenting Supreme Court justices in *Leroy v. Great Western United Corp.*[637] In *Leroy,* an action alleging certain violations of federal securities law by state officials, the dissenters argued that "[o]nce it is determined that § 27 contemplates venue. . .in the Northern District of Texas, the federal court in that District also had personal jurisdiction over the Idaho defendants, they having been served in a 'district. . .wher[e]. . .found,' there being no objections to the manner of service of process, and *there being no restrictions imposed by the Constitution on the exer-*

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633. *Id.* at 333 n.3.
634. *Id.* at 333.
635. *Id.*
636. *Id.* at 334. The court described the five factor "fairness" test developed in Oxford First Corp. v. PNC Liquidating Corp., 372 F. Supp. 191 (E.D. Pa. 1974), *see infra* notes 769-84 and accompanying text, but declined, on the following grounds, to adopt it:

> the "fairness" measured by these factors does not relate to the fairness of the exercise of power by a particular sovereign—the central concern of *Shaffer* and its predecessors—but instead to the fairness of imposing the burdens of litigation on a particular forum. As such, these factors are more appropriately used in applying 28 U.S.C. §1404(a), which embodies the non-jurisdictional doctrine of *forum non conveniens,* and we therefore decline to import them into determination of the constitutionality of exercises of personal jurisdiction.

*Fitzsimmons,* 589 F.2d at 334 (footnote omitted).

637. 443 U.S. 173, 187-92 (1979) (White, J. dissenting). *Leroy* involved a declaratory judgment suit brought by a Texas-based corporation, Great Western United Corporation, against certain Idaho officials charged with enforcing the Idaho corporate takeover law because the officials had interfered with an attempted tender offer by Great Western to purchase shares of stock in a company having substantial assets in Idaho. The plaintiff had sought a declaration that the state law was invalid insofar as it purported to apply to interstate tender offers to purchase stocks traded on a national exchange. The defendant Idaho officials resisted suit on several grounds, including the grounds that the District Court for the Northern District of Texas lacked personal jurisdiction over the defendants and that venue could not be properly laid in that court. *Id.*

*cise of jurisdiction by the United States over its residents. . . .*"[638] But for the citation of *Fitzsimmons,* this position might be interpreted as a restatement of the approach in *Arpet, Sohns* or *Hilgeman.*[639] Instead, the dissent seemed to be approving the "presence in the United States as sufficient contacts" test of *Fitzsimmons. Leroy* did not, however, present any conclusive Supreme Court decision on the issue of personal jurisdiction in federal question cases in which process is served, pursuant to a federal nationwide service of process statute, on a nonresident defendant found within the United States. The majority determined that venue could not be obtained under Section 27 and never reached the question of personal jurisdiction.[640]

*Fitzsimmons,* therefore, would validate all exercises of personal jurisdiction by federal courts in cases in which service is made in the United States on a resident or citizen of the United States pursuant to a federal statute authorizing nationwide or worldwide service of process. Although the *Fitzsimmons* court used a "contacts" analysis to justify this result, the result flows directly from the statutory authority to serve process within the United States. Whenever the service of process requirements are properly met, the required contacts would exist. In short, *Fitzsimmons* might be viewed as supporting the proposition that when process is served in the United States pursuant to a statute such as Section 27 of the 1934 Act, the only separate amenability standard required would be presence or domicile of the defendant in the United States. As in the above discussion of *Mariash,* however, such analysis results in automatic amenability or amenability from the statute itself, because proper service would require finding the defendant or his domicile in the place in which process is served.

The final cases to be considered in this group, *Driver v. Helms*[641] and *Briggs v. Goodwin,*[642] are particularly significant because they culminated in a decision of the Supreme Court, *Stafford v. Briggs.*[643] In *Driver,* a class action suit against twenty-five present or former United States government officials in which the plaintiffs sought damages and injunctive relief for alleged violations of certain constitutional rights, process had been served on defendants pursuant to

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638. *Id.* at 191-92 (White, J. dissenting) (emphasis added).

639. *See supra* notes 587-608 and accompanying text.

640. 443 U.S. at 182. In Colby v. Driver, 444 U.S. 527 (1980), *see infra* notes 665-74 and accompanying text, the Supreme Court again did not rule on this question, although the dissent again utilized the *Mariash* and *Fitzsimmons* analysis.

641. 74 F.R.D. 382 (D. R.I. 1977).

642. 384 F. Supp. 1228 (D. D.C. 1974).

643. 444 U.S. 527 (1980).

Section 2 of the Mandamus and Venue Act of 1962, 28 U.S.C. Section 1391(e). This section provides that if the venue requirements of Section 1391(e) are satisfied, "delivery of the summons and complaint . . . .may be made by certified mail beyond the territorial limits of the district in which the action is brought."[644] Suit was instituted in the federal district court for the district of Rhode Island, although "none of the appellants reside[d] in or [had] substantial contacts with Rhode Island."[645] The defendants asserted, *inter alia,* that the district court lacked personal jurisdiction because "[Section] 1391(e) speaks only to service of process, not to the exercise of personal jurisdiction,"[646] and exercise of personal jurisdiction in this case would be unconstitutional because of the defendants' lack of contacts with Rhode Island.[647] The district court disagreed, citing *Mariash* and finding that the applicable due process test was whether the manner of process provided "notice calculated to inform the defendant of the pendency of the suit."[648] The district court recognized that "[e]xtraterritorial service of process must be based on necessary minimum contacts to satisfy due process,"[649] but based its analysis on its conclusion that "nation wide service of process, when authorized by Congress, is not extra-territorial at all."[650] Since service within the territory of the United States was not extraterritorial, such service was analogous to state court service within a state. State court service required only satisfaction of an adequate notice requirement in order to subject the defendant to the personal jurisdiction of the court.[651]

The court of appeals concurred in the conclusion of the district court that, at least in the case of 28 U.S.C. § 1391(e), when a federal statute authorized nationwide service of process and such service had adequately apprised the defendant of the pendency of the suit, no additional test need be satisfied for the court to assert personal jurisdiction over the defendant.[652] In response to the appellants' arguments that the broadened venue provisions of Section 1391(e) should apply "only if the district in which the suit is brought can establish personal jurisdiction by some other mechanism"[653] or that "even if [Section] 1391(e) broadens personal jurisdiction, it would be unconstitu-

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644. *See supra* note 248.
645. Driver v. Helms, 577 F.2d 147, 149 (1st Cir. 1978).
646. 74 F.R.D. at 389.
647. *Id.* at 390.
648. *Id.* at 391.
649. *Id.* at 391 n.6.
650. *Id.* at 391.
651. *Id.* (citing *Mariash*).
652. 577 F.2d at 154-57.
653. *Id.* at 154.

tional to apply it to individuals who lacked the minimum contacts with the state in which the court sits that are required by *International Shoe Co. v. Washington*. . .and its progeny,"[654] the court of appeals concluded that Congress had created nationwide service of process which did not depend on the ability of the forum district to establish personal jurisdiction. Moreover, any limitation on the exercise of personal jurisdiction in these cases "is not related to state boundaries."[655] Like the district court, the court of appeals rejected any minimum contacts test relating to state boundaries because "[t]he circumspection of state court jurisdiction is a product of boundaries to states' sovereignty [while t]he United States. . .does not lose its sovereignty when a state's border is crossed."[656] The appellate court ruled that the defendants were protected from the unfairness of having to defend suits in federal districts "with which they have had no connection" by the transfer of venue provisions of Section 1404(a) of Title 28 of the United States Code.[657] The court, moreover, noted that "officers of the federal government are different from private defendants because they can anticipate that their official acts may affect people in every part of the United States."[658] Finally, the court recognized that Congress is limited, by the fifth amendment due process clause, in its authorizations of nationwide service of process, but only in terms of whether the manner of service is "reasonably calculated to inform the defendant of the pendency of the proceedings." Because "[s]uch service is not extraterritorial for a court of the United States; therefore, the minimum contacts analysis is not relevant."[659] Alternatively, the court suggested, in a footnote, that the United States as a sovereign would have authority over anyone found within its borders and that "even if we were to say that minimum contacts had to be established, anyone found and served within the United States would have sufficient contacts with the United States."[660] The court of appeals, therefore, adopted the analysis in *Mariash* and *Fitzsimmons*.

The court of appeals tied together the positions of the courts in some of the opinions discussed above and bolstered its own conclusions by arguing facts peculiar to *Driver*. In short, the court of appeals concluded that no separate amenability analysis was required: (1) it rejected minimum contacts with the state of Rhode Island as

654. *Id.* at 154-55.
655. *Id.* at 157.
656. *Id.* at 156.
657. *Id.* at 157.
658. *Id.*
659. *Id.*
660. *Id.* at 156 n.25.

inappropriate in a federal context;[661] (2) it rejected any fairness analysis with respect to the particular federal district because of the protection inherent in the change of venue provision and the particular character of the defendants to be served with process;[662] (3) while refusing to require a minimum contacts test, it found the defendants' "presence" in the United States sufficient to satisfy any such standard,[663] thus, in effect, equating any authorization for nationwide service with satisfaction of any due process requirement and making the authorization for service alone sufficient to give the federal court personal jurisdiction; and (4) it determined that the only real due process question was whether the manner of service would satisfy notice requirements,[664] therefore accepting service that was procedurally sufficient as satisfying due process. In other words, the court found that if service properly was made pursuant to Section 1391(e), a federal court would have personal jurisdiction over the defendant so served, irrespective of the defendant's contacts with the federal district in which the suit was instituted or his contacts with the state in which the federal court was sitting. Service under the federal statute authorizing nationwide service of process in suits against federal officials gave the court personal jurisdiction over those officials.

The Supreme Court granted certiorari under the name *Colby v. Driver*[665] and heard this case with a companion case, *Stafford v. Briggs,* styled as *Briggs v. Goodwin* in the district court[666] and in the court of appeals.[667] In *Briggs,* the plaintiffs had brought suit in the federal district court for the District of Columbia against three Department of Justice attorneys and an FBI agent, seeking declaratory relief and damages for alleged violations of the plaintiffs' constitutional rights. Plaintiffs again relied on 28 U.S.C. § 1391(e), Section 2 of the Mandamus and Venue Act of 1962. The district court ruled that venue was improper and that the court lacked personal jurisdiction over some of the defendants, residents of Florida.[668] The United States Court of Appeals for the District of Columbia Circuit reversed, finding venue proper because one of the defendant-appellees resided in the District of Columbia. Moreover, the court of appeals found that Section 1391(e) provided personal jurisdiction without the requirement of

661. *Id.* at 156-57.
662. *Id.* at 157.
663. *Id.* at 156 n.25.
664. *Id.* at 157.
665. 444 U.S. 527 (1980).
666. 384 F. Supp. 1228 (D.D.C. 1974).
667. 569 F.2d 1 (D.C. Cir. 1977).
668. *Driver,* 444 U.S. at 531.

applying the *International Shoe* minimum contacts test or any requirement that the defendants have contacts with the federal district in which the district court was sitting.[669]

The majority opinion of the Supreme Court never reached the question of amenability standards for personal jurisdiction. The Court concluded that Section 1391(e) did not apply to actions for money damages brought against government officials in their individual capacities.[670] In dissent, Justice Stewart, joined by Justice Brennan, concluded that "[Section] 1391(e) means what it says, and that it thus applies. . .to a suit for damages against a federal officer for his own wrongdoing."[671] Justice Stewart then discussed "the petitioner's position that a serious due process problem arises when the provisions of § 1391(e) are taken to mean what they say, so as to permit a federal district court to exercise personal jurisdiction over a federal officer who lacks sufficient 'minimum contacts' with the State or district in which the federal court sits."[672] First, Justice Stewart asserted that Section 1391(e) not only governed venue and service of process, but also conferred personal jurisdiction on the court. He argued "that, as a general rule, service of process is the means by which a court obtains personal jurisdiction over a defendant, and. . .the petitioners have failed to demonstrate that there was any defect in the means by which service of process was effected."[673] Then, Justice Stewart found that such exercises of personal jurisdiction under Section 1391(e) would not be unconstitutional:

> [D]ue process requires only certain minimum contacts between the defendant and the sovereign that has created the court. . . .The issue is not whether it is unfair to require a defendant to assume the burden of litigating in an inconvenient forum, but rather whether the court of a particular sovereign has power to exercise personal jurisdiction over a named defendant. The cases before us involve suits against residents of the United States in the courts of the United States. No due process problem exists.[674]

In sum, Justice Stewart found that proper service pursuant to Section 1391(e) conferred personal jurisdiction that was appropriate constitutionally so long as notice requirements were met. No separate due process analysis would be required on any case by case basis; the statute always would operate to pass constitutional muster.

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669. *Id.* at 532.
670. *Id.* at 543-45.
671. *Id.* at 545-46.
672. *Id.* at 553.
673. *Id.* at 553 n.5.
674. *Id.* at 554.

In these two cases, therefore, lower federal courts had concluded, on essentially a sovereignty or power theory, that Section 1391(e), which authorized nationwide service of process, gave a federal court personal jurisdiction that was consistent with constitutional mandates without any separate test of amenability by minimum contacts or another standard. Moreover, the majority opinion of the United States Supreme Court in *Briggs* did not take issue with that conclusion and the dissenting opinion provided strong support for that position. No recent Supreme Court decision, including the case of *Verlinden v. Central Bank of Nigeria,*[675] has expressed a view contrary to that of Justice Stewart in *Briggs.*

A few federal courts merely have cited the existence of a federal statute authorizing nationwide, or worldwide, service of process plus proper service pursuant to the statute as providing the federal court with personal jurisdiction over the defendant so served.[676] Most federal courts that have rejected or ignored any "fairness" analysis as an additional requirement for assertion of personal jurisdiction, however, have justified the result on the basis of sovereignty.[677] The United States, as a single jurisdiction acting through its federal courts, constitutionally can assert jurisdiction over any defendant present or domiciled within its borders if proper service, including adequate notice, is made upon that defendant. The special federal statutes authorizing nationwide service of process provide the vehicles by which this authority is triggered. Some of these courts have labelled this as a "contacts" analysis,[678] because presence or domicile within the United States is surely sufficient contact with the sovereign territory to satisfy any fifth amendment due process requirement. The inevitable result of the analysis, however, is the conclusion that proper service pursuant to such statutes renders the defendant amenable to jurisdiction in the federal district in which the suit is brought.

None of these cases have involved service on aliens outside the borders of the United States. Amenability in those circumstances, according to the court of appeals in *Mariash,*[679] could not be justified on the territorial sovereignty theory because it would be extraterritorial and comparable to state court service on a defendant located and domiciled in other states. The Supreme Court has not made a specific ruling on this issue, either in regard to service within the United States

675. 103 S. Ct. 1962 (1983). *See supra* notes 520-60 and accompanying text.
676. *See supra* notes 587-608 and accompanying text.
677. *See supra* notes 609-75 and accompanying text.
678. *See supra* notes 622-36 and accompanying text.
679. *See supra* notes 622-29 and accompanying text.

or to service in a foreign country. The approach in cases such as *Fitzsimmons* and *Mariash* relies on a power theory of personal jurisdiction, a theory that has been rejected increasingly by commentators and the courts.[680] The result, however, makes sense in light of the federal policy behind nationwide or worldwide service of process statutes: to provide a federal forum, convenient to the plaintiff, in which all defendants in the case can be joined.[681] Such statutes have been enacted by Congress in areas of particular federal concern and reveal the abiding interest of the federal government in providing a forum for resolution of these matters.[682] Whether the result of these cases, assertion of personal jurisdiction by a federal court over any defendant properly served within the territory of the United States pursuant to a federal nationwide or worldwide service of process statute, can be incorporated into a practically sensible and doctrinally sound personal jurisdiction theory for the federal courts in federal question cases, will be discussed at the conclusion of the next section of this article.

### *Cases in Which Courts Have Required Separate Amenability Analysis—Variations on* International Shoe *in a National Context*

While some federal question cases in which process was served pursuant to a federal statute authorizing nationwide or worldwide service of process and in which courts have engaged in a separate amenability analysis have involved nonalien defendants served within the United States,[683] the majority have involved alien defendants served outside the United States.[684] These results may flow from the analysis

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680. *See generally* von Mehren, *supra* note 2, at 1178-79.

681. *See, e.g.,* Eastman Kodak Co. of New York v. Southern Photo Mat'l Co., 273 U.S. 359, 373-74 (1926) (Section 12 of the Clayton Act "supplements the remedial provision of the Anti-Trust Act . . . by relieving the injured person from the necessity of resorting for the redress of wrongs committed by a non-resident corporation, to a district, however distant, in which it resides or may be found . . . and enabling him to institute suit in a district, frequently that of his own residence, in which the corporation in fact transacts business. . . ."); Texas Trading v. Federal Republic of Nigeria, 647 F.2d 300, 315 (2d Cir. 1981) (*quoting* House Judiciary Committee, *Jurisdiction of United States in Suits Against Foreign States*, H.R. Rep. No. 1487, 94th Cong., 2d Sess. 2, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 6604, 6605) ("Congress has passed the [Foreign Sovereign Immunities Act] specifically to provide 'access to the courts' "); Driver v. Helms, 74 F.R.D. 382, 388 (D.R.I. 1977) (purpose of Congress in enacting Section 2 of the Mandamus and Venue Act of 1962 was to eliminate obstacles to litigation against federal officials and "to enable citizens to obtain relief against official wrongdoing effectively, conveniently, economically, and fairly"); Clapp v. Stearns & Co., 229 F. Supp. 305, 307 (S.D.N.Y. 1964) (policy of Section 27 of Securities and Exchange Act of 1934 was "to provide a forum for suits involving multi-state frauds, no matter of how many states the defendants are citizens").

682. *See supra* notes 247-50 and accompanying text.

683. *See infra* notes 754-84 and accompanying text.

684. *See infra* notes 687-753 and accompanying text.

in *Mariash* that service outside the United States is extraterritorial and, therefore, analagous to service of process by a state court, pursuant to a state long-arm statute, beyond the borders of the state. Some due process-amenability test, therefore, must be applied to determine whether such extension of power by the sovereign, the United States, violates a defendant's due process rights.[685] Generally, when process is served in a wholly federal manner, the due process clause that must be satisfied is that of the fifth amendment.[686] How this requirement is satisfied, however, has varied significantly from court to court.

Several federal courts have analogized to the *International Shoe* test, examining the defendant's contacts with the United States as a whole to determine whether those contacts were sufficient to be "minimum." In *Alco Standard Corporation v. Benalal*,[687] for example, an action brought in the United States District Court for the Eastern District of Pennsylvania against certain alien individuals and corporations for violations of the Securities Exchange Act of 1934 and Rule 10b-5 of the Securities Exchange Commission and for common law misrepresentation, the defendants had been served with process outside the territory of the United States pursuant to the worldwide service of process provisions of Section 27 of the 1934 Act.[688] In response to the defendants' attack on personal jurisdiction of the district court, the court stated that under the fifth amendment, "citizens of foreign countries are entitled to [the minimum contacts] standard of protection" established in *International Shoe*, but that "[f]or purposes of jurisdiction . . . under the Securities and Exchange Act, the relevant question asks what acts they have committed anywhere in the United States since that Act is national in scope."[689] The court concluded that the defendants "clearly had sufficient contacts with the United States to satisfy the requirement of due process."[690] The district court, therefore, treated Section 27 of the 1934 Act as a federal long-arm statute and measured the constitutionality of its application to the alien defendants in question by weighing their contacts with the United States as a whole. This analysis is similar to *International*

685. *See supra* notes 624-29 and accompanying text.
686. *See supra* notes 329 and 497 and accompanying text.
687. 345 F. Supp. 14 (E.D. Pa. 1972).
688. *Id.* at 19. For the text of the service of process provision of Section 27, see *supra* note 249.
689. 345 F. Supp. at 24-25.
690. *Id.* at 25. The court made the quoted statement in regard to one particular set of defendants. As to all defendants challenging personal jurisdiction, the court concluded: "[W]e believe that all of these defendants have done sufficient acts in this Country so as to fall outside of. . . .[the Fifth Amendment's] protective limitations." *Id.*

*Shoe*, which requires weighing of a defendant's contacts with the state seeking to assert its jurisdiction over him.[691] Some courts and commentators have referred to such a jurisdictional test, which requires weighing the defendant's contacts with the United States as a whole, as a "national contacts" test or an "aggregation of national contacts" test.[692] Apparently, under the analysis by the court, the suit could have been instituted in any federal district; the court, however, did not consider inconvenience to the defendant in litigating in the Eastern District of Pennsylvania rather than another federal district. Perhaps some limitation on the district might have been required if the transaction had no relationship to the Eastern District of Pennsylvania, although the possibility of finding venue in such a district would be remote. Some courts have suggested that any unfairness caused by the plaintiff's choice of a federal forum inconvenient to the defendant could be cured by a change of venue to a more convenient forum.[693] Moreover, under the venue restrictions of many of the special federal statutes, a federal court in which venue lay would not be highly inconvenient for the defendant.[694]

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691. *See supra* notes 106-55 and accompanying text. *See also* Chrysler Corp. v. Fedders Corp., 643 F.2d 1229, 1237-39 (court recognized that some jurisdictions had adopted a "minimum contacts with the United States" test when, as here, the defendant was an alien served pursuant to a worldwide service of process statute, but refused to adopt or reject the test because plaintiff had "failed to establish that [defendants had] sufficient contacts with the United States as a whole").

692. Courts: *See, e.g.*, Chrysler Corp. v. Fedders Corp., 643 F.2d 1229, 1237-38 (6th Cir. 1981) ("[t]his 'national contacts' or 'aggregate contacts' concept is based on the proposition that a court's jurisdictional power . . . on federal questions must be examined in light of the due process clause of the Fifth . . . Amendment"); Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 416 (9th Cir. 1977) ("plaintiffs argue that where . . . the court is to determine whether it has jurisdiction over an alien defendant who is being sued on a claim arising under *federal* law, it may appropriately consider . . . the aggregate contacts of the alien with the United States as a whole"); Centronics Data Computer Corp. v. Mannesmann, A.G., 432 F. Supp. 659, 663 (D.N.H. 1977) ("[t]his 'national contacts' theory has been considered by other courts"); Engineered Sports Prods. v. Brunswick Corp., 362 F. Supp. 722, 728 (D. Utah 1973) ("the court . . . may consider the aggregate presence of the defendants' apparatus in the Untied States as a whole"). Commentators: *See, e.g.*, Comment, *National Contacts, supra* note 186, at 687 ("federal courts should be permitted to aggregate the national contacts of alien defendants to determine in personam jurisdiction in federal question suits"); Note, *supra* note 21, at 475 ("inability of the current jurisdictional scheme to effectively address [certain] situations . . . has motivated some courts to consider the aggregate contacts test").

693. *See, e.g., supra* notes 188, 226, 337, 354 and 657 and accompanying text and *infra* note 880 and accompanying text.

694. Under section 27 of the Securities and Exchange Act of 1934, for example, venue is laid in any federal district "wherein any act or transaction constituting the violation occurred. . . .or in the district wherein the defendant is found or is an inhabitant or transacts business." 15 U.S.C. §78aa (1976). Thus, the defendant would not be able to argue unfair inconvenience since the venue requirements relate to his contacts with the forum. Only in the case in which venue is laid solely on the ground that the defendant had been "found" within the district and the defendant's presence was transitory and unrelated to the claim might unfair inconvenience be alleged. No court, state or federal, has yet ruled that personal jurisdiction based on even the most transitory presence is unconstitutional.

Subsequent to the district court opinion in *Alco*, the United States Court of Appeals for the Second Circuit apparently followed a similar analysis in *Leasco Data Processing Equipment Corp. v. Maxwell*,[695] a suit brought against various defendants, including aliens, for violations of the Securities Exchange Act of 1934 and Rule 10b-5 of the Securities Exchange Commission. Alien defendants had been served outside the territorial limits of the United States pursuant to the worldwide service of process provisions of Section 27 of the 1934 Act.[696] The plaintiffs had asserted, as an alternative source of personal jurisdiction over some of the defendants, various provisions of the New York long-arm statute. The court of appeals, however, refused to apply the New York statutes:

> Since we hold that Congress meant § 27 to extend personal jurisdiction to the full reach permitted by the due process clause, it is unnecessary to discuss the applicability of the New York statutes, which could reach no further.[697]

The court found that Congress had intended, by Section 27 of the 1934 Act, "to authorize service on a defendant who can be 'found' only in a foreign country, and although the section does not deal specifically with *in personam* jurisdiction, it is reasonable to infer that Congress meant to assert personal jurisdiction over foreigners not present in the United States to but, of course, not beyond the bounds permitted by the due process clause of the Fifth Amendment."[698] The court then cited *Hanson* and *McGee* as authority for the proposition that a state can assert jurisdiction over nonpresent, nonresident defendants only if they have contacts with the state.[699] The Second Circuit examined the defendants' contacts with the Untied States to determine whether the federal court had personal jurisdiction.[700] Although the court never explicitly announced a test of "minimum contacts with the United States," such a test actually was applied.

In several cases in which subject matter jurisdiction was based on the Foreign Sovereign Immunities Act of 1976 (FSIA) and service was made on the defendants, foreign countries or instrumentalities of foreign countries, outside the territory of the United States,[701] federal

695. 468 F.2d 1326 (2d Cir. 1972). *See also* Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 418 (9th Cir. 1977) (dictum) ("aggregation of an alien's American contacts may . . . be proper when a federal statute authorizes worldwide service of process . . . and, therefore, the only constraint is fifth amendment due process rather than statutory authorization").

696. *Leasco*, 468 F.2d at 1339.

697. *Id.* at 1339.

698. *Id.* at 1340.

699. *Id.* at 1340-41.

700. *Id.* at 1341-44.

701. *See supra* notes 520-55 and accompanying text.

courts have engaged in a "minimum contacts with the United States" due process analysis. This analysis is undertaken even though the FSIA purports to provide for personal jurisdiction whenever subject matter jurisdiction exists under the Act and process is served properly pursuant to Section 1608 of Title 28 of the United States Code.[702] Probably the most well-known case adopting this position was *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*,[703] a suit initiated in the United States District Court for the Southern District of New York alleging that the Federal Republic of Nigeria and its central bank had breached a contract with the plaintiff for delivery of cement. The Court of Appeals for the Second Circuit determined that the subject matter jurisdiction requirements of the FSIA had been satisfied and that the defendants had been served properly under Section 1608, thus satisfying the FSIA criteria for assertion of personal jurisdiction.[704] The Court continued, however, to analyze separately the constitutionality, under the fifth amendment due process clause, of asserting personal jurisdiction over the defendants.[705] The court engaged in a traditional *International Shoe* analysis, as modified by *World-Wide Volkswagen Corp. v. Woodson*,[706] using the United States as a whole as "the relevant area in delineating contracts"[707] and determining that "maintenance of the suit [would not] offend 'traditional notions of fair play and substantial justice'."[708] After determining that the defendants had contacts with the United States, the Second Circuit decided whether these contacts were sufficient enough to be "minimum" by making the "four separate inquiries" required by its reading of *World-Wide*.[709] The court resolved all inquiries in favor of litigating in the United States and concluded that assertion of personal jurisdiction over the defendants would be constitutional.[710] Each inquiry in its minimum contacts analysis focused only on the United States and not on the particular federal district in which suit had been brought.

The *Texas Trading* analysis for personal jurisdiction was applied in a more recent FSIA decision, *Gibbons v. Udaras na Gaeltachta*,[711]

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702. *See supra* notes 549-55 and accompanying text.
703. 647 F.2d 300 (2d Cir. 1981). *See also supra* note 554 and accompanying text.
704. *See supra* note 550 and accompanying text.
705. 647 F.2d at 313-15.
706. *See supra* notes 145-55 and accompanying text.
707. 647 F.2d at 314.
708. *Id.* (*quoting* International Shoe Co. v. Washington, 326 U.S. 310, 316 quoting, in turn, Millikin v. Meyer, 311 U.S. 457, 463).
709. *Texas Trading*, 647 F.2d at 314.
710. *Id.* at 315.
711. 549 F. Supp. 1094 (S.D.N.Y. 1982).

by the United States District Court for the Southern District of New York. After concluding that the FSIA requirements for personal jurisdiction had been satisfied, the court noted that it "must still determine whether an exercise of the personal jurisdiction conferred by the FSIA is permissible under the due process clause of the Fifth Amendment."[712] As in *Texas Trading*, the "four inquiry" test was applied to find sufficient contacts with the United States to satisfy an *International Shoe* standard, and any factors that related to the particular federal district in which the suit had been initiated were not considered.

In another recent FSIA case, *Harris Corp. v. National Iranian Radio and Television*,[714] the United States Court of Appeals for the Eleventh Circuit also followed *Texas Trading* by requiring a separate due process analysis on the issue of personal jurisdiction and by applying a minimum contacts with the United States analysis.[715] Apparently, the trend in the lower federal courts in FSIA cases is to require not only that the specific statutory requirements of the FSIA for personal jurisdiction be met but that the assertion of jurisdiction be determined constitutionally appropriate by an examination of the defendant's aggregate contacts with the United States. As noted above,[716] however, the Supreme Court has expressed no view on this issue although it had the opportunity to do so.

In other cases in which defendant aliens were served pursuant to special federal statutes, the federal courts seem to conduct a separate fifth amendment due process analysis by applying the *International Shoe* minimum contacts test to the defendant's contacts with the United States, but the opinions are not as clear as those in *Alco* and *Texas Trading*. In a recent case involving the service in the United States by an Internal Revenue Service summons on an agent of the defendant alien company, *United States v. Toyota Motor Corp.*,[717] the United States District Court for the Central District of California found that it constitutionally could assert personal jurisdiction over the defendant. The court required a two-step analysis, determining first whether the defendant came within the language of the federal statute authoriz-

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712. *Id.* at 1117.
713. *Id.* at 1117-18.
714. 691 F.2d 1344 (11th Cir. 1982).
715. *Id.* at 1352-53.
716. *See supra* notes 547-48 and accompanying text.
717. 561 F. Supp. 354 (C.D. Calif. 1983). The federal statute provided, in pertinent part: "If any person is summoned under the internal revenue laws to appear, . . .the United States district court for the district in which such person resides *or is found* shall have jurisdiction by appropriate process to compel such attendance. . . ." 26 U.S.C. §7604(a) (1976) (emphasis added).

ing service of the summons and then it determined whether fifth amendment constitutional limitations are respected by such an assertion of personal jurisdiction.[718] The court went on to examine the relationship of defendant corporation with the forum "citing *World-Wide Volkswagen* as well as several lower federal court opinions that had adopted the "minimum contacts with the United States" approach.[719] Whether "the forum" refers to the state of California, the central district of California (where the defendant's subsidiary corporation was located), or the United States as a whole cannot be determined from the language of the court. The facts of the case create the inference that the defendant would have sufficient contacts with California or the Central District of California to satisfy any requirement of contacts with those territories.[720] Therefore, the defendant's contacts also would satisfy any requirement of contacts with the United States as a whole since the contacts merely were centered in one part of the country. The court, moreover, referred to the defendant's activities as being "the sale of Toyota Japan's products to *United States consumers*" by its California subsidiary[721] and, in a footnote, referred to "aggregation of Toyota Japan's *American* contacts [as] proper in this case,"[722] thereby indicating that the court viewed the United States as "the forum."

In other cases involving alien defendants served pursuant to worldwide service of process statutes, federal courts have considered similar tests in finding personal jurisdiction to be lacking. In *Kramer Motors, Inc. v. British Leyland, Ltd.*,[723] a suit for violation of the antitrust laws in which service was made pursuant to the worldwide service of process provisions of Section 22 of the Clayton Act, the United States Court of Appeals for the Ninth Circuit stated that "we recognize . . . that when a federal statute . . . authorizes worldwide service of process, it may be proper to consider whether an alien defendant's contacts with the entire United States provide adequate grounds for asserting personal jurisdiction consistent with due process."[724] The

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718. 561 F. Supp. at 356.
719. *Id.* at 359.
720. In a footnote, the court "noted that Toyota Japan enjoys significant benefits from sales in California. . . .[and] virtually all sales of Toyota Japan's products in the United States are facilitated through Toyota U.S.A., which is headquartered in the Central District of California." *Id.* at 360 n.10.
721. *Id.* at 360 (emphasis added).
722. *Id.* at 360 n.10 (emphasis added). In the footnote the court went on to establish a basis for jurisdiction arising from the defendant's contacts with the state or federal district "if an aggregation theory is not applied." *Id.* *See supra* note 720 and accompanying text.
723. 628 F.2d 1175 (9th Cir. 1980).
724. *Id.* at 1177.

court, however, did not adopt the "aggregation of contacts" approach, finding that even under such a test the defendant's contacts would have been insufficient to satisfy due process.[725] Thus, while the Ninth Circuit recognized the possibility that such a test might be appropriate in some circumstances, it chose not to make any decision in this case because insufficient grounds for assertion of personal jurisdiction existed, even under what would be considered the most liberal test, "minimum contacts with the United States."

In *Wagman v. Astle*,[726] a suit against three Canadian defendants for alleged violations of the Securities and Exchange Act of 1934 by stock transactions which took place in Canada, the United States District Court for the Southern District of New York found that it did not have personal jurisdiction over the alien defendants. Even though the defendants had been served in Canada pursuant to the worldwide service of process provisions of Section 27 of the 1934 Act, personal jurisdiction could not be obtained because "to assert jurisdiction over them in this case would violate due process."[727] The court concluded that the personal service in Canada had been invalid because such service would lead to an unconstitutional assertion of personal jurisdiction.[728] In finding the exercise of personal jurisdiction unconstitutional, the court cited *Hanson, McGee* and *International Shoe* as outlining "[t]he general boundaries of due process in connection with jurisdiction"[729] and derived from those cases "a requirement of some minimal connection between the defendant and the state enforcing liability, . . .such that the exercise of jurisdiction does not offend traditional notions of justice and fair play."[730] Here, the court apparently concluded, the entity "enforcing liability" would be the United States, for the court noted that "[s]ince . . . the defendants did not come within or do business in the *United States*, the basis for personal jurisdiction must be the effects within the United States of their acts in Canada."[731] The court determined that the acts had "no actual effect" in the United States and that it therefore could not assert jurisdiction over the defendants without violating due process.[732]

In *Maritime International Nominees Establishment v. Republic of*

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725. *Id.* at 1178.
726. 380 F. Supp. 497 (S.D.N.Y. 1974).
727. *Id.* at 499.
728. *Id.* at 502.
729. *Id.* at 499-500.
730. *Id.* at 500.
731. *Id.* (emphasis added).
732. *Id.* at 502.

*Guinea,*[733] an FSIA case, the court found that the subject matter jurisdiction requirements of the FSIA had not been satisfied.[734] The court, therefore, could not reach the personal jurisdiction issue because the statutory prerequisites for personal jurisdiction, subject matter jurisdiction coupled with proper service of process,[735] had not been established. The court cited *Texas Trading* and noted, however, "the well-established principle that, in assessing personal jurisdiction under either a constitutional due process standard or a statutory standard, courts may look to the contacts between the forum and agents of the defendant."[736] It discussed, moreover, the relationship between the subject matter jurisdiction requirements of the FSIA that protect, by sovereign immunity, those defendants who lack sufficient contacts with the United States and the personal jurisdiction requirements that the defendant have sufficient contacts with the forum.[737] The court continued: "[W]e do not understand this . . . to mean that the statutory standard for determining non-immunity is coextensive with the due process standard governing personal jurisdiction, *see World-Wide Volkswagen Corp. v. Woodson. . . ; International Shoe Co. v. Washington. . . .*"[738] The court, therefore, seemed to recognize that if subject matter jurisdiction had been found, a separate due process analysis that examined the contacts of the defendant with the United States would have been required.

Some federal courts facing the question of assertion of personal jurisdiction over alien defendants served pursuant to federal statutes authorizing worldwide service of process have applied more stringent requirements than merely sufficient contacts with the United States as a whole. Several courts that have upheld personal jurisdiction have based their decisions on the sufficiency of the defendant's contacts with the federal district in which the court is sitting or even, in at least one case, on the defendant's contacts with the state in which the federal court is sitting. In *Travis v. Anthes Imperial Limited,*[739] a suit alleging violations of the Securities and Exchange Act of 1934, some of the defendants served were Canadians who had been served in Canada under the authorization for worldwide service of process of Section 27. The United States Court of Appeals for the Eighth Circuit found that the intent of Congress in enacting Section 27 was

733. 693 F.2d 1094 (D.C. Cir. 1982).
734. *Id.* at 1112.
735. *See supra* note 250 and accompanying text.
736. 693 F.2d at 1105.
737. *Id.*
738. *Id.*
739. 473 F.2d 515 (8th Cir. 1973).

"to extend personal jurisdiction to the full reach permitted by the Due Process Clause [of the Fifth Amendment]."[740] The Court stated the following as its due process "test": "[P]ersonal jurisdiction can be acquired over the defendants who have acted within the district or sufficiently caused foreseeable consequences there, by service of process on them in Canada. See McGee v. International Life Ins. Co.. . . ."[741] Thus, the Eighth Circuit settled on a form of *International Shoe* test that required contacts with the federal district seeking to assert jurisdiction. The facts of this case clearly would satisfy the "minimum contacts with the United States" test, and the court might have decided to apply the more restrictive state test because the facts also could satisfy that test.[742] No indication of such an analysis exists, however, and the approach of the court gives no justification for the decision to examine the defendant's contacts with the federal district rather than with some other jurisdictional unit.

