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Personal Jurisdiction in Flux: Insurance Corp. of Ireland v. Campagnie des Bauxites de Guinee

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RECENT DEVELOPMENTS

PERSONAL JURISDICTION IN FLUX: *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*

In *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee,*[1] the Supreme Court upheld the use of Federal Rule of Civil Procedure 37(b)(2)(A) sanctions to impose personal jurisdiction on a defendant who disobeyed court orders to submit to jurisdictional discovery.[2] Read narrowly, *Compagnie des Bauxites* holds that the jurisdictional use of rule 37(b)(2)(A) does not offend the fifth amendment due process clause.[3] The Court, however, extended its discussion of jurisdictional due process beyond the fifth amendment and implicated fourteenth amendment due process. The Court's discussion appears inconsistent with recent fourteenth amendment jurisdictional precedent and could have wide-ranging effects on the jurisdiction of federal and state courts.

I
BACKGROUND

A. Due Process Limitations on the Exercise of Personal Jurisdiction

A court must have personal jurisdiction over a defendant before entering a valid judgment imposing a personal obligation in the plaintiff's favor.[4] Both the federal Constitution[5] and restrictions emanating

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1 456 U.S. 694 (1982).

2 The term "jurisdictional discovery" is used throughout this Note to describe discovery of information relating to the question of personal jurisdiction.

3 Although the Court in *Compagnie des Bauxites* never expressly stated that it was applying a fifth amendment due process standard, this Note attempts to show that the Court did, in fact, invoke such a standard. *See infra* notes 94-120 and accompanying text.

4 Kulko v. Superior Court, 436 U.S. 84, 91 (1978).

5 The due process clauses of the fifth and fourteenth amendments form the primary constitutional constraints on personal jurisdiction. Other provisions of the federal Constitution, however, also may limit personal jurisdiction. For example, in certain instances, the first amendment may constitute a jurisdictional constraint. *See, e.g.,* New York Times Co. v. Connor, 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 over other types of tortious activity."); Environmental Research Int'l v. Lockwood Greene Eng'rs, Inc., 355 A.2d 808, 813-14, 813 n.11 (D.C. 1976) (basing jurisdictional finding on defendant's visits to forum, when such visits were made solely to consult with government officials, might violate first amendment right to petition government for redress of grievances). The commerce clause may also limit personal jurisdiction. *See e.g.,* Davis v. Farmer Coop. Equity Co., 262 U.S. 312 (1923). *But see* RESTATEMENT (SECOND) OF JUDGMENTS § 4 comment e (1980) ("It is . . . uncertain whether there are limitations on the territorial jurisdiction of the states beyond those imposed under the Due Process Clause.").

from other sources[6] limit a court's personal jurisdiction. In state courts, the exercise of personal jurisdiction must conform to the fourteenth amendment due process clause and applicable state and federal statutory and decisional law.[7] In federal courts, jurisdictional restrictions beyond those imposed by the federal Constitution may, depending on the circumstances, derive from either state or federal law.[8] When a federal court must apply state jurisdictional law,[9] it measures the constitutional-

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See generally Developments in the Law—State-Court Jurisdiction, 73 HARV. L. REV. 909, 983-87 (1960) [hereinafter cited as *Developments*].

6 In addition to the jurisdictional limitations imposed on states by the federal Constitution, federal statutory law may constrain a state court's personal jurisdiction. *See, e.g.,* 12 U.S.C. § 94 (1982) (stipulating the forum in which national banks may be sued). State statutory law, decisional law, and rules of court may also limit a state court's jurisdictional reach. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 4 comment c (1980). For example, a number of state long-arm statutes, which act to grant state courts jurisdiction over parties outside their boundaries, do not extend jurisdiction to the extent permissible under the fourteenth amendment. *See, e.g.,* N.Y. CIV. PRAC. LAW § 302 (McKinney 1972 & Supp. 1982-83). These long-arm statutes act as self-imposed limitations on a state's personal jurisdiction. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 4 comment c (1980). *See generally* 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1068 (1969); Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois,* 1963 U. ILL. L.F. 533 (1963).

7 *See* RESTATEMENT (SECOND) OF JUDGMENTS § 4 comments b, c (1980).