A similar result was reached by the United States District Court for the Southern District of Ohio in the recent case of *Jordan v. Global Natural Resources, Inc.*,[743] a class action suit brought against an alien corporation for alleged violations of the Securities Exchange Act of 1934 and Rule 10b-5 of the Securities Exchange Commission. Service had been made on a subsidiary of the defendant located in New Jersey under the service provisions of Section 27 of the 1934 Act.[744] In response to the defendant's argument that the court lacked personal jurisdiction, the court noted:

> Personal jurisdiction under [Section 27] extends to the full reach permitted by the due process clause of the United States Constitution. Thus, jurisdiction can be obtained over any defendant who has minimum contacts with the forum such that maintenance of a suit in that district does not offend traditional notions of fair play and substantial justice.[745]

From this statement, whether the due process standard to be applied is that of the fifth or that of the fourteenth amendment is unclear. Apparently, however, "the forum" discussed is "the federal district" in which the suit is brought. That conclusion partially is borne out

740. *Id.* at 529.
741. *Id.*
742. In some cases, courts adopt the most restrictive test that still will permit assertion of personal jurisdiction, thus remaining far removed from the limits of due process.
743. [1982-83 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,179 (S.D. Ohio 1983). *See also* Securities and Exchange Comm'n v. Myers, 285 F. Supp. 743, 749 (D. Md. 1968) (service on alien defendants pursuant to Section 214 of the Investment Advisers Act of 1940, 15 U.S.C. §80b-14 (1982); court considers defendants' contacts with the "country and with this district").
744. [1982-83 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,179.
745. *Id.*

by application of a minimum contacts test to the facts of the case:

> We find that defendant has the minimum contacts necessary for this Court to exercise its jurisdiction in this case. Not only did defendant solicit proxy voters by letter and by advertisement *in this district*, shares of defendant's stock are bought and sold *in this district*, from which defendant derives substantial revenue. The alleged fraud in this case was perpetrated almost entirely through the use of the mails and the advertisements in national newspapers. We do not think it is unfair or offends the notions of substantial justice to *require defendant to appear in this jurisdiction* to answer the charges against it.[746]

While discussion of the mails and national newspapers as the vehicles by which the defendant's alleged fraud was perpetrated does not necessarily refer to a contact with the Southern District of Ohio, the rest of the holding of the Court rests on contacts with the district. In sum, the court clearly required a separate due process analysis and strongly suggested by the language of its opinion that an examination of the defendant's contacts with the federal district in which the suit had been brought must be made to determine whether those contacts were sufficient to be "minimum contacts with the forum." Again, perhaps the facts of the case suggested the analysis: since the defendant had sufficient contacts with the federal district, why resort to any "contacts with the United States" analysis?[747]

The final case to be examined involving alien defendants, *Securities & Exchange Commission v. VTR, Inc.*,[748] was an action against a foreign bank and its sales agent for violations of the Securities Act of 1933. Service had been made on the defendants outside the United States pursuant to Section 22(a) of the 1933 Act.[749] The defendants objected to the mode of service as well as to personal jurisdiction. The court found that the defendants had been properly served and went on to decide whether "it is *fair* to assume jurisdiction."[750] Citing *Hanson, McGee*, and *International Shoe* as establishing a test based on "traditional notions of fair play,"[751] the court concluded that assertion of jurisdiction over the defendants was fair since "there clearly was business transacted by the defendants *within this state*."[752] The court, therefore, seemed to be applying the fourteenth amendment standard developed in the cases cited. This approach would tie in with

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746. *Id.* (emphasis added).
747. *See supra* note 742 and accompanying text.
748. 39 F.R.D. 19 (S.D.N.Y. 1966).
749. *Id.* at 20-21.
750. *Id.* at 21. For discussion of another "fairness" test, see *infra* notes 769-84 and accompanying text.
751. 39 F.R.D. at 21.
752. *Id.* at 22 (emphasis added).

the rule that the authority of a federal court generally runs to the borders of the state in which it is sitting.[753] If contacts are to be considered, therefore, then the area of contacts should at least be coextenstive with the ordinary process power of the court. Neither *Travis, Jordan*, nor *VTR* considered this distinction and the use in *VTR* of "state" as opposed to "district" was probably inadvertent. Clearly, none of the courts that have applied a sub-United States minimum contacts approach have provided explanations for their choices of measuring fora or their reasons for not applying broader tests.

As noted above,[754] many courts have dealt with the question of personal service pursuant to a federal statute authorizing nationwide, or worldwide, service of process upon a nonalien defendant served in the United States as essentially a sovereignty question. A sovereign can assert jurisdiction over anyone "found" within its borders and, in these cases, the United States is the sovereign. Other courts have employed a separate due process analysis based on a minimum contacts test, but have not examined the defendant's contacts with the United States, which would possibly lead directly into the sovereignty-power argument, but instead have considered his contacts with the federal district in which the federal court is held. This test is probably a less defensible approach because it is really the same type of test which would be applied under the fourteenth amendment to a state seeking to assert jurisdiction in the same circumstances.[755] On the other hand, this approach eliminates arguments that the chosen courtroom is substantially inconvenient to the defendant.[756] In *Indian Head Inc. v. Allied Tube & Conduit Corporation*,[757] an antitrust action was initiated in the United States District Court for the Southern District of New York against a Massachusetts corporation that had been served in Massachusetts under the worldwide service of process provision of Section 12 of the Clayton Act.[758] After a lengthy consideration of the venue provision of Section 12, the district court moved to the question of whether exercise of jurisdiction over the defendant "is consistent with the principles of due process."[759] The court con-

753. *See supra* note 263 and accompanying text.
754. *See supra* notes 573-682 and accompanying text.
755. Thus, a federal court hearing a federal question case would be reduced to deciding when and if to open its doors in regard to a particular defendant by employing the same test used by state courts but on a territorially smaller scale because not all federal districts are coextensive with the borders of the states in which the federal courts sit. *See supra* note 341 and accompanying text.
756. *See supra* note 183 and accompanying text.
757. 560 F. Supp. 730 (S.D.N.Y. 1983).
758. *Id.* at 730-31.
759. *Id.* at 733.

cluded that the requirements of the Constitution had been satisfied:

> [The defendant's] substantial and continuous activities within this district are sufficient to support the conclusion that it has purposefully availed itself of the privilege of conducting its business within this district, and has every reasonable basis to believe that it is subject to suit here, see World-Wide Volkswagen Corp. v. Woodson. . . . ; Hanson v. Denckla. . . ; International Shoe Co. v. Washington. . . ; even with respect to actions which may not arise out of the business which it has transacted in this district.[760]

Clearly the analysis by this court requires some concentration of contacts in the federal district in which suit is brought, while the analyses in cases like *Alco* and *Texas Trading* do not. Moreover, any standard of minimum contacts with the United States would have been satisfied by the facts of this case. What is interesting, however, is the application by the court of its test without any real explanation and with citation to cases involving state court extraterritorial assertions of jurisdiction. Perhaps the explanation lies in the nature of the litigation, a suit against a nonalien corporation served with process within the United States. Any analogy between state long-arm statutes and federal statutes authorizing extraterritorial service breaks down because, in regard to the United States, service in Massachusetts is service within the territory of the sovereign. Clearly, no state needs to invoke its long-arm statute if it can serve the defendant within its borders. If a federal court chooses not to rely on a *Mariash* sovereignty analysis,[761] then it must choose some territory to be "the forum" in a minimum contacts analysis, and the federal district is one possible choice. On the other hand, the court merely might have found that the defendant had substantial contacts with the federal district and, therefore, that no contacts analysis on a grander scale would be required.[762] As noted above, because no accepted federal fifth amendment standard exists,[763] circumstances often seem to dictate the test upon which a court bases its analysis.

Another variation of the "contacts with the federal district" analysis of *Indian Head* appeared in *I.A.M. National Pension Fund, Benefit Plan A v. Wakefield Industries, Incorporated, Division of Capehart Corp.*,[764] a suit brought to compel compliance with a Trust Agreement executed pursuant to a collective bargaining agreement. Service had been made on the defendant corporation and on its president

760. *Id.*
761. *See supra* notes 622-29 and accompanying text.
762. *See supra* notes 742-47 and accompanying text.
763. *See supra* notes 446-47 and accompanying text.
764. 699 F.2d 1254 (D.C. Cir. 1983).

in the Southern District of New York pursuant to 29 U.S.C. Section 1132(e)(2), ERISA. This statute provides:

> Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.[765]

The suit had been initiated in the District Court for the District of Columbia because the Trust Agreement was administered there. The defendant president argued that the federal court lacked jurisdiction over him and that the corporation had been served "well outside the territorial limits of a federal district court sitting in the District of Columbia."[766] The district court based its resolution of statutory interpretation of Section 1132(e)(2) on a determination of whether assertion of jurisdiction would violate "due process," without distinguishing between the fourteenth amendment and fifth amendment due process clauses: "for service of process on a corporation to be valid under Section 1132(e)(2) corporate contacts with the *district of service* must meet the *International Shoe* test."[767] According to the district court, therefore, for the defendant corporation to be "found" in New York for purposes of service of process, the corporation must have sufficient contacts with the federal district in which process is served. While the court relied on *International Shoe*, it did not consider anything but the propriety of service, essentially ignoring the issue of the propriety of the defendant being haled into court in the District of the District of Columbia. This court seemed to misapprehend the due process problem raised by the defendant. Even though the court relied on *International Shoe* and a "contacts" analysis, the result only can be justified, under the court analysis, on a power theory:[768] personal jurisdiction in the District of Columbia was proper if the federal district in which service was made had power over the defendant, *i.e.*, if the defendant was "present" in that jurisdiction. The authority, thus, for suit to be brought in the District of Columbia flows directly from the statute. This case aptly illustrates the confusion that exists in the area of personal jurisdiction in federal question cases. The court tries to use a "contacts" analysis to bring the defendant within the statute in the first place rather than to justify assertion of jurisdiction over the defendant by a federal district different from the one in which the defendant was served.

765. 29 U.S.C. §1132(e)(2).
766. 699 F.2d at 1256.
767. *Id.* at 1258 (emphasis added).
768. *See supra* notes 579 to 682 and accompanying text.

The United States District Court for the Eastern District of Pennsylvania, in *Oxford First Corporation v. PNC Liquidating Corp.*,[769] purported to devise a special "fairness" test to determine whether service of process on nonresident, nonalien shareholders of a Philadelphia-based corporation pursuant to the nationwide service of process provisions of Section 27 of the Securities and Exchange Act of 1934 violated the defendants' fifth amendment due process rights.[770] After rejecting the defendants' arguments that venue and service of process had been improper, the court extensively analyzed the question of due process limitations on Congressional grants of nationwide or worldwide service of process. The court examined all relevant authority[771] and "reject[ed] the notion that there are no limitations upon extraterritorial service of process under federal statutes such as the securities acts" on the ground that "the existence of the Fifth Amendment would indicate otherwise."[772] In the course of its discussion, the court noted the "anomaly" of applying *International Shoe* standards to situations like that before the court:

> The anomaly here lies not only in overlooking the principle that the United States may exercise personal jurisdiction over any defendant within the United States, but also in limiting federal action by a constitutional provision applicable only to state action.[773]

The court, however, decided not to base its amenability test upon notions of territoriality on one hand or applications of state standards on the other; it chose to formulate a special federal test based on notions of "fairness." In devising this fairness test, the court noted:

> [P]ractical considerations emanating from the realities of contemporary litigation . . . are . . . persuasive justification for upholding the view that any constitutional due process limitations upon a federal extraterritorial (nationwide) service of process statute must be broadly defined.[774]

In its test, the court decided "to include the traditional procedural due process notions as *a part* of a judicial fairness test, rather than impose the *International Shoe* mandate of due process on federal nationwide service of process statutes."[775] The fairness test contemplated by the court would include the following:

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769. 372 F. Supp. 191 (E.D. Pa. 1974).
770. *Id.* at 203-05.
771. *Id.* at 198-201.
772. *Id.* at 201.
773. *Id.* at 199-200 (quoting First Flight Co. v. National Carloading Corp., 209 F. Supp. 730, 737 (E.D. Tenn. 1962)).
774. *Oxford*, 372 F. Supp. at 201.
775. *Id.* at 203 (emphasis in original).

> *First,* a court should determine the extent of the defendant's contacts with the place where the action was brought; *i.e.,* the *International Shoe* type criteria. *Second,* a court should weigh the inconvenience to the defendant of having to defend in a jurisdiction other than that of his residence or place of business. . . . *Third,* the matter of judicial economy should be evaluated . . . . *Fourth,* a court should consider the probable situs of the discovery proceedings in the case and the extent to which the discovery proceedings will, in any event, take place outside the state of defendant's residence or business. . . .*Fifth,* a court should examine the nature . . . and the extent of impact that defendant's activities have beyond the borders of his state of residence or business.[776]

Upon application of this fifth amendment test, the court found that "the fairness balance . . . point[s] strongly to upholding jurisdiction here."[777]

The "fairness" test devised by the *Oxford* court is significant in several regards. First, while the court recognized that federal exercises of jurisdiction pursuant to federal service of process statutes should be measured differently from state court exercises of jurisdiction, the court seemed to key its test on the "state of the defendant's residence or place of business"; it referred to "state" in factors four and five of its above-quoted test while otherwise generally referring to "the place where the action was brought" or "jurisdicton." The court did not, on one hand, rely on federal districts in its analysis or, on the other hand, on the United States as a whole. In many ways, moreover, the *Oxford* test resembles the "balancing of the conveniences" test that many state courts employed in deciding whether the *International Shoe* minimum contacts test had been satisfied,[778] at least prior to the Supreme Court decision in *World-Wide Wolkswagen*[779] decided subsequent to *Oxford.* In *World-Wide Volkswagen,* the Supreme Court ruled that before any type of balancing of factors might be employed, the court had to establish that the defendant had some contacts with the forum state. The fifth factor, "nature of the regulated activity . . . and . . . extent of impact . . . beyond the borders of [the] state," seems geared to the special federal purpose in authorizing nationwide or worldwide service of process in regard to certain disputes arising out of that activity.[780] This factor is comparable to discussions as to whether the state long-arm

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776. *Id.* 203-04 (emphasis in original).
777. *Id.* at 204.
778. *See supra* notes 106-44 and accompanying text.
779. *See supra* notes 149-55 and accompanying text.
780. *See supra* note 573 and accompanying text.

statute that authorized the extraterritorial service of process was intended to reach certain types of acts having consequences in the forum state. A strong argument can be made that the *Oxford* court, in attempting to formalize its fairness test, merely listed factors that many state courts had included in *International Shoe* analyses.[781] Further, *Oxford* may have anticipated the *World-Wide* "two-step" test for state courts: (1) some defendant contacts with the forum state, and (2) balancing conveniences to determine whether those contacts were sufficient to be "minimum" for *International Shoe* purposes.[782] This interpretation finds support in the following statement by the *Oxford* Court:

> It is a close question whether these facts and the reasonable inferences therefrom would meet the *International Shoe* standards of due process, if that was the sole test. However, in view of the foregoing discussion, we need not answer the question on *International Shoe* terms alone. On this record we find that there were sufficient contacts between the St. Claire defendants and this jurisdiction to support the first criterion of the multifaceted fairness test that justifies *in personam* jurisdiction here.[783]

Finally, the *Oxford* court has devised a test applicable only to nonalien defendants. The court gave no clue as to how the test would change if the defendant had no state of residence or business. One conclusion might be that the "fairness" test of *Oxford* is no different in effect from the "minimum contacts with the state in which the federal court is sitting" test of *VTR*, except that *VTR* applied the test to alien defendants. In short, *Oxford*, which at first glance appears to create a new, fully federal test for personal jurisdiction in these federal statute cases, in reality seems to apply *International Shoe* almost without regard to the federal context.[784]

### *Summary and Analysis*

Federal courts have varied greatly in treatment of the question of amenability standards in federal question cases in which process has been served pursuant to a federal statute authorizing nationwide or worldwide service of process. Some courts, in effect, have determined that when service is made within the United States, personal jurisdiction flows automatically from the statute on a sovereignty theory.[785]

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781. *See supra* notes 106-44 and accompanying text.

782. *See supra* notes 149-50 and accompanying text.

783. 372 F. Supp. at 204 (emphasis in original, footnote omitted).

784. At least, the test is only useful in circumstances such as those posed by the case. What *Oxford* offers is a well-written and reasoned alternative to the *Mariash* power approach, *see supra* notes 622-29 and accompanying text, in regard to nonalien defendants.

785. *See supra* notes 573-682 and accompanying text.

Other courts have required a separate due process analysis in similar cases, applying some form of the *International Shoe* test—"minimum contacts with the federal district"[786] or "minimum contacts with the state in which the federal court is sitting."[787] In cases in which the defendant is an alien served outside the United States, all courts addressing this issue have required a separate amenability analysis, again applying some form of the *International Shoe* test—"minimum contacts with the United States as a whole," a "national contacts" approach,[788] "minimum contacts with the federal district in which the suit is brought,"[789] or "minimum contacts with the state in which the federal court is sitting."[790]

Other approaches also have been suggested. One commentator has noted that satisfaction of the venue requirements of certain federal statutes authorizing nationwide or worldwide service of process automatically would serve personal jurisdiction purposes because those venue provisions require defendant-contact with the federal district in which the court is sitting.[791] Other commentators have suggested

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786. *See supra* notes 754-68 and accompanying text.

787. *See supra* notes 769-84 and accompanying text.

788. *See supra* notes 687-716 and accompanying text. *See also* notes 717-38 and accompanying text; Engineering & Equipment Co. v. S.S. Selene, 446 F. Supp. 706 (S.D.N.Y. 1978) (in rem jurisdiction as authorized by Rule B(1) of the Supplemental Rules for Certain Admiralty and Maritime Claims is constitutional when the defendants whose property was being attached had sufficient contacts with the United States as a whole).

789. *See supra* notes 739-47 and accompanying text.

790. *See supra* notes 748-53 and accompanying text. In some cases in which nationwide or worldwide service of process might be authorized by statute, federal courts have not considered amenability under the particular statute but, instead, have applied state long-arm statutes as authorized by former Rule 4(d)(7) of the Federal Rules of Civil Procedure or Rule 4(e) of the Federal Rules of Civil Procedure. *See, e.g.*, Rios v. Marshall, 530 F. Supp. 351 (S.D.N.Y. 1981) (although court could have utilized nationwide service provisions of Section 12 of the Clayton Act, the court applied the New York long-arm statute, finding personal jurisdiction over the Florida defendants on the basis of the sufficiency of their contacts with the state of New York); Hitt v. Nissan Motor Co., Ltd., 399 F. Supp. 838 (S.D. Fla. 1975) (court discussed Section 12 of the Clayton Act only in regard to the question of venue; court used Florida long-arm statute to find defendant amenable to suit). While Federal Rule 4 permits a party to select among the approved methods of service so long as the factual requirements of the particular method are satisfied, to rely on a state long-arm statute does not seem sensible except in cases in which state standards under the long-arm statute clearly are satisfied, thus making the long-arm analysis uncomplicated. The Court of Appeals for the Fifth Circuit observed, in Hilgeman v. National Ins. Co. of Am., 547 F.2d 298, 301 n.6 (5th Cir. 1977):

> We have been given no explanation of why, given the liberal nationwide service of process provisions of the federal Securities Acts, particularly §27 of the Securities Exchange Act of 1934, . . .the plaintiff made use of the Alabama insurance statute to effect service of process when the whole thrust of his action was that he held a security rather than an insurance policy. Plaintiff obtained service of process on the two non-corporate defendants under the federal statute.

*Id.*

791. Comment, *Civil Procedure—Service of Process—"Fairness" Test Applied to Service Under Securities Exchange Act of 1934 Despite Broad Authorization of Section 27*, 15 U.S.C. §78aa (1970). Oxford First Corp. v. PNC Liquidating Corp., 372 F. Supp. 191 (E.D. Pa. 1974), 7 RUTGERS-CAM. L. J. 158, 166 (1975).

that federal courts should have worldwide service of process, with the location of suit being controlled, by venue and forum nonconveniens/transfer provisions, to preclude unfairness to the defendant caused by inconvenient location of trial.[792]

Clearly, no uniform approach has been adopted, even in this least complicated federal question area in which service is made pursuant to a special federal statute. To this writer, the only unifying test possible would be one of "minimum contacts with the United States," barring, of course, the legislative or judicial establishment of some different wholly federal fifth amendment standard. In cases involving service within the United States, the defendant's presence in the country would be a sufficient contact, especially since the purpose envisioned by Congress in enacting these special statutes was to maximize the potential for providing federal fora for the vindication of certain federally-created rights, fora which would be convenient to the plaintiff involved.[793] This doctrine, however, would not be based on some notion of sovereignty, which has been rejected frequently as a ground for personal jurisdiction in the state context, but rather on a balancing test in which presence within the United States would be such a heavy factor that only the most extreme hardship to the defendant in litigating in the United States might outweigh the presence factor. In the state court context, no factor has yet outweighed presence, no matter how transitory, as a constitutionally proper basis of personal jurisdiction.[794] Any intra-United States inconvenience could be mitigated by transfer of venue provisions, but only when such transfer would not undermine the Congressional purpose in enacting the special service of process statute. Thus, in cases involving service within the United States, the outer limits of due process would be satisfied by presence in the country, and any more rigorous contacts analysis generally would not be required.

In regard to defendants served outside the United States pursuant to a federal statute authorizing worldwide service of process, "minimum contacts with the country" again would satisfy any fifth amendment requirement. To require sufficient contacts with either the state in which the federal court is sitting or the particular federal district seeking to assert personal jurisdiction is not required constitutionally nor is it sound doctrinally. The former, the *International Shoe* test, would create the admittedly anomalous situation of subjecting

792. ALI, Study of the Division of Jurisdiction Between State and Federal Courts §2374, & 437-41 mem. (1969).

793. *See supra* note 247 and accompanying text.

794. *See supra* note 4 and accompanying text.

federal court personal jurisdiction in cases in which process is served in a wholly federal manner to the same standard applied to state courts under the fourteenth amendment.[795] Moreover, because each state might have its own interpretation of what is sufficient to satisfy due process subject to Supreme Court decisions, the federal courts also would have to decide whether to apply the standards of the particular states in which they were sitting or apply some uniform federal test. The "minimum contacts with the state" standard also would be subject to further criticism. Since states vary greatly in size, one defendant, who had acted in New York, New Jersey, Connecticut and Rhode Island but had not acted sufficiently in any state to have minimum contacts therewith, could not be brought to justice in a federal court. However, another defendant who had committed these same acts at the most remote corners of Alaska, a greater land area, would be subject to suit in a federal court because the accumulation of acts would be sufficient to be minimum. Finally, a defendant might not have sufficient contacts with any state to satisfy a minimum contacts test, and, yet, he might have acted sufficiently to have minimum contacts with the United States.[796] Clearly, in these cases, the purpose of the federal statute authorizing worldwide service of process would be undermined if suit could not be maintained in any federal court because the defendant's activities were scattered too thinly throughout the country.

Some of the same criticisms could be levelled at the "minimum contacts with the federal district" test. Again, a defendant whose activities were spread thinly would not be amenable to suit although he might have caused substantial effects in the United States. Moreover, federal districts are never larger than the states in which the federal courts are sitting, and they are often smaller. Thus, a "federal district contacts" requirement would be, in some cases, more strict than that required by straight application of the *International Shoe* "contacts with the state" test, a result making no sense at all, especially since Congress has authorized that federal process run at least to the borders of the states in which the federal courts are held.[797] A federal court hearing purely federal business should not be more restricted than a state court hearing the same matter.

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795. Even in diversity cases, courts and commentators have noted this anomaly with tension. *See supra* note 488 and accompanying text. In the federal question context, many more authorities have been disturbed by the doctrinal disharmony created. *See, e.g., infra* notes 878, 968, and 1132 and accompanying text.

796. Several courts and commentators have noted this possibility. *See, e.g., infra* notes 1030, 1083, 1267 and 1281 and accompanying text.

797. *See supra* note 263 and accompanying text.

Apparently, no reason exists why the fifth amendment would not be satisfied by a requirement of minimum contacts with the United States. An examination of the cases in which personal jurisdiction was upheld upon application of other amenability tests probably would reveal that the defendant's contacts had been concentrated sufficiently as to satisfy the more restrictive test of contacts with a particular state or district. Therefore, the more liberal test of "minimum contacts with the United States," or "national contacts," also would have been satisfied. On the other hand, in cases in which personal jurisdiction was denied upon application of other amenability standards, the defendant's contacts, such as they were, probably had been concentrated in only one state or federal district, and, thus, the more liberal test of "national contacts" also would not have been satisfied because no other contacts could have been added to the insufficient local contacts. In other words, a federal court might apply a localized contacts analysis, not because the test established the outer limits of due process, but because, on the facts of the case, local contacts were determinative. That does not mean, however, that a uniform standard of minimum contacts with the United States should not be developed. A more sensible analytic approach would be to begin with an established standard, rather than selecting the standard by the facts of the particular case. As noted above,[798] moreover, any abuse by plaintiffs of a "contacts with the United States" test by bringing suit in a very remote or inconvenient federal district could be precluded, by the venue requirements included in the federal statutes authorizing nationwide or worldwide service of process, by liberal change of venue statutes, or by the doctrine of *forum non conveniens*.

### *2. Amenability Standards in Federal Question Cases in which Process is Served in a Wholly Federal Manner Pursuant to Rules 4(d)(1) and 4(d)(3) of the Federal Rules of Civil Procedure*

Federal Rules 4(d)(1) and 4(d)(3) provide methods of service upon individuals and corporations and other business entities, respectively.[799] Rule 4(d)(1) permits service by delivery to the defendant or by "leaving copies . . . at his dwelling house or usual place of abode," a wholly federal method of serving an individual defendant present within or a resident of the state in which the federal court is sitting.[800] Federal process ordinarily runs to the borders of the state in which the federal

798. *See supra* notes 188, 226, 337, 354, 657 and 693 and accompanying text.
799. *See supra* notes 273-74 and accompanying text.
800. *See supra* note 273 and accompanying text.

court is sitting.[801] Rule 4(d)(3) permits service upon a business entity by delivery, within the state, "to an officer . . . or to any other agent authorized by appointment or by law to receive service of process," a wholly federal method of serving a defendant corporation whose agent is present within the state in which the federal court is sitting.[802] This provision presupposes that in most cases such an agent will not be authorized to receive service of process unless the defendant business entity has some relationship to the state in which the federal court is sitting.[803]

Unlike the methods of service permitted by the special federal statutes discussed above, the more general methods of 4(d)(1) and 4(d)(3) may be utilized in any federal question case so long as the factual requirements of the Federal Rule are satisfied. Service is more limited in territorial scope, however, because Congress has not chosen to grant federal courts across-the-board nationwide, or worldwide, service of process, although such a statute would not be unconstitutional.[804] Instead, Congress has decided to limit such statutory grants to areas of particular federal concern.[805]

Federal Rules 4(d)(1) and 4(d)(3) speak only to the manner of serving process and not to the question of whether such service will lead to

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801. Rule 4(f) provides, in pertinent part:

> All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state.

FED. R. CIV. P. 4(f). As described above, dozens of federal statutes authorize more extensive service of process. *See supra* note 247 and accompanying text. Rule 4(f) itself authorizes a limited service beyond the borders of the state, within 100 miles of the federal courthouse, for "persons. . . .brought in as parties pursuant to Rule 14, or as additional parties to a pending action or a counterclaim or crossclaim therein pursuant to Rule 19." FED. R. CIV. P. 4(f). Rule 4, moreover, authorizes service pursuant to state long-arm statutes in some circumstances. *See infra* notes 897 and 1103-08 and accompanying text. Such service, therefore, also would be "authorized . . . by these rules."

802. *See supra* note 274 and accompanying text.

803. Such service still will be scrutinized as to due process requirements. *See infra* notes 806-87 and accompanying text. If the corporation has no contacts with the state in which the federal court is sitting, the suit probably could not be maintained because of lack of personal jurisdiction. *See infra* notes 823-71 and accompanying text. Or, if the court applies a "minimum contacts with the United States" due process test for personal jurisdiction, as in First Flight Co. v. National Carloading Corp., 209 F. Supp. 730 (E.D. Tenn. 1962), the suit probably would fail for lack of venue. *See infra* notes 872-87 and accompanying text.

804. *See supra* note 217 and accompanying text.

805. *See supra* notes 205-50 and accompanying text. In somè circumstances, courts have found that Congress implicitly has authorized nationwide or worldwide service of process. *See, e.g.*, F.T.C. v. Browning, 435 F.2d 96 (D.C. Cir. 1970) (third paragraph of section 9 of Federal Trade Commission Act, 15 U.S.C. §49 (1976), impliedly authorized nationwide service of process in proceedings to enforce investigative subpoena issued by F.T.C.). *Cf.* United States v. Hill, 694 F.2d 258 (D.C. Cir. 1982) (court finds that section 645 of Department of Energy Organization Act, 42 U.S.C. §7255 (Supp. IV 1980) does not confer power of extraterritorial service of process in Department of Energy subpoena enforcement proceedings).

a constitutionally permissible assertion of personal jurisdiction.[806] Since the method of service in these cases would be wholly federal, the appropriate amenability standard should be the due process clause of the fifth amendment.[807] Any reliance on state standards, except, perhaps, by analogy, seems wholly misplaced.[808] Federal question cases must be examined to determine how federal courts actually have dealt with this issue, not a simple task because federal courts often do not indicate clearly the subsection of Federal Rule 4 under which process was served. This omission is indicative of the absence of uniform treatment of the personal jurisdiction question; no formula has been developed.[809]

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806. Unlike those cases in which service is made pursuant to a federal statute authorizing nationwide and/or worldwide service and in which the courts have not engaged in any separate amenability analysis either because the court felt that no separate analysis would be required or the court felt that the standard had been "built into" the statute, *see supra* notes 579-682 and accompanying text, federal courts seem to assume that service pursuant to Rule 4(d)(3) cannot trigger federal court personal jurisdiction unless such assertion of jurisdiction would satisfy the due process clause of the fifth amendment. *See infra* notes 817-87 and accompanying text. When service is made pursuant to Rule 4(d)(1), a separate due process analysis probably would not be employed because of the obvious sufficiency of the defendant's presence and/or residence as a constitutionally appropriate basis for assertion of personal jurisdiction. *See infra* notes 810-16 and accompanying text.

807. *See supra* notes 329 and 497 and accompanying text. One federal court has noted:

> Comparatively recent decisions have held that federal courts considering questions arising under the Constitution of the United States or federal statutes properly may exercise jurisdiction limited only by the due process clause of the Fifth Amendment. . . .But in [those] . . . cases, the manner of serving process was provided for by both federal rule and by state law. It was possible, therefore, to use Rule 4(d)(3) to the exclusion of any procedures under state statutes, and to disregard their limitations. . . .It is obvious that although a federal court may have a foreign corporation within its territorial jurisdiction, the court may not have procedure available under the Federal Rules of Civil Procedure to bring the corporation into court. Where no agent is served in fact a federal court must look to the state statutory procedure. A federal court is authorized to do this under Rule 4(d)(7). It follows that the adequacy of service of process must be determined by that rule.

Hartley v. Sioux City & New Orleans Barge Lines, Inc., 379 F.2d 354, 356 (3d Cir. 1967). The problems created when process is served by some state method, as authorized by Rule 4(e) and (possibly) by former Rule 4(d)(7), will be discussed below. *See infra* notes 915-1038 and 1123-1316 and accompanying text.

808. *See supra* note 795 and accompanying text.

809. Many cases have been devoted to the development of a technique for determining whether a state court properly can assert jurisdiction over a defendant. *See supra* notes 60-185 and accompanying text. The resulting test might be summarized in the following format: (1) Was process served properly pursuant to the statute providing for service of process? (2) If yes, did such service give the defendant adequate notice of the pendency of the suit against him and has the defendant been afforded the opportunity to be heard in his own defense? (3) If yes, did the state have the authority, under its long-arm statute, to serve process on the defendant? (4) If yes, would assertion of personal jurisdiction over this defendant offend his rights under the due process clause of the fourteenth amendment, *i.e.*, (a) did the defendant have any contacts with the state seeking to assert jurisdiction over the defendant, and (b) if yes, were the defendant's contacts with the state sufficient to be considered "minimum contacts" within the meaning of *International Shoe* and its progeny? No such basic structure of analysis has been developed in federal court cases, although most federal courts follow the state-developed analysis in regard to diversity cases, regardless of the manner in which process

Very few amenability issues arise regarding service pursuant to Rule 4(d)(1). The explanation for this paucity of discussion is simple: service under Rule 4(d)(1) is limited, at the time of service, to individuals residing in or present in the state in which the federal court is sitting, and, since no state court would be denied personal jurisdiction over a defendant so served as long as the other procedural aspects of due process—adequate notice and opportunity to be heard—had been satisfied,[810] a federal court surely would not be denied personal jurisdiction. This is because a federal court is subject only to the restrictions of the due process clause of the fifth rather than the fourteenth amendment, restrictions that *could not* be more limiting than those on state courts. In other words, presence and residence in a state always have been considered sufficient bases for assertion of personal jurisdiction, and federal courts should be entitled to assert jurisdiction on the basis of presence or residence in the state in which the court is sitting.[811] Even if some sort of "minimum contacts" analysis were applied, presence or residence always would be sufficient contacts.[812] *In re Arthur Treacher's Franchise Litigation*[813] was one federal question case in which a defendant, personally served in the state of Pennsylvania in regard to a suit instituted in the United States District Court for the Eastern District of Pennsylvania, presumably pursuant to Rule 4(d)(1), resisted the exercise of court authority over him. Defendant claimed he was immune from service of process because "[h]is sole

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was served. *See supra* notes 376-492 and accompanying text. Perhaps this absence of technique can be explained partly by the variety of options available for federal court service of process. The more likely explanation, however, is that no series of cases has developed any fifth amendment standard, resulting in an analytical "catch as catch can": use whatever analysis makes sense in light of the facts of the case and the result that seems reasonable—minimum contacts with the federal district, with the state, with the United States as a whole, or some new and unique test. Most federal courts end up using some analogue of the *International Shoe* test, probably because that test is already well-established in doctrine and practice and at this point, the probability that the Supreme Court will step up and require some new and unique test that does not require some sort of minimum contacts analysis seems unlikely. Even when a court purports to be establishing such a test, the test can be folded neatly into the *International Shoe* mold. *See supra* notes 769-84 and accompanying text.

810. *See supra* note 511 and accompanying text.

811. Congress has elected to relegate the arms of the federal system, the federal district courts, to federal districts that are either territorially coextensive with the states in which the federal courts are sitting, or are subsumed within the states with two or more federal districts combining together to be territorially coextensive with one state. Congress further has provided that the process of each federal district court reaches at least to the borders of the state in which the federal court is sitting. *See supra* note 801 and accompanying text. Thus, the ordinary service of process power of the federal court is coextensive with that of a state court and any amenability analysis could be analogous to that regarding a state court serving a defendant who is present in or a resident of the state.

812. *See supra* note 115 (discussing the traditional bases of personal jurisdiction—presence, domicile, and residence—as contacts with the forum state).

813. 92 F.R.D. 398 (E.D. Pa. 1981).

purpose for being in [Pennsylvania] (when he was hand-served with process) was to testify in [a related] action."[814] The defendant and the court both assumed that if the immunity from process were not granted, the defendant would be amenable to suit in the federal court even though "at all times subsequent to the filing of the complaint in this particular action. . . . , (defendant) has neither resided in nor conducted business in Pennsylvania."[815] His transitory presence at the time of service would have been sufficient to subject him to the authority of the federal court.[816]

In cases in which process is served on a corporation or other business entity pursuant to Rule 4(d)(3), more difficult amenability questions have arisen. These questions stem in large measure, from the fact that a corporation, unlike an individual, lacks the capacity to be "physically present" in a jurisdiction.[817] Thus, since Rule 4(d)(3) prescribes only a method for triggering the power of a federal court when service is made on some corporate agent located within the state in which the federal court is sitting, the court must decide whether assertion of personal jurisdiction over the corporation would violate the due process clause of the fifth amendment. In *First Flight Company v. National Carloading Corp.*,[818] the United States District Court for the Eastern District of Tennessee described various judicial responses to this problem:

> There is . . . a great deal of confusion as to just what the federal law is in this regard. Aside from cases which purport to limit federal court jurisdiction by state law [by the minimum contacts with the state test under the fourteenth amendment], other cases are to be

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814. *Id.* at 404.

815. *Id.*

816. The court noted that "[d]efendant's argument relates solely to the sufficiency of service of process and it is not premised on any asserted lack of personal jurisdiction." *Id.* at 405. The court ultimately refused to grant the defendant the desired immunity "because service could have been made upon him by certified mail pursuant to Pennsylvania's long-arm statute and pursuant to Fed. R. Civ. P. 4(d)(7)." *Id.* at 404 (*quoting* Plaintiff's Memorandum). The court noted:

> The rationale underlying this particular rule of immunity is to ensure the efficient administration of justice by encouraging the voluntary attendance of witnesses who might otherwise be dissuaded from appearing in a jurisdiction for fear of being served with process in an unrelated action.

*Id.* Since the defendant could have been served validly by another means, the court concluded that the purpose of the doctrine would not be achieved by grant of immunity. *Id.* at 405.

The court recognized that an effective alternative method of service would be available, although that method would depend, to some extent, on state law. In regard to other defendants, the court analyzed their jurisdictional objections in terms of due process standards applicable to state long-arm statutes. *See infra* notes 1172-77 and accompanying text.

817. *See supra* note 97 and accompanying text (discussing "presence" problem in regard of state court jurisdiction).

818. 209 F. Supp. 730 (E.D. Tenn. 1962).

> found which require as a prerequisite to the personal jurisdiction of a federal court over a foreign corporation that the defendant be "doing business" within the district in which the court is held because the Fourteenth Amendment requires it, or because the Fifth Amendment requires it, or because venue statutes require it, or because the Court merely assumes that something requires it. Other courts require "doing business" not within the district but within the state in which the federal court sits, for equally diverse reasons.[819]

As described below,[820] the *First Flight* court, by "reference to fundamental principles and authorities," found "a rational and consistent explanation of federal court personal jurisdiction" when process is served pursuant to Rule 4(d)(3).[821] The court developed a requirement of "minimum contacts with the United States" to satisfy the fifth amendment due process clause.[822]

Before considering *First Flight* and its comprehensive treatment of the question of federal court personal jurisdiction when process is served, pursuant to Rule 4(d)(3), by a wholly federal method, some other federal question cases that consider this issue should be examined for comparison purposes. In *Fraley v. Chesapeake and Ohio Railway Co.*,[823] a Federal Employers' Liability Act (FELA) suit instituted in the United States District Court for the Western District of Pennsylvania, service had been made on defendant Virginia corporation, under Rule 4(d)(3), at an office maintained by the defendant in the Western District of Pennsylvania. The district court had dismissed the action on the ground that it lacked personal jurisdiction over the defendant because the defendant was not "doing business" in the Western District of Pennsylvania.[824] The United States Court of Appeals reversed and remanded on the following ground:

> [T]he District Court erred in refusing to direct defendant to answer plaintiff's interrogatories designed to elicit the range of operations of defendant's offices in Pennsylvania. . . .[because t]he range of activities of defendant's offices was critical to ascertaining whether they were of sufficient dimension to constitute "minimum contacts" or "doing business" in Pennsylvania, with consequential establishment of *in personam* jurisdiction in the Western District of Pennsylvania.[825]

The court of appeals asserted that it was relying on federal law "in

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819. *Id.* at 736.
820. *See infra* notes 872-84 and accompanying text.
821. 209 F. Supp. at 736.
822. *Id.* at 736-40. *See infra* notes 872-84 and accompanying text.
823. 397 F.2d 1 (3d Cir. 1968).
824. *Id.* at 2.
825. *Id.* at 3.

determining the issue of *in personam* jurisdiction where the complaint . . . asserts a federal right, and personal service . . . was made in accordance with . . . Rule 4(d)(3)."[826] In this circumstance, however, the court apparently found that "federal law" would be "minimum contacts with the state," the same test that would apply to Pennsylvania state court assertions of jurisdiction over foreign corporations.[827] While its conclusion was based, in part, on an erroneous understanding of the derivation of the *International Shoe* standard,[828] the court also grounded its test on "basic principles of fairness."[829] The test in *Fraley* is clearly no different from the test for a state court and creates the anomaly of opening the doors of a federal court in a federal question case in which service is made in a wholly federal manner only to the extent that a state court in similar circumstances would be permitted to open its doors.[830] The result, moreover, cannot be explained on the ground that "minimum contacts with the state" is an acceptable test because its application necessarily will result in the assertion of personal jurisdiction.[831] The facts of *Fraley* might not satisfy the state standard but clearly might satisfy a "minimum contacts with the United States" standard.[832] The case may be explained on the ground that because the plaintiff himself

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826. *Id.* at 4. Thus, the court limited its approach to cases in which service had been made by some wholly federal manner.

827. The question before the court of appeals was whether the district court had erred in refusing to require the defendant to answer interrogatories in regard to "the range of operations of defendant's offices in *Pennsylvania*" and the court of appeals noted that the scope of these activities "was critical to ascertaining . . . 'minimum contacts' . . . in *Pennsylvania*." *Id.* at 3 (emphasis added). Thus, although the court of appeals quoted a test of minimum contacts with the *forum*, it seemed to regard the State of Pennsylvania as the critical area of concern. *Id.* Moreover, the court cited *International Shoe* as the source of its test. *Id.*

828. After citing *International Shoe* as the source of the "minimum contacts" test, the court stated: "It must be noted that while the principles stated were announced by the Supreme Court in diversity jurisdiction cases they are now generally regarded as applicable in cases grounded on a federal claim." *Id.* at 3. *International Shoe* and its progeny were not diversity cases but state court cases. *See supra* notes 106-55 and accompanying text. This error in regard of the *International Shoe* test has been made by several other federal courts. *See, e.g.*, DeJames v. Magnificence Carriers, Inc., 654 F.2d 280, 283 (3d Cir. 1981); In re Arthur Treacher's Franchisee Litig., 92 F.R.D. 398, 408 n.7 (E.D. Pa. 1981); Superior Coal Co. v. Ruhrkohle, A.G., 83 F.R.D. 414, 418 n.5 (E.D. Pa. 1979). Such a misconception provides further demonstration of the confusion in this area of the law.

829. *Fraley*, 397 F.2d at 3 (*quoting* Lone Star Package Car Co., Inc. v. Baltimore & O.R. Co., 212 F.2d 147, 155 (5th Cir. 1954).

830. *See supra* note 795 and accompanying text and *infra* notes 878, 968 and 1132 and accompanying text.

831. *See supra* notes 742, 747 and 762 and accompanying text.

832. The defendant maintained some offices in Pennsylvania "for the purpose of soliciting business," *Fraley*, 397 F.2d at 3 (*quoting* affidavit of defendant's corporate secretary), but asserted that it had "no railroad lines or tracks nor [did] it operate any trains . . . in, on or across the State of Pennsylvania." *Id.* Clearly, the defendant railroad company operated trains and maintained railroad lines in other states; the plaintiff had been injured in West Virginia where the defendant maintained railroad lines.

sought to establish "minimum contacts with Pennsylvania," the court keyed on that request. Again, as in many of the cases discussed above, the circumstances of the case seemed to dictate the test applied because no general federal approach had been devised.[833]

In *Volkswagen Interamericana, S.A. v. Rohlsen*,[834] a federal question action instituted in the United States District Court for the District of Puerto Rico under the Automobile Dealers' Day in Court Act,[835] service had been made on the defendant Mexican Corporation, under Rule 4(d)(3), by serving process on the manager of a Puerto Rican franchise of the defendant.[836] In response to the defendant's objection to personal jurisdiction, the court observed that federal court assertions of personal jurisdiction in federal question cases were to be "tested . . . by reference to the standards developed under the [fifth amendment due process] clause"[837] and proceeded to examine the defendant's contacts with Puerto Rico, citing *International Shoe* as the source of "[t]he basic standard."[838] While the court, therefore, gave lip service to the need to apply federal standards, it applied the same analysis that a state court would use. Again, the federal standard, when applied, looks, acts, tastes, and smells just like the state standard.

In another federal question suit, service was made, apparently pursuant to Rule 4(d)(3),[839] on a defendant alien corporation by personal service on a wholly-owned subsidiary located in the Southern District of New York. In *United States v. Imperial Chemical Industries*,[840] the district court examined the defendant's relationship with the federal district and concluded that "requiring [defendant] to defend here will [not] work such an inconvenience as to result in a denial of due process."[841] The court cited *International Shoe* as the source of the test applied to the defendant: "[The defendant] has taken advantage of the opportunities offered here for its corporate activities; it has received the benefit of the laws of the United States; it must expect

833. *See supra* notes 742, 747 and 762 and accompanying text.
834. 360 F.2d 437 (1st Cir. 1966).
835. 15 U.S.C. §§1221-1225 (1982).
836. 360 F.2d at 439.
837. *Id.* at 440 n.3.
838. *Id.* at 440.
839. The court did not cite the source of authority for serving the defendant corporation by delivery to an "agent" located in the state in which the federal court was sitting, but also did not cite any state rule or state long-arm statute. Thus, one can infer from the facts of the case, which are consistent with the requirements of Rule 4(d)(3), that service was made in the wholly federal fashion permitted thereby.
840. 100 F. Supp. 504 (S.D.N.Y. 1951).
841. *Id.* at 511.

to be required to answer for their breach."[842] While the court did not use specifically the term "minimum contacts," it clearly relied on a state court test, but applied the test even more narrowly by examining only the defendant's contacts with the federal district in which the suit had been brought.[843] In both *Chemical Industries* and *Rohlsen* the courts may have applied the least broad standard necessary to find personal jurisdiction; in each case the defendant's contacts with the smaller entity were sufficient to support personal jurisdiction.[844] *Rohlsen* and *Chemical Industries* differ, however, because the former court purported to be applying some federal standard while the latter did not.

In a patent infringement suit, *Honeywell, Inc. v. Metz Apparatewerke*,[845] the United States District Court for the Northern District of Illinois pursued two alternative analyses to determine whether it had obtained personal jurisdiction over the defendant alien corporation. Process was served, within Illinois, on the branch manager of the defendant's exclusive American distributor of the defendant's allegedly infringing devices, and a copy of the summons and complaint was mailed to the defendant in Germany.[846] The plaintiff first asserted that personal jurisdiction had been obtained by service under Rule 4(d)(3) on the defendant's agent.[847] In a confusing opinion, the court reversed the ordinary order of analysis, ruling that if the distributor served was an agent of the defendant, then due process would be satisfied because the defendant would have "sufficient minimum contacts with Illinois so as to warrant *in personam* jurisdiction."[848] If, however, the distributor served were "an independent purchaser" of the defendant's product, then due process would not be satisfied and service on the distributor would be insufficient.[849] According to the district court, therefore, if satisfaction of the re-

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842. *Id.*

843. This case was decided only 6 years after *International Shoe* and before subsequent cases "filled out" the *International Shoe* doctrine. Thus, the court understandably purported to follow *International Shoe* but did not employ the talismanic phrase "minimum contacts". This case is probably most significant because it demonstrates that federal courts were using *International Shoe*, soon after it was decided, as a constitutional barometer, not only of the fourteenth amendment, but of the fifth as well.

844. In *Chemical Industries*, the defendant's subsidiary was incorporated in the state and maintained its office and conducted substantial activities in the federal district. 100 F. Supp. at 511. In *Rohlsen*, the defendant's franchisee maintained its office and conducted its activities in Puerto Rico. 360 F.2d at 440-41.

845. 353 F. Supp. 492 (N.D. Ill. 1972), *rev'd*, 509 F.2d 1137 (7th Cir. 1975).

846. 353 F. Supp. at 494.

847. *Id.* at 494-95.

848. *Id.* at 494.

849. *Id.*

quisites of Rule 4(d)(3) could be established, due process would be satisfied.[850] Although the court seemed to say that an *International Shoe* test had been programmed into Rule 4(d)(3), the court might have been careless in stating the issue. In this case, the distributor's activities within Illinois were so substantial that the only determinative question was whether the distributor was actually an agent of the defendant. The court concluded that the distributor was *not* an agent of the defendant and that the defendant therefore did "not have sufficient minimum contacts with the State of Illinois to warrant this Court exercising *in personam* jurisdiction over it."[851] Clearly, the court did not conclude that any special amenability standards should be applied in federal question cases; the court employed the *International Shoe* test directly to the circumstances before it.

On the alternative basis asserted for personal jurisdiction, amenability to service under the Illinois state long-arm statute as authorized by Rule 4(e) of the Federal Rules, the court found that the requirements of the Illinois statute were not satisfied.[852] The appellate court decision,[853] which will be discussed below,[854] considered only the Rule 4(e) prong of the district court decision. The court of appeals found that the state statutory requirements had been met and that exercise of personal jurisdiction would not offend the defendant's fifth amendment due process rights.[855]

*Lone Star Package Car Co. v. Baltimore & Ohio Railroad Co.*,[856] a federal question case, involved the question of whether a United States District Court sitting in Texas had personal jurisdiction over a third party defendant, Baltimore & Ohio Railroad Co. (B. & O.), a Maryland Corporation that had no permit to do business in Texas and that did no business in Texas but maintained offices in Dallas

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850. In Edwards v. Gulf Miss. Marine Corp., 449 F. Supp. 1363 (S.D. Tex. 1978), the district court found that because service had been made on some defendants pursuant to Rule 4(d)(3) no need existed to resort to the Texas long-arm statute in regard to those defendants. As in *Honeywell*, the court seemed to find some due process standard built into Rule 4(d)(3): In order for service to be effective under Rule 4(d)(3) in this case, the agent served must meet the tests of a "managing agent." *Id.* at 1365-66. *See infra* note 1109 and accompanying text (discussing service on one defendant pursuant to Rule 4(e)). *See also* Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 424 (9th Cir. 1977) ("[g]iven the legislative authorization [of Rule 4(d)(3)], and if plaintiffs can establish that [defendant] was carrying on 'continuous and systematic' activities in Nevada through [the entity served] as [the defendant's] 'general agent', we see no reason why [the defendant] itself should not be said to have been present there and served at the time [the entity served] was served").

851. 353 F. Supp. at 494.

852. *Id.* at 495.

853. 509 F.2d 1137 (7th Cir. 1975).

854. *See infra* notes 1202-12 and accompanying text.

855. 509 F.2d at 1141-45.

856. 212 F.2d 147 (5th Cir. 1954).

and Houston. These offices were manned by B. & O. freight representatives on whom personal service had been made. The district court had dismissed for lack of personal jurisdiction over B. & O. because of the insufficiency of its contacts with the State of Texas and the federal district.[857] Much like the district court in *Honeywell*, the court of appeals in *Lone Star* stated the following as its jurisdictional rule in 4(d)(3) cases:

> If a corporation's business is so substantial as to render the corporation amenable to suit in that state, its principal agent in charge of activities within the state meets the test of a "managing agent". . . .Hence, with the indicated assumption, service was authorized under Rule 4(d)(3).[858]

The court then determined that the appropriate test of amenability in a federal question case was not the test applied by the district court, which might be determinative in diversity cases,[859] but was one of "basic principles of fairness."[860] The court cited several cases, including *International Shoe*, recognizing that "in most of the cases . . . the question has arisen as to constitutional limitations imposed upon the states."[861] The court argued, however, that "the broad statements of policy expressed, particularly in *International Shoe* . . . seem to us to be extended also to cases where the jurisdiction of the federal court depends upon federal law."[862] Without analysis as to how the "fairness test" should be applied in general, or how it would be applied to the case at hand, the court concluded: "[U]nder the tests of fairness elaborated in the foregoing cases, the facts of this case require that the district court exercise jurisdiction over the B. & O. . . ."[863]

Earlier in its opinion, the court carefully had examined the scope of

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857. The district court had ruled:

> this Court does not have jurisdiction over [the B. & O.]. . . , a foreign corporation, [because] it is not a resident or inhabitant of the State of Texas nor of this judicial district, nor is it doing business in either said state or district of such nature as to subject it to the jurisdiction of this Court in the instant case.

*Id.* at 149 (quoting district court opinion).

858. *Id.* at 152 (citation omitted).

859. *Id.* at 153.

860. *Id.* at 155. The failure of the court to use the term "minimum contacts" might come from the fact that this case was decided only nine years after *International Shoe* and before the *International Shoe* test had been explained in subsequent Supreme Court cases. *See supra* notes 106-55 and accompanying text.

861. 212 F.2d at 155.

862. *Id.* The court, therefore, rejected the approach followed in diversity cases. *See supra* text at note 859. The court settled on the test from which the diversity approach arose, seemingly coming full circle, albeit *sub silentio*, to the "minimum contacts with the state" test of *International Shoe.*

863. 212 F.2d at 155.

the activities of the B. & O. Texas freight representatives,[864] but the court did not, in its conclusion, refer back to those facts particularly as establishing a "fair" basis for personal jurisdiction. Thus, whether the "fairness" of the exercise rested on the scope of the agent's activities in Texas or in the particular federal district is unclear from the opinion. What does seem clear, however, is that the court was not adopting any national contacts approach: (1) it only examined the defendant's activities in Texas, and (2) its analysis—amenability to suit in state renders instate agent a "managing agent" for purposes of service under Rule 4(d)(3)—leads to the conclusion that only instate activities are significant. Although this case goes farther than *Honeywell* by labelling its amenability standard as a "fairness test," the effect of the analyses in each case is really the same. To be subject to service pursuant to Rule 4(d)(3), a corporation must carry on sufficient activities in a state to be amenable to suit there. The court, therefore, really is applying a "minimum contacts with the state" or "federal district" test.[865]

Unlike *Lone Star*, the question in *Goldberg v. Mutual Readers League, Inc.*,[866] a federal question case, was whether the defendant corporation had sufficient control over the business of the person served, arguably not an employee of the defendant, to make him a "managing agent" for purposes of service of process.[867] Moreover, the court separated, at least partially, the question of the amenability to suit of the corporation from the question of the status of the individual served. In its conclusion, the court stated: "[W]e think [the business of the person served] is sufficiently controlled by [the defendant] and sufficiently necessary to [the defendant's] operations to enable us to conclude that [the person served] is [the defendant's] agent in Pennsylvania for the purpose of service of process on [the defendant] *and* of exercising our jurisdiction over [the defendant]."[868]

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864. *Id.* at 149-51.

865. Thus, in cases like *Honeywell, see supra* notes 845-55 and accompanying text, *Ag-Tronic, see infra* note 879, and *Lone Star*, which have made the question of propriety of service under Rule 4(d)(3) depend on amenability in the state, this analysis has limited Rule 4(d)(3) in an unintended way. Whether or not a defendant's agent is servable under 4(d)(3) should depend on the agent's status in the defendant corporation and not the amenability to suit of the corporation.

866. 195 F. Supp. 778 (E.D. Pa. 1961).

867. *Id.* at 780. In this case, the defendant had argued that the person served was an "independent contractor" rather than a "managing agent". *Id.* Clearly, the person served was not directly in the employ of the defendant corporation as were the persons served in *Lone Star.*

868. *Id.* at 783 (emphasis added). After the court had found that the defendant's contacts with Pennsylvania, through its "agent", were sufficient to make the defendant amenable to suit in the federal court, the court ruled that, because the agent was "in charge of the local business of a foreign corporation," he was a "managing agent" for purposes of Rule 4(d)(3).

As to due process, the court purported to adopt the position that a federal standard should be employed[869] and to follow *Lone Star* in establishing that standard.[870] But the test that it devised was articulated more completely than was that in *Lone Star.* The court ruled:

> We hold . . . that the limits of our jurisdiction in this case are to be determined by looking to the "contacts" which [the defendant] has with the Commonwealth of Pennsylvania; if they are substantial enough to require [the defendant] to defend this lawsuit here without violating traditional concepts of fairness and substantial justice, we have the power to render a judgment for or against [the defendant].[871]

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*Id.* Unlike *Lone Star*, the court, therefore, *did not* base the agent's status for Rule 4(d)(3) purposes on the corporate defendant's amenability to suit in the state. Instead, that determination was based on the agent's status in regard to the business of the defendant corporation and conducted a separate due process analysis in regard to amenability.

869. *Id.* at 781. The court stated:

> All counsel agree that the question of jurisdiction presented by the present motion is a question to be determined by "Federal law." It has been previously stated that the Court's jurisdiction over the subject matter of this action depends upon the Fair Labor Standards Act; and the questions presented by the suit are questions arising under a Federal statute. Therefore, we believe that Pennsylvania statutory law and case law on the issue of the jurisdiction of Pennsylvania courts over foreign corporations have no bearing on this case. State law has been followed by Federal Courts in *diversity cases* to determine the jurisdiction of the Federal Court over a foreign corporation. Apparently, the Circuit Courts of Appeal are not in accord as to whether state law should be determinative of a Federal Court's jurisdiction even in diversity cases. However, it seems clear that "Federal law" should control the question of our jurisdiction in this case. It is not so clear just what Federal law exists to guide our determination.

*Id.* (emphasis in original, footnotes omitted).

870. *Id.* at 782-83 and n.10.

871. *Id.* at 783. Before reaching this conclusion, the court summarized the "Federal law" on the question of personal jurisdiction, *see supra* note 869, in the following way:

> We noted earlier that Federal cases applying state laws to resolve jurisdictional questions provide us with no Federal law. Technically, neither do the cases of International Shoe or McGee. Those cases set forth the limits to which a state could go under the Due Process Clause of the Fourteenth Amendment in exercising jurisdiction over foreign corporations. Obviously, the Fourteenth Amendment has no effect on the jurisdiction of Federal District Courts in cases arising under Federal law. The Fifth Amendment contains a Due Process Clause, but its limitation on the jurisdiction of the Federal District Courts over foreign corporations has never been clearly stated. The result is that we are left at best with an anomalous body of "Federal law" from which to discern the principles applicable to this case.

195 F. Supp. at 782 (footnotes omitted). After noting that the Federal Rules only provide the manner in which service may be made and the geographical area within which such service will be effective, the court continued:

> In spite of the doubtful applicability of the formula of the International Shoe case to questions of Federal jurisdiction, some Federal Courts have applied that formula to cases where the jurisdiction of the Federal Court depended upon Federal law. Although we have found no case decided by the Circuit Court of Appeals for the Third Circuit which deals with this problem, we think the reasoning of the Court in the Lone Star Package Car Co. case is correct. . . .

*Id.* (footnote omitted).

As its "federal standard," therefore, the court adopted a "minimum contacts with the state" test, examining the activities of the defendant's agent in the state in making that evaluation.

Finally, the discussion returns to the well-reasoned district court opinion in *First Flight Co. v. National Carloading Corp.*,[872] a federal question suit brought in the Eastern District of Tennessee under various sections of the Interstate Commerce Act[873] for alleged damage to a shipment of golf clubs. The defendant-carrier had filed a third-party complaint against three other carriers. One of the third-party defendants, Atchison, Topeka and Santa Fe Railway Company (Santa Fe), moved to quash the service of process and dismiss the third-party action as to itself upon the ground that "Santa Fe does no business in Tennessee, and therefore is not subject to the jurisdiction of [the district] court."[874] Santa Fe, a Kansas corporation that did not operate or own any railroad lines in Tennessee, was not licensed to do business in Tennessee, and did no business in Tennessee except to maintain a single office staffed by two employees whose function was to solicit business but to make no contracts,[875] had been served with process, under Rule 4(d)(3), by service upon one of its two Tennessee employees.[876] In response to the argument by Santa Fe that under Tennessee law, Santa Fe would not be amenable to suit, the court stated:

> Federal law defines the extent to which the states may go, under the due process clause of the Fourteenth Amendment, in exercising personal jurisdiction over foreign persons and corporations. But the states need not go—and frequently do not go—as far as the Constitution permits in authorizing their courts to exercise such jurisdiction.
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> * * *
>
> [T]he extent of the personal jurisdiction of the federal courts and the sufficiency of service of process under 4(d)(3) is a matter governed solely by federal rather than statelaw.[877]

The court then considered the question of what would be an appropriate federal standard:

> One fundamental principle of the Anglo-American law of jurisdiction is that a sovereignty has personal jurisdiction over any defendant within its territorial limits, and that it may exercise that jurisdiction by any of its courts able to obtain service upon the defendant.

872. 209 F. Supp. 730 (E.D. Tenn. 1962).
873. 49 U.S.C. §§ 20(11), (12) (1976).
874. 209 F. Supp. at 733.
875. *Id.*
876. *Id.*
877. *Id.* at 734, 736.

> This principle has long been applied to the states under the due process clause of the Fourteenth Amendment. In the case of corporations, the requirement of "presence" has given way to other standards such as consent to being sued within the state, "doing business" within the state, and finally to the having of such "minimum contacts with the state that the exercise of jurisdiction does not offend 'traditional notions of fair play and substantial justice.' " The basic principle, however, has remained unchanged.
>
> What has frequently been overlooked is that this same basic principle has long been applied to the United States itself, so that the United States is deemed to have personal jurisdiction over any defendant within the United States. Because of this oversight, and by analogy to the application of the basic principle to the states, there is a line of cases apparently denying the validity of an exercise of personal jurisdiction by a federal court over a defendant present within the United States unless the defendant is also present (or "doing business," etc.) within the district in which the court is held. In other words, the restrictions of the Fourteenth Amendment upon state jurisdiction have been applied by these cases to federal jurisdiction. The anomaly here lies not only in overlooking the principle that the United States may exercise personal jurisdiction over any defendant within the United States, but also in limiting federal action by a constitutional provision applicable only to state action.[878]

The court then discussed, with approval, the "conclusion" of Professor Thomas F. Green, Jr. "that the test of United States jurisdiction should be to the effect that the United States may exercise personal jurisdiction over a corporation if the latter has such minimum contacts with the United States that the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice."[879]

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878. *Id.* at 736-37.

879. *Id.* at 738 (citing Green, *supra* note 191). In *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280 (3d Cir. 1981), a federal question case involving a suit by a longshoreman against the Japanese corporation that had converted the vessel on which he was working at the time of his injury, service had been made on the defendant corporation by the state long-arm statute pursuant to FED. R. CIV. P. 4(e). *See infra* notes 1123-41 and accompanying text (discussing service pursuant to Rule 4(e)). In the course of its opinion, the court stated, in dictum:

> We will accept for purposes of this appeal DeJames' position that if service can be made by wholly federal means all of [defendant's] contacts with the United States may be aggregated to support jurisdiction in the District of New Jersey, even if these contacts are limited exclusively to Hawaii, to Alaska, or to a few states on the west coast. As we noted earlier, the *Fraley* court stated that the fourteenth amendment standards of due process announced in *International Shoe* and its progeny also apply to cases grounded on a federal claim, which is governed by fifth amendment standards. . . .Even if this statement is not read to limit the jurisdictional inquiry to contacts with the forum state, we are not sure that some geographic limit short of the entire United States might not be incorporated into the "fairness" component of the fifth amendment.

654 F.2d at 286 n.3 (citation omitted). The court found, however, that service had not been

The court noted the various methods by which exercise of federal court jurisdiction is restricted so as not to subject defendant corporations to the "inconvenience in defending federal court suits far from their home offices and places of business:"[880] the limitation in Rule 4(f) that, as a general matter, effective federal court service of process is limited to the boundaries of the state in which the court is sitting;[881] venue statutes that restrict, on convenience grounds, the places in which a federal suit might be heard;[882] and the change of venue statute that permits the defendant to seek transfer of the suit to a more convenient location.[883] Applying the test, the court examined the contacts of Santa Fe with the United States as a whole and found those contacts sufficient to permit constitutional exercise of personal jurisdiction by the United States District Court for the Eastern District of Tennessee.[884]

*First Flight* was probably the first federal decision in which the court discussed a national contacts approach, even in the context of service pursuant to Rule 4(d)(3), and certainly was one of the few decisions in which the court actually applied such a test. Subsequent decisions, many involving service according to different methods available to federal courts, have mentioned or discussed the national contacts approach,[885]

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made by a wholly federal means under Rule 4(d)(3). *Id.* at 286-90.

In Ag-Tronic, Inc. v. Frank Paviour Ltd., 70 F.R.D. 393 (D. Neb. 1976), a federal question suit seeking a declaratory judgment that the defendant's patent was invalid or that it was not infringed by the plaintiff's product, the court rejected a national contacts test of amenability when service had been made in accordance with the Nebraska long-arm statute pursuant to former Rule 4(d)(7) or Rule 4(e). In reaching its conclusion, the court found that in this case, "plaintiff's reliance upon contacts with the United States alone is misplaced." *Id.* at 400. The court reasoned:

> While it is true that the due process clause of the fourteenth amendment does not apply to federal action and the due process clause of the fifth amendment does, the same minimal contacts test applicable under the fourteenth amendment is applicable under the fifth amendment, although national contacts may properly be considered under the fifth amendment. Sufficiency of service of process under Rule 4(d)(3) is a matter governed solely by federal rather than state law. . . .[U]nless Congress has provided for nationwide service of process, when the defendant is a foreign corporation it must have an agent within the territorial limits of the State in which the court sits, unless substituted service or extra-state service can be made. . . .when a state statute so authorizes. . . .Under Nebraska's long-arm statute, plaintiff must prove that defendant transacts business in the state.

*Id.* The court, therefore, recognized that a national contacts approach might be appropriate in a Rule 4(d)(3) case but would not be appropriate in a former Rule 4(d)(7) case or a Rule 4(e) case. *See infra* notes 985-99 and accompanying text (discussing court treatment of the question of service pursuant to former Rule 4(d)(7)).

880. 209 F. Supp. at 739.

881. *Id.*

882. *Id.* at 739-40.

883. *Id.* at 740.

884. *Id.*

885. *See, e.g., supra* cases discussed at notes 687-716 and *infra* cases discussed at notes 956-62, 973-1038, 1138-41, 1202-12, and 1244-1316.

some even with approval.[886] Few, however, actually have relied on the test. Most courts prefer to rest on some more restrictive test under which jurisdiction also could be approved.[887]

*Summary and Analysis*

In the context of service pursuant to Rule 4(d)(1) or Rule 4(d)(3), service in a wholly federal manner, only the national contacts approach makes any sense as a general test for federal court personal jurisdiction. Cases under Rule 4(d)(1) will not be troublesome; if the factual requirements that permit service are satisfied, then any amenability standard would be satisfied and no serious inconvenience that could not be remedied by a change of venue would occur. Cases under Rule 4(d)(3) all could be resolved satisfactorily by the national contacts approach outlined by the district court in *First Flight*.[888] Any other "minimum contacts" approach, such as "minimum contacts with the state" or "with the federal district" would suffer from the defects described above:[889] federal court jurisdiction over purely federal matters in which process had been served in a wholly federal manner would be limited by the same standards, or more narrow ones, applicable in similar state cases, thus rendering irrelevant the argument that federal courts are limited by the fifth amendment while state courts are limited by the fourteenth amendment. Since federal district boundaries, in the federal context, do not separate one sovereign from another,[890] and Congress has not indicated any desire to limit the federal system to state lines, to limit federal court exercises of personal jurisdiction by standards developed for the states makes no sense. So long as the defendant is served properly and has sufficient contacts with the United States as a whole so that he fairly may be required to defend in the United States, any unfair interdistrict inconvenience can be remedied by change of venue.[891] This approach would provide a standardized context for determining personal jurisdiction questions, at least when federal methods for service of process are employed, and would permit federal courts to hear all of the cases described above, as well as those cases in which the defendant's contacts are scattered too thinly throughout the United States to satisfy a "minimum contacts with the state" or "with the federal district"

886. *See, e.g., supra* cases discussed at notes 687-716 and *infra* cases discussed at notes 956-62, 973-1038, and 1244-1316.
887. *See, e.g., infra* cases discussed at notes 956-62, 973-1038, 1202-12, and 1244-68.
888. *See supra* notes 872-84 and accompanying text.
889. *See supra* notes 795-97 and accompanying text.
890. *See supra* note 186 and accompanying text.
891. *See supra* notes 188, 226, 337, 354, 657, 693, and 880 and accompanying text.

approach.[892] The primary factor in favor of this approach would be the standardization of federal question cases. Analysis would be dictated by the standard rather than by the facts of the case.

*3. Amenability standards in federal question cases in which process was served "in the manner prescribed by the law of the state in which the district court is held" pursuant to former Rule 4(d)(7) of the Federal Rules of Civil Procedure and new Rule 4(c)(2)(C)(i)*

Although the Constitution does not preclude Congress from providing that the process of federal district courts reach nationwide or worldwide in all cases,[893] or, at least, in all federal question cases, Congress has elected to exercise this authority only in limited circumstances by enacting particular statutes for that purpose.[894] In other cases, federal process is limited by Rule 4(f) to the territorial boundaries of the state in which the federal court sits, subject to certain limited exceptions,[895] unless some federal rule permits a more extensive authority.[896] Many courts had read former Rule 4(d)(7) as supplying authorization for service beyond state lines by providing, in pertinent part, that as to any individual or business entity defendant, in addition to the power provided by Rules 4(d)(1) and 4(d)(3) and that authorized by federal statutes, "it is also sufficient if the summons and complaint are served . . . in the manner prescribed by the law of the state in which the district court is held."[897] Under the 1983 amendments to Rule 4, Rule 4(d)(7) was eliminated; it apparently was replaced, in part, by present Rule 4(c)(2)(C)(i), which provides that service may be made on any individual or business entity "pursuant to the law of the state in which the district court is held."[898]

892. *See supra* notes 796 and accompanying text and *infra* notes 1030, 1083, 1267 and 1281 and accompanying text.

893. *See supra* notes 217-18 and accompanying text.

894. *See supra* notes 246-47 and accompanying text.

895. Rule 4(f) permits service on "persons who are brought in as parties pursuant to Rule 14, or as additional parties to a pending action or a counterclaim or cross-claim therein pursuant to Rule 19 . . . at all places outside the state but within the United States that are not more than 100 miles from the place in which the action is commenced. . . ." FED. R. CIV. P. 4(f).

896. Rule 4(f) provides that "when authorized by a statute of the United States or by these rules, [process may be served] beyond the territorial limits of [the] state." FED. R. CIV. P. 4(f).

897. FED. R. CIV. P. 4(d)(7). *See supra* notes 278-83 and accompanying text; *infra* notes 898-911 and 1039-1102 and accompanying text (discussing former Rule 4(d)(7)); *see also infra* notes 915-1038 and accompanying text (discussing federal question cases in which service was made pursuant to former Rule 4(d)(7)).

898. FED. R. CIV. P. 4(c)(2)(C)(i); *see supra* notes 278-86 and accompanying text and *infra* notes 1062-66 and 1094-1102 and accompanying text (discussing Rule 4(c)(2)(C)(i)).

No cases yet have arisen under Rule 4(c)(2)(C)(i), but many have been decided under former Rule 4(d)(7),[899] which had been interpreted to authorize federal courts to utilize the service of process statutes, including long-arm statutes, of the states in which the federal courts were sitting.[900] The possible significance of Rule 4(c)(2)(C)(i) in regard to the present rules of federal court personal jurisdiction, as well as the significance of new Rule 4(c)(2)(C)(ii), which provides a special federal service by mail procedure for those defendants coming within the classes referred to in Rules 4(d)(1) and 4(d)(3),[901] will be discussed below.[902]

Rule 4(e) also authorizes federal courts to make service pursuant to any state statute or rule providing for "service . . . upon a party not an inhabitant of or found within the state in which the district court is held."[903] Such service may be made, according to Rule 4(e), under the circumstances and in the manner prescribed in the statute or rule.[904] Although this authorization to use state long-arm statutes arguably was subsumed in the broader authority of former Rule 4(d)(7) (as interpreted by some courts), Rule 4(e) differs from former Rule 4(d)(7) in that under Rule 4(e), service must be made "under the circumstances and in the manner prescribed"[905] in the state statute or rule whereas under the language of former Rule 4(d)(7) service was to be made merely "in the manner prescribed by the law of the state."[906] Some have argued that this distinction is significant, indicating that former Rule 4(d)(7) merely contemplated incorporation into the federal court of the technique employed by state courts whereas Rule 4(e) contemplates (and contemplated) incorporation into the federal courts of both the technique and amenability standards imposed on state courts.[907] Moreover, arguments can be made, after the adoption of Rule 4(c)(2)(C)(i) and (ii), which arguably have the effect of providing alternative methods for serving defendants who might come within Rules 4(d)(1) and 4(d)(3) by using state methods or service by mail, that former Rule 4(d)(7) was not intended to govern

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899. *See infra* notes 915-1038 and accompanying text.

900. *See infra* note 909 and accompanying text.

901. *See supra* note 275 and accompanying text (discussing new Rule 4(c)(2)(C)(ii)).

902. *See infra* notes 1065-66 and accompanying text.

903. FED. R. CIV. P. 4(e), *see supra* notes 278-86 and accompanying text and *infra* notes 904-13 and 1061-71 and accompanying text (comparing Rule 4(e) with former Rule 4(d)(7)).

904. FED. R. CIV. P. 4(e).

905. *Id.; see supra* notes 284-88 and accompanying text and *infra* notes 1328-50 and accompanying text (discussing possible significance of this language).

906. FED. R. CIV. P. 4(d)(7) (1963).

907. *See, e.g.*, Burstein v. State Bar of Cal., 693 F.2d 511, 516-17 (5th Cir. 1982); Black v. Acme Markets, Inc., 564 F.2d 681, 685 n.5 (5th Cir. 1977).

circumstances in which a state long-arm statute would be employed. Since Rule 4(e) speaks specifically to that issue, former Rule 4(d)(7) may have applied only where a defendant already could be served by a Rule 4(d)(1) or 4(d)(3) method.[908] In other words, one very plausible interpretation is that former Rule 4(d)(7), and present Rule 4(c)(2)(C)(i), provided only that if a defendant could be served under Rule 4(d)(1) or 4(d)(3), and if the state provided an alternative technique for achieving such service, then former Rule 4(d)(7), and present Rule 4(c)(2)(C)(i), allowed the state alternative to be used. Many federal courts that have purported to use former Rule 4(d)(7) in regard to service have not so interpreted the Rule; rather, they have cited former Rule 4(d)(7) as authorizing service, pursuant to state long-arm statutes, on parties "not an inhabitant of or found within the state."[909] To understand the amenability standards developed in cases arising under former Rule 4(d)(7), cases involving that rule must be discussed. These cases will demonstrate the confusion occasioned by the juxtaposition of Rules 4(d)(7) and 4(e)[910] as well as the confusion concerning amenability standards.[911] After evaluating former Rule 4(d)(7) cases, this article will return to some of the particular interpretational questions mentioned above[912] and then turn to Rule 4(e) cases.[913]

Clearly, when a federal court is adopting state law for a particular purpose, a question arises as to what exactly "comes with" the state law and must be used by the adopting court in order for the use of the state law to be appropriate. In other words, is the federal court

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908. Stanley v. Local 926 of the Int'l Union of Operating Eng'rs of the AFL-CIO, 354 F. Supp. 1267, 1269-70 (N.D. Ga. 1973). *See infra* notes 1238-40 and accompanying text (discussing this aspect of *Stanley*). *See also infra* notes 1052-66 and accompanying text (arguing in favor of narrow interpretation of former Rule 4(d)(7)).

909. *See, e.g.*, Wells Fargo & Co. v. Wells Fargo Express, 556 F.2d 406 (9th Cir. 1977) (*see infra* notes 974-84 and accompanying text); Centronics Data Computer Corp. v. Mannesmann, A.G., 432 F. Supp. 659 (D.N.H. 1977) (*see infra* notes 1011-38 and accompanying text); Amburn v. Harold Forster Indus., Ltd., 423 F. Supp. 1302 (E.D. Mich. 1976) (*see infra* notes 1000-11 and accompanying text); Ag-Tronic Inc. v. Frank Paviour Ltd., 70 F.R.D. 393 (D. Neb. 1976) (*see infra* notes 985-99 and accompanying text); Time, Inc. v. Manning, 366 F.2d 690 (5th Cir. 1966) (*see infra* notes 920-28 and accompanying text); Gkiafis v. Steamship Yiosonas, 342 F. Supp. 546 (4th Cir. 1965) (*see infra* notes 964-71 and accompanying text); Finance Co. of America v. Bankamerica Corp., 493 F. Supp. 895 (D. Md. 1980) (*see infra* notes 956-62 and accompanying text); Grappone, Inc. v. Subaru of America, Inc., 403 F. Supp. 123 (D.N.H. 1975) (*see infra* note 929-35 and accompanying text); Scott Paper Co. v. Scott's Liquid Gold, Inc., 374 F. Supp. 184 (D. Del. 1974) (*see infra* notes 944-55 and accompanying text); Keller v. Clark Equip. Co., 367 F. Supp. 1350 (D. N. Dak. 1973) (*see infra* notes 936-43 and accompanying text); Bar's Leaks Western, Inc. v. Pollack, 148 F. Supp. 710 (N.D. Calif. 1957) (*see infra* notes 915-19 and accompanying text).