8 *See generally* RESTATEMENT (SECOND) OF JUDGMENTS § 4 comment f (1980). Federal courts generally apply state jurisdictional law absent contrary federal statutes or rules. 4 C. WRIGHT & A. MILLER, *supra* note 6, § 1075, at 302; Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts,* 66 CORNELL L. REV. 411, 428 (1981). *See generally* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1107-08, 1118-21 (2d ed. 1973) [hereinafter cited as HART & WECHSLER]. An example of such a federal statute is the Federal Interpleader Act, 28 U.S.C. §§ 1335, 1397, 2361 (1976). Furthermore, sometimes federal courts apply federal standards of amenability even without a federal statute or rule dictating their application. *See* R. FIELD, B. KAPLAN & K. CLERMONT, MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE 772 (4th ed. 1978); *see also infra* notes 111-13 and accompanying text. An example is the federal common law governing immunity from service of process in federal court. *See* 4 C. WRIGHT & A. MILLER, *supra* note 6, § 1076.

The requirement that federal courts apply state amenability standards derives from federal legislation. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 4 comment f (1980); *see, e.g.,* FED. R. CIV. P. 4. Nothing precludes Congress from authorizing nationwide service of process in all federal actions, thus avoiding application of state amenability standards in federal courts. *See* Mississippi Publishing Corp. v. Murphree, 326 U.S. 438, 442 (1946); Robertson v. Railroad Labor Bd., 268 U.S. 619, 622 (1925); *see also* ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 437-38 (1969); C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 64, at 420 (4th ed. 1983) ("Congress has power to provide for the service of process anywhere within the United States . . . .") (footnote omitted); Clermont, *supra,* at 427. *But see* National Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 331 (1964) (Black, J., dissenting) ("Neither the Federal Constitution nor any federal statute requires that a person who could not constitutionally be compelled to submit himself to a state court's jurisdiction forfeits that constitutional right because he is sued in a Federal District Court acting for a state court solely by reason of the happenstance of diversity jurisdiction.").

9 In many instances, federal statutes or rules specifically require the application of state jurisdictional law in federal courts. For example, Federal Rule of Civil Procedure 4(e) requires that federal service made out of state conform to the jurisdictional standards of the forum state unless there is a contrary federal provision. *See, e.g.,* Edward J. Moriarty & Co. v. General Tire & Rubber Co., 289 F. Supp. 381, 390-92 (S.D. Ohio 1967). *See generally* HART &

ity of its exercise of personal jurisdiction against the standard of the fourteenth amendment due process clause.[10] When a federal court applies federal jurisdictional law, however, the court's personal jurisdiction need only conform to the standard of fifth amendment due process.[11]

The Supreme Court has interpreted the fourteenth amendment to place two restrictions on a court's jurisdictional reach.[12] Before a court may assert personal jurisdiction, it must have "power" over the defendant,[13] and it must ensure the "reasonableness" of adjudicating the ac-

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WECHSLER, *supra* note 8, at 1118-21; 4 C. WRIGHT & A. MILLER, *supra* note 6, § 1075, at 312-14. In other instances, the *Erie* doctrine dictates the application of state law in federal courts. *See, e.g.,* Arrowsmith v. UPI, 320 F.2d 219 (2d Cir. 1963) (requiring application of state amenability standards in federal court when process is served under rule 4(d)(3)). *See generally* 4 C. WRIGHT & A. MILLER, *supra* note 6, § 1075.

10 *See* Pulson v. American Rolling Mill Co., 170 F.2d 193 (1st Cir. 1948); 4 C. WRIGHT & A. MILLER, *supra* note 6, § 1075, at 316; Foster, *Long-Arm Jurisdiction in Federal Courts,* 1969 WIS. L. REV. 9, 38-39.