910. *See infra* note 937 and notes 921, 975, 989, 1069 and 1164 and accompanying text (discussing federal courts' confusion as to proper authority for use of state long-arm statutes).

911. *See infra* notes 920-1083 and accompanying text.

912. *See infra* notes 1039-71 and accompanying text.

913. *See infra* notes 1103-1355 and accompanying text.

authorized to "pick and choose" the parts useful to it and discard other facts, state interpretations and standards associated with the law, or must the federal court adopt the state law "whole cloth"? This is different from the question arising in diversity cases where the majority of federal courts have ruled that even if a wholly federal method of service of process is employed, exercises of personal jurisdiction are to be measured by fourteenth amendment due process standards because the federal courts are functioning as state courts in deciding state law questions.[914]

In an early federal question case involving an action for copyright and trademark infringement and unfair competition, *Bar's Leaks Western, Inc. v. Pollock*,[915] the United States District Court for the Northern District of California considered the question of amenability standards when process is served, under Rule 4(d)(7), pursuant to the state long-arm statute.[916] The court noted:

> It is not disputed that Rule 4(d)(7) . . . sanctions service on a foreign corporation by the *method* prescribed by the forum state law. There is, however, no such unanimity of opinion on the question of whether *amenability* to process is to be determined by applying state standards as they are limited by concepts of due process [under the fourteenth amendment], or by applying federal "general law" concepts.
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> [W]here jurisdiction is based on "federal question" grounds . . . there appears to be no justification for an acquiescence to state standards and Fourteenth Amendment due process for the purposes of deciding the issue of amenability of the foreign corporation to process. . . .[917]

After posing the dilemma facing federal courts, however, the court hedged in stating any amenability test[918] and refused to decide the jurisdictional issue because it found that venue requirements would

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914. *See supra* notes 376-492 and accompanying text (discussing amenability standards in diversity cases).

915. 148 F. Supp. 710 (N.D. Cal. 1957).

916. *See supra* note 3 (discussing California long-arm statute).

917. 148 F. Supp. at 712-13.

918. The court stated the jurisdictional issue as "whether a foreign corporation selling its products to an independent distributor within a state and designating on the product label that the independent distributor is a 'branch plant' has made itself available to process in the federal court in that state." 148 F. Supp. at 713. The court did not describe any amenability standard at all other than, in passing, a test of "substantial fairness," because it found no need to resolve the personal jurisdiction question. The court concluded:

> Although it might be consistent with considerations of substantial fairness and the attendant safeguards of notice and opportunity to be heard, to hold that [defendant] is amenable to the process of this Court, the question of jurisdiction becomes academic when merged in the larger question of proper venue. . . .

*Id.*

not be satisfied.[919] The case, however, serves as a good starting point for this discussion because it states the issue—whether state or federal amenability standards apply in federal question cases in which service is made, under Rule 4(d)(7), pursuant to a state long-arm statute—and presents the conclusion of one court that state standards should not apply.

Most courts that have considered this question have applied state standards, minimum contacts with the state in which the federal court is sitting, for a number of reasons: (1) the state long-arm statute carries with it state amenability standards; (2) while a federal standard should be devised, none exists so the state standard must be applied in absence of a federal test; (3) the state standard is applied by analogy; (4) the state standard is applied because no federal statute authorizes application of a different standard; (5) the state standard is applied with apologies in regard to the anomaly created by basing federal court authority on state court standards; and (6) the state standard is applied without apology or explanation.

In *Time, Inc. v. Manning*,[920] an action by a Louisiana citizen against a New York corporation for damages arising from the defendant corporation's publication of a copyrighted picture, the United States Court of Appeals for the Fifth Circuit examined the defendant's contacts with Louisiana to determine whether the defendant corporation, which had been served under the Louisiana long-arm statute as authorized by Rule 4(d)(7),[921] was amenable to suit in a federal district court held in Louisiana.[922] While the court recognized that "the propriety of service issuing from a federal court need not necessarily be tested by the same yardstick as is the constitutional limitation upon service of process from a state court,"[923] the court argued that the state standard "provides a helpful and often-used guide-line."[924] While the court gave lip-service to the possibility of a separate federal standard, it

919. *Id.* at 713-14. The court dismissed the action against the defendant for lack of venue, thereby side-stepping the amenability standards question which it had posed earlier in the opinion.
920. 366 F.2d 690 (5th Cir. 1966).
921. *Id.* at 693. The court cited Rule 4(e) as alternative authority for use of the state long-arm statute. The language quoted by the court, however, only included the reference to "the manner" of service under state law, which language appears in both 4(d)(7) and 4(e), and omitted reference to "the circumstances" of service under state law, which language appears only in 4(e) and is a primary distinguishing feature between the provisions. *Id.*
922. The court cited the following as the two requirements for amenability under Rule 4(d)(7): "First, service must conform to state statutory standards. . . .Second, the foreign corporation must have sufficient contacts with the state so that application of the state statute will not offend due process. International Shoe Co. v. State of Washington. . . ." 366 F.2d at 693 (citations omitted).
923. 366 F.2d at 694.
924. *Id.*

chose to rely on the time-honored *International Shoe* test. The result in this case may have been precipitated by the fact that the court never resolved the question whether the case was a federal question case or a pure diversity suit;[925] the court thus followed a personal jurisdiction analysis which would be appropriate in a diversity case.[926] The court, moreover, noted that the narrow test of *International Shoe* was satisfied by the facts of the case,[927] thus possibly indicating an expediency approach: if the narrow test was satisfied, why seek a different federal standard, especially where a finding of diversity jurisdiction might require the more narrow analysis?[928]

In *Grappone, Inc. v. Subaru of America, Inc.*,[929] a federal question suit instituted in the United States District Court for the District of New Hampshire alleging violations of the Sherman Anti-Trust Act, the Clayton Act, and the Automobile Dealers' Day in Court Act, the defendant foreign corporation had been served with process, as authorized by Rule 4(d)(7), pursuant to the New Hampshire long-arm statute.[930] Except for its observation that Rule 4(d)(7) "authorizes extraterritorial service under state law even when the claim arises under federal law,"[931] the court treated the jurisdictional question exactly as would a New Hampshire court. First, the court noted that according to the Supreme Court of New Hampshire, the New Hampshire statute "is to be interpreted to the fullest extent permissible under the due process clause of the Fourteenth Amendment."[932] Next, the court applied two state-created principles, which apparently derived from *International Shoe*, in guiding its assessment of the "jurisdictional facts" and "jurisdictional contacts"[933] and concluded that on

925. The plaintiff had asserted that his claim was one arising under the laws of Louisiana while the defendant "insist[ed] that the action [was] for infringement of the plaintiff's copyright. . . ." 366 F.2d at 693. The court did not decide this issue, stating that "[u]nder either view, the district court has jurisdiction over the *subject matter* of the action." *Id.* (emphasis in original). *See supra* notes 18-19 and accompanying text (discussing distinction between diversity and federal question subject matter jurisdiction).

926. *See supra* notes 376-492 and accompanying text (discussing development of amenability standard for diversity cases).

927. 366 F.2d at 695.

928. *See supra* notes 742, 747, 762, and 831 and accompanying text (discussing practice of basing jurisdictional standard adopted on the facts of the particular case).

929. 403 F. Supp. 123 (D.N.H. 1975).

930. *Id.* at 126, 133-34.

931. *Id.* at 133. The court did not address any amenability considerations which might be peculiar to the federal courts; in the remainder of its analysis the court treated the case exactly as if the case had arisen under state law.

932. *Id.* at 133.

933. The court quoted Leeper v. Leeper, 114 N.H. 294, 296, 319 A.2d 626, 628 (1974) as providing the following guiding principles: "First, the exercise of jurisdiction has to be reasonable from the standpoint of New Hampshire's interest in the litigation. Second, it has to be consistent with principles of fair play and substantial justice." 403 F. Supp. at 134 (*quoting* Leeper v. Leeper).

the facts of this case, assertion of jurisdiction over other defendant would not violate "judicial notions of fair play and substantial justice."[934] Although the court never used the term "minimum contacts," it followed the balancing procedure that a state court in 1975 would have followed to determine whether the defendant's *contacts with the state* were sufficient to satisfy the fourteenth amendment.[935] The court never dealt with the possibility of a separate fifth amendment standard governing federal court assertions of personal jurisdiction and seemed to assume that the state due process analysis was part and parcel of the right of a federal court to serve process according to state law.

*Keller v. Clark Equipment Co.*,[936] a federal question suit against an alien defendant corporation instituted in the United States District Court for the District of North Dakota, was another Rule 4(d)(7) suit in which the federal court dealt with the case exactly as if it had arisen in state court, apparently finding that service pursuant to state statute carried with it a state amenability test.[937] *Keller* was complicated by some preliminary procedural maneuverings irrelevant to the issue under discussion.[938] The defendant alien corporation also

934. 403 F. Supp. at 134.

935. The court balanced a number of factors including the interest of New Hampshire in the suit, *see supra* note 933, the reasonableness that the defendant should have anticipated causing an effect in New Hampshire, 403 F. Supp. at 134, as well as "the right of New Hampshire citizens to institute local suit in quest of injuries committed here," *id.*, finding that such a factor "is given heavy weight when contacts are weighted [sic] on the jurisdictional scale." *Id.* (citation omitted). This type of balancing procedure, which focused less on the interests of the defendant than on other factors, was rejected by the Supreme Court in World-Wide Volkswagen v. Woodson, 444 U.S. 286 (1980), wherein the court stressed that a defendant must have *some* contacts with the state seeking to assert jurisdiction before any minimum contacts test could be satisfied. *See supra* notes 145-55 and accompanying text (discussing *World-Wide Volkswagen*).

936. 367 F. Supp. 1350 (D. N.D. 1973).

937. *See also* United States Dental Institute v. American Association of Orthodontists, 396 F. Supp. 565 (N.D. Ill. 1975). In *United States Dental Institute*, a federal question suit brought under the antitrust laws, the court treated the case exactly as if it had arisen under state law, determining whether the defendants' conduct came within the Illinois long-arm statute and applying a "minimum contact with the state" analysis on the due process issue. 397 F. Supp. at 569-73. As authority for making service on the defendants by means of the Illinois long-arm statute, the federal court cited and quoted both former Rule 4(d)(7) and Rule 4(e), making no further reference to federal law. 396 F. Supp. at 569-70. The failure of the court to distinguish between Rule 4(d)(7) and Rule 4(e), or rather, its reliance on both without determining whether one might be the more appropriate authority in the circumstances of this case again underlines the basic uncertainty of courts as to the differences between the two rules. *See supra* notes 910 and 921 and accompanying text and *infra* notes 989, 1069 and 1164 and accompanying text.

938. As noted in the opinion:

> On August 20, 1973, [the parent corporation and the defendant] moved this court to stay the . . . action pending the outcome of a declaratory judgment action . . . filed in the United States District Court for the Western District of Michigan, or alternatively to transfer the above action to the Michigan court for consolidation.
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> The defendants' motion to stay or transfer has been rendered moot by an order of the Michigan Court dated August 23, 1973. . . .Judge Engle determined that the

had been served with process by service, in North Dakota, on the defendant's parent corporation that was doing business in the state.[939]

The defendant argued that the North Dakota long-arm statute was irrelevant because service had been made *within* North Dakota.[940] The court, however, seemed to consider service within the state on an "agent" of the defendant for purposes of service under North Dakota law to be permissible under Federal Rule 4(d)(7) (the federal court was adopting the state equivalent of Rule 4(d)(3) for purposes of service of process)[941] while it still considered the North Dakota long-arm statute in determining whether the defendant corporation was amenable to suit in the District of North Dakota.[942] The court did not mention the possibility of any separate amenability standard, ruling that amenability was to be measured by the *International Shoe* test of "minimum contacts" and examining the facts to determine "whether [defendant's] acts . . . in North Dakota were 'minimum contacts.' "[943] It concluded that jurisdiction existed over the defendant corporation.

In *Scott Paper Co. v. Scott's Liquid Gold, Inc.*,[944] a federal question suit instituted in the District of Delaware for trademark infringement and unfair competition, the defendant, a Pennsylvania corporation which had its principal place of business in Colorado but which marketed its product nationwide, had been served with federal process pursuant to the Delaware long-arm statute as authorized by Rule 4(d)(7).[945] In responding to the defendant's motion to dismiss

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> significant contacts rested in North Dakota, whereupon the Michigan case was ordered transferred to the United States District Court for the District of North Dakota, Western Division. Subsequent to the transfer to North Dakota, the Plaintiffs . . . moved . . . for a change of venue from the Southwestern Division of North Dakota to the Southeastern Division. This motion was granted on November 6, 1973, and both cases are now venued with this Court.

367 F. Supp. at 1351-52.

939. *Id.* at 1352.

940. *Id.* at 1353.

941. *Id.* This analysis supports the author's suggestion that former Rule 4(d)(7) was not intended to incorporate state long-arm statutes, but rather all state statutes regarding only the manner of service of process in Rule 4(d)(1) and Rule 4(d)(3) circumstances. *See supra* note 908 and accompanying text and *infra* notes 1052-66 and accompanying text.

942. 367 F. Supp. at 1353-54.

943. *Id.*

944. 374 F. Supp. 184 (D. Del. 1974).

945. According to the court:

> Defendant has no office, warehouse or manufacturing facility in the State of Delaware. Its principal place of business is located in Denver, Colorado, where it manufactures and directs the marketing of its home cleaning products. . . .Defendant markets its products nationally, both through its employees who solicit orders from national chain stores and through commission brokers who solicit orders from smaller, independent retailers. Through these marketing channels defendant's products are made readily available to consumers throughout Delaware.
>
> No employee of defendant has entered Delaware to solicit sales. However, as a result of employees' sales to large retailers defendant has shipped its products directly into this state. . . .

for lack of personal jurisdiction, the court stated, "Even though this action arises under the laws of the United States, since service was effected under Rule 4(d)(7). . . , amenability to service presents a question of state law."[946] In a footnote, the court distinguished certain cases that had held that federal common law should be applicable in federal question cases, noting that those cases had involved service under Rule 4(d)(3).[947] The court concluded, "[a]n obviously different situation obtains when, as here, service is made pursuant to a state statute adopted under the terms of either Rule 4(d)(7) or 4(e)."[948] After establishing that the defendant's conduct had come within the provisions of the Delaware long-arm statute, the court turned to the "constitutional issue" of "whether assertion by this Court of *in personam* jurisdiction over the defendant violates the Due Process Clause of the Fifth Amendment."[949] Such characterization of this issue seems curious in view of the insistence by the court that state law would govern amenability and the fact that state law requires that the due process clause of the fourteenth amendment not be violated.[950] Moreover, while the court proposed a minimum contacts test based on *International Shoe* and *McGee*,[951] it felt the need to justify reliance on the state-created test:

> While the Supreme Court cases articulating the "minimum contacts" test dealt with the reach of state court jurisdiction over the person, the test has been held to be applicable to the district court where jurisdiction is premised on a federal question.[952]

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> In order to stimulate a demand for its products in Delaware and elsewhere, defendant has advertised . . . extensively. This advertising program includes advertisements on national television, in magazines of national circulation and in newspapers with a substantial Delaware circulation. It is undisputed that many thousands of these commercial messages were intended to be and were received in Delaware.

*Id.* at 185-86 (footnote omitted).

946. *Id.* at 186-87.

947. *Id.* at 187 n.3. *See also* Hartley v. Sioux City & New Orleans Barge Lines, Inc., 379 F.2d 354, 356 (3d Cir. 1967) (court noted that recent decisions which indicate that "[e]ven where the procedure for exercising . . . jurisdiction is prescribed by state law, these courts need not be bound by restrictions found in the state law" were all cases in which service was made by a wholly federal method, Rule 4(d)(3)); First Flight Co. v. National Carloading Corp., 209 F. Supp. 730, 735 (E.D. Tenn. 1962) (while a national contacts approach was appropriate in a Rule 4(d)(3) case when there was a "wholly federal method of service," court suggested, but refused to decide, that when service was made under Rule 4(d)(7) which "adopts local methods to some extent," the defendant "might argue that the validity of service made under a state statute pursuant to Rule 4(d)(7) would be governed by state law"). *See also supra* notes 799-897 and accompanying text (discussing Rule 4(d)(3) cases).

948. 374 F. Supp. at 187 n.3.

949. *Id.* at 188.

950. *See supra* notes 60-185 and accompanying text (discussing jurisdictional standards in state cases).

951. 374 F. Supp. at 188.

952. *Id.* at 188 n.4 (*citing* Fraley v. Chesapeake & O. Ry. Co., 397 F.2d 1 (3d Cir. 1968), *see also supra* notes 823-33 and accompanying text).

This assertion is quite startling, not only because it seems to contradict the earlier statement by the court that state law should apply directly to the amenability question, but also because, as authority for the assertion, the court cited a case that it had earlier rejected as inapplicable to the case at hand because service therein had been made under Rule 4(d)(3).[953] The court resolved the "constitutional issue" by assessing the defendant's contacts with the State of Delaware and pronouncing these contacts "sufficient to meet [the] fundamental fairness standard" of *International Shoe.*[954] In sum, the court seemed confused as to whether the fourteenth amendment *International Shoe* test applied directly to amenability questions in Rule 4(d)(7) cases or whether a fifth amendment standard would be appropriate but that the fourteenth amendment test had been adopted as the fifth amendment standard.[955] In any event, while the court applied an *International Shoe* analysis to the facts of the case, it seemed to suggest that a 4(d)(7) case was not exactly the same as a state court case.

Other federal courts that have adopted a state-created standard for amenability in Rule 4(d)(7) cases have done so after analysis that considered the possibility of a separate federal standard. In *Finance Company of America v. Bankamerica Corporation*,[956] a federal question suit alleging violation of the Lanham Act, which suit had been initiated in the United States District Court for the District of Maryland, the moving defendants had been served pursuant to the Maryland long-arm statute as authorized by Rule 4(d)(7). The court reviewed various positions on the question of amenability standards,[957] noting that while adoption of a state standard might make sense in diversity cases because of "' the policy underlying the doctrine of intra-state

953. *Compare* 374 F. Supp. at 188 n.4 *with* 374 F. Supp. at 187 n.3.

954. *Id.* at 189.

955. *See infra* notes 956-62 and 1000-10 and accompanying text (discussing cases adopting the former position) and notes 973-99 and accompanying text (discussing cases adopting the latter position).

956. 493 F. Supp. 895 (D. Md. 1980).

957. The court stated:

> The parties have assumed that state law governs the personal jurisdiction inquiry. Although this appears to be the rule in this Circuit, . . .it has not received universal endorsements and therefore warrants some reexamination.
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> Congress has not provided for nationwide service of process. Rather, in cases in which a defendant does not have an agent within the state, Fed. R. Civ. P. 4(d)(7) authorizes service of process in any manner authorized by the law of the state in which the district court is located. But, as noted in an early case also arising under the Lanham Act, the rule "sanctions service on a foreign corporation by the *method* prescribed by the forum state law. There is, however, no such unanimity of opinion on the question of whether *amenability* to process is to be determined by applying state standards as they are limited by concepts of due process, or by applying federal 'general law' concepts. . . ."

*Id.* at 898 (citations omitted).

uniformity,'. . . .this policy is absent in federal question cases"[958] and observing that "application of state standards in such cases engenders the anomalous result 'that the jurisdiction of federal courts dealing with federal questions will vary from state to state'."[959] After citing cases in which a state standard had been "applied" and cases in which a federal standard had been "adopted,"[960] the court concluded that "it would appear that . . . a federal standard would be more sensible [; t]he venue statute would seem to provide adequate safeguards against vexatious lawsuits."[961] Reluctantly, however, the court felt compelled to follow precedent in the fourth circuit by applying state law[962] and applied the *International Shoe* test to find that the defendant's contacts with the state of Maryland were sufficient to satisfy due process. Clearly, facts which satisfy *International Shoe* also would satisfy any fifth amendment standard.

The case cited in *Finance Company of America* as binding fourth circuit precedent for application of a state standard in Rule 4(d)(7) cases[963] was *Gkiafis v. Steamship Yiosonas*,[964] a federal question case arising in admiralty. The defendant alien corporation, which had been served under the "substituted service provisions" of the Maryland long-arm statute, moved to quash service. In its opinion, the court of appeals noted:

> The jurisdiction of a court over a defendant foreign corporation is tested in the federal courts by a motion attacking the service of process. This indirect approach to questions of jurisdiction is understandable in the federal courts since there is no statutory provision which informs the courts when foreign corporations "are amenable to process so that in personam jurisdiction may be had over them in diversity and most non-diversity suits." . . . Consequently, federal judges attempting to fill this statutory void have held that a federal court can obtain jurisdiction over a foreign corporation only when it is constitutionally and statutorily permissible to serve the corporation.[965]

958. *Id. See also supra* notes 376-492 and accompanying text (discussing amenability standards in diversity cases).
959. 493 F. Supp. at 898-99 (citations omitted).
960. *Id.* at 899. The different terminology used by the court—"applied" in the case of state standards and "adopted" in the case of federal standards—may indicate judicial recognition that state standards were applicable because already well-developed whereas federal standards could only be "adopted" because no such standard had yet been developed. *See supra* notes 476-77 and accompanying text (discussing lack of a genuine federal standard).
961. 493 F. Supp. at 899. *See also supra* notes 188, 226, 337, 354, 657, 693, 880, and 891 and accompanying text (discussing venue restrictions as a possible check under a national contacts approach to federal court jurisdiction in federal question cases).
962. 493 F. Supp. at 899.
963. *See supra* note 962 and accompanying text.
964. 342 F.2d 546 (4th Cir. 1965).
965. *Id.* at 548-49.

The court noted the various problems attendant on using a state method for service of process such as the difficulty of finding an appropriate amenability standard and the anomalous result that, because of differences among long-arm statutes, "[s]ome plaintiffs will be unable to obtain service on foreign corporations while such service would be available to similarly situated plaintiffs in federal courts sitting in other states."[966] The court did not resolve this anomaly, however, because it found that the defendant came within the Maryland long-arm statute.[967] In determining the constitutional question of amenability, the court faced "another anomaly—the Fourteenth Amendment could operate to limit the jurisdiction of a federal court deciding a federal question."[968] Again, however, the court was spared from dealing with this problem; it found that "assertion of jurisdiction by Maryland over the respondent would be well within the state's constitutional power"[969] because the defendant satisfied the *International Shoe* requirement of minimum contacts with the state of Maryland.[970] While noting some of the conceptual difficulties occasioned by applying a state test to federal courts in federal question cases, the court refused to consider the possibility of a special federal standard because the state standard, which would be more strict than a federal standard, had been satisfied.[971] This was the rationale establishing the rule that the *Finance Company of America* court felt compelled to follow.[972]

Several recent federal cases have considered the propriety of a "national contacts" test for amenability even when service is made, as authorized by Rule 4(d)(7), pursuant to a state long-arm statute.[973] In *Wells Fargo & Co. v. Wells Fargo Express Co.*,[974] a trademark infringement action in which the court of appeals considered whether

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966. *Id.* at 549. *See also* Hartley v. Sioux City & New Orleans Barge Lines, Inc., 379 F.2d 354, 356 and n.2 (3d Cir. 1967) (court noted the anomaly but found that did not need to resolve because the defendant's conduct did not come within the language of the Pennsylvania long-arm statute).

967. 342 F.2d at 549.

968. *Id.* at 554. *See also supra* notes 795 and 878 and accompanying text and *infra* note 1132 and accompanying text (discussing "anomaly" of limiting federal court jurisdiction by standards applicable to state courts).

969. 342 F.2d at 554.

970. *Id.* at 554-58.

971. *See supra* notes 742, 747, 762, 831 and 928 and accompanying text (discussing selection of standards according to the facts of the case).

972. *See supra* note 962 and accompanying text.

973. *See infra* notes 974-1038 and accompanying text; *see also supra* notes 785, 798, 888-92 and accompanying text and *infra* notes 1039-1102 and 1320-58 and accompanying text (discussing, in other contexts, a national contacts test for assertion of personal jurisdiction).

974. 556 F.2d 406 (9th Cir. 1977). *See also supra* note 850 (*discussing* analysis by *Wells Fargo* court of standards applicable when service is made pursuant to Rule 4(d)(3)).

the defendant corporation had been served properly, pursuant to Rules 4(d)(7) and 4(e)[975] and the Nevada long-arm statute, the plaintiff had asserted several grounds on which such service would be permissible constitutionally.[976] While the court recognized that the fifth amendment applies to federal question cases, it found no case suggesting a distinction between the fifth and fourteenth amendments in regard to amenability.[977] The court approved a test based on the defendant's contacts with the state of Nevada,[978] but rejected any test based on the aggregation of the defendant's United States contacts.[979] On the facts of this particular case, in which the defendant was a Liechtenstein-based corporation and the federal forum would be either a district court in California (where most contacts occurred) or a district court in Nevada,[980] the court of appeals noted that "[i]t might very well be neither unfair nor unreasonable as a matter of due process to aggregate the nonforum contacts."[981] The court continued, "What plaintiffs overlook, however, is that, not only must the requirements of due process be met before a court can properly assert *in personam* jurisdiction, but the exercise of jurisdiction must also be affirmatively authorized by the legislature."[982] Finding no federal legislative authority permitting aggregation of a defendant's contacts with the United

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975. The court quoted pertinent parts of former Rule 4(d)(7) and Rule 4(e) and then stated: "Thus, the federal district court of Nevada may, reading Rules 4(d)(7) & 4(e) together, also service out-of-state defendants by availing itself of the *in personam* jurisdictional statutes of Nevada." 556 F.2d at 414. The court did not, in any way, establish why it thought Rule 4(d)(7) and 4(e) should be read together; most courts have used one or the other rule or have considered either sufficient to support federal court use of state long arm statutes. Again, this statement indicates understandable judicial confusion as to the ways in which the two rules differ, if at all, and the circumstances in which one should be used as opposed to the other. *See supra* note 937 and notes 910 and 921 and accompanying text and *infra* notes 995, 989, 1069 and 1164 and accompanying text.

976. The plaintiffs had asserted that the defendant alien corporation was amenable to suit in the district court sitting in Nevada because (1) the defendant had "minimum contacts" with the State of Nevada, (2) the defendant had "minimum contacts" with the United States as a whole, (3) the defendant, through its agent, had sufficient contacts with regard to either of the above-described territories, and (4) the defendant was present in Nevada because its agent was present in Nevada. 556 F.2d at 415-16.

977. *Id.* at 416 n.7. The court went on "to note that, in any event, *International Shoe* and its progeny point the way" in regard to amenability. *Id.*

978. *Id.* at 415-16. The court was not deciding the jurisdictional question itself, but was establishing guidelines by which the district court, on remand, would resolve the issue.

979. *Id.* at 416-19.

980. The defendant corporation had made two loans in California, which, if aggregated with the defendant's Nevada contacts, would make the contacts being considered more substantial. *Id.* at 416. Moreover, it appears that the plaintiffs were attempting to establish the right to sue on the California-based matters in the Nevada district court. *Id.* In this way, an aggregation of national contacts test might also lead to the desirable result of avoiding multiple lawsuits involving the same parties.

981. *Id.*

982. *Id.*

States as a whole,[983] the court refused to adopt a national contacts approach, at least in 4(d)(7) cases.[984]

The United States District Court for the District of Nebraska, in *Ag-Tronic v. Frank Paviour Ltd.*,[985] also refused to adopt a national contacts test in a federal question suit in which service had been made pursuant to a state long-arm statute.[986] The district court had refused to assert jurisdiction over the defendant because it found that the defendant had no contacts with the State of Nebraska and, therefore, was not amenable to suit in a district court sitting in that state.[987] The plaintiff then urged the district court to reconsider the issue and find amenability on the basis of the defendant's aggregate contacts with the United States.[988] In response, the court first noted that the

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983. The court noted:

> If policy considerations do indeed dicate that an alien defendant's contacts with the entire United States should be aggregated, and if the Constitution does not forbid such a practice—at least where the plaintiff is suing in federal court on a federal cause of action, the Federal Rules should be amended to authorize such a practice. Such a step is, however, not ours to take.

*Id.* at 418 (citations omitted).

984. The court admitted that aggregation of national contacts might be proper where "a federal statute authorizes world-wide service of process . . . and, therefore, the only relevant constraint is the fifth amendment due process clause rather than statutory authorization." *Id.*

985. 70 F.R.D. 393 (D. Neb. 1976). *See supra* note 879 (discussing court's position when service is made pursuant to Rule 4(d)(3).

986. The plaintiff, a Nebraska corporation, had instituted this suit against the defendant, a New Zealand partnership, for a declaratory judgment of patent invalidity, noninfringement, or both. *See* 70 F.R.D. at 395.

987. The court stated:

> In addition, the Court must dismiss this case for the reason that the defendant Authority is not amenable to service of process under the Nebraska Long Arm Statute.
>
> . . .
>
> The relevant portion of the statute reads as follows:
>
> (1) A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action arising from the person's:
>
> (a) Transacting any business in this state;
>
> Amenability to extra-territorial personal jurisdiction is a question of due process. A defendant must "have certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" . . . This Court has previously held that Nebraska's Long Arm Statute is as broad as the constitutional standard of due process.
>
> [P]laintiff has failed to prove by a preponderance of evidence that the Authority derived sufficient revenue from sales in Nebraska to justify its amenability to service of process in this jurisdiction.

*Id.* at 398, 399 (citations omitted). Even though this statute has been interpreted as going to the limits of due process, this decision, which was framed in terms of amenability, could also be described as resting on simple statutory interpretation: the defendant's conduct did not come within the language of the statute, so no due process analysis really was required. *See infra* note 1010 and accompanying text. On the other hand, one might argue that whether or not a defendant is found to be "transacting business" within the meaning of the statute depends entirely upon whether such contacts satisfy a due process standard—here, minimum contacts with the state in which the federal court is sitting.

988. 70 F.R.D. at 399-401 (Supplemental Memorandum). The plaintiff had argued "that the aggregate contacts of defendant . . . with the United States as a whole are sufficient to satisfy the fifth amendment and hence personal jurisdiction is present." *Id.* at 399-400.

defendant had been "served with process pursuant to [Rule 4(d)(7)], Rule 4(e) and the Nebraska long-arm statute."[989] Agreeing with the plaintiff "that the due process clause of the fourteenth amendment does not apply to federal action and the due process clause of the fifth amendment does,"[990] the court ruled, however, that "the same minimal contacts test applicable under the fourteenth amendment is applicable under the fifth amendment, although national contacts may properly be considered under the fifth amendment."[991] The court went on to note circumstances in which sufficiency of service of process "is a matter governed solely by federal rather than state law," such as where Congress has provided for nationwide service of process or process is served pursuant to Rule 4(d)(3).[992] In this case, however, no special federal authorization pertained; federal process therefore was limited by Rule 4(f) to the borders of the State of Nebraska unless extended, under Rule 4(d)(7), by some state statute.[993] Finding that service could only be made properly under the Nebraska statute if the defendant had been transacting business in Nebraska,[994] the court refused to assert jurisdiction. The court noted, moreover, that "[t]his requirement inheres whether the due process limitations are imposed by the fourteenth amendment or the fifth amendment, as Rule 4(e) requires service 'made under the circumstances . . . prescribed in the [state] statute or rule'."[995] While this case has been cited as rejecting a national contacts analysis in Rule 4(d)(7) cases, it can be read, in-

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Apparently, the plaintiff assumed that if due process were satisfied, then service on the defendant would be appropriate.

989. *Id.* at 400. Again a court found difficulty in choosing between Rule 4(d)(7) and Rule 4(e). Later in its opinion, however, the court impliedly seemed to distinguish between 4(d)(7) and 4(e), citing 4(d)(7) as supporting circumstances when "substituted service or extra-state service can be made . . . when a state statute so authorizes," while citing 4(e) in connection with fifth amendment limitations. *Id. See supra* note 937 and notes 910, 921 and 975 and accompanying text and *infra* notes 1069 and 1164 and accompanying text (discussing problems of distinguishing between the two statutory provisions).

990. 70 F.R.D. at 400.

991. *Id.*

992. *Id.* Apparently, the court considered these circumstances to be appropriate for the use of a national contacts approach.

993. *Id.*

994. *Id.*

995. *Id.* (quoting Rule 4(e)). The court seemed to be saying that, even if some fifth amendment standard would be satisfied by aggregating the defendant's national contacts, there is no statutory authority for such exercise: the state long-arm was limited to defendants who transact business in Nebraska (and defendant did not) and no federal statute applied in this case. The court also seemed to imply that Rule 4(e) incorporated not only the state procedure for service of process but also the state limitations on the use of those procedures (transacts business in the state) by using the language "in the circumstances." *Cf.* Rule 4(d)(7), which only requires that service be made "in the manner" prescribed by the state statute or rule. *See supra* notes 278-86 and accompanying text and *infra* notes 904-13, 1061-71 and accompanying text (discussing possible distinctions between the two rules and the jurisdictional standards applicable thereto).

stead, as simply holding that a defendant's conduct must come within the language of the state long-arm statute before any amenability analysis would be appropriate.[996] Indeed, the decision in *Wells Fargo*[997] can be read similarly: before the court sought statutory authority for aggregation of national contacts, it already had concluded that no state statute or rule would authorize such a procedure.[998] While both courts thus refused to aggregate the defendant's national contacts, neither based its ultimate holding on that refusal. *Ag-Tronic* is significant, moreover, for analysis that seems to associate Rule 4(e) with the fifth amendment while implying that Rule 4(e) incorporates not only the manner of service permissible under the state statute but also the circumstances in which such service could be made by a state court.[999]

The question of applicability of a national contacts test of amenability in a 4(d)(7) case was squarely presented in *Amburn v. Harold Forster Industries, Ltd.*,[1000] a patent infringement and unfair competition suit instituted in the United States District Court for the Eastern District of Michigan. The plaintiffs did not allege, nor did any proof exist, that the defendants had any contacts with the state of Michigan.[1001] Instead, the plaintiffs contended:

> [S]ince [the plaintiffs] are Michigan residents and citizens and have been damaged by reason of defendants' sale or delivery of the infringing products in [other] states . . . and . . . since plaintiffs' infringement claim is a federally created cause of action, Fifth Amendment due process requirements can be met by aggregating defendants' contacts in all 50 states and service of process may be made under the Michigan long-arm statute. . . .[1002]

In a well-reasoned opinion, the court concluded that, in federal question cases, "the aggregate contacts test would seem the correct one;"[1003] no unfairness would result from the sovereign, the United States, asserting power over defendants, each of which had sufficient contacts within the United States.[1004] The court, however, refused to assert personal

996. *See infra* note 1005 and accompanying text.
997. *See supra* notes 974-84 and accompanying text.
998. Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 417 (9th Cir. 1977). The court found that the Nevada long-arm statute did not include the California loans, thus providing no statutory authority for considering those contacts. Without those contacts, the defendant's acts in Nevada were insufficient to come within the Nevada long-arm statute. *Id.*
999. *See supra* note 995 and accompanying text.
1000. 423 F. Supp. 1302 (E.D. Mich. 1976).
1001. *Id.* at 1303.
1002. *Id.*
1003. *Id.* at 1304.
1004. *Id.*

jurisdiction over the defendants because there existed no statutory "vehicle to serve defendants who have no contacts with the State of Michigan."[1005] According to the court, the state long-arm statute can be used only within the limitations of the fourteenth amendment, and the fourteenth amendment requires that the defendant have at least one contact with the state.[1006] Despite the authorization in Rule 4(d)(7) for a federal court to use the Michigan long-arm statute, the court noted:

> It remains, however, a state statute and the power of the State of Michigan is limited by the due process requirements of the Fourteenth Amendment. There must be some contact of a defendant with Michigan. It must have invoked the benefits or protection of the laws of the State of Michigan, if not directly at least indirectly through an agent. . . .[1007]

After rejecting the plaintiffs' arguments that other factors besides the defendants' contacts with the State of Michigan could satisfy the fourteenth amendment due process clause,[1008] the court concluded: "The due process principles of *International Shoe* and its progeny control the validity of service of process under a state's long-arm statute."[1009] Finding no contacts with the State of Michigan, the court determined that service of process had not been valid. The court ruled, therefore, that after a defendant in a federal question case had been served validly, the constitutional propriety of a federal court asserting personal jurisdiction over the defendant was subject to the due process restrictions of the fifth amendment. Since this merely would require satisfaction of a national contacts test, the service itself, if made pursuant to a state long-arm statute, would be valid only if fourteenth amendment limitations on the application of the statute were satisfied. This leads to the conclusion that service must satisfy the stricter "minimum contacts with the state" standard, and therefore any defendant on whom service is properly made also will be amenable to suit under a fifth amendment standard.[1010]

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1005. *Id.* at 1309.
1006. *Id.* at 1305, 1308.
1007. *Id.* at 1305.
1008. *Id.*
1009. *Id.* at 1308.
1010. Once the fourteenth amendment has been satisfied in regard to validity of service, any less strict standard already has been satisfied and is, therefore, irrelevant. As in *Wells Fargo* and *Ag-Tronic*, one might argue that the decision was again one of statutory interpretation: if the defendants had no contacts with the state, they could not come within the language of the state long-arm statute. On the other hand, in state court cases such as *World-Wide Volkswagen*, a state court thought that the defendant came within the state long-arm statute and yet the court found that the defendant had no contacts with the state for purposes of a fourteenth amendment due process analysis. "Contacts" can have different meanings depending on whether the questions is due process or statutory interpretation.

In *Centronics Data Computer Corporation v. Mannesmann, A.G.*,[1011] suit was instituted in the United States District Court for the District of New Hampshire by a Delaware corporation with its sole place of business in New Hampshire against a multinational alien conglomerate headquartered in Germany. The case might be cited as a federal question case in which the court, under former Rule 4(d)7), adopted national contacts as the appropriate fifth amendment amenability standard, at least in cases involving an alien corporate defendant.[1012] The decision in this case, which involved alleged violations of the antitrust laws, interference with advantageous contractual relations, misappropriation of trade secrets, and defamation, cannot be read, however, as a clear adoption of a national contacts approach. The court vascillates between discussion of requirements for service of process under the New Hampshire long-arm provisions, which involve constitutional analysis because they purportedly go to the limits of due process under the fourteenth amendment,[1013] and discussion of amenability standards applicable to a federal court in the circumstances of this case. As noted both above[1014] and below,[1015] determination of personal jurisdiction involves two distinct inquiries: (1) whether the defendant's conduct comes within the statute which purportedly authorizes service of process, and (2) if so, whether assertion of personal jurisdiction over the defendant would violate his due process rights under either the fifth or fourteenth amendments. When consideration of these separate and separable issues is combined or not distinguished by the court, the opinion can become quite confusing and will lack the clarity to be of important precedential value.

In deciding whether it had jurisdiction over the defendant Mannesmann, the court first noted that "[t]he plaintiffs have availed themselves of Rule 4(d)(3) and (7) by using the service provisions of New Hampshire's long arm statutes."[1016] Next, the court quoted the

1011. 432 F. Supp. 659 (D.N.H. 1977).

1012. *See* Note, *supra* note 21, at 472 n.10.

1013. After quoting one of The New Hampshire long-arm provisions, the court noted that, according to the interpretation of the Supreme Court of New Hampshire, "[t]his statute is meant to extend jurisdiction to . . . the full constitutional limit." 432 F. Supp. at 661 (citation omitted). The "full constitutional limit" for a state long-arm statute would be the limit of the due process clause of the fourteenth amendment. A federal court, therefore, might have to examine the outer limits of the fourteenth amendment to determine if a state long-arm statute applies to a defendant served pursuant to former Rule 4(d)(7) or Rule 4(e). (The former rule has been reenacted, in part, as Rule 4(c)(2)(C)(i). *See supra* notes 278-86 and accompanying text.) *See infra* notes 1076-93 and 1341-49 and accompanying text (discussing this possibility in greater detail).

1014. *See supra* note 120 and accompanying text.

1015. *See infra* notes 1079-93 and 1341-49 and accompanying text.

1016. 432 F. Supp. at 661 (emphasis added). The reference of the court to Rule 4(d)(3) is not for the purpose of discussing some alleged service, within the State of New Hampshire,

New Hampshire "foreign corporation long-arm statute,"[1017] which, according to the court, "is meant to extend jurisdiction over foreign corporations to the full constitutional limit."[1018] Then the court went on to set out its "game plan" for analysis of the personal jurisdiction issue:

> In my analysis of jurisdictional facts as they relate to the New Hampshire statute, I am guided by two principles.
>
> First, the exercise of jurisdiction has to be reasonable from the standpoint of New Hampshire's interest in the litigation. Second, it has to be consistent with principles of fair play and substantial justice. . . .
>
> In addition, the reach of the long arm statute may not be extended beyond what is permitted by the Constitution of the United States.[1019]

The court seemed to establish a test that included not only considerations of the requirements of the long-arm statute that purportedly goes to the limits of the fourteenth amendment but also of an amenability requirement established by the Constitution. After setting out this test and without specifically addressing the applicability of the long-arm statute to the facts before it, the court seemed to consider immediately constitutional questions. It did not distinguish between the fifth and fourteenth amendments, nor did it determine under which amendment federal court amenability standards were measured. Instead, without explanation, the court lumped the two amendments together:

> The factors to be weighed in determining whether the contacts in a given case are sufficient to meet the requirements of fair play called for by the Due Process Clauses of the Fifth and Fourteenth Amendments include the quantity of contacts, the nature of the contacts, and the connection of the cause of action with those contacts. . . .In addition, I must consider New Hampshire's interest in protecting its citizens and whether that interest has been invoked here. . . .[1020]

upon an agent of the defendant as authorized by Rule 4(d)(3), but because former Rule 4(d)(7) was applicable in regard to defendants "of any class referred to in . . . [Rule 4(d)(3)]," FED. R. CIV. P. 4(d)(7) (1963), and Mannesmann, as a business entity, would be a Rule 4(d)(3) defendant. *See supra* notes 802-03 and accompanying text.

1017. 432 F. Supp. at 661.

1018. *Id; see supra* note 1013 and accompanying text.

1019. 432 F. Supp. at 661-62 (*quoting* Grappone, Inc. v. Subaru of Am., Inc., 403 F. Supp. 123, 134 (D.N.H. 1975), which, in turn, quoted Leeper v. Leeper, 114 N.H. 294, 296, 319 A.2d 626, 628 (1974)).

1020. 432 F. Supp. at 662 (citations omitted). The court's "constitutional stew" analysis is particular disheartening because this is a recent case that should be clarifying or establishing important standards rather than obfuscating established doctrines. This opinion, moreover, has been criticized because of the decision by the court to "toss in" a local concern factor, the state "interest in protecting its citizens," in a case involving the vindication of an important federal interest, violation of antitrust laws. *See* Note, *supra* note 121, at 471 n.10.

The court went on to describe the "usual test" of the the "due process requirements of the Fourteenth and Fifth Amendments as set out in *International Shoe* . . . and its progeny"[1021] as "the *state* must have 'sufficient contacts' so that the maintenance of a suit locally would not offend the 'traditional conception of fair play and substantial justice.' "[1022] The court, which apparently through that this "contacts of the state test" applied to both the fifth and fourteenth amendments, examined "the sufficiency of the defendants' contacts with the State"[1023] and concluded that the defendants' "physical contacts" with the state—three visits by the defendants' agents at the request of the plaintiff—"[did] not, in and of themselves, constitute sufficient contacts with the State of New Hampshire on which to base jurisdiction."[1024] These contacts were held "not sufficient to meet the fairness requirement"[1025] and the court concluded that, "[i]f state contacts were the sole consideration, I would hold that they were not sufficient to ground jurisdiction."[1026] What the court actually was saying remains unclear. It may have held that the defendants did not come within the New Hampshire long-arm statute because some fourteenth amendment fairness requirement had not been satisfied; alternatively, the court may have held that even if the defendants could be served, the fifth amendment due process limitation on federal courts would not be satisfied if measured by a test of "contacts with the state." The remainder of the opinion is difficult to follow because the significance of the holding is in doubt.

Next, without clarifying the significance of this consideration, the court dealt with the plaintiff's contention "that, since the defendants are alien, it is not their contacts with the State that should control, but that their contacts with the country as a whole must be

1021. 432 F. Supp. at 662 (citation omitted). Nowhere in its opinion did the court explain or support its implied assertion that *International Shoe* established a fifth amendment test of due process. Moreover, in light of the description by the court of these standards as requiring certain contacts with the state, *see infra* notes 1022-23 and accompanying text, the court would seem to have lost any constitutional justification for its subsequent consideration of a "national contacts" test. If the court thought that the fifth amendment standard was contacts with the state and finds that the standard is not satisfied, how could it argue "national contacts?" Perhaps this observation explains the refusal of the court to characterize "national contacts" as a constitutional standard or, indeed, as anything more than a factor to be weighed in a personal jurisdiction analysis. *See infra* notes 1027-28, 1033, and 1038 and accompanying text.

1022. 432 F. Supp. at 662 (*quoting* International Shoe v. Washington, 326 U.S. 310, 320 (1945) (emphasis added)). The court does not make clear with what entity the state must have had contacts. Probably, in light of the consideration by the court of the defendant's contacts with the state of New Hampshire, *see infra* notes 1023-26 and accompanying text, the court merely misstated the rule.

1023. 432 F. Supp. at 662.

1024. *Id.*

1025. *Id.*

1026. *Id.* at 663.

considered."[1027] Still silent as to how a national contacts test would be applied, the court then cited cases in which other federal courts had discussed "national contacts" as a possible amenability standard in federal question cases.[1028] The court provided two reasons for adoption of this approach: (1) if the defendant is an alien, the defendant would be "no more inconvenienced by a trip to one state than another;"[1029] and (2) if an alien has substantial contacts with the United States as a whole but doesn't have "sufficient contacts with any state so as to give that state jurisdiction," the defendant would escape suit unless a federal court were allowed to base jurisdiction on an aggregation of the defendant's contacts with the nation.[1030] After acknowledging that a national contacts test had "not yet been generally accepted"[1031] and that while Congress could have enacted "a statute stating that jurisdiction over aliens will be based on their contacts with the nation as a whole," it had not done so,[1032] the court concluded:

> But in this age of multinational conglomerates doing business on an international scale, plaintiff's position has merit, and I specifically rule that where an alien defendant is sued by an American plaintiff, and where there is no particular inconvenience due to the specific forum state, the fact that the defendant is an alien and that there is no other forum in which to litigate the claim should be taken into consideration for purposes of determining whether a finding of jurisdiction meets the requisite constitutional standards of fair play.[1033]

Assuming that the court, in its discussion of "national contacts," was considering a federal amenability standard for fifth amendment

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1027. *Id.*

1028. *Id.* (*citing* Honeywell, Inc. v. Metz Apparatewerke, 509 F.2d 1137, 1143 n.2 (7th Cir. 1975) (*supra* notes 845-55 and accompanying text; *infra* notes 1202-12 and accompanying text); Graham Eng'g Corp. v. Kemp Prods., Ltd., 418 F. Supp. 915 (N.D. Ohio 1976) (*infra* notes 1244-50 and accompanying text); Cryomedics, Inc. v. Spembly, Ltd., 397 F. Supp. 287 (D. Conn. 1975) (*infra* notes 1269-83 and accompanying text); Gerber Scientific Instrument v. Barr & Stroud, Ltd., 383 F. Supp. 1238 (D. Conn. 1973); Engineered Sports Prods. v. Brunswick Corp., 362 F. Supp. 722 (D. Utah 1973) (*infra* notes 1264-68 and accompanying text); Holt v. Klosters Rederi A/S, 355 F. Supp. 354 (W.D. Mich 1973) (*infra* notes 1310-16 and accompanying text); Alco Standard Corp. v. Benala, 345 F. Supp. 14, 24-25 (E.D. Pa. 1972) (*supra* notes 687-94 and accompanying text); Edward J. Moriarty & Co. v. General Tire & Rubber Co., 289 F. Supp. 381, 390 (S.D. Ohio 1967)(*infra* notes 1251-63 and accompanying text); First Flight Co. v. National Carloading Corp., 209 F. Supp. 730, 736-37 (E.D. Tenn. 1962) (*supra* notes 872-84 and accompanying text); Ag-Tronic, Inc. v. Frank Paviour Ltd., 70 F.R.D. 393 (D. Neb. 1976) (*supra* notes 985-99 and accompanying text)).

1029. 432 F. Supp. at 663.

1030. *Id.* at 664.

1031. *Id.*

1032. *Id.*

1033. *Id.* (footnote omitted).

purposes, it did not adopt or approve such a standard. Rather, the court merely agreed, in certain very limited circumstances, to "take . . . into consideration" defendants' national contacts.

The court then discussed another basis on which jurisdiction is claimed for New Hampshire.[1034] Personal jurisdiction might be found under another New Hampshire long-arm provision that provided "[i]f a foreign corporation commits a tort . . . in New Hampshire, such acts shall be deemed doing business in New Hampshire. . . ."[1035] The court found that the defendants' alleged conspiracy to interfere with the plaintiff's New Hampshire business, if proved, would be a tortious act committed in New Hampshire even though "the defendants did not set foot in the State in order to commit the alleged tort"[1036] and forcefully argued that "[t]he traditional notions of justice and fair play should not be used to extend a cloak of immunity over deliberate torts merely because the defendant is an alien corporation."[1037] Instead of arguing that the defendants could be served with process under the "tortious act" long-arm statute, and instead of considering the constitutionality of that assertion of jurisdiction by a federal court, however, the court abruptly concluded:

> Based on the defendants' physical contacts with the State, their substantial contacts with the country as a whole, and New Hampshire's interest in protecting its corporate citizens injured as a result of torts such as those alleged here, I find that this court has jurisdiction.[1038]

The court accepted that national contacts might play some part in assertion of personal jurisdiction by a federal court but only as something to add flavor to the jurisdictional stewpot. This tortuous opinion cannot serve as precedent or persuasive authority for adoption of national contacts as a federal amenability standard.

*Summary and Analysis*

The lack of any genuine analysis is probably the strongest unifying factor in these cases in which courts have dealt with the question of amenability standards when service is made, pursuant to former Rule 4(d)(7), according to statute or rule of the state in which the federal court is sitting. In each case, the court seemed to find in former 4(d)(7) the authority to invoke a state long-arm statute rather than,

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1034. *Id.*
1035. *Id.* at 665 n.2 (*quoting* N.H. REV. STAT. ANN. 300:14).
1036. *Id.* at 665-67.
1037. *Id.* at 668.
1038. *Id.*

as suggested by this author,[1039] merely the authority to invoke a state statute for service of process on defendants already "present" in the state. Some courts applied an amenability test of minimum contacts with the state whose statute was being invoked without any justification for such application.[1040] Other courts recognized that a separate federal standard might exist, but decided that it would not be applicable when service is made pursuant to state statute[1041] or decided that in the context of the case such a determination was not necessary since the narrower fourteenth amendment standard had been satisfied.[1042] Some courts went farther and agreed that a federal standard would be required, but concluded that *International Shoe* "points the way" to that standard.[1043] Still other courts concluded that a federal standard, such as minimum contacts with the United States, might be an appropriate standard, but only if some statutory provision authorized such aggregation. In other words, if a federal long-arm statute existed that permitted service on any defendant having minimum contacts with the United States, then a determination of the reach of the fifth amendment would be made by considering whether the defendant's contacts with the United States were sufficient so that "traditional notions of fair play and substantial justice" would not be offended.[1044] This might be considered a "practical result." If a defendant does not have sufficient contacts with the state in which the federal court is sitting to satisfy a test of "minimum contacts with the state," even though he has substantial contacts with the United States as a whole, then the state long-arm statute cannot be employed because that statute was drafted in contemplation of making service upon defendants who had *some* relationship to the state. Most long-

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1039. *See supra* note 1004 and accompanying text; *see also infra* notes 994-1014 and accompanying text (arguing in favor of narrow interpretation of former Rule 4(d)(7)).

1040. *See, e.g.*, Grappone, Inc. v. Subaru of Am., Inc., 403 F. Supp. 123 (D.N.H. 1975) (*see supra* notes 929-35 and accompanying text); Keller v. Clark Equip. Co., 367 F. Supp. 1350 (D.N.D. 1973) (*see supra* notes 936-43 and accompanying text).

1041. *See, e.g.*, Finance Co. of Am. v. Bankamerica Corp., 493 F. Supp. 895 (D. Md. 1980) (*see supra* notes 956-62 and accompanying text); Scott Paper Co. v. Scott's Liquid Gold, Inc., 374 F. Supp. 184 (D. Del. 1974) (*see supra* notes 944-55 and accompanying text).

1042. Gkiafis v. Steamship Yiosonas, 342 F.2d 546 (9th Cir. 1965) (*see supra* notes 964-71 and accompanying text). *See also* Bar's Leaks Western, Inc. v. Pollack, 148 F. Supp. 710 (N.D. Cal. 1957) (refused to resolve questions as to federal amenability standard because venue not satisfied) (*see supra* notes 915-19 and accompanying text).

1043. *See, e.g.*, Time, Inc. v. Manning, 366 F.2d 690 (5th Cir. 1966) (*see supra* notes 920-28 and accompanying text).

1044. *See, e.g.* Wells Fargo & Co., v. Wells Fargo Express Co., 566 F.2d 406 (9th Cir. 1977) (*see supra* notes 974-84 and accompanying text); Amburn v. Harold Forster Indus., Ltd., 423 F. Supp. 1302 (E.D. Mich. 1976) (*see supra* notes 1000-10 and accompanying text); Ag-Tronic v. Frank Paviour Ltd., 70 F.R.D. 393 (D. Neb. 1976) (*see supra* notes 985-99 and accompanying text).

arm statutes, by their terms, only allow service in situations where the fourteenth amendment would not be violated by such service. In other words, when states drafted long-arm statutes, they tried to limit service of process to circumstances in which due process would not be violated.[1045] No state long-arm statute, therefore, provides that service may be made on a defendant who has had no contacts with the state. When a federal court, however, is asked to assert personal jurisdiction over a defendant who has sufficient "national contacts" but insufficient "state contacts" to satisfy the fifth amendment and fourteenth amendment due process clauses, respectively, the courts argue that the state long-arm statute cannot be used because the factual prerequisites for using the statute cannot be satisfied. If these prerequisites were satisfied, the defendant would have some contact with the state. Courts, therefore, are left with a perfectly satisfactory fifth amendment amenability standard, but with no way to use it because service cannot be made pursuant to a state long-arm statute if the factual prerequisites of the statute are not met. The result is, according to the courts, a lack of statutory authority to serve process.[1046] The lack of authority, however, comes from failure to satisfy the prerequisites of the state statute being adopted and not from absence of federal authorization. Analysis of these former Rule 4(d)(7) cases makes clear that each federal court considering the amenability standard has applied, for one of several reasons, the test of "minimum contacts with the state" in which the federal court is sitting. The *Centronics* court merely threw in a national contacts element to its consideration but did not rely on national contacts as a test.[1047]

After reviewing all of the arguments presented, this writer concludes that a separate federal amenability standard should have applied in former Rule 4(d)(7) cases and that the appropriate fifth amendment due process standard would be "minimum contacts with the United States."[1048] Such a standard would preclude the anomaly of determining federal court jurisdiction in federal question cases by a test applicable to the state court system.[1049] This conclusion can be justified

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1045. *See supra* notes 119 to 126 and accompanying text.

1046. *See* cases cited *supra* note 1044.

1047. Centronics Data Computer Corp. v. Mannesmann, 432 F. Supp. 659 (D.N.H. 1977) (*see supra* notes 1011-38 and accompanying text).

1048. *See supra* notes 348-51 and 367-74 and accompanying text (discussing development of national contacts approach); notes 793-98 and 888-92 and accompanying text (discussing applicability of national contacts approach where service is made by wholly federal methods).

1049. *See supra* notes 795, 878, 961, and 1132 and accompanying text (discussing this anomaly). *See also supra* note 488 and accompanying text (discussing this anomaly in the context of diversity cases).

whether former Rule 4(d)(7) is interpreted narrowly, as urged by this writer, as merely an authorization to use state methods of service in cases involving defendants who also could be served pursuant to Rules 4(d)(1) or 4(d)(3),[1050] or broadly, as interpreted by the courts, as an authorization to use state long-arm statutes for service on defendants who could not be reached under Rule 4(d)(1) or 4(d)(3).[1051]

Persuasive arguments can be made in support of the position that former Rule 4(d)(7) merely authorized a federal court to employ a state method of service in lieu of the federal methods prescribed by Rules 4(d)(1) and 4(d)(3). First, a person to be served under former Rule 4(d)(7) was described as "a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule."[1052] Those paragraphs define authorized methods for making service upon individuals present or residing in the state in which the federal district court is sitting (4(d)(1))[1053] or upon business entities that have agents, for service of process, located within the state in which the federal district court is held (4(d)(3)).[1054] The methods provided in Rules 4(d)(1) and 4(d)(3) only could be utilized on defendants present, residing, or doing some sort of business within the state. The reference in former Rule 4(d)(7) to defendants "of any class referred to in paragraphs (1) or (3)" therefore can be read sensibly as limiting former Rule 4(d)(7) to defendants who might be served under Rules 4(d)(1) and 4(d)(3). Such an interpretation is reasonable in view of the specific language in Rule 4(e) making that provision applicable to "service . . . upon a party not an inhabitant of or found within the state in which the district court is held."[1055] If Rule 4(e) covers situations in which a defendant is not present, residing, or doing some sort of business within the state, or defendants not servable by the methods of 4(d)(1) and 4(d)(3), then one could logically conclude that former Rule 4(d)(7) was not intended to cover the same sorts of defendants covered by Rule 4(e).[1056]

The language in former Rule 4(d)(7) that authorized service "in the manner prescribed by any statute of the United States or in the

1050. *See infra* notes 1067-68 and accompanying text.
1051. *See infra* notes 1076-90 and accompanying text.
1052. FED. R. CIV. P. 4(d)(7) (1963).
1053. FED. R. CIV. P. 4(d)(1). *See supra* notes 810-16 and accompanying text (discussing Rule 4(d)(1) and cases arising thereunder).
1054. FED. R. CIV. P. 4(d)(3). *See supra* notes 817-87 and accompanying text (discussing Rule 4(d)(3) and cases arising thereunder).
1055. FED. R. CIV. P. 4(e). *See infra* notes 1103-12 and accompanying text (discussing Rule 4(e)) and 1113-1285 and accompanying text (discussing cases arising under Rule 4(e)).
1056. Two provisions of the same rule usually do not overlap, especially when one of the provisions, Rule 4(e), specifically deals with a particular type of case.

manner prescribed by the law of the state in which the district court is held for service of process . . . upon any such defendant''[1057] also supports a narrow interpretation of former Rule 4(d)(7). The difference in scope between former Rule 4(d)(7), which authorizes service "in the manner prescribed by" state or federal statutes, and Rule 4(e), which provides for service "under the circumstances and in the manner prescribed by" state or federal statutes, indicates both a recognition of the distinction between acceptable techniques of service (*e.g.*, time, place and manner) and factual situations in which such techniques might be employed ("circumstances"). The difference also reflects a deliberate decision to limit former Rule 4(d)(7) merely to adoption of techniques that are alternatives to those provided by Rules 4(d)(1) and 4(d)(3).[1058] Congress should be credited with not only recognizing the difference between "manner" and "circumstances and manner" but also with using each phrase deliberately, not inadvertently. Since former Rule 4(d)(7) and Rule 4(e) followed one another spatially, Congress probably knew and deliberately intended the differences between the two provisions.

One might argue that reading former Rule 4(d)(7) as merely prescribing methods of service of process as alternatives to those already provided in Rules 4(d)(1) and 4(d)(3) would leave a statutory provision with no real usefulness unless the methods of service were coupled with circumstances in which those methods could be employed. Under this argument, former Rule 4(d)(7) must have been intended to include factual circumstances tied to the state statutes, including state long-arm statutes. This argument, however, can be countered. Former Rule 4(d)(7) *did* include a description of the circumstances in which the state and other federal methods were to be employed, circumstances in which, under Rules 4(d)(1) or 4(d)(3), defendants were present, residing, or doing some sort of business within the state in which the federal court was sitting.[1059] Such an interpretation also is supported by the concluding language of former Rule 4(d)(7) that the state manner of service adopted would be that prescribed "for the service . . . upon any *such* defendant in an action brought in the courts of general jurisdiction of that state."[1060] Again, the circumstances in which the rule could operate effectively would be those that involved particular defendants who also could be served under 4(d)(1) or 4(d)(3).

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1057. FED. R. CIV. P. 4(d)(7) (1963).

1058. *See supra* notes 273-75 and 799-809 and accompanying text (discussing Rules 4(d)(1) and 4(d)(3)).

1059. *See supra* notes 273-75 and accompanying text.

1060. FED. R. CIV. P. 4(d)(7) (1963).

A final argument in support of the narrow interpretation of former Rule 4(d)(7) is that since Rule 4(e) effectively and specifically, by its terms, deals with adoption of state and federal statutes in regard to service on defendants outside the state in which the federal court is sitting, both as to manner and circumstances of service, former Rule 4(d)(7) must have dealt with something else. That "something else" would be providing an alternative method for serving defendants present, residing, or doing some sort of business within the state, methods provided in state and federal service of process statutes. Former Rule 4(d)(7), therefore, did not adopt, for federal court use, state long-arm statutes and should not have been used in so many cases as justification for federal courts using state long-arm statutes.[1061]

Present Rule 4(d)(2)(C)(i), which replaced, in part, former Rule 4(d)(7),[1062] also can be narrowly interpreted as prescribing methods of service in 4(d)(1) and 4(d)(3) circumstances and as supporting a narrow interpretation of both former Rule 4(d)(7) and Rule 4(c)(2)(C)(i). Rule 4(c)(2)(C)(i) permits a federal court to serve process "upon a defendant of any class referred to in [4(d)(1) or 4(d)(3)] . . . pursuant to the law of the State. . . ."[1063] While this provision does not refer specifically to "manner of service," the references to 4(d)(1) and 4(d)(3) defendants again could be interpreted as limitations on the circumstances in which the rule could be employed.[1064] Rule 4(c)(2)(C)(ii), moreover, provides for an alternative *federal method* of service on 4(d)(1) and 4(d)(3) defendants, service by first class mail.[1065] Finally, Rules 4(c)(2)(C)(i) and (ii), which, together, apparently have replaced Rule 4(d)(7), appear in a subsection of Rule 4 dealing *only* with methods of service of process.[1066]

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1061. *See supra* cases cited in note 1044.

1062. *Compare* FED. R. CIV. P. 4(c)(2)(C)(i) *with* FED. R. CIV. P. 4(d)(7) (1963). *See supra* notes 269 and 267 (providing texts of these provisions). Former Rule 4(d)(7) authorized service, on 4(d)(1) and 4(d)(3) defendants, "in the manner" provided in any federal statute or statute of the state in which the federal court was held. Rule 4(c)(2)(C)(i) authorizes service, on 4(d)(1) and 4(d)(3) defendants, "pursuant to" any statute of the state in which the federal court is held. Rule 4(c)(2)(C)(ii), which authorizes an alternative federal method of service by mail, *see supra* note 269 (providing text of Rule 4(c)(2)(C)(ii)), apparently has replaced that part of former Rule 4(d)(7) that authorized use of other federal service of process statutes. The only real differences between former Rule 4(d)(7) and present Rules 4(c)(2)(C)(i) and (ii) appear to be: (1) a change in the position of the provision so that it now appears in that part of Rule 4 devoted to techniques of service, (2) replacement of the authorization in Rule 4(d)(7) to use federal statutory methods of service other than those provided in 4(d)(1) and 4(d)(3) with a specific alternative federal method for service, and (3) a change in the language of Rule 4(d)(7), which authorized service "in the manner" prescribed by state statute or rule, to the language of Rule 4(c)(2)(C)(i), which, more ambiguously, authorizes service "pursuant to" state statute or rule.

1063. FED. R. CIV. P. 4(c)(2)(C)(i).

1064. *Cf.* FED. R. CIV. P. 4(d)(7) (1963). *See supra* notes 1059-60 and accompanying text.

1065. FED. R. CIV. P. 4(c)(2)(C)(ii). *See supra* note 269 (providing text of Rule 4(c)(2)(C)(ii)).

1066. Former Rule 4(d)(7) appeared in subsection 4(d) of Rule 4, which subsection was

In former Rule 4(d)(7) is interpreted in this narrow sense, then a federal due process standard of "minimum contacts with the United States" would be appropriate. The argument in favor of such a standard would be the same as in 4(d)(1) and 4(d)(3) cases[1067] because the only difference between former Rule 4(d)(7) and Rules 4(d)(1) and 4(d)(3) is that a different method of service is being employed, a method that must comport with due process by being reasonably calculated to give the defendant actual notice of the pendency of suit against him.[1068] Amenability questions, however, which depend on the factual circumstances triggering the assertion by the court of personal jurisdiction over the defendant, should not differ from 4(d)(1) and 4(d)(3) cases.

Courts, however, while troubled by a juxtaposition of former Rule 4(d)(7) and Rule 4(e),[1069] have cited former Rule 4(d)(7) as authority for federal court use of state long-arm statutes.[1070] That result can be reached by reading the limitation to defendants "of any class referred to" in Rules 4(d)(1) or 4(d)(3) as meaning only individuals (4(d)(1)) or business entities (4(d)(3)) and not including the circumstances in which 4(d)(1) (presence or residence in the state) or 4(d)(3) (agent in the state for service of process) are applicable.[1071] While such an interpretation of the words "of any class" is sensible, it does not resolve other problems like the former Rule 4(d)(7) use of "manner" as

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entitled "Summons: Personal Service." Rules 4(c)(2)(C)(i) and (ii) appear in subsection 4(c) of Rule 4, which subsection is entitled "Service." In the 1983 amendments to Rule 4, subsection 4(d) has been given a new title, "Summons and Complaint: Person to be Served," indicating that subsection 4(d) now is devoted to defining who can be served (including the circumstances in which he must find himself in order to be served) while subsection 4(c) is devoted to methods for accomplishing this service. Subsection 4(e), which has the title "Summons: Service Upon Party Not Inhabitant of or Found Within State," seems to be devoted to describing the situations in which a nonpresent, nonconsenting defendant may be served with process.

1067. *See supra* notes 888-92 and accompanying text (discussing national contacts test in 4(d)(1) and 4(d)(3) cases).

1068. *See supra* note 511 and accompanying text.

1069. Many courts have resolved their confusion as to which Rule authorizes use of state long arm statutes by citing both former Rule 4(d)(7) and 4(e) and leaving it up to the reader to decide on which provision the court is or should be relying. *See, e.g.*, Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 414 (9th Cir. 1977) (*see supra* note 975 and accompanying text); Time, Inc. v. Manning, 366 F.2d 690, 693 (5th Cir. 1966) (*supra* note 921); Ag-Tronic v. Frank Paviour Ltd., 70 F.R.D. 393, 400 (D. Neb. 1976) (*supra* note 989 and accompanying text); Conwed Corp. v. Nortene, S.A., 404 F. Supp. 497, 500-01 (D. Minn. 1975) (*infra* note 1164 and accompanying text); United States Dental Inst. v. American Ass'n of Orthodontists, 396 F. Supp. 565, 569-70 (N.D. Ill. 1975) (*supra* note 937); Scott Paper Co. v. Scott's Liquid Gold, Inc., 374 F. Supp. 184, 188 (D. Del. 1974) (*supra* text accompanying note 949); Japan Gas Lighter Ass'n v. Ronson Corp., 257 F. Supp. 219, 231 (D.N.J. 1966) (*infra* note 1184). *But see* Stanley v. Local 926 of the Int'l Union of Operating Eng'rs of the AFL-CIO, 354 F. Supp. 1267, 1269-70 (N.D. Ga. 1973) (distinguishing between former Rule 4(d)(7) and Rule 4(e)) (*infra* notes 1238-40 and accompanying text).

1070. *See supra* cases cited in note 909.

1071. *See supra* notes 273-75 and accompanying text.

opposed to the Rule 4(e) use of "circumstances and manner," and the existence of two apparently overlapping provisions, a statutory wastage quite uncharacteristic of legislative bodies.

Because so many federal courts used former Rule 4(d)(7) to adopt state long-arm statutes for service on defendants not present, residing, or doing business within the states in which the federal courts were sitting,[1072] however, a determination must be made as to whether a broader interpretation of former Rule 4(d)(7) precludes application of a uniform federal amenability standard in federal question cases. This discussion, moreover, necessarily will include examination of Rule 4(c)(2)(C)(i), to determine whether a uniform federal test can survive in cases arising under this new rule that authorizes service "pursuant to" state law, perhaps a more ambiguous grant than that of service "in the manner" of state law as prescribed in former Rule 4(d)(7).[1073]

This writer agrees with those courts and commentators who find an anomaly in measuring federal court personal jurisdiction in federal question cases by fourteenth amendment due process standards applicable to state courts.[1074] Although a federal standard could be derived from, analogous to, or even identical with the standard applicable to state courts, some separate federal fifth amendment due process standard should be applicable to all federal question cases. The development of such a standard would not eliminate the anomaly caused by the nonuniformity of possible assertions of federal personal jurisdiction because state long-arm statutes are not uniform. For example, a federal court sitting in a state with a liberal long-arm statute might be able to assert jurisdiction over a defendant who, in similar circumstances, might escape the personal jurisdiction of a federal court sitting in a state with a less liberal long-arm statute.[1075] Nonuniformity will exist so long as federal courts rely on state statutes for "permission" to serve process. The problem at which this discussion is aimed is not procedural—uniformity of "permission" to serve process is not the goal. Rather, if a federal court has obtained "permission" to serve process because a particular defendant's conduct comes within the state's long-arm statute, then the problem is whether assertion by the court of personal jurisdiction will be measured by some uniform fifth amendment amenability standard or whether the assertion of jurisdiction will be subject to a fourteenth amendment due process standard developed for state courts.

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1072. *See supra* cases cited in note 909.
1073. *See supra* note 1062 (discussing changes from Rule 4(d)(7) to Rules 4(c)(2)C)(i) and (ii)).
1074. *See supra* notes 795, 878, 968 and 1132 and accompanying text.
1075. *See supra* note 966 and accompanying text.

A separate fifth amendment standard clearly should be developed. A broad standard that would not violate the fifth amendment would be a "minimum contacts with the United States" standard, aggregation of the defendant's national contacts.[1076] This test derives from the fourteenth amendment standard of "minimum contacts with the state,"[1077] which standard has been defined and developed carefully over a number of years by a tremendous number of courts and commentators.[1078] An application of this test would require a federal court wishing to serve a defendant with process by using a state long-arm statute under former Rule 4(d)(7) to engage in the same type of two step analysis that any court must use to determine whether it could assert jurisdiction over the defendant:[1079] (1) Does a statute authorize service on this defendant, *i.e.*, does this defendant come within the language of the statute authorizing service of process? (2) Would assertion of jurisdiction over this defendant violate the defendant's due process rights (here, his rights under the fifth amendment)? In a former Rule 4(d)(7) case, these two enquiries could have been kept entirely separate. The court first would have decided whether the defendant to be served was one who came within the state long-arm statute. If the potential defendant had an insufficient relationship with the state to come within its long-arm statute, no matter how narrow that statute might be, then jurisdiction could not be asserted because service on the defendant would not be authorized by statute.[1080] Thus, all of the courts that refused to apply a national contacts test to federal question cases because no statutory authority existed really were faced with circumstances in which the defendant could not be served with process since he was outside the scope of the applicable state long-arm statute.[1081] The courts should not have reached the question of amenability because service of process had not been authorized in these cases.

Once it were established that the defendant's conduct came within the scope of the long arm statute, then the federal court, according to former Rule 4(d)(7), would have been authorized to serve that defendant "in the manner" prescribed by that state statute. Only then would

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1076. *See supra* notes 793-98 and 888-92 and *infra* notes 1324-55 and accompanying text (discussing national contacts test in various contexts).

1077. *See supra* notes 348-51 and 367-74 and accompanying text (discussing derivation of national contacts test).

1078. *See supra* notes 70-185 and accompanying text (discussing historical development of *International Shoe* test).

1079. *See supra* note 120 and accompanying text (discussing proper analysis in long-arm cases).

1080. *See supra* note 120.

1081. *See supra* notes 977-1010 and accompanying text.

the court turn to the question of amenability, applying the "minimum contacts with the United States" test. In most cases either the facts would satisfy the *International Shoe* test of "minimum contacts with the state" or service could not be had at all; that is, most state long-arm statutes require some substantial contact with the state before the defendant would come within the scope of the statute, and, if that conduct were established, a minimum contacts with the state test also would be satisfied. This does not mean, however, that the narrower *International Shoe* test should apply. Expediency should not dictate the standard employed; the standard, instead, should define the outer limits of personal jurisdiction. Any facts that satisfy the *International Shoe* test also would satisfy the broader national contacts test and some cases would arise in which the defendant had done something that triggered the state long-arm statute but that would not be a substantial enough contact with the state to satisfy the fourteenth amendment.[1082] Then, the court, properly having served the defendant "in the manner" of the state long-arm statute, could have aggregated the defendant's contacts with the United States as a whole to determine whether assertion of personal jurisdiction over this defendant would violate his fifth amendment rights. Such a test would allow a federal court to assert personal jurisdiction over a defendant whose substantial contacts were scattered so thinly throughout the United States that no state court constitutionally could obtain personal jurisdiction over him.[1083]

Use of a national contacts test in former Rule 4(d)(7) cases would not only have been sensible, but would have allowed federal courts to apply an amenability standard of their own to the facts of a particular case; courts would not have been forced to examine and extrapolate from the facts a test satisfactory to the particular case.[1084] In most circumstances, a defendant would not have been sued in a

1082. In cases in which the defendant's contacts within the United States were substantial but his contacts with any particular state were small, such contact might trigger the use of the long-arm statute without making such contacts sufficient to satisfy the fourteenth amendment. Often a state court has purported to assert jurisdiction over a defendant served pursuant to the state long-arm statute and a higher court has determined that the assertion of jurisdiction would not be consistent with due process. The court then did not backtrack and say that the defendant did not come within the long-arm statute because due process was not satisfied.

On the other hand, a long-arm statute arguably cannot be applied unless its application would be constitutional. This would require that the constitutional analysis be conducted first to determine whether the long-arm statute could be used, or that the statutory interpretation be conducted first with applicability of the statute being revoked by a subsequent judicial decision that due process would not be satisfied.

1083. *See supra* note 1030 and accompanying text and *infra* notes 1267 and 1282 and accompanying text (suggesting such a consideration).

1084. *See supra* notes 742, 747, 762, 831, 928, and 971 and accompanying text.

highly inconvenient forum; the state long-arm statute would not have permitted service on a defendant who had nothing to do with the state.[1085] Venue restrictions also would have operated to limit the situs of the suit[1086] and change of venue provisions could have been utilized in rare cases in which a defendant would have been highly inconvenienced by the plaintiff's choice of forum.[1087]

If this approach had been adopted, some cases seemingly would have required a federal court to engage in two separate due process analyses. In those states like California and Rhode Island in which the state long-arm statutes do not specify circumstances in which service can be made on nonresident, nonpresent, nonconsenting defendants but rather authorize service whenever the defendant has sufficient contacts with the state so that the fourteenth amendment due process clause would not be violated,[1088] the first step for a federal court would entail determining whether the defendant had sufficient contacts with the state so that the *International Shoe* test would have been satisfied.[1089] If that test had been satisfied, then the court should have determined amenability under the fifth amendment national contacts approach. Since the fifth amendment test would be satisfied if the fourteenth amendment test were satisfied,[1090] however, the second part of the analysis would not be necessary. This would create the odd result that in cases in which the state long-arm statute is open-ended and only limited by the constitution, the only cases a federal court using the state long-arm could hear would be those that a state court also could hear. Again, however, this would not be a reason to reject a broad federal amenability standard for all federal question cases. This only demonstrates that when a federal court must serve process by a state long-arm statute, the state and federal standards usually would be satisfied.

On the other hand, a strong argument can be made that a different two-step analysis would have been required. The first question would be whether the defendant could have been served under the

1085. The broadest long-arm statutes permit state courts to assert jurisdiction to the limits of the constitution as defined by the fourteenth amendment. *See supra* note 3 (discussing such long-arm statutes). The fourteenth amendment requires, however, that the defendant have sufficient contacts with the state to satisfy "minimum contacts."

1086. *See supra* note 188 and accompanying text.

1087. *See supra* notes 188 and 693 and accompanying text and *infra* notes 1310-16 and accompanying text (*discussing* Holt v. Klosters Rederi A/S, 355 F. Supp. 354 (W.D. Mich. 1973)).

1088. *See supra* note 3.

1089. In a state court case, the question of applicability of the statute and amenability to service collapse into a single inquiry because the statute only authorizes service when due process is satisfied.

1090. *See supra* text following note 797.

statute and the second would be whether assertion of personal jurisdiction would have been constitutional by whatever standard applied to the particular court, the fourteenth amendment to state courts deciding state questions and the fifth amendment to federal courts deciding federal questions. If the state had a long-arm statute that was written to reach the limits of the Constitution, those limits would depend on the court, the fourteenth amendment limitation on state courts, and the fifth amendment limitation on federal courts.[1091] Even though the analysis would collapse into a single question, the question would be whether the particular limitations of that court have been exceeded. Under this possible analysis, federal courts would have broader jurisdictional powers than state courts. The argument would be more difficult to sustain in cases in which long-arm service is made under Rule 4(e) because 4(e) is limited to service *"under the circumstances"* as well as "in the manner" of the state long-arm statute. Some federal courts have read this additional language to mean that the federal court cannot use the state long-arm statute unless the state could constitutionally do so.[1092] This question will be discussed below.[1093]

Before moving to the final major group of cases to be examined, those arising under Rule 4(e),[1094] this writer would like to examine former Rule 4(d)(7) and compare it with the new rule, Rule 4(c)(2)(C)(i) as well as with Rule 4(e), to determine whether a national contacts test of amenability in federal courts will make sense under the new rule. First, a significant distinction between former Rule 4(d)(7) and Rule 4(e) must be emphasized. Former Rule 4(d)(7) authorized service "in the manner" prescribed by state law while Rule 4(e) authorizes service "under the circumstances and in the manner" prescribed by state law.[1095] Some have argued that because of the additional requirement in Rule 4(e), Rule 4(e) adopts not only the state long-arm statute for purposes of service of process but also the state amenability standard because the state long-arm statute cannot be used by a state court in circumstances in which the state amenability standard is not satisfied.[1096] Under the narrow interpretation of former Rule 4(d)(7), which this writer suggested above,[1097] one might conclude, on the other hand, that "under the circumstances" in Rule 4(e) refers only to factual circumstances of the case that would bring the defendant within

1091. *See supra* notes 329 and 497 and accompanying text.
1092. *See, e.g.*, cases discussed *infra* at notes 1123-33, 1142-62, 1172-77, and 1190-1201.
1093. *See infra* notes 1329-49 and accompanying text.
1094. *See infra* notes 1103-1283 and accompanying text.
1095. *See supra* notes 903-07 and accompanying text.
1096. *See, e.g.*, cases discussed *infra* at notes 1123-33, 1142-62, 1172-77, and 1190-1201.
1097. *See supra* notes 1052-61 and accompanying text.

the long-arm statute.[1098] Under either interpretation, however, former Rule 4(d)(7) only referred to "manner" of service, thus permitting a strong argument that the drafters of the federal rules did not intend that former Rule 4(d)(7) incorporate any more into federal procedure than the techniques of service embodied in state long-arm statutes and the factual requisites for application of those statutes. New Rule 4(c)(2)(C)(i) is a little more ambiguous; it permits a federal court to serve 4(d)(1) and 4(d)(3) defendants "*pursuant* to the law of the State. . . ."[1099] Some evidence, however, points to an interpretation of Rule 4(c)(2)(C)(i) as a recodification of former Rule 4(d)(7) as to using state *methods* for service of process. First, Rule 4(e) still includes references to both the "circumstances and manner" of service.[1100] Second, Rule 4(c)(2)(C)(i) is included in subsection (c) of Rule 4, which subsection is entitled "Service," thereby indicating that subdivisions of that subsection all deal with methods for service.[1101] All subdivisions of subsection 4(c), moreover, deal with technical requirements for federal service of process and 4(c)(2)(C)(ii), the parallel clause to 4(c)(2)(C)(i), describes a new federal method (by mail) for serving process on 4(d)(1) and 4(d)(3) defendants.[1102] Rule 4(c)(2)(C)(i) seemingly was intended to replace the portion of Rule 4(d)(7) that authorized federal courts to use state law for service of process; no substantial changes were intended. In fact, the section was moved to a subsection dealing *only* with methods for service of process, possibly to clarify that former Rule 4(d)(7) also dealt only with techniques. Therefore, any amenability standard, like national contacts, which makes sense in light of former Rule 4(d)(7) and the cases arising thereunder, will be equally sensible when the authorization for use of the state statute is Rule 4(c)(2)(C)(i).

In conclusion, this writer perceives nothing that recommends adoption of state amenability standards as part and parcel of state statutes for service of process under former Rule 4(d)(7) and present Rule 4(c)(2)(C)(i). Federal courts should determine and apply a uniform amenability standard, if possible. The policy behind permitting federal courts to use state long-arm statutes and state methods of service probably was to allow federal courts to do *at least* what courts of the states in which they were sitting could do. One should not infer a congressional desire, and, indeed, none has been documented, to limit

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1098. *See infra* notes 1328-40 and accompanying text.
1099. FED. R. CIV. P. 4(c)(2)(C)(i). *See supra* note 1062.
1100. *See* FED. R. CIV. P. 4(e).
1101. *See* FED. R. CIV. P. 4(c)(2)(C)(i). *See also supra* note 1062.
1102. *See* FED. R. CIV. P. 4(c)(2)(C)(ii). *See also supra* note 1062.

federal courts to *only* what state courts could do under similar circumstances.

*4. Amenability standards in federal question cases in which process was served, "upon a party not an inhabitant of or found within the state in which the district court is held, . . .under the circumstances and in the manner prescribed" by the law of the state in which the district court is held pursuant to Rule 4(e) of the Federal Rules of Civil Procedure*

Like the broader interpretation of former Rule 4(d)(7) of the Federal Rules of Civil Procedure,[1103] Rule 4(e) allows a federal court to serve process beyond the borders of the state in which the federal court is sitting. According to its heading, Rule 4(e) provides authorized methods for "service . . . upon a party not an inhabitant of or found within the state in which the district court is held."[1104] One method, discussed above,[1105] is service according to "a statute of the Untied States [which] provides for service . . . upon a party not an inhabitant of or found within the state,"[1106] that is, service pursuant to a federal statute that authorizes nationwide or worldwide service of process. Another method, considered below,[1107] is service "under the circumstances and in the manner prescribed" by a state statute that "provides for service . . . upon a party not an inhabitant of or found within the state."[1108] Thus, Rule 4(e) authorizes a federal court to adopt state long-arm statutes in certain circumstances.

A major issue arising in Rule 4(e) federal question cases, when the federal court serves process under the long-arm statute of the state in which it is sitting, is whether the amenability of a defendant to federal court personal jurisdiction is measured by the fourteenth amendment standard of minimum contacts with the state or by some fifth amendment standard like minimum contacts with the nation. Some courts and commentators argue that the provisions that service be "under the circumstances . . . prescribed in the statute" requires a fourteenth amendment amenability standard because the only circumstances under which a state court might serve a defendant validly under its long-arm statute would be circumstances in which a four-

1103. *See supra* cases cited in note 909; *see also supra* notes 893-913 and accompanying text.
1104. FED. R. CIV. P. 4(e).
1105. *See supra* notes 683-798 and accompanying text.
1106. FED. R. CIV. P. 4(e).
1107. *See infra* notes 1123-1283 and accompanying text.
1108. FED. R. CIV. P. 4(e).

teenth amendment due process test is satisfied.[1109] On the other hand, the limitation to "the circumstances . . . prescribed in the statute" might refer only to those factual circumstances that must be satisfied in order for the defendant to come within the language of the state long-arm statute;[1110] amenability would be a separate issue to be determined by some fifth amendment standard. Other courts do not consider the specific language of Rule 4(e), applying instead a fourteenth amendment standard as something that "comes with" the adopted state long-arm statute.[1111] But for the fourteenth amendment requirements, this long-arm statute might have been drafted differently. Still other courts, finding no statutory authority to support consideration of the defendant's "national contacts," apply the *International Shoe* standard as "the only game in town."[1112]

While most courts that have considered the question have rejected any national contacts test,[1113] many have referred to the possibility of applying national contacts in other federal question contexts.[1114] The Rule 4(e) cases discussed below have been divided, roughly, into three categories: (1) those courts that applied a fourteenth amendment minimum contacts test and found the defendant's contacts with the state insufficient to support jurisdiction;[1115] (2) those courts that applied a fourteenth amendment minimum contacts with the state test and found the defendant's state contacts sufficient to support

1109. *See infra* cases cited at note 1318. *See also* Edwards v. Gulf Mississippi Marine Co., 449 F. Supp. 1363, 1367-68 and n.2 (one defendant served pursuant to state long-arm statute as authorized by Rule 4(e); court applies fourteenth amendment test to find personal jurisdiction but suggests it might not have to consider limitations on state courts if service had been under former Rule 4(d)(7) which doesn't include "under the circumstances" language). *See supra* note 850 (discussing another aspect of *Edwards* case).

1110. *See infra* notes 1328-36 and accompanying text.

1111. *See infra* cases cited at note 1320.

1112. *See infra* cases cited at note 1319.

1113. *See infra* notes 1155-58, 1180-82, 1189, 1210, and 1215 and accompanying text.

1114. *See, e.g.*, Burstein v. State Bar of Cal., 693 F.2d 511, 517 (5th Cir. 1982); Illinois v. City of Milwaukee, 599 F.2d 151, 156 n.3 (7th Cir. 1979); Brotherhood Cia Naviera S.A. v. Zapata Marine Service, Inc., 547 F. Supp. 688, 691 n.3 (E.D. Pa. 1982).

1115. *See infra* notes 1123-82 and accompanying text. In many federal question cases in which service is made pursuant to a state long-arm statute and an *International Shoe* test is applied to find that the defendants had insufficient contacts with the state to support personal jurisdiction, the courts do not cite any statute or rule authorizing service by the state long-arm. *See, e.g.*, Land-O-Nod Co. v. Bassett Furniture Indus., Inc., 708 F.2d 1338 (8th Cir. 1983); Insurance Co. of N. Am. v. Marina Salina Cruz, 649 F.2d 1266 (9th Cir. 1981); Grevas v. M/V Olympic Pegasus, 557 F.2d 65 (4th Cir. 1977); Lomanco, Inc. v. Missouri Pac. RR Co., 566 F. Supp. 846 (E.D. Ark. 1983); Chattanooga Corp. v. Klinger, 528 F. Supp. 372 (E.D. Tenn. 1981); In re Mid-Atl. Toyota Antitrust Litig., 525 F. Supp. 1265 (D. Md. 1981) (as to some defendants); Harem-Christensen Corp. v. M.S. Frigo Harmony, 477 F. Supp. 694 (S.D.N.Y. 1979). *See also* Wood v. Santa Barbara Chamber of Commerce, Inc., 705 F.2d 1515 (9th Cir. 1983) (court finds insufficient contacts between defendant and state but never examines any long-arm statute); Gerber Scientific Inst. Co. v. Barr & Strould Ltd., 383 F. Supp. 1238 (D. Conn. 1973) (same).

jurisdiction;[1116] and (3) those courts which have applied some amenability test other than minimum contacts with the state.[1117] The first category of cases may include two types of cases: those in which the defendant's contacts with the United States were no greater than its contacts with the state in which the federal court was sitting, cases which might turn on an argument that the court need not decide whether a different federal amenability standard would be appropriate because such standard also would not be satisfied;[1118] and those in which the defendant's contacts with the United States were greater than its contacts with the state in which the federal court was sitting, cases in which the court deliberately has decided to apply the narrower state standard of amenability.[1119] The second category includes cases in which some federal amenability standard would have been satisfied but in which the court applied the state standard, either because it believed the state standard was required,[1120] or because, since the state standard was satisfied, it did not have to consider any broader federal standard[1121] (if contacts with one state were sufficient, then contacts with the United States would also be sufficient). The third category includes only cases in which a federal court has adopted, for use, a federal amenability standard like national contacts.[1122]

*Category 1. DeJames v. Magnificence Carriers, Inc.*[1123] was an admiralty action for personal injuries sustained by a longshoreman while working in a New Jersey port on board a vessel that had been converted by the defendant Japanese corporation, Hitachi Shipbuilding and Engineering Co., Ltd. *DeJames* often is cited[1124] because of the

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1116. *See infra* notes 1183-1268 and accompanying text. In many federal question cases in which service is made pursuant to a state long-arm statute and an *International Shoe* test is applied to find the defendants had sufficient contacts with the state to support jurisdiction, the courts do not cite any statute or rule authorizing service by the state long-arm. *See, e.g.*, Lapeyrouse v. Texaco, Inc., 693 F.2d 581 (5th Cir. 1982); Taubler v. Giraud, 655 F.2d 991 (9th Cir. 1981); Martin v. Steubner, 652 F.2d 652 (6th Cir. 1981); Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distributors Party Ltd., 647 F.2d 200 (D.C. Cir. 1981); Greater Newburyport Clamshell Alliance v. Public Service Company of New Hampshire, No. 83-0066 (D. Mass. May 25, 1983); Rios v. Marshall, 530 F. Supp. 351 (S.D.N.Y. 1981); In re Mid-Atl. Toyota Antitrust Litig., 525 F. Supp. 1265 (D. Md. 1981) (some defendants); Holt v. Nissan Motor Co., 399 F. Supp. 838 (S.D. Fla. 1975); Vergaro v. Aeroflot "Soviet Airlines", 390 F. Supp. 1266 (D. Neb. 1975); Honda Assoc., Inc. v. Nozawa Trading Co., 374 F. Supp. 886 (S.D.N.Y. 1974); H.K. Corp. v. Lauter, 336 F. Supp. 79 (N.D. Ga. 1971); Scott v. Middle East Airlines Co., S.A. 240 F. Supp. 1 (S.D.N.Y. 1965).

1117. *See infra* notes 1269-83 and accompanying text.

1118. *See, e.g., infra* notes 1150-52 and accompanying text.

1119. *See, e.g.*, infra notes 1176-77 and 1181-82 and accompanying text.

1120. *See, e.g., infra* notes 1190-95 and 1213 and 1215 and accompanying text.

1121. *See, e.g., infra* notes 1209-11 and 1244-47 and accompanying text.

1122. *See infra* notes 1269-1316 and accompanying text.

1123. 654 F.2d 280 (3d Cir. 1981).

1124. *See, e.g.*, Comment, *supra* note 186, at 687 n.10; Note, *supra* note 121, at 476 n.30, 478.

discussions of a national contacts amenability standard that occur in the majority[1125] and the dissenting[1126] opinions. Service had been made, under Rule 4(e), pursuant to the New Jersey long-arm statute. The majority, in considering whether the federal court had personal jurisdiction over Hitachi, noted the applicability of the fifth amendment to this question.[1127] The court stated, however, that "the principle announced in *diversity* cases such as *International Shoe* . . . and its progeny is also applicable to nondiversity cases."[1128] Since the court erroneously characterized *International Shoe* and its progeny as "diversity cases" rather than state court cases,[1129] its reliance on *International Shoe* might derive from a desire to create uniformity among federal court cases rather than a desire to adopt a test developed for state court cases. This point was clarified, in part, when the court expressed doubt as to whether, under a prior third circuit case, "the fifth amendment requires a defendant to have minimum contacts with the forum state, or whether . . . the *International Shoe* test be applied by analogy, so that a defendant need only have minimum contacts with the United States as a whole."[1130] The court, therefore, was not striving for federal uniformity but for some sensible fifth amendment amenability standard. Finally, the court further limited its speculation by noting:

> In any event, even in nondiversity cases, if service of process must be made pursuant to a state long-arm statute or rule of court, the defendant's amenability to suit in federal district court is limited by that statute or rule.[1131]

While recognizing the appropriateness of measuring amenability by some fifth amendment standard, the court concluded that use of the state long-arm statute could limit amenability according to that statute. The character of this limitation, as determined by this court, carefully was described and explained in the following paragraph:

> The New Jersey long-arm rule is intended to extend as far as is constitutionally permissible. In enacting its long-arm rule, the state of New Jersey is limited by the due process constraints of the four-

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1125. 654 F.2d at 283; *see also* 654 F.2d at 287-90 (discussing possibility of a national contacts test if it could be established that the defendant had been validly served pursuant to some federal law authorizing worldwide service of process).

1126. 654 F.2d at 292-93 (Gibbons, J. dissenting).

1127. *Id.* at 283.

1128. *Id.* (emphasis added).

1129. *See supra* notes 106-55 and accompanying text (discussing *International Shoe* and its progeny). *See also supra* note 828 and accompanying text (citing other cases in which the same erroneous statement was made).

1130. 654 F.2d at 283.

1131. *Id.*

> teenth amendment. Therefore, we believe that Hitachi's amenability to suit in the District of New Jersey must be judged by fourteenth amendment standards. We recognize that *this creates an anomalous situation because it results in a federal court in a nondiversity case being limited by the due process restrictions imposed on the states by the fourteenth amendment as opposed to those imposed on the federal government by the fifth amendment.* However, it would be equally anomalous to utilize a state long-arm rule to authorize service of process on a defendant in a manner that the state body enacting the rule could not constitutionally authorize. The anomaly of a federal court being limited by the requirements of the fourteenth amendment in a nondiversity case where service must be made pursuant to a state long-arm rule could be easily rectified by congressional authorization of nationwide service of process for admiralty cases. It is not within our province to create such authorization.[1132]

After considering the defendant's contacts with New Jersey and the requirements of the New Jersey long-arm statute, which had been determined to reach the limits of due process, the court concluded that Hitachi's contacts with New Jersey were "insufficient to support the assertion of jurisdiction over Hitachi under the New Jersey long-arm rule."[1133]

Judge Gibbons disagreed, finding in dissent that "Hitachi's relation to New Jersey satisfies the fourteenth amendment due process concerns the Supreme Court enunciated in *World-Wide Volkswagen* . . . ."[1134] The dissent, moreover, took issue with the conclusion by the majority that the fourteenth amendment should govern amenability to suit in this situation.[1135] The dissent argued:

> The fourteenth amendment due process clause does not properly apply in all its aspects to federal question claims. In *International Shoe*. . . , the Supreme Court established a two-pronged test to determine the constitutionality of a state's assertion of personal jurisdiction over an out-of-state defendant. A state's exercise of jurisdiction must comport with traditional notions of fundamental fairness, and it must be consistent with the values of federalism embodied in the fourteenth amendment. . . .When a court asserts personal

1132. *Id.* at 284 (emphasis added).

1133. *Id.* at 286. *See also* Elefteriou v. Tanker Archontissa, 443 F.2d 185 (4th Cir. 1971) (court remands for decision as to whether plaintiff's claim, which would come within the state long-arm statute, had been asserted in good faith; court poses the question as to whether, if court adopts long-arm through Rule 4(e), it also adopts statutory limitations on scope of long arm).

1134. 654 F.2d at 290 (citation omitted).

1135. *Id.* at 292. Judge Gibbons recognized that because of his conviction that fourteenth amendment standards had been satisfied by the defendant's contacts with New Jersey, his conclusion as to the appropriate amenability test was "not crucial to the disposition of this case." *Id.*

> jurisdiction over a foreign defendant on the basis of a state law claim, it must ensure that the forum state does not unduly encroach on a sister state's interests. When a court, state or federal, adjudicates a federal claim, the federalism issue is of no relevance, for the court determines the parties' rights and liabilities under uniform, national law. No state intrudes on another's interests. The only relevant interest is the national one. Thus the applicable constitutional due process provision should not be the fourteenth amendment, but the fifth amendment.[1136]

The dissent to this point had not parted company with the majority opinion, which had recognized that "the fifth amendment determines whether the district court has personal jurisdiction over Hitachi."[1137]

Next, the dissent described, as an appropriate fifth amendment test, aggregation of the defendant's contacts with the United States.[1138] In meeting the position of the majority that a federal court, using a state statute for service of process, should be limited in the same way that a state court using that statute would be limited, the dissent argued:

> [W]ere a state court adjudicating a federal claim, the relevant due process standard should remain the fifth amendment. The nature of the claim, not the identity of the court, should determine the appropriate due process test. New Jersey has enacted a "constitutional" long arm; its courts may assert personal jurisdiction to the limits of the relevant due process clause. A federal court in a federal question case referred under Federal Rule of Civil Procedure 4(e) to the New Jersey long arm thus must ask two questions: Would assertion of personal jurisdiction violate the fifth amendment? and, Has New Jersey placed any restriction on the constitutionally exercisable scope of jurisdiction? The answer to the second question is

1136. *Id.* (citations omitted).
1137. *Id.* at 283.
1138. Judge Gibbons stated:

> The fifth amendment requires only that the forum be a fair and reasonable place at which to compel defendant's appearance, and that he have had notice and a reasonable opportunity to be heard. . . .A defendant's *national* contacts enter into the fifth amendment fairness analysis, for it would be unreasonable to subject to suit in the United States a foreign national defendant who had but one fleeting connection with this country. But it is not necessary, under the fifth amendment due process clause, that that defendant's contacts relate primarily to the particular United States location in which the claim arose. Thus, for example, it would not be unfair under the fifth amendment to subject a foreign national shipper to suit in New Jersey on the basis of an admiralty claim that arose in that state, even if the offending ship was the only one ever to dock in New Jersey, and all of defendant's other ships land in Texas. The hypothetical defendant has sufficient contacts with the United States, and the availability of witnesses points to the District of New Jersey as the most convenient forum for the litigation . . . .

*Id.* at 292 (citations omitted).

> no, and therefore when addressing a federal claim, the federal court, or for that matter, a New Jersey court, need consider only the issue of fifth amendment fairness in determining whether to assert personal jurisdiction over the foreign defendant.[1139]

Judge Gibbons concluded:

> [W]hile Rule 4(e) has the effect of converting a federal court into a state court for purposes of determining personal jurisdiction, the rule does not automatically make the fourteenth amendment the guiding due process provision.[1140]

Judge Gibbons's rather unique approach—consideration of the amenability question, under whichever due process clause is applicable, fifth or fourteenth, followed by examination of the long-arm statute to determine whether it goes to the limits of due process has some appeal and would work in cases in which a state has given its courts all power permitted by the Constitution. The general applicability of this approach will be discussed below in the materials following the discussion of particular cases.[1141]

Other circuit courts also have reached the conclusion advanced by the majority in *DeJames*—that the amenability standard in 4(e) federal question cases involving use of state long-arm statutes would be "minimum contacts with the state" in which the federal court is held. In *Kransco Manufacturing, Inc. v. Markwitz*,[1142] a declaratory judgment action to have a patent declared invalid or not infringed by plaintiff's device, the Ninth Circuit considered the question of whether a district court sitting in California had acquired personal jurisdiction over the defendant, a West German citizen and resident, by service outside the State of California. The court noted that the California long-arm statute was coextensive with whatever would be consistent under the fourteenth amendment,[1143] and, without discussing the possible applicability of the fifth amendment, examined the defendant's contacts with California to determine whether the district court had obtained jurisdiction over the defendant.[1144] The court concluded that the defendant's "forum contacts" were insufficient to permit assertion of personal jurisdiction.[1145] Although the court did not define

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1139. *Id.* at 292-93.
1140. *Id.* at 293.
1141. *See infra* notes 1351-52 and accompanying text.
1142. 656 F.2d 1376 (9th Cir. 1981).
1143. 656 F.2d at 1377. *See supra* note 3 (discussing California long-arm statute). *See also infra* notes 1346-49 and accompanying text (discussing a suggested fifth amendment analysis in cases involving a California-type long arm).
1144. 656 F.2d at 1378.
1145. *Id.* at 1380. The court concluded that the *International Shoe* test of "fair play and substantial justice" would be offended by "requir[ing] him to submit to the court's jurisdiction." *Id.*

"forum" as the State of California, inquiry was "limited to determining whether, consistent with due process, Markwitz's personal contacts with California [were] sufficient to support an exercise of . . . jurisdiction."[1146] The opinion does not reveal whether the defendant had any contacts with other parts of the United States.

The Sixth Circuit faced a similar issue of personal jurisdiction in a federal question case in which service had been made on the defendant, pursuant to Rule 4(e), by use of the Michigan long-arm statute. In *Chrysler Corp. v. Fedders Corp.*,[1147] an action for violation of antitrust laws, an alternative ground advanced by the plaintiff in support of personal jurisdiction was that the Michigan long-arm statute gave the court authority over an alien defendant served outside of Michigan.[1148] In considering this question, the court noted the requirements of the Michigan long-arm statute, judicial interpretations that the long-arm went to the limits permitted by the fourteenth amendment, and the due process requirement of "minimum contacts with the forum state."[1149] The court did not distinguish between applicability of the statute to the defendant and amenability standards, nor did it mention the possibility of applying the fifth amendment. Instead, the court examined the defendant's contacts with Michigan and concluded that these were insufficient "contacts with Michigan to justify an exercise of personal jurisdiction over [the defendant] by the District Court."[1150] Although the court did recognize that a fifth amendment standard might apply in federal question cases, it did so only while discussing the alternative basis for personal jurisdiction—service under Section 12 of the Clayton Act.[1151] In the Section 12 portion of the opinion, the court expressly found that if a national contacts test were applied, the plaintiff had "failed to establish that [the defendant had] sufficient contacts with the United States as a whole."[1152] Apparently, the facts of this case would require the same result even if this court had applied some fifth amendment standard while reviewing the adequacy of service pursuant to the state long-arm statute.

In *Burstein v. State Bar of California*,[1153] a recent suit instituted in United States District Court for the Eastern District of Louisiana,

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1146. *Id.* at 1379.
1147. 643 F.2d 1229 (6th Cir. 1981). *See also supra* notes 691-92 and accompanying text (discussing court's analysis of personal jurisdiction under §12 of the Clayton Act).
1148. 643 F.2d at 1236-37.
1149. *Id.* at 1236. The court cited *International Shoe* as the source of this list.
1150. *Id.* at 1237.
1151. *Id.* at 1237-40.
1152. *Id.* at 1239.
1153. 693 F.2d 511 (5th Cir. 1982).

a Louisiana resident who had failed the California bar examination alleged that the State Bar of California had violated her constitutional rights. The analysis by the Fifth Circuit of personal jurisdiction over defendant Bar Association proceeded from its conclusion that

> [t]he clear import of the 'under the circumstances' language [in Rule 4(e)], at least where the assertion of jurisdiction [as under 4(e)] and not just the service of process depends on the state statute, is that a federal court, even in a federal question case, can use a state long-arm statute only to reach those parties whom a court of the state could also reach under it.[1154]

The Fifth Circuit distinguished some cases in which a national contacts approach had been suggested, because service had been made under Rule 4(d)(3) in a wholly federal manner[1155] under the first sentence of Rule 4(e) pursuant to a federal statute authorizing nationwide or worldwide service of process,[1156] or under Rule 4(d)(7) as instate service by a state method (since Rule 4(d)(7) did not have any "under the circumstances" language).[1157] The court concluded that in this, a 4(e) case in which no federal statute authorized nationwide or worldwide service of process, "personal jurisdiction over the Bar . . . is proper only if a Louisiana court could have asserted it."[1158] The court examined the circumstances of this case in light of fourteenth amendment limitations on state court jurisdiction[1159] and concluded "that the alleged actions of the Bar . . . have insufficient relation to Louisiana to support the personal jurisdiction of a Louisiana state court."[1160] A federal court serving process according to the state long-arm statute, therefore, also would lack personal jurisdiction.[1161] In a footnote, the court limited its holding:

> We stress that our holding is a statutory one. The analysis of the statute, rule 4(e), requires us to apply the fourteenth amendment restrictions on state court jurisdiction to this case. Absent the statute, however, the only relevant constitutional provision would have been the due process clause of the fifth amendment, since this case involves a federal claim in federal court.[1162]

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1154. *Id.* at 514. *See also infra* notes 1328-45 and accompanying text (discussing the significance of the "under the circumstances" language).
1155. 693 F.2d at 515 (*discussing* Lone Star Package Car Co. v. Baltimore & O.R.R., 212 F.2d 147 (5th Cir. 1954); *see supra* notes 856-65 and accompanying text).
1156. 693 F.2d at 515-16 (*discussing* Federal Trade Comm. v. Jim Walker Corp., 651 F.2d 251 (5th Cir. 1981), *see supra* note 597).
1157. 693 F.2d at 516 (*discussing* Terry v. Raymond Int'l, Inc., 658 F.2d 398 (5th Cir. 1981), *cert. denied*, 456 U.S. 928 (1982)).
1158. 693 F.2d at 517.
1159. *Id.* at 517-23.
1160. *Id.* at 523.
1161. *Id.*
1162. *Id.* n.16.

The court did not, however, describe that fifth amendment standard.

The district courts also have denied jurisdiction in 4(e) cases on the basis of the insufficiency of the defendant's contacts with the state whose long-arm statute was used. In *Conwed Corp. v. Nortene, S.A.*,[1163] a federal question suit for a declaratory judgment instituted in the United States District Court for the District of Minnesota, the defendant alien corporation had been served, outside the United States, pursuant to the Minnesota long-arm statute. After noting that such a procedure was authorized under Rule 4(e) and (former) Rule 4(d)(7),[1164] the court stated that "*constitutional limitations aside*, the reach of State long-arm statutes is a question of State law, to be decided by the highest court of the State."[1165] According to state law, the Minnesota long-arm statute, which was written in such a way as to describe circumstances in which a Minnesota court would be authorized to assert jurisdiction,[1166] was intended to go to the limits of the constitution.[1167] One ground on which the plaintiff asserted that the defendants were subject to the Minnesota long-arm statute was that the defendant had "transacted business" in Minnesota within the meaning of the statute.[1168] The court found that the defendant's conduct would not come within the Minnesota long-arm statute but that even if it did, "the due process clause would prohibit . . . application" of the state long-arm statute because the requirements of *International Shoe* could not be satisfied.[1169] The court never returned to the "constitutional limitations" that it had set aside, unless incorporation of the fourteenth amendment analysis into the statutory scope discussion was intended to resolve amenability issues. The court apparently never reached any question of federal court amenability because the court decided that under the restrictions of the fourteenth

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1163. 404 F. Supp. 497 (D. Minn. 1975).

1164. *Id.* at 500-01. As noted above, if former Rule 4(d)(7) is interpreted as permitting federal courts to utilize state long arm statutes, federal courts become confused, between 4(d)(7) and 4(e), as to the source of authority for this procedure. In such cases, the courts tend to cite both provisions, without further explanation. *See supra* note 937 and notes 910, 921, 975, 989, and 1069 and accompanying text.

1165. 404 F. Supp. at 501 (emphasis added).

1166. Unlike the long-arm statutes of California, *see supra* note 3, and Pennsylvania, *see infra* note 1173 and accompanying text, long-arm statutes that broadly authorize their courts to do "everything not unconstitutional," states like Minnesota and New York, *see supra* note 3, have enacted statutes that specify the type of conduct, *e.g.*, "commits a tortious act within the state," which can be reached under the statute. When a state court provides that such a statute "goes to the limits of the Constitution," it is not converting the statute into a California-type authorization, but rather is saying that the statute is to be given broad interpretation so that, within the particular categories of conduct reached by the statute, only the Constitution limits that reach.

1167. 404 F. Supp. at 501; *see supra* note 1166.

1168. 404 F. Supp. at 504-05.

1169. *Id.* at 504.

amendment, a state court could not have used the long-arm statute *in the circumstances* of this case. A federal court, therefore, also could not use the provision under Rule 4(e).[1170] The result of this analysis, however, is that a fourteenth amendment due process standard operates to preclude a federal court from asserting personal jurisdiction.[1171]

*In re Arthur Treacher's Franchise Litigation*,[1172] a federal question suit brought in the United States District Court for the Eastern District of Pennsylvania by a franchisor, involved an alleged conspiracy to violate antitrust laws and a breach of a franchise agreement. Some of the defendants, nonresidents of Pennsylvania, had been served with process outside the state pursuant to the Pennsylvania long-arm statute as authorized by Rule 4(e). Again, the long-arm statute purported to go to the limits of the fourteenth amendment.[1173] Without distinguishing between constitutional standards necessary to determine the scope of the long-arm statute and those applicable to amenability questions, the court said, in a footnote, that "the constitutional standards to be applied when examining questions of personal jurisdiction are the same for the state and federal courts."[1174] The court framed its analysis and conclusion in terms of the defendant's contacts with "the forum," finding insufficient contact to satisfy the *International Shoe* fairness doctrine.[1175] The court, however, clearly was applying the standard developed for state court cases, minimum contact with the state: the court outlined the development of the *International Shoe* test[1176] and then examined only Pennsylvania contacts under circumstances in which it was obvious that the defendants had substantial contacts with other parts of the United States.[1177]

In a more recent federal question case, *Brotherhood Cia Naviera S.A. v. Zapata Marine Service, Inc.*,[1178] the United States District Court for the Eastern District of Pennsylvania again faced the question of

1170. *See infra* notes 1328-45 and accompanying text (discussing the significance of the "under the circumstances" language in Rule 4(e)).

1171. If the long arm cannot be used unless the fourteenth amendment is satisfied, then a fourteenth amendment threshold test must be satisfied and would limit the federal court.

1172. 92 F.R.D. 398 (E.D. Pa. 1981); *see also supra* notes 813-16 and accompanying text (discussing this case in regard to personal jurisdiction, under Rule 4(d)(1), over different defendants).

1173. 92 F.R.D. at 408. The court noted, "Pennsylvania's long-arm statute . . . provides for the exercise of in personam jurisdiction over non-residents 'to the fullest extent allowed under the Constitution of the United States' and may be based on the most minimum contact with the Commonwealth [of Pennsylvania] allowed under the Constitution of the United States." *Id.* (*citing* 42 Pa. Cons. Stat. Ann. §5322(b) (Purdon 1981)).

1174. 92 F.R.D. at 408 n.6.

1175. *Id.* at 410.

1176. *Id.* at 408-09.

1177. Some of the defendants were large corporations incorporated in the United States and doing business in other areas of the United States. *See id.* at 407 (describing defendants).

1178. 547 F. Supp. 688 (E.D. Pa. 1982).

personal jurisdiction in a case in which the defendants, Texas and Panamanian corporations, had been served with process, as authorized by Rule 4(e), pursuant to the Pennsylvania long-arm statute.[1179] In a footnote, the court recognized the existence of a "national contacts approach" to federal court personal jurisdiction but cited *DeJames* as rejecting that approach "in the absence of express Congressional authorization."[1180] Consequently, although the defendants had substantial contacts with other areas of the United States,[1181] the court used the fourteenth amendment test and, based on the defendants' contacts with the state of Pennsylvania, found that the court lacked personal jurisdiction.[1182]

*Category 2.* In *Japan Gas Lighter Association v. Ronson Corporation,*[1183] a federal question suit for declaratory judgment that the defendants' patent was invalid or that the plaintiff's device did not infringe the defendants' patent, one of the defendants, an alien corporation that had been served, pursuant to Rule 4(e),[1184] under the New Jersey long-arm statute, moved to dismiss for lack of personal jurisdiction. The district court found that service under the state long-arm rule "was proper as long as the State rule may constitutionally be applied to the facts."[1185] On this issue the court noted that "[i]nsofar as due process is concerned, this Court's power to assert jurisdiction in a Federal question matter is tested, technically speaking, under the Fifth rather than the Fourteenth Amendment."[1186] The court, however, asserted that "the clearest guidance on when such jurisdiction is permissible is found in the Supreme Court's pronouncements on the corresponding power of State tribunals."[1187] After discussing *International Shoe, Hanson,* and *McGee,* the court concluded that the alien defendants' contacts with New Jersey were sufficient to satisfy the tests established in those state court cases.[1188]

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1179. 547 F. Supp. at 688-90.

1180. 547 F. Supp. at 691 n.3; *see supra* notes 1123-41 and accompanying text (discussing the *DeJames* case).

1181. 547 F. Supp. at 691 n.3.

1182. *Id.* at 690-92. The court did not dismiss the case but transferred it, pursuant to 28 U.S.C. 1404(a), to the United States District Court for the Southern District of Texas. *Id.*

1183. 257 F. Supp. 219 (D.N.J. 1966).

1184. The court noted that "Federal Rules 4(e) and [former] 4(f) authorize service outside the State in which the District Court sits in any manner prescribed by State law." *Id.* This is another example of a court, confused by the juxtaposition of two rules that seemed to it to provide the same authority, citing both without deciding which actually authorizes use of state law. *See supra* note 937, 910, 975, 989, 1069 and 1164 and accompanying text (discussing other cases in which courts reacted in this manner). *See also supra* notes 1052-61 and accompanying text (suggesting an important distinction in the way these rules were intended to operate).

1185. 257 F. Supp. at 231.

1186. *Id.* at 232.

1187. *Id.*

1188. *Id.* at 232-36.

In a footnote, however, the court questioned whether, "in a Federal action such as this, the relevant 'affiliating circumstances' may not include the ties which [the defendant] has with the United States Federal system as a whole. . . ."[1189] Since the court found sufficient contacts with the state, it did not pursue this line of reasoning.

In *Horne v. Adolph Coors Co.*,[1190] a recent federal question case involving a claim for patent infringement brought in the District of New Jersey against a Colorado corporation, the United States Court of Appeals for the Third Circuit applied *International Shoe* to the question of the personal jurisdiction of the federal court. Service had been made on the defendant, as authorized by Rule 4(e), pursuant to the New Jersey long-arm statute.[1191] The court noted that the statute had been interpreted as going to the limits of due process[1192] and concluded that its "inquiry present[ed] the question whether due process [would] permit . . . the district court to exercise personal jurisdiction over [the defendant]."[1193] The court seemed to include a constitutional element in its consideration of the applicability of the New Jersey statute.[1194] In other cases, this approach has led inexorably to the application of the fourteenth amendment "minimum contacts with the state" approach first announced in *International Shoe*.[1195]

After posing the question of whether the Supreme Court, in *Insurance Corp. of Ireland*,[1196] had abandoned any sovereignty rationale for limitation of state court jurisdiction,[1197] the court observed that this "intriguing question . . . need not be answered in this case" because the case involved a federal question exclusively reserved to federal courts.[1198] Moreover, the court said that "[t]he only constitutional limitation on Congressional power to provide a forum is whatever fairness to the defendant is required by the fifth

1189. *Id.* at 236 n.34. The ties to which the court referred were the defendant's patents. The court continued, "Those ties, of course, do involve the interest of the Federal system in vindicating its substantial law policies in this area." *Id.*

*Japan Gas Lighter* arose four years after the United States District Court for the Eastern District of Tennessee in First Flight Co. v. National Carloading Co., formulated and adopted a national contacts approach in a 4(d)(3) case. *See* 209 F. Supp. 730 (E.D. Tenn. 1962); *supra* notes 872-87 and accompanying text. *Japan Gas Lighter*, which did not cite *First Flight*, was one of the earlier cases to recognize the possibility of some national contacts approach to amenability in federal question cases.

1190. 684 F.2d 255 (3d Cir. 1982).

1191. *Id.* at 257.

1192. *Id.*

1193. *Id.*

1194. *See supra* notes 1076-93 and *infra* notes 1328-49 and accompanying text (discussing the possibility of such a threshold requirement).

1195. *See supra* notes 1123-33, 1142-52 and 1172-77 and accompanying text.

1196. *See supra* notes 156-77 and accompanying text.

1197. 684 F.2d at 259.

1198. *Id.; see also supra* note 19 (discussing subject matter areas in which federal courts have been given exclusive subject matter jurisdiction).

amendment."[1199] No "fifth amendment fairness" test, however, was formulated. The court held instead that when the defendant placed its allegedly infringing product "in the stream of interstate commerce" under circumstances in which the defendant should have known that the plaintiff patent owner would be injured wherever he lived (New Jersey) and, when some of the products actually reached New Jersey, then "it cannot be said that requiring the alleged infringer to defend in the forum chosen by the patent owner, which also happens to be the patent owner's residence, so offends traditional notions of fairness as to be a violation of due process and therefore unconstitutional."[1200]

The court, therefore, ambiguously stated, in the context of the long-arm requirements, that "due process" would determine personal jurisdiction and then asserted that a fifth amendment fairness standard should govern in federal question cases that only arise in federal courts. The court did not clarify whether this was the "due process" by which to judge the applicability of the New Jersey long-arm statute or a separate amenability standard to be applied after statutory applicability had been established. Next, however, the court considered fairness to the defendant under the circumstances of this case, an analysis which did not look any different from an examination of the defendant's contacts with the State of New Jersey. (The court examined the defendant's action outside New Jersey which caused injury to the plaintiff within New Jersey.) This approach, then, really was an application of the fourteenth amendment standard. Clearly, the court did not weigh in its analysis the defendant's other substantial contacts with the United States.[1201]

*Honeywell, Inc. v. Metz Apparatewerke*[1202] was another patent infringement suit against an alien corporation. The United States District Court for the Northern District of Illinois examined two alternative bases for asserting personal jurisdiction over the defendant: (1) service in Illinois on an agent of the corporation under Rule 4(d)(3) (discussed above)[1203] and (2) service outside Illinois pursuant to the Illinois long-arm statute. The district court confused the two questions, deciding that 4(d)(3) did not apply because defendant did "not have sufficient minimum contacts with the State . . . to warrant . . . exercising *in personam* jurisdiction. . . ."[1204] Second, the court

1199. 684 F.2d at 259.
1200. *Id.* at 260.
1201. The court almost seemed to be interpreting a statute to decide whether the defendant had "done enough" to come within the New Jersey long-arm statute. The court did not more than a state court would have done if a state court had been authorized to hear such a case.
1202. 353 F. Supp. 492 (N.D. Ill. 1972). *See also supra* notes 845-55 and accompanying text.
1203. *See supra* notes 845-55 and accompanying text.
1204. 353 F. Supp. at 495.

found that the defendant's conduct did not come within the language of the Illinois long-arm statute.[1205]

The United States Court of Appeals for the Seventh Circuit reversed.[1206] The appellate court held that the defendant's conduct did fall within the Illinois long-arm statute,[1207] finding that the "activities engaged in by [the defendant] were sufficient to establish minimum contacts with the state. . . , and that exercise of personal jurisdiction pursuant to the . . . Illinois long-arm statute . . . would not violate the due process clause of the Fifth Amendment."[1208] The court of appeals never considered the applicability of Rule 4(d)(3).

The court of appeals distinguished between the statutory interpretation of the Illinois long-arm statute and the due process limitations concerning the constitutionality of the assertion of jurisdiction. The court did not include any constitutional analysis or references in its consideration of the first issue. When deciding the second issue, amenability, the Seventh Circuit did not find, as have courts that have programmed a fourteenth amendment constitutional requirement into the statutory interpretation question, that the amenability question was moot.

The court recognized that *International Shoe* and its progeny established restraints, under the fourteenth amendment, on "*state* power." The Seventh Circuit noted, however, that "[i]n this litigation . . . a federally created right is at issue, and due process is properly a matter for examination in light of the Fifth Amendment rather than the Fourteenth Amendment."[1209] The court said, in a footnote, that some courts had applied national contacts as the fifth amendment due process standard but observed that "[w]e need not reach such a broad conclusion here."[1210] This statement probably arose from the determination by the court that a narrower test, minimum contacts with the state, had been satisfied. The *International Shoe* test was adopted based upon the following reasoning:

> [T]he International Shoe line of cases is [not] irrelevant to our inquiry here. The due process clause of the Fifth Amendment is essentially a recognition of the principles of justice and fundamental fairness in a given set of circumstances . . . and, so viewed, on the facts of this case, we can perceive no operative difference between the concept of due process as applied to the states and as

1205. *Id.*
1206. Honeywell, Inc. v. Metz Apparatewerke, 509 F.2d 1137 (7th Cir. 1975).
1207. *Id.* at 1141-43.
1208. *Id.* at 1145.
1209. *Id.* at 1143.
1210. *Id.* n.2.

> applied to the federal government. This and other courts have reached this result, explicitly or tacitly, and have applied the "minimum contacts" standard to federal question cases in which in personam jurisdiction was at issue, and we deem it appropriate to do so here.[1211]

The court then examined the circumstances of the case under the *International Shoe* standard as it had then been interpreted[1212] and determined that assertion of personal jurisdiction *would* be constitutional.

In *People of State of Illinois v. City of Milwaukee*,[1213] a recent suit brought under the federal common law of nuisance in which service was made, under Rule 4(e), pursuant to the Illinois long-arm statute, the Seventh Circuit again applied a current fourteenth amendment test and concluded that defendant's contacts with the state of Illinois made it fair and reasonable for the court to assert personal jurisdiction.[1214] Again, the court divided the analysis into statutory construction and amenability, and again the court kept constitutional issues separate from its interpretation of the long-arm statute. In a footnote, the court observed:

> If Congress had chosen to authorize nationwide service of process, no minimum contacts issue would be raised. . . .Congress has not done so and Fed. R. Civ. P. 4(e) makes jurisdiction dependent on the long-arm statute or rule of court of the state in which the district court is held; therefore we are required to determine whether defendants' contacts with Illinois are sufficient to support the exercise of in personam jurisdiction.[1215]

While the court seemed incorrect in stating that *no* minimum contacts issue would be raised (at least, amenability would still be an issue),[1216] the Seventh Circuit clearly will continue to apply the fourteenth amendment, in the absence of Congressional action, in 4(e) cases involving use of state long-arm statutes.

In a more recent case, *In re Oil Spill by Amoco Cadiz off Coast of France on March 16, 1978*,[1217] the Seventh Circuit reaffirmed its

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1211. *Id.* at 1143 (citations and footnote omitted).

1212. The factors to be considered by a court in determining whether *International Shoe* has been satisfied have changed as the doctrine developed. *See supra* notes 106-85 and accompanying text (discussing the historical development of the *International Shoe* test).

1213. 599 F.2d 151 (7th Cir. 1979).

1214. *Id.* at 156.

1215. *Id.* n.3 (citations omitted).

1216. In cases like Fitzsimmons v. Barton, 589 F.2d 330 (7th Cir. 1979), *see supra* notes 630-36 and accompanying text, and Mariash v. Morill, 496 F.2d 1138 (2d Cir. 1974), *see supra* notes 622-29 and accompanying text, where service is made pursuant to a nationwide service of process statute, the only amenability standard might be "presence" where served. *See supra* note 793 and accompanying text. However, a "contacts" analysis still is possible. *See supra* note 794 and accompanying text. Moreover, service outside the Untied States pursuant to such a statute clearly requires amenability analysis. *See supra* notes 795-96 and accompanying text.

1217. 699 F.2d 909 (7th Cir. 1983).

approach to the question of amenability standards in federal question cases in which service is made, pursuant to Rule 4(e), by the long-arm statute of the state in which the federal court is sitting. This case involved a suit by French citizens, for damage caused by the breakup of a supertanker off the coast of France, against, *inter alia*, the builder of the ship, a Spanish company that had built the ship in Spain.[1218] The court again divided the analysis into two parts, statutory and constitutional. First, it found that the defendant's conduct came within one of the provisions of the Illinois long-arm statute.[1219] Then, it turned to the question of "whether the Illinois statute, so interpreted, violates due process."[1220] The court applied Supreme Court cases involving fourteenth amendment limitations on state courts,[1221] finding that the defendant "had . . . a sufficient presence within Illinois to satisfy the territorial notions that *Volkswagen* brought back into due process analysis of personal jurisdiction."[1222] Although the Supreme Court has, subsequent to *World-Wide Volkswagen*, disavowed any intention to reintroduce notions of sovereignty or territoriality into state due process analysis,[1223] this Seventh Circuit opinion is important because the court was applying, to federal court amenability, the test it perceived as applicable to state courts under the fourteenth amendment. The Seventh Circuit did not mention the possibility that a standard different from that which had developed under the fourteenth amendment should apply in federal courts, nor did it discuss any other standard.

Federal district courts also have relied on standards established for state courts and have applied variations on the *International Shoe* test to federal question cases in which service was made outside the state in which the federal court is held, as authorized by Rule 4(e),

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1218. The defendant, Astilleros Espanoles, S.A., had contacts with the State of Illinois in regard of the problem before the court. The court stated the following facts: "The contract to build the *Amoco Cadiz* [the supertanker], was signed in Chicago in 1970 after extensive negotiations, in Chicago and Spain, between Astilleros and Amoco. . . .The real purchaser of the *Amoco Cadiz* was Standard Oil Company (Indiana), whose headquarters is in Chicago. . . ." *Id.* at 914.

1219. *Id.* at 914-15.

1220. *Id.* at 915.

1221. *Id.* at 915-16. The court discussed International Shoe Co. v. Washington, 326 U.S. 310 (1945) (*see supra* notes 106-15 and accompanying text), Hanson v. Denckla, 357 U.S. 235 (1958) (*see supra* notes 129-33 and accompanying text), and World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) (*see supra* notes 145-55 and accompanying text).

1222. 699 F.2d at 916. *See supra* note 148 accompanying text (discussing federalism and sovereignty analysis in *World-Wide*). *But see supra* note 167 and 174-75 and accompanying text (discussing effect of *Insurance Corp. of Ireland* on federalism basis of fourteenth amendment standard).

1223. Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n.10 (1982). *See supra* notes 174-75 and accompanying text.

by using the state long-arm statute. In *Crucible, Inc. v. Stora Kopparsbergs Bergslags AB*,[1224] a patent infringement action initiated in United States District Court for the Western District of Pennsylvania, the defendant alien corporation, which "maintain[ed] no established place of business in Pennsylvania,"[1225] had been served outside Pennsylvania "in the precise manner required by the Pennsylvania [Long-Arm] Statute. . . ."[1226] The court noted that "the sole question presented . . . is whether, in these circumstances, proper service of process under the Pennsylvania Statute subjects the defendant to the *in personam* jurisdiction of this court."[1227] The court recited the applicable provisions of the long-arm statute,[1228] noted that "the Pennsylvania Legislature clearly expressed its intention to extend in personam jurisdiction over foreign corporations to the fullest measure permitted by federal due process standards,"[1229] and observed that "[u]nder familiar doctrine, those constitutional standards are satisfied by finding that the defendant corporation has certain 'minimum contacts' with the Commonwealth [of Pennsylvania],"[1230] the *International Shoe* test. The court did not clarify whether it included this fourteenth amendment test as part of the statutory interpretation, *i.e.*, the statute cannot be used unless a state court could use it constitutionally, or whether this was the amenability standard to be applied in federal courts. Finding the defendant's contacts with Pennsylvania sufficient, the court asserted personal jurisdiction over the defendant.[1231]

In another recent case, *Odriozola v. Superior Cosmetic Distributors, Inc.*,[1232] the United States District Court for the District of Puerto Rico applied the *International Shoe* doctrine to resolve a question of personal jurisdiction in a federal question case. Under Rule 4(e), the Puerto Rico long-arm statute was held to apply.[1233] The court did not discuss constitutional doctrine; rather, it merely cited *Inter-*

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1224. 403 F. Supp. 9 (W.D. Pa. 1975).
1225. *Id.* at 10.
1226. *Id.*
1227. *Id.*
1228. *Id.* at 11.
1229. *Id.*
1230. *Id.*
1231. The opinion reveals that the defendant had contacts with other parts of the United States. *Id.* at 11-13. The court did not have to consider any test other than "minimum contacts with the state" (and it did not consider any) because the narrow *International Shoe* test had been satisfied.
1232. 531 F. Supp. 1070 (D.P.R. 1982).
1233. *Id.* at 1073. The court argued that since the federal statute under which the suit had been brought did "not provide an independent basis for personal jurisdiction, we must look to the law of the state in which the action was brought. Rule 4(e) FRCP." *Id.*

*national Shoe* and *World-Wide Volkswagen* and examined the defendant's contacts with Puerto Rico,[1234] finding them sufficient to support jurisdiction.[1235] The defendant objecting to personal jurisdiction, a New York-based corporation,[1236] clearly had substantial contacts with other parts of the United States. The court, however, seemed content to consider only local contacts.

In *Stanley v. Local 926 of the International Union of Operating Engineers of the AFL-CIO*,[1237] a civil rights class action brought against an international union located in Washington, D.C., the United States District Court for the Northern District of Georgia distinguished between the incorporation of state law that was permissible under former Rule 4(d)(7) and Rule 4(e). While Rule 4(d)(7) "incorporates all state methods" of service upon 4(d)(1) and 4(d)(3) defendants, the court argued that 4(d)(7) was limited, by Rule 4(f), "to the territorial limits of the state in which the district court is held, unless some federal statute or rule authorizes extra-territorial service."[1238] Rule 4(e) is such a rule, permitting extra-territorial service by state long arm statute or rule.[1239] The court, therefore, concluded that since no federal statute authorized service outside Georgia, then it must consider the Georgia long-arm statute as incorporated into the Federal Rules by Rule 4(e).[1240] The Georgia statute would apply, the court found, "if the assertion of personal jurisdiction over the International was constitutionally permissible."[1241] The court went on to apply the traditional fourteenth amendment "minimum contacts with the state" approach and found that the test had been satisfied.[1242] It did not specify whether consideration of the constitutional issue was for purposes of applying the statute or for purposes of establishing federal court amenability. In a footnote, however, the court seemed to indicate that it was applying an amenability standard. The existence of a national contacts approach for federal question cases was recognized but rejected on the ground "that the terms of Rule 4(e) dictate a test based on minimal contacts with the forum state."[1243]

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1234. *Id.* at 1073-74.
1235. *Id.* at 1073-76.
1236. *Id.* at 1072.
1237. 354 F. Supp. 1267 (N.D. Ga. 1973).
1238. *Id.* at 1269-70. *See also supra* notes 1052-66 and accompanying text (discussing possibility of limiting former Rule 4(d)(7) to service within the state).
1239. 354 F. Supp. at 1270.
1240. *Id.*
1241. *Id.* at 1271.
1242. *Id.*
1243. *Id.* at 1271 n.3.

Some district courts in Rule 4(e) cases have been more sympathetic to a national contacts test, but have declined to adopt the standard, finding such action unnecessary on the facts of their particular cases. In *Graham Engineering Corp. v. Kemp Products Ltd.*,[1244] for example, a patent litigation brought in the Northern District of Ohio by a Pennsylvania corporation against, *inter alia*, a Canadian corporation, the court acknowledged that a national contacts test had been applied to amenability in federal question cases.[1245] The court expressed doubt as to the applicability of such a standard without some statutory authority therefor,[1246] but declined to resolve the question because "it is clear that . . . jurisdiction is available [under state law]."[1247] Instead, the doing-business-in-Ohio provision of the Ohio long-arm statute, which supposedly was limited only by the due process clause of the fourteenth amendment, was applied. The court admitted that "technically it is the Due Process Clause of the Fifth . . . Amendment that requires construction" in this federal question case[1248] but resolved this difficulty by noting that those courts holding that "federal law should govern the area . . . have opined that the Fifth Amendment standard is more liberal."[1249] The conclusion by the court, therefore, that the defendant had sufficient contacts with Ohio to satisfy the fourteenth amendment[1250] also would satisfy any fifth amendment standard.

The United States District Court for the Southern District of Ohio considered a national contacts test for federal court personal jurisdiction in federal question cases in *Edward J. Moriarty & Co. v. General Tire & Rubber Co*,[1251] an antitrust action against, *inter alia*, an alien manufacturer. Service had not been made on the defendant pursuant to a federal statute authorizing worldwide service of process but "pursuant to Rule 4(d)(7) and (e) . . . which provides that summons may be served upon a foreign corporation *in the manner* prescribed by the law of the state in which the district court sits."[1252] The court seemed reluctant to choose between former Rule 4(d)(7) and Rule 4(e) as authority for use of the Ohio long-arm statute;[1253] moreover, the

1244. 418 F. Supp. 915 (N.D. Ohio 1976).
1245. *Id.* at 919 n.3.
1246. *Id.*
1247. *Id.*
1248. *Id.* at 920 n.6.
1249. *Id.*
1250. *Id.* at 920-22.
1251. 289 F. Supp. 381 (S.D. Ohio 1967).
1252. *Id.* at 387 (emphasis added).
1253. *See also supra* notes 937, 910, 921, 975, 989, 1069, 1166, and 1186 and accompanying text (discussing judicial difficulty in distinguishing between the functions of former Rule 4(d)(7) and those of Rule 4(e)).

court used the words "in the manner" which appear in both former 4(d)(7) and 4(e).[1254] In a later portion of the opinion, however, the court relied on Rule 4(e) and its particular "under the circumstances" language in refusing to apply what it considered to be the proper test for federal court personal jurisdiction—contacts with the United States as a whole.[1255] This writer, therefore, has read *Edward J. Moriarty* as a Rule 4(e) case because the purported limiting language in Rule 4(e) provided a pivotol point in the court's analysis.

The court made a strong argument for a separate federal amenability test, stating that in other federal question cases which purported to apply a " 'federal' test of jurisdiction . . . the Court invariably winds up looking at the contacts of the foreign corporation *with the state*, rather than with the United States. . . . ,a misconception of the 'federal' test as we appl[y] it. . . ."[1256] The court began analysis by positing that a federal standard should apply in cases like the one at bar:

> It is our opinion that a federal district court may acquire jurisdiction over the person of a defendant incorporated under the laws of a foreign country without regard to contacts of the corporation with the state where the court sits. This is especially true in a case where the cause of action rests upon a federally-created right, such as this one, and where national uniformity in enforcing that right should be the true guideline.[1257]

Making an argument that appeared in cases involving federal statutes authorizing nationwide or worldwide service of process, the court continued:

> [I]n our view, the judicial jurisdiction over the person of the defendant does not relate to the geographical power of the particular court which is hearing the controversy, but to the power of the unit of government of which that court is a part. The limitations of the concept of personal jurisdiction are a consequence of territorial limitations on the power of the respective forums. Thus, as applied to the states, the constitutional test for personal jurisdiction involves a determination as to whether the defendant has certain minimal contacts with the forum state, such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. . . .

1254. *See supra* notes 278-83 and accompanying text (discussing former Rule 4(d)(7) and notes 287-88 and accompanying text (discussing Rule 4(e)). On the other hand, this might be interpreted as selection of former Rule 4(d)(7), which included only the "in the manner" language, rather than Rule 4(e), which included the entire phrase "under the circumstances and in the manner."

1255. 289 F. Supp. at 390.

1256. *Id.* at 390 n.2.

1257. *Id.* at 389.

> By the same token, we feel that the appropriate inquiry to be made in a federal court where the suit is based upon a federally created right is whether the defendant has certain minimal contacts with the United States, so as to satisfy due process requirements under the Fifth Amendment.[1258]

After arguing in favor of a fifth amendment federal standard, minimum contacts with the United States as a whole, the court nevertheless declined to apply that standard; "this course has not been left open to us by the federal rules or statutes. . . .[because] neither Congress nor the Supreme Court has provided statute or rule whereby substituted service may be made upon an alien corporation having certain minimum contacts with the United States."[1259] The court interpreted the "under the circumstances" language of Rule 4(e) "to mean that when service is made pursuant to a state long-arm statute, it is only proper when the corporation served meets the qualifications for service set out in the statute."[1260] This construction also would not seem to require application of a fourteenth amendment test.[1261] After examining not only the question of whether the defendant's conduct came within the meaning of the Ohio long-arm statute but also the sufficiency of those contacts with the state of Ohio, the court concluded that those standards had been satisfied.[1262] Clearly preferring a national contacts approach, the court felt constrained to use the "contacts with the state" test. "[T]he lack of means to pursue the proper course leaves room for no other result,"[1263] the court noted.

*Engineered Sports Products v. Brunswick Corp.*,[1264] a patent infringement suit in which the defendant alien corporation had been served with process, as authorized by Rule 4(e), under the Utah long-arm statute, is often cited as a case favorable to the national contacts approach.[1265] First, the court concluded that the defendants were subject to suit under the Utah long-arm statute because each had sufficient contacts with Utah to satisfy the fourteenth amendment limita-

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1258. *Id.* at 390.
1259. *Id.*
1260. *Id.*
1261. *But see supra* note 1109 and accompanying text and *infra* notes 1341-50 and accompanying text (discussing interpretation that "under the circumstances" language limits federal court use of the state long-arm statute to only those circumstances in which a state court could constitutionally use the long-arm statute).
1262. 289 F. Supp. at 390-91.
1263. *Id.* at 390 n.2.
1264. 362 F. Supp. 722 (D. Utah 1973).
1265. *See, e.g.*, Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 416-17 (9th Cir. 1977) (*supra* notes 974-84 and accompanying text); Cryomedics, Inc. v. Spembly, Ltd., 397 F. Supp. 287, 291 (D. Conn. 1975) (*infra* notes 1269-83 and accompanying text); Note, *supra* note 121, at 476.

tion on that provision.[1266] Next, the court approved, in the circumstances of this case, evaluation of the defendant's national contacts:

> [W]here, as here, suit is brought against alien defendants, the court properly may consider the aggregate presence of the defendants' apparatus in the United States as a whole. Due process or traditional notions of fair play and substantial justice should not immunize an alien defendant from suit in the United States simply because each state makes up only a fraction of the substantial nationwide market for the offending product.[1267]

The conclusion by the court, however, did not mention the fifth amendment or national contacts:

> The court has carefully reviewed each of the arguments and materials presented and concludes that the present suit is encompassed by Utah's long-arm statute and is not offensive to the Fourteenth Amendment.[1268]

Whether the court "threw in" national contacts to bolster its fourteenth amendment analysis or whether it saw a fifth amendment national contacts approach as an alternative holding remains unclear. The concluding paragraph, however, clearly robs this case of any binding precedential value in favor of national contacts as a general federal amenability standard.

*Category 3.* This category really includes only one federal question case in which service was made, pursuant to Rule 4(e), under a state long-arm statute: *Cryomedics, Inc. v. Spembly, Limited*,[1269] a patent action by a Connecticut corporation against a Great Britain corporation. The defendant did not "contest [plaintiff's] claim that the Connecticut corporate long-arm statute . . . provides a basis for service of process on it"[1270] under Rule 4(e) and Rule 4(i)(1)(D), which provides *methods* of service outside the United States,[1271] but only that "the application of the statute to it is unconstitutional."[1272] Whether the defendant was arguing that the statute could not be applied to it because the fourteenth amendment would not permit a state court to assert jurisdiction over the defendant,[1273] or whether the defendant was arguing that some fifth amendment amenability standard imposed on federal courts had not been satisfied is unclear.[1274] The

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1266. 362 F. Supp. at 725-28.
1267. *Id.* at 728.
1268. *Id.* at 729.
1269. 397 F. Supp. 287 (D. Conn. 1975).
1270. *Id.* at 288.
1271. FED. R. CIV. P. 4(i); *see supra* note 269 (text of Rule 4(i)).
1272. 397 F. Supp. at 288.
1273. *See infra* note 1321 and accompanying text (discussing this aspect of 4(e) cases).
1274. *See infra* note 1322 and accompanying text.

defendant *did* argue that its contacts with Connecticut were insufficient to satisfy the *International Shoe* test,[1275] but this argument might have furthered either position.

The court also did not reveal to which of these questions it applied a due process analysis. Since, however, the court concluded that a fifth amendment standard applied to the question,[1276] it either was discussing amenability directly or was assuming (or concluding) that each assertion of personal jurisdiction is entitled to only *one* due process analysis, regardless of how service was made, a fourteenth amendment analysis for a state court and a fifth amendment analysis for a federal court. Assessing the importance of *International Shoe* in a footnote, the court said:

> *International Shoe* applied the due process clause of the Fourteenth Amendment in determining the limits of state court in personam jurisdiction over non-residents. Because subject-matter jurisdiction in the present action is conferred by federal law, the sufficiency of Spembly's contacts, whether with the State of Connecticut or with the United States, must be tested against the Fifth Amendment. Although the Fifth Amendment test is sometimes expressed in more general "fairness" terms, *International Shoe* and subsequent cases provide the basis for the fairness test, and the analysis is substantially similar.[1277]

Later, the court considered the constitutional test applicable to those counts of the complaint that arose under federal law:

> [I]t is not necessary to decide whether [the defendant's] contracts [sic] with Connecticut are alone sufficient to satisfy the demands of the Constitution. When a federal court is asked to exercise personal jurisdiction over an *alien* defendant sued on a claim arising out of federal law, jurisdiction may appropriately be determined on the basis of the alien's aggregated contacts with the United States as a whole, regardless of whether the contacts with the state in which the district court sits would be sufficient if considered alone. . . . If the defendant's contacts with the United States are sufficient to satisfy the fairness standard of the Fifth Amendment, . . . then the only limitation on place of trial would be the doctrine of *forum non conveniens*.[1278]

Discussing cases that had considered a national contacts approach,[1279]

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1275. 397 F. Supp. at 288.
1276. *Id.* n.3.
1277. *Id.*
1278. *Id.* at 290.
1279. *Id.* at 290-92 (discussing Edward J. Moriarty & Co. v. General Tire & Rubber Co., 289 F. Supp. 381 (S.D. Ohio 1967)) (*supra* notes 1251-63 and accompanying text); Engineered Sports Prods. v. Brunswick Corp., 362 F. Supp. 722 (D. Utah 1973) (*supra* notes 1264-68

the court noted at least two important reasons for adopting the test in cases involving alien defendants: the national contacts test would allow suit in a federal district court in those situations in which the defendant had substantial but thinly-scattered contacts throughout the United States,[1280] and, in terms of convenience to the defendant, an alien defendant which had contacts throughout the United States but which was incorporated and had its place of business in another country would have "no reason based on fairness to prefer any one particular district to any other. . . ."[1281] On the other hand, the court observed, "[w]hen a defendant is a citizen of the United States, there are very real differences in convenience between litigating in a state where it does business or resides, and one in which it has only insignificant contacts. . . ."[1282] Using its announced fifth amendment test of national contacts, the court found that the defendant was amenable to suit in the federal district court.[1283] The court did not discuss the applicability of a state standard based on grounds raised by other courts: the use of the state long-arm statute or the "under the circumstances" language of Rule 4(e). In support of its national contacts test, moreover, the court discussed cases in which service had been made by wholly federal methods when the court had adopted a national contacts test, as well as cases involving use of state long-arm statutes when the court had not adopted expressly a national contacts test. This case, therefore, is not entirely persuasive as authority for the adoption of a national contacts approach in a 4(e) case involving service of process pursuant to a state long-arm statute.

Several other federal courts recently have adopted a national contacts test for personal jurisdiction in federal question cases, but these cases do not fit neatly into the category of cases being considered in this section. Although they clearly did not employ a wholly federal method of service of process, these courts do not specify what part of Rule 4 was used to effect service.[1284] These probably are 4(e) cases and thus are discussed here as related to *Cryomedics*.

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and accompanying text); First Flight Co. v. National Caroloading Corp., 209 F. Supp. 730 (E.D. Tenn. 1962) (*supra* notes 872-84 and accompanying text).

1280. 397 F. Supp. at 291 (*quoting* Engineered Sports Products v. Brunswick Corp., 362 F. Supp. 722, 728 (D. Utah 1973)).

1281. 397 F. Supp. at 292.

1282. *Id.*

1283. *Id.*

1284. *See, e.g.*, Max Daetwyler Corp. v. Meyer, 560 F. Supp. 869 (E.D. Pa. 1983) (*infra* notes 1285-1301 and accompanying text); Coats Company, Inc. v. Vulcan Equip. Co. Ltd., 459 F. Supp. 654 (N.D. Ill. 1978) (*infra* notes 1302-09 and accompanying text); Holt v. Klosters Rederi A/S, 355 F. Supp. 354 (W.D. Mich. 1973) (*infra* notes 1310-16 and accompanying text).

In a very recent case, *Max Daetwyler Corp. v. Meyer*,[1285] the United States District Court for the Eastern District of Pennsylvania treated the national contacts approach as established, citing *Cryomedics* as authority.[1286] This result could not be predicted from prior cases in the Eastern District of Pennsylvania and Third Circuit,[1287] and *Cryomedics*, a case decided by the District of Connecticut, certainly would not bind the Third Circuit on this issue. *Daetwyler* involved an action for patent infringement by a New York corporation against an alien defendant. The defendant objected to the personal jurisdiction of the district court, claiming that "he [had] never been to Pennsylvania and had never done business in Pennsylvania."[1288] Plaintiff urged that the court could assert jurisdiction based on the defendant's contacts with the United States outside Pennsylvania: the defendant shipped the allegedly infringing devices to two United States companies that sold the devices in the United States, and the defendant advertised "in trade publications distributed throughout the United States."[1289]

The plaintiff had urged that the defendant came within the "transacting business" part of the Pennsylvania long-arm statute.[1290] Citing *Cryomedics*, the court responded that "[b]ecause this case presents a federal question, however, the issue whether jurisdiction may be asserted over defendant must be determined by reference to federal law."[1291] The court did not discuss or allude to statutory authority, state or federal, for service on the defendant, but immediately began to examine the defendant's contacts with Pennsylvania, concluding that "[w]ere jurisdiction over defendant to be tested solely by his contacts with Pennsylvania, one would be hard pressed, on these facts, to find contacts sufficient to satisfy Fifth Amendment standards."[1292] Quoting the reasons advanced in *Cryomedics* for the appropriateness of a national contacts test, the court adopted a national contacts standard, finding the defendant amenable to suit.[1293]

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1285. 560 F. Supp. 869 (E.D. Pa. 1983) (memorandum opinion).
1286. *Id.* at 870.
1287. *See infra* note 1300 and accompanying text.
1288. 560 F. Supp. at 870.
1289. *Id.*
1290. *Id.* at 870.
1291. *Id.*
1292. *Id.*
1293. *Id.* at 870-71 (*citing* Cryomedics, Inc. v. Spembly, Ltd., 397 F. Supp. 287, 290 (D. Conn 1975) (contacts with United States) (*supra* notes 1271-85 and accompanying text); 397 F. Supp. at 291 (territory with which to measure contacts is entire unit, that is, the United States); Engineered Sports Prods. v. Brunswick Corp., 362 F. Supp. 722, 728 (D. Utah 1973) (national contacts important where defendant's contacts too thinly scattered to permit suit in any particular state) (*supra* notes 1264-68 and accompanying text); Centronics Data Computer

This wholehearted espousal by the court of the national contacts test has little precedential value. Service could not have been made on the defendant by a wholly federal method because (a) no federal statute authorizes nationwide or worldwide service of process in patent cases,[1294] (b) the defendant was not present or residing in Pennsylvania as required by Rule 4(d)(1),[1295] and (c) service was not made within Pennsylvania upon some agent of the defendant as authorized by Rule 4(d)(3).[1296] Service, therefore, could have been made, as authorized by Rule 4(e) and perhaps, former Rule 4(d)(7), only by using the Pennsylvania long-arm statute. That statute, however, expressly goes to the limits of the fourteenth amendment,[1297] and the court said that the defendant's contacts with Pennsylvania probably would be insufficient to satisfy this standard.[1298] The court might have found that when a state long-arm statute expressly purports to permit service whenever constitutional, then a defendant may be served with process so long as the appropriate due process standard, fifth amendment for federal courts and fourteenth amendment for state courts, is satisfied.[1299] The statutory interpretation and due process questions would be analyzed at the same time; the statute would only apply if due process were satisfied. The court, however, was silent as to manner of service of process, and the analysis suggested above cannot be inferred from the opinion. Moreover, the court cited *Cryomedics* as authority, but ignored opinions of Eastern District of Pennsylvania and the Third Circuit rejecting a national contacts test in the absence of statutory authority.[1300] Finally, in *Cryomedics*, the defendant did not argue that he could not be served under the Connecticut long-arm statute, and the court interpreted this as a waiver of any non-constitutional objection to service.[1301] The *Cryomedics* court, therefore, did not have to determine whether any circumstances could arise in which service would be appropriate pursuant to the terms of the Connecticut long-arm statute and the "in the circumstances" language

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Corp. v. Mannesmann, 432 F. Supp. 659 (D.N.H. 1977) (convenience factor for alien defendant usually not affected by location of suit) (*supra* notes 1011-38 and accompanying text)).

1294. *See supra* note 247 and accompanying text; *see also* Graham Eng'g Corp. v. Kemp Prods. Ltd., 418 F. Supp. 915, 919-20 (N.D. Ohio 1976).

1295. *See supra* note 273 and accompanying text.

1296. *See supra* note 274 and accompanying text.

1297. *See supra* note 1173.

1298. *See supra* note 1292 and accompanying text.

1299. *See infra* notes 1348-49 and accompanying text (discussing this possible analysis in certain 4(e) cases).

1300. *See, e.g.*, DeJames v. Magnificence Carriers, Inc., 654 F.2d 280, 283 (*supra* notes 1123-41 and accompanying text); Brotherhood Cia Naviera S.A. v. Zapata Marine Service, Inc., 547 F. Supp. 688, 691 n.3 (*supra* notes 1180-84 and accompanying text).

1301. *See supra* notes 1270-72 and accompanying text.

of Rule 4(e), but in which only a national contacts test could be satisfied.

In a 1978 case, *Coats Company, Inc. v. Vulcan Equipment Company Ltd.*,[1302] the United States District Court for the Northern District of Illinois adopted *Cryomedics*. The district court said that "[s]ince the Seventh Circuit did not, when given the opportunity to do so, expressly question or reject the validity of that holding, *Honeywell, Inc. v. Metz Apparatswerks* [sic], . . .this court feels compelled under the circumstances to follow the reasoning of [*Cryomedics*]."[1303] The question before the district court was whether the federal district court sitting in Iowa, to which this patent infringement action had been transferred pursuant to 28 U.S.C. Section 1404(a),[1304] had personal jurisdiction over the defendant alien corporation at the time the suit had been instituted in the Northern District of Illinois. If the defendant was not, at that time, subject to the personal jurisdiction of the federal court sitting in Iowa, then the case, according to the express terms of Section 1404(a), could not be transferred there.[1305] The requirement was purely technical because six days after the plaintiff had commenced his patent infringement action in the Northern District of Illinois, the defendant in the Illinois action brought a declaratory judgment suit for invalidity and noninfringement against the plaintiff in the Southern District of Iowa.[1306] In these circumstances, the court applied *Cryomedics*, holding that since the defendant's "contacts with the United States were sufficient in quality and nature to satisfy this standard . . . the courts of the Southern District of Iowa would have been able to validly assert personal jurisdiction over [the defendant] on [the date the suit in the Northern District of Illinois was initiated]."[1307] The court refused to read *Cryomedics* narrowly as requiring that some of the contacts with the United States had to be with the place of trial.[1308]

The precedential value of *Coats* is unclear in light of recent Seventh Circuit opinions.[1309] The problem with *Coats* was that the court merely

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1302. 459 F. Supp. 654 (N.D. Ill. 1978).

1303. *Id.* at 659 (citation omitted). *See supra* notes 1269-83 and accompanying text (discussing *Cryomedics*) and notes 1202-12 and accompanying text (discussing *Honeywell*).

1304. 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." *Id.*

1305. 459 F. Supp. at 659.

1306. *Id.* at 656.

1307. *Id.* at 659.

1308. *Id.* at 659-60.

1309. *See, e.g., In re* Oil Spill by Amoco Cadiz off Coast of France, 699 F.2d 909 (7th Cir. 1983) (applies "contacts with state" test) (*supra* notes 1217-23 and accompanying text); Illinois v. City of Milwaukee, 599 F.2d 151 (7th Cir. 1979) (applies "contacts with state" test)

had to satisfy technical requirements since the defendant, by bringing a declaratory judgment suit, had subsequently waived any objection to the personal jurisdiction of the federal court sitting in Iowa. *Coats*, moreover, arises out of unusual circumstances, a decision to change venue to a forum selected by the defendant. Finally, no information exists as to the authority, either in the federal court in Iowa or the federal court in Illinois, for service of process on the defendant alien corporation.

Another national contacts suit that was concerned partly with transfer of venue was *Holt v. Klosters Rederi A/S*,[1310] an admiralty action instituted in the United States District Court for the Western District of Michigan against an alien corporation. The authority for service upon the defendant again was unstated; the court observed that "[d]efendant, as well as plaintiff, relies upon the Michigan jurisdictional statutes and case law . . . " but rejected that reference to state law because "this is not a diversity case and accordingly, the principles of *Erie* . . . do not apply."[1311] Without further consideration of the question of service, which, in many cases has dictated analysis, the court immediately considered the question of the constitutionality of asserting personal jurisdiction over the defendant. The court noted that the question arose under the fifth amendment and that the appropriate test "where the suit is based upon a federally created right is whether the defendant has certain minimal contacts with the United States, so as to satisfy due process requirements under the Fifth Amendment."[1312] Finding that defendant had substantial contacts with other parts of the United States, the court held that it had personal jurisdiction over the defendant.[1313]

The district court recognized that this exercise of personal jurisdiction might be limited by the federal rules or by federal statutes. No limitations, such as the authority for service of process were considered, however, because "[d]efendant's motion to dismiss challenge[d] this court's power to render an *in personam* judgment only."[1314] The court asserted, "All other objections which the defendant may have raised . . . have been waived."[1315] The impact of this case is unclear,

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(*supra* notes 1213-16 and accompanying text); Honeywell, Inc. v. Metz Apparatewerke, 509 F.2d 1137, 1143 n.2 (recognizes national contacts test but finds it "need not reach such a broad conclusion here") (*supra* notes 1202-12 and accompanying text).

1310. 355 F. Supp. 354 (W.D. Mich. 1973).
1311. *Id.* at 356.
1312. *Id.* at 356-57.
1313. *Id.* at 358.
1314. *Id.* at 357-58.
1315. *Id.* at 358.

therefore, since the court might have decided differently had it not viewed *Holt* as involving a pure federal amenability question not tied in any way to the authorization for service of process. Subsequent to the jurisdictional decision, the court granted the defendant's motion for a change of venue to the place in the United States with which the defendant had the bulk of its contacts.[1316] This illustrates that change of venue statutes, if liberally applied, can mitigate any inconvenience the defendant suffers from application of a national contacts test of personal jurisdiction.

*Summary and Analysis*

The above-described cases[1317] indicate that judicial resistance to adoption of a federal amenability standard, like national contacts, is most pronounced in Rule 4(e) cases. In some cases, this seems to arise from the language of Rule 4(e), which permits service only "under the circumstances" of the state long-arm statute being adopted.[1318] In other cases, courts have been persuaded by lack of federal authority for aggregation of national contacts;[1319] absent statutory authority, the federal courts believe they are limited to using the state statutes as would state courts when fourteenth amendment standards are satisfied. Still other courts, in arguments that subsume, to some extent, the positions described directly above, simply maintain that when a federal court adopts a state statute, the court cannot pick and choose the parts of state law that it wishes to adopt, but must take the whole package, including limiting standards that would apply to state courts using the statute.[1320] In some cases, courts combine amenability and

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1316. *Id.* at 359. *See supra* notes 188, 226, 337, 354, 657, 693, 880, 891, and 1086 and accompanying text (discussing use of change of venue statutes to preclude forum inconvenient to defendant).

1317. *See supra* notes 1103-1316 and accompanying text.

1318. *See, e.g.*, Burstein v. State Bar of Cal., 693 F.2d 511, 514 (5th Cir. 1982) (*see supra* notes 1153-62 and accompanying text); Edward J. Moriarty & Co. v. General Tire & Rubber Co., 289 F. Supp. 381, 390 (S.D. Ohio 1967) (*supra* notes 1251-63 and accompanying text); *see also* Conwed Corp. v. Nortene, S.A., 404 F. Supp. 497 (D. Minn. 1975) (*supra* notes 1163-71 and accompanying text).

1319. *See, e.g.*, DeJames v. Magnificence Carriers, Inc., 654 F.2d 280, 284 (3d Cir. 1981) (*supra* notes 1123-33 and accompanying text); Illinois v. City of Milwaukee, 599 F.2d 151, 156 n.3 (7th Cir. 1979) (*supra* notes 1213-16 and accompanying text); Brotherhood Cia Naviera S.A. v. Zapata Marine Serv., Inc., 547 F. Supp. 688, 691 n.3 (E.D. Pa. 1982) (*supra* notes 1178-84 and accompanying text); Edward J. Moriarty & Co. v. General Tire & Rubber Co., 289 F. Supp. 381, 390 (S.D. Ohio 1967) (*supra* notes 1251-63 and accompanying text); *see also* Graham Eng'g Corp. v. Kemp Prods. Ltd., 418 F. Supp. 915, 919 n.3 (N.D. Ohio 1976) (*supra* notes 1244-50 and accompanying text).

1320. *See, e.g.*, In re Oil Spill by Amoco Cadiz off Coast of France on March 16, 1978, 699 F.2d 909 (7th Cir. 1983) (*supra* notes 1217-23 and accompanying text); Kransco Mfg., Inc. v. Markwitz, 656 F.2d 1376 (9th Cir. 1981) (*supra* notes 1142-46 and accompanying text); Odriozola v. Superior Cosmetic Distrib., Inc., 531 F. Supp. 1070 (D.P.R. 1982) (*supra* notes

statutory construction analyses so that the application of a fourteenth amendment standard is required,[1321] while other courts simply refuse to consider a federal standard because the state standard, admittedly narrower, has been satisfied by the facts of their particular cases.[1322] Moreover, those few courts adopting a federal amenability standard of contacts with the United States have done so in questionable circumstances.[1323] They have: made ambiguous references to national contacts; relied on cases from other jurisdictions while other courts in their own jurisdiction have rejected national contacts; adopted national contacts in cases in which other procedural objections have been waived, allowing courts to avoid national contacts analysis in the context of Rule 4(e) service of process.

After considering all of the judicial positions and arguments, this writer concludes that a federal amenability standard of minimum contacts with the United States, national contacts or aggregation of national contacts, can be applied rationally and successfully in federal question cases in which process has been served, pursuant to Rule 4(e), under the long-arm statute of the state in which the federal court is sitting, as well as in all other federal question cases discussed above.[1324] First, applicability of such a standard would meet the clear need for an independent fifth amendment standard that would pro-

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1232-36 and accompanying text); Stanley v. Local 926 of the Int'l Union of Operating Eng'rs of the AFL-CIO, 354 F. Supp. 1267 (N.D. Ga. 1973) (*supra* notes 1237-43 and accompanying text); *see also* Horne v. Adolph Coors Co., 684 F.2d 255 (3d Cir. 1982) (*supra* notes 1190-1201 and accompanying text).

1321. *See, e.g.*, Chrysler Corp. v. Fedders Corp., 643 F.2d 1229 (6th Cir. 1981) (*supra* notes 1147-52 and accompanying text); *In re* Arthur Treacher's Franchise Litig., 92 F.R.D. 398 (E.D. Pa. 1981) (*supra* notes 1172-77 and accompanying text); Conwed Corp. v. Nortene, S.A., 404 F. Supp. 497 (D. Minn. 1975) (*supra* notes 1163-71 and accompanying text); Crucible, Inc. v. Stora Kipparsbergs Bergslags AB, 403 F. Supp. 9 (W.D. Pa. 1975) (*supra* notes 1224-31 and accompanying text).

1322. *See, e.g.*, Honeywell v. Metz Apparatewerke, 509 F.2d 1137, 1143 n.2 (7th Cir. 1975) (*supra* notes 1206-12 and accompanying text); Graham Eng'g Corp. v. Kemp Prods. Ltd., 418 F. Supp. 915, 919 n.3 (N.D. Ohio 1976) (*supra* notes 1244-50 and accompanying text); Japan Gas Lighter Ass'n v. Ronson Corp., 257 F. Supp. 219, 236 (D.N.J. 1966) (*supra* notes 1183-89 and accompanying text).

1323. *See* Max Daetwyler Corp. v. Meyer, 560 F. Supp. 869 (E.D. Pa. 1983) (*supra* notes 1285-1301 and accompanying text); Coats Co., Inc. v. Vulcan Co., Ltd., 459 F. Supp. 654 (N.D. Ill. 1978) (*supra* notes 1302-09 and accompanying text); Cryomedics, Inc. v. Spembly, Ltd., 397 F. Supp. 287 (D. Conn. 1975) (*supra* notes 1269-83 and accompanying text); Engineered Sports Prods. v. Brunswick Corp., 362 F. Supp. 722 (D. Utah 1973) (*supra* notes 1264-68 and accompanying text); Holt v. Klosters Rederi A/S, 355 F. Supp. 354 (W.D. Mich. 1973) (*supra* notes 1310-16 and accompanying text).

1324. *See supra* notes 785-98 and accompanying text (suggesting national contacts approach in which process is served in a wholly federal manner pursuant to a federal statute authorizing nationwide or worldwide service of process), notes 888-92 and accompanying text (suggesting national contacts approach in which process is served in a wholly federal manner pursuant to Rules 4(d)(1) and 4(d)(3) of the Federal Rules of Civil Procedure), and notes 1039-1102 and accompanying text (suggesting national contacts approach in which process is served, pursuant to former Rule 4(d)(7) and present Rule 4(c)(2)(C)(i), according to state statute).

mote uniformity among federal courts in federal question cases, at least on the question of the constitutional test to be applied. Second, the national contacts standard is rational because it relates directly to the United States, the sovereign that is seeking to assert jurisdiction over the defendant. Third, the structure of the test, examination of the sufficiency of the defendant's contacts with the sovereign seeking to assert jurisdiction, parallels the test devised for state courts after careful and extended judicial consideration. The test, moreover, while not promoting total uniformity among federal courts, would eliminate the anomaly of basing federal court personal jurisdiction, purportedly limited only by the fifth amendment, on tests applicable to the state courts. Lack of uniformity still will exist because of the many different ways in which a federal court, under Rule 4, is authorized to serve process.

The national contacts test also could create additional uniformity of analysis in that the test could be applied to both alien and nonalien defendants. Although federal courts often have drawn a distinction between alien and nonalien defendants, with the national contacts approach being favored more in regard to alien defendants because they would not be "present" in any particular location in the United States, such a distinction is not mandated. While alien defendants generally would not be more inconvenienced by suit in one federal forum than another, whereas a nonalien defendant probably would have a place in the United States where most of its activities would be concentrated, any substantial inconvenience of place of trial for nonalien defendants would be prevented by venue rules and change of venue provisions.[1325] The same types of provisions, as well as the doctrine of *forum non conveniens*, would protect alien defendants from abusive inconvenience occasioned by a national contacts approach.[1326] Moreover, the basis of any fifth amendment amenability standard would be fairness to the defendant; fairness does not require that a suit be maintained in the location most convenient to the defendant, but only that the defendant not be *inconvenienced unfairly*. In sum, a national contacts approach could be applied to a United States corporation having few or no contacts with the location of the federal court seeking to assert jurisdiction just as it could to an alien corporation in similar circumstances. A United States corporation with substantial contacts in one state is analogous to a foreign corpora-

1325. *See supra* notes 188, 326, 337, 354, 657, 693, 880, 891, 1086, and 1316 and accompanying text.

1326. *See supra* note 1278 and accompanying text.

tion with concentrated activity in a single state, and therefore, a national contacts standard should apply in both instances.

Before the benefits of a uniform federal standard of amenability—national contacts—can be achieved, however, this writer must deal with the particular problems of such a standard in Rule 4(e) cases. First, the refusal of some courts to consider any federal standard, because the admittedly narrower state standard of minimum contacts with the state had been satisfied, provides no impediment to the adoption of the broader federal standard. This is not a circumstance in which each case must be decided on the narrowest possible grounds. Moreover, adoption of a broad, uniform federal standard of national contacts would produce desirable results. Courts, for example, would begin their jurisdictional analyses with a statement of the standard, followed by an application of that standard to the facts of the case, instead of selecting a jurisdictional standard that provides the desired result in light of the facts of the particular case.[1327]

A national contacts amenability standard also should not be precluded by the Rule 4(e) language which prescribes that service be made "under the circumstances and in the manner" prescribed by the state long-arm statute. First, as in former Rule 4(d)(7) cases, a narrow interpretation for the words "under the circumstances" in Rule 4(e) is possible.[1328] One might argue that these words merely limit service to those defendants who come within the language of the state long-arm statute. Most long-arm statutes prescribe both the factual circumstances in which the long-arm statute might be used *and* the method for achieving such service of process.[1329] The words "under the circumstances" in Rule 4(e), therefore, might apply merely to the factual requisites necessary to trigger the state long-arm statute, *i.e.*, is this a defendant whose behavior comes within the language of the long-arm statute? This would parallel the narrow reading of former Rule 4(d)(7) that suggests the circumstances in which state methods of service can be adopted pursuant to former Rule 4(d)(7) are those in which the defendants fit the particular descriptions of Rule 4(d)(1) or Rule 4(d)(3).[1330] Such an analysis would work admirably in circumstances in that state long-arm statutes specify the kinds of behavior which the statute is intended to reach.[1331] (Statutes providing merely that

1327. *See supra* notes 742, 747, 762, 831, 928, 971, 1084, 1210 and 1246 and accompanying text.
1328. *See supra* notes 1052-61 and accompanying text (discussing narrow interpretation of Rule 4(d)(7)).
1329. *See, e.g., supra* note 120.
1330. *See supra* notes 1052-55 and accompanying text.
1331. *See supra* note 120.

the state courts can assert jurisdiction "whenever constitutional" will be discussed separately below.)[1332] Under this narrow interpretation, therefore, constitutional analysis would not be appropriate until it is determined that the defendant's conduct falls within the long-arm statute. At that point, the court would consider the question of whether assertion of jurisdiction over such a defendant would violate his constitutional rights to due process. The applicable standard, however, would be the due process clause of the fifth, rather than the fourteenth, amendment and that standard would be minimum contacts with the United States. One might argue that, if the defendant's conduct comes within the state long-arm statute, he surely would satisfy a minimum contacts with the state standard and, thus, a broader federal test would be superfluous. This argument presumes, however, that every time a defendant comes within a state long-arm statute, he has had sufficient contacts with the state to satisfy the fourteenth amendment test developed from *International Shoe*. That clearly is not the case. A defendant might, for example, come within the language of a long-arm statute that permits service on any defendant who commits a tortious act outside the state causing consequences within the state.[1333] If this single act were the defendant's only contact with the state in question, a court might find that the fourteenth amendment would not permit a state court to assert jurisdiction over this defendant. In fact, the facts of *World-Wide Volkswagen v. Woodson*[1334] were similar to this hypothetical, and the result was a refusal to allow the state court to assert personal jurisdiction.[1335] If a federal court, on the other hand, in a federal question case (assume, for example, that the tort was a federal common law nuisance as in *Illinois v. City of Milwaukee*[1336]), were permitted to determine constitutionality by aggregating the defendant's contacts with the United States rather than with the state in which it was sitting, the contacts might be sufficient to permit assertion of personal jurisdiction.

Some still might argue that the above analysis is fallatious because such a long-arm statute would be unconstitutional on its face, or because a state court could not serve process pursuant to the statute if assertion of jurisdiction would be unconstitutional. As to the first argument, although a long-arm statute might lead to service on an individual over whom a court could not constitutionally assert jurisdic-

1332. *See infra* notes 1346-49 and accompanying text.
1333. *See supra* note 120.
1334. 444 U.S. 286 (1980).
1335. *See supra* notes 145-55 and accompanying text (discussing *World-Wide*).
1336. 599 F.2d 151 (7th Cir. 1979); *See supra* notes 1212-15 and accompanying text.

tion, that does not mean that the statute itself will be found unconstitutional.[1337] Obviously, if a statute were written in such a way as to lead to unconstitutional results in a substantial percentage of cases, a court might determine that the statute was unconstitutional on its face.[1338] Those statutes, however, which usually lead to constitutional assertions of jurisdiction, would not be invalidated if assertion of jurisdiction over a particular defendant were unconstitutional; the court merely would decide that the application of the statute in that particular situation would not lead to a constitutional assertion of personal jurisdiction.

As to the second argument, that a state long-arm statute cannot be used if assertion of jurisdiction would be unconstitutional and thus a federal court could not use it unless the fourteenth amendment were satisfied, jurisdictional analysis is not conducted in this fashion. Whether the defendant comes within the language of the statute for service of process is the first question the court should reach to avoid unnecessary determinations of constitutional issues.[1339] Only after the long-arm statute is held to apply to the defendant should the court turn to the question of the constitutionality of assertion of jurisdiction over *this* defendant. If the court then finds that due process would be violated, it refuses to assert jurisdiction. The court does not, however, circle back and obliterate service because of the unconstitutional result. A determination merely is made that the second criterion for personal jurisdiction, satisfaction of a due process standard, is not met. Consideration of cases in which state court assertions of jurisdiction were found to be unconstitutional prove this assertion.[1340]

Most courts do not adopt a narrow interpretation of the "under the circumstances" language in Rule 4(e). They argue, however, that these words limit federal court use of a state long-arm statute to only those circumstances in which the state court actually could assert jurisdiction over the defendant, that is, only if both the statutory and constitutional (fourteenth amendment) tests are met.[1341] This interpretation apparently requires that the federal court use a fourteenth

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1337. *See, e.g.*, World-Wide Volkswagen v. Woodson, 444 U.S. 286 (1980) (*supra* notes 145-55 and accompanying text) (application of Oklahoma long-arm statute led to unconstitutional results in this particular case but statute not invalidated); Kulko v. Superior Court, 436 U.S. 84 (1978) (*supra* notes 134-44 and accompanying text) (application of California long-arm statute led to unconstitutional results in this particular case but statute not invalidated); Hanson v. Denckla, 357 U.S. 235 (1957) (*supra* notes 129-33 and accompanying text) (application of Florida long-arm statute led to unconstitutional results in this particular case but statute not invalidated).

1338. *See* Shaffer v. Heitner, 433 U.S. 186, 219 (1977); *see also supra* note 3.

1339. *See supra* note 120.

1340. *See, e.g.*, cases cited *supra* note 1337.

1341. *See, e.g.*, cases cited *supra* note 1318.

amendment amenability standard. One way of solving the problem, however, is to argue that in those cases, satisfaction of a separate amenability standard would not be important; all of the analysis would occur in the statutory interpretation. If a state court could not assert jurisdiction because the fourteenth amendment would not be satisfied, then the federal court could not assert jurisdiction, not because some federal amenability standard had not been satisfied, but because the federal court would have no authority to serve process if the state long-arm statute could not be used. The federal court, therefore, would not be adopting a fourteenth amendment amenability standard by which to measure its jurisdiction, but would be deciding only that the amenability issue is irrelevant. The court would be using the fourteenth amendment only on the question of whether the court is authorized to use the state statute in the first place. The problem with this analysis, however, is that if the state statute were found to be applicable, any federal amenability standard again would be irrelevant because the state standard already had been satisfied. While the analysis is technically correct, therefore, it does not lead to a satisfying solution to the underlying conceptual difficulty raised by a broad interpretation of the "under the circumstances" language of Rule 4(e).

A more persuasive argument, however, can be made in opposition to the position that the "under the circumstances" language of Rule 4(e) only permits a federal court to assert its power over a particular defendant if a state court actually could do so. Some federal question subject matters are in areas that have been exclusively reserved to the federal courts.[1342] A state court could not, for example, assert personal jurisdiction over a defendant in a patent litigation, regardless of the location of that defendant.[1343] Yet, the very federal courts arguing that the "under the circumstances" language of Rule 4(e) limits them to situations in which state courts could validly use their long-arm statutes to reach the defendant fail to recognize that a state court could not use its long-arm statute on that defendant. Federal courts use state long-arms to reach defendants in actions involving questions exclusively reserved to federal courts.[1344] Unless federal courts,

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1342. *See supra* note 19.

1343. *See supra* note 19.

1344. *See, e.g.*, Conwed Corp. v. Nortene, S.A., 404 F. Supp. 197 (D. Minn. 1975) (*supra* 1163-71 and accompanying text) (declaratory judgment in patent action); Edward J. Moriarty & Co. v. General Tire & Rubber Co., 289 F. Supp. 381, 390 (S.D. Ohio 1967) (*supra* notes 1251-63 and accompanying text) (antitrust action). *See also* Horne v. Adolph Coors Co., 684 F.2d 255 (3d Cir. 1982) (*supra* notes 1190-1201 and accompanying text) (patent action); Kransco Mfg., Inc. v. Markwitz, 656 F.2d 1376 (9th Cir. 1981) (*supra* notes 1142-46 and accompanying

therefore, are willing to eschew use of state long-arm statutes in areas of subject matter jurisdiction reserved exclusively to federal courts, they cannot maintain that the "under the circumstances" language in Rule 4(e) limits them to cases in which state courts could act validly. Since no federal statute authorizes nationwide or worldwide service in patent cases,[1345] moreover, jurisdiction would be limited severely if state long-arm statutes could not be used "under circumstances" in which state courts could not use those same statutes.

Adoption and use of a federal national contacts amenability standard seems more problematic when the state long-arm statute merely purports to permit jurisdiction "on any basis not inconsistent with the Constitution of . . . the United States" (California)[1346] or "to the fullest extent allowed under the Constitution of the United States . . . [including] the most minimum contact with [this state] allowed under the Constitution of the United States" (Pennsylvania).[1347] The first type of statute is not as difficult as the second. The former only specifies that assertions of jurisdiction be consistent with "the Constitution" without specifying by which due process clause this question should be measured; the latter, by its express reference to minimum contacts with the state, seems to tie authorized exercises of jurisdiction to the due process clause of the fourteenth amendment. In regard to either type of statute, a fourteenth amendment due process examination arguably has been programmed directly into the statute; that is, the statute can be used only in those circumstances in which the fourteenth amendment would not be violated by assertion of personal jurisdiction over the defendant. If that is the case, a fifth amendment national contacts standard would be irrelevant and useless, because for the defendant to come within the state long-arm statute, the narrower fourteenth amendment standard would have to be satisfied. This argument might be countered by the assertion that the existence and scope of a uniform fifth amendment test should

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text) (declaratory judgment in patent action); DeJames v. Magnificence Carriers, Inc., 654 F.2d 280 (3d Cir. 1981) (*supra* notes 1123-41 and accompanying text) (admiralty action); Chrysler Corp. v. Fedders Corp., 643 F.2d 1299 (6th Cir. 1981) (*supra* notes 1147-52 and accompanying text) (antitrust action); Honeywell v. Metz Apparatewerke, 509 F.2d 1137 (7th Cir. 1975) (*supra* notes 1206-12 and accompanying text) (patent action); Brotherhood Cia Naviera S.A. v. Zapata Marine Svc., Inc., 547 F. Supp. 688 (E.D. Pa. 1982) (*supra* notes 1178-84 and accompanying text) (admiralty action); Crucible, Inc. v. Stora Kopporsbergs Bergslags AB, 403 F. Supp. 9 (W.D. Pa. 1975) (*supra* notes 1224-31 and accompanying text) (patent action); Japan Gas Lighter Ass'n v. Ronson Corp., 257 F. Supp. 219 (D.N.J. 1966) (*supra* notes 1183-89 and accompanying text) (patent action).

1345. *See supra* note 19.

1346. *See supra* note 120.

1347. *See supra* note 1173 and accompanying text; *see also supra* note 115 (Rhode Island long-arm statute).

not depend on the test being determinative in every federal question case in which it arises. This response, while acceptable, is not satisfying intellectually and, moreover, would lead to a seemingly anomalous result: in cases in which a state, by tying its long-arm jurisdiction directly to the constitutional limits on that jurisdiction, sought to give its courts the broadest permissible personal jurisdiction, a federal court employing that long-arm statute also would be limited by the fourteenth amendment; however, in cases in which the state long-arm statute specified the circumstances in which its courts were to have jurisdiction, a federal court, under the above reasoning, only would be limited by the fifth amendment. From this, one might conclude that for the sake of consistent analysis, a fourteenth amendment standard must be implicit in all state long-arm statutes and that therefore, a federal court would never get past the statutory construction phase of its analysis without having satisfied the fourteenth amendment.

Another conclusion, however, one more consistent with the fact that a federal court can employ state long-arm statutes in cases that state courts could not hear[1348] and that, thus, would never be subject to a fourteenth amendment test, is possible and is urged strongly herein. First, in regard to statutes that merely permit state courts to exercise personal jurisdiction "whenever constitutional," the limitation is sensibly read as referring to whichever due process clause applied to the particular court hearing the case, the fourteenth amendment to state courts and the fifth amendment to federal courts. The long-arm statute need not be interpreted as incorporating, as part of the prerequisites for use of the statute, a fourteenth amendment test. The statute should be read, instead, as requiring satisfaction of the applicable due process test. As argued above, moreover, the defendant first must be served with process before a court, even under a California-type statute, would be faced with the question of due process. Even if the court subsequently decides that due process would not be satisfied, it does not reach back and retroactively invalidate service of process, but merely denies jurisdiction on the ground of unconstitutionality.[1349]

When a state statute goes further, providing that state courts are limited to constitutional exercises of jurisdiction "based on the most minimum contacts with the state," a national contacts test still would be useful and applicable. Since the reference to "minimum contacts with the state" is a legislative effort to program the *International*

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1348. *See supra* note 1344 and accompanying text.
1349. *See supra* note 1337 and accompanying text.

*Shoe* test directly into the long-arm statute, one might argue that the language is surplusage; the limitation to constitutional assertions of jurisdiction includes the appropriate test for such assertions. Therefore, a federal court still would apply a fifth amendment national contacts test because the fifth amendment defines the outer limits of federal court assertions of personal jurisdiction. Moreover, the due process standard applicable to the particular court using the statute, fifth amendment for federal courts deciding federal questions and fourteenth amendment for state courts deciding state questions, arguably determines the quantum of state contacts sufficient to be the "most minimum" permitted by the constitution. In the case of federal courts, if a fifth amendment national contacts test would require *no* contacts with the state in which the federal court was sitting, then the "minimum contacts with the state" requirement of the statute always would be satisfied. The question of personal jurisdiction then would turn on whether sufficient national contacts existed to satisfy the fifth amendment. Following this analysis, federal courts using state long-arm statutes would have the broadest reach in states that have the broadest long-arm statutes, a sensible result.

Some courts have not argued that the "under the circumstances" language of Rule 4(e) limits federal courts using state long-arm statutes only to circumstances in which the state court validly could assert jurisdiction. They reach the same conclusion by maintaining, instead, that when Rule 4(e) adopts a state long-arm statute, it adopts everything that is "part and parcel" of the statute, including due process limitations on the use of the statute.[1350] The above analysis also deals with this position. Due process, as a limitation on the court, is not peculiar only to the question of personal jurisdiction. Due process clings to the court, not the statute. State long-arm statutes clearly were drafted with an eye toward fourteenth amendment limitations; it did not, however, actually become part of the statute. So long as the question of personal jurisdiction includes two inquiries—statutory authority and satisfaction of constitutional requirements—the inquiries are separate, and the second is not part and parcel of the first.

Another analytical means of supporting the application of a fifth amendment national contacts test in all Rule 4(e) cases derives from the dissenting opinion in *DeJames v. Magnificence Carriers, Inc.*[1351] In that case, Judge Gibbons maintained that the nature of the claim, rather than the nature of the court, should determine which due pro-

1350. *See, e.g.*, cases cited *supra* note 1320.
1351. 654 F.2d 280 (3d Cir. 1981); *see supra* notes 1134-41 and accompanying text.

cess clause should be applied on the amenability issue.[1352] Implicit in this position is the argument that each exercise of personal jurisdiction is entitled to only one due process analysis. Thus, a federal court, as part of its statutory construction, would not consider fourteenth amendment limitations for service and then apply a fifth amendment standard to amenability. To facilitate this process, the due process issues might be analyzed first in any case in which the usual order of analysis would create confusion. This would be useful particularly in cases in which the state long-arm statute is pinned to constitutional limitations. Therefore, the court first would decide whether the case could proceed under the applicable due process standard before looking at the state long-arm statute to determine whether the state had limited such exercises of personal jurisdiction.

This author agrees with the one-case-one-due-process-analysis, but disagrees with Judge Gibbons' assertion that the nature of the question, rather than the court, should determine the applicable due process test. If all personal jurisdiction precedent could be eliminated, and the courts and Congress could begin with a clean slate, his approach might be sensible. At this point, however, state courts clearly are limited by the fourteenth amendment, whether the courts are deciding state questions or federal questions. Moreover, if the fourteenth amendment standard is based, in any part, on federalism,[1353] that factor remains the same regardless of the type of question being decided. This author believes, instead, that the nature of the court should determine the applicable amenability standard and that a uniform fifth amendment standard should apply to *all* cases heard in federal courts, diversity cases as well as federal question cases. This conclusion is sensible in light of the historical bases for these courts as well as their function as parts of particular judicial systems.

Before concluding this section, the author must deal with those courts that would embrace a national contacts approach only if federal legislation provided authority.[1354] These courts fall prey to the error of failing to separate the issues of service of process and amenability to suit. When a state court asserts jurisdiction over a nonpresent defendant, it serves process on the defendant pursuant to a state long-arm statute. The constitutionality of any assertion of jurisdiction is then determined by examining the sufficiency of the defendant's contacts with the forum state, a test that is not prescribed in any statute. When a federal court asserts jurisdiction, it also must satisfy two criteria:

1352. *See supra* note 1139 and accompanying text.
1353. *See supra* note 113 and accompanying text.
1354. *See, e.g.*, cases cited *supra* note 1319.

some statutory authority to serve process and satisfaction of a fifth amendment due process test. In cases arising under Rule 4(e), the federal court must rely on a state long-arm statute to satisfy the first criterion—4(e) authorizes the federal court to use the state statute. The court, however, does not require statutory authority to engage in the due process analysis. Some courts, those that adopt the position that national contacts cannot be embraced without a federal statute authorizing the test, note that Congress could have provided for nationwide service for federal courts in all cases, or, at least, in all federal question cases. Since Congress has not chosen to do so, however, but has, on the contrary, through Rule 4(f), generally limited federal court authority to the boundaries of the states in which the federal courts are sitting, these courts reason that Congress has limited federal court personal jurisdiction and has not permitted a test based on national contacts. This argument, however, fails to separate statutory authority to serve process from the analysis by which a court determines constitutionality. While federal courts, lacking a general federal long-arm statute, must, in some circumstances, rely on state long-arm statutes for service of process, such reliance is authorized by federal rule (4(e)). Federal authority exists, therefore, for utilization of such statutes. The other part of the amenability analysis, constitutionality, is not regulated by statute in state or federal courts. The national contacts test, therefore, need not be sanctioned legislatively before it can become a measure of the constitutionality of assertion by a federal court of personal jurisdiction.

In sum, strong arguments can be made that even in federal question cases in which federal courts serve process, as authorized by Rule 4(e), pursuant to the long-arm statutes of the states in which they are sitting, federal courts should adopt a uniform federal amenability standard of minimum contacts with the United States. The benefits of a uniform federal standard have been described above.[1355] Federal courts should determine their personal jurisdiction by some well-defined, rational test, rather than by the *ad hoc* system used at present.

## IV. Conclusion

Over a period spanning more than a century, courts have been involved in fashioning an amenability standard for state courts. This standard, which is often referred to as "minimum contacts with the state," has grown and developed over time. During this period,

1355. *See supra* text following note 1324, text accompanying notes 1324-26, and text following note 1326.

however, state courts always have been aware that the constitutionality of their exercises of personal jurisdiction was to be measured by this standard that derived from the due process clause of the fourteenth amendment.

Federal courts never have been in such an enviable position. Although most authorities have agreed that the constitutionality of federal court exercises of personal jurisdiction should be limited only by the due process clause of the fifth amendment, no all-encompassing federal standard ever has been developed. This failure is attributable to many causes: federal courts, under diversity subject matter jurisdiction, must handle many of the same sorts of cases as are handled by state courts;[1356] the federalism-independent sovereign question did not exist in the federal system as a motivating force for amenability standards; the historical development of the federal court system did not proceed in a direct manner;[1357] under Rule 4, federal courts have many different methods for serving process and obtaining jurisdiction over defendants;[1358] by the time the federal system was well in gear, the state standard had become reasonably well-defined; the federal courts were organized territorially inside state borders, thus making the adoption of the well-developed state standards particularly tempting; in many cases, the narrower state standard is satisfied, thereby making the quest for a federal standard seem unimportant. These factors have combined to create the present system in which federal court amenability standards seem to be devised on an ad hoc basis, depending on the facts of the particular case or the manner in which service has been made.

Some definitive answer has been reached in diversity cases, with the Supreme Court in the recent case of *Insurance Corporation of Ireland v. Compagnie des Bauxites de Guinee*[1359] impliedly accepting the position of Second Circuit[1360] in *Arrowsmith v. United Press International*[1361] that federal courts in diversity cases should use the amenability standards of the states in which they are sitting. The result in *Arrowsmith* probably derived partly from a misreading of the requirements of *Erie R.R. v. Tompkins* and partly from the lack of

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1356. When the question of amenability standards in diversity cases was addressed, therefore, a natural response was to rely on the state standard. *See supra* notes 376-492 and accompanying text (discussing amenability standards in diversity cases).

1357. *See supra* notes 196-272 and accompanying text (discussing historical development of the federal court system).

1358. *See supra* notes 273-94 and accompanying text (discussing Rule 4).

1359. 456 U.S. 694 (1982); *see supra* notes 156-82 and accompanying text.

1360. *See supra* note 481 and accompanying text; *see also supra* note 482 and accompanying text.

1361. 320 F.2d 219 (2d Cir. 1963); *see supra* notes 453-77 and accompanying text.

any genuine federal standard.[1362] This writer disagrees with the result in *Arrowsmith*, both when service of process is made by a wholly federal method and when service is made, as authorized by Rule 4(e), and perhaps, by former Rule 4(d)(7), by using the state long-arm statute. Federal court personal jurisdiction should not turn on a standard developed for state courts. After all, although the situation admittedly is not completely analogous, when state courts decide federal questions state courts still use fourteenth amendment amenability standards.

The law in the area of federal question jurisdiction remains unsettled, with choice of amenability standard depending in part on the manner in which service is made and in part on the exigencies of the circumstances of the case. Without any well-developed federal standard to which to turn, federal courts have often adopted the state standard, which "worked out fine" in the circumstances of the case. The federal courts could take a lesson from state courts: the state court amenability standard is constant, regardless of how process is served in the particular case. The answer to the problem of lack of uniformity caused by the diversities of Rule 4 perhaps would be to formulate a federal long-arm statute, but not to use different due process standards for different methods of service of process.

The answer to the present problem of devising an appropriate fifth amendment due process standard applicable in all federal question cases would be the adoption of the "national contacts" test. As argued above, this standard can be applied whether process is served by a wholly federal method or by a state method that has been incorporated into federal law by Rule 4(e), and perhaps by former Rule 4(d)(7)—present Rule 4(c)(2)(C)(i). The standard is sensible in that it relates directly to the sovereign seeking to assert jurisdiction, the United States, derives from and is analogous to the well-developed state standard, and precludes unfairness to the defendant because of venue and transfer of venue provisions and the doctrine of *forum non conveniens*. This standard would provide the proper basis for the analysis of an amenability problem in a federal question case because the court could begin an opinion by stating the amenability standard. Adoption of a uniform federal standard also would eliminate the anomaly created when federal courts, deciding federal questions, base amenability decisions on state standards. Finally, the question of federal court jurisdiction would receive the same careful treatment as has been accorded state court jurisdiction.

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1362. *See supra* notes 453-77 and accompanying text.

While this writer strongly urges the adoption of a uniform federal amenability standard, minimum contacts with the United States, several factors seem to militate against the establishment and adoption of such a standard. First, the Supreme Court, in *Insurance Corp. of Ireland*, apparently has approved the use of state amenability standards in diversity cases. Second, when recently provided with the opportunity, in *Verlinden v. Central Bank of Nigeria*,[1363] to discuss amenability standards in federal question cases, the Supreme Court ducked the issue completely.[1364] Third, because the state standard is so well-developed, federal courts tend to rely on it whenever possible; short of legislation mandating a particular uniform federal standard or a Supreme Court ruling to that effect, both of which are highly unlikely, federal courts probably will continue this reliance. Fourth, the trend in federal courts seems to be to reject national contacts, except in cases involving service on aliens pursuant to federal statutes authorizing worldwide service of process. Fifth, the majority of cases that have adopted national contacts have done so in poorly reasoned opinions that would be of little value as precedent. Sixth, recent amendments in Rule 4 of the Federal Rules of Civil Procedure reveal no intent to create a single uniform federal method for service of process. The only real hope for action, therefore, would be a well-reasoned Supreme Court decision embracing national contacts as the federal amenability standard, a federal *International Shoe* opinion. Barring such a decision, the area of amenability standards in federal questions cases probably will remain as described above, a patchwork of amenability standards derived from various sources for a variety of reasons.

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1363. 51 U.S.L.W. 4567 (May 23, 1983); *see supra* notes 520-55 and accompanying text.
1364. *See supra* text following note 554.