11 The fourteenth amendment due process clause limits the jurisdictional reach of state courts, while the fifth amendment due process clause limits the reach of federal courts. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 24 comment e (1971). When federal courts use state jurisdictional law, they also apply the fourteenth amendment due process standard, which forms the constitutional limitation on personal jurisdiction. When a federal court is not required to apply state jurisdictional law, however, the fifth amendment constitutes the appropriate standard for assessing the constitutionality of a federal court's jurisdictional reach. *See* Note, *The Use of Rule 37(b) Sanctions to Enforce Jurisdictional Discovery,* 50 FORDHAM L. REV. 814, 837 (1982)[hereinafter cited as Note, *Rule 37(b) Sanctions*]. Federal jurisdictional law, for example, applies in a suit based on federal question jurisdiction with service of process under Federal Rule of Civil Procedure 4(d)(3). *See, e.g.,* Fraley v. Chesapeake & O. Ry., 397 F.2d 1, 3-4 (3d Cir. 1968); Lone Star Package Car Co. v. Baltimore & O.R.R., 212 F.2d 147, 152-54 (5th Cir. 1954); *see also* R. FIELD, B. KAPLAN & K. CLERMONT, *supra* note 8, at 768; HART & WECHSLER, *supra* note 8, at 1119. In such situations, some courts apply a fifth amendment amenability standard. *See, e.g.,* First Flight Co. v. National Carloading Corp., 209 F. Supp. 730 (E.D. Tenn. 1962); *cf.* Edward J. Moriarty & Co. v. General Tire & Rubber Co., 289 F. Supp. 381, 389-90 (S.D. Ohio 1967) (indicating that court would apply fifth amendment standard had service of process not been made under rule 4(e), which obligated court to apply state standard of amenability). Even when free to apply fifth amendment due process, a number of courts have relied on the better-defined fourteenth amendment standard and have invoked the constitutional restrictions that pertain to the forum state. *See, e.g.,* Fraley v. Chesapeake & O. Ry., 397 F.2d 1, 3-4 (3d Cir. 1968); Lone Star Package Car Co. v. Baltimore & O.R.R., 212 F.2d 147, 152-54 (5th Cir. 1954); *see also* R. FIELD, B. KAPLAN & K. CLERMONT, *supra* note 8, at 768-69; HART & WECHSLER, *supra* note 8, at 1119. Reference to the fourteenth amendment in such situations, however, is not required. *See* Clermont, *supra* note 8, at 438-39.

When a party serves process under a federal statute that specifically provides for nationwide or worldwide service, federal courts most often invoke a fifth amendment standard uninfluenced by fourteenth amendment requirements. *See, e.g.,* Stafford v. Briggs, 444 U.S. 527, 553-54 (1980) (Stewart, J., dissenting); Fitzsimmons v. Barton, 589 F.2d 330, 333-34 (7th Cir. 1979); Mariash v. Morrill, 496 F.2d 1138, 1143 (2d Cir. 1974). *See generally* Note, *Fifth Amendment Due Process Limitations on Nationwide Federal Jurisdiction,* 61 B.U.L. REV. 403, 411-16 (1981) [hereinafter cited as Note, *Fifth Amendment Limitations*].

12 *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-92 (1980). *See generally* Clermont, *supra* note 8, at 413-26.

13 In Pennoyer v. Neff, 95 U.S. 714, 722 (1878), the Supreme Court held that a court must have power over the target of an action before entering a proper judgment. *Pennoyer* suggested that in the absence of waiver, the fourteenth amendment required the presence of

tion in the forum selected by the plaintiff.[14]

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the defendant in the state before a court could assert personal jurisdiction. *Id.* at 733. The *Pennoyer* Court regarded each state as the sovereign master of its own territory, but as powerless to exert jurisdiction over parties outside its boundaries. *Id.* at 722. Thus, notions of federalism and territoriality underlay *Pennoyer.*

The Court redefined the power requirement, largely in response to technological changes in society, in International Shoe Co. v. Washington, 326 U.S. 310 (1945). *See* Hanson v. Denckla, 357 U.S. 235, 250-51 (1958). In the years following *Pennoyer,* the bases of jurisdictional power expanded. *See generally* 4 C. WRIGHT & A. MILLER, *supra* note 6, § 1065. By the time *International Shoe* was decided in 1945, the Court had recognized that jurisdiction could be exercised over a party domiciled in, but absent from, the forum state, *see* Milliken v. Meyer, 311 U.S. 457 (1940), or over a party that impliedly consented to a court's jurisdiction, *see* Hess v. Pawloski, 274 U.S. 352 (1927). *International Shoe* unified these diverse bases of power by suggesting that jurisdiction existed whenever the defendant had sufficient "minimum contacts" with the forum state. 326 U.S. at 316. Such contacts might exist if the defendant had continuous and substantial contacts with the forum, even if unrelated to the cause of action, or if the defendant's contacts with the state were less substantial but highly related to the claim. *Id.* at 318. Isolated contacts unrelated to the cause of action, however, could not support a finding of personal jurisdiction. *Id.* at 319. Although the test announced in *International Shoe* included notions of reasonableness, it retained, albeit in somewhat altered form, the power requirement established in *Pennoyer.* For example, in reference to *Pennoyer,* the Court noted that "[h]istorically the jurisdiction of courts to render judgment *in personam* is grounded on their de facto power over the defendant's person." *Id.* at 316.

Thirteen years after *International Shoe,* the Court in Hanson v. Denckla, 357 U.S. 235 (1958), reaffirmed that, aside from any issue of reasonableness, a court must have power over a defendant before properly adjudicating an action:

> [R]estrictions [on the reach of a state's personal jurisdiction] are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the "minimal contacts" with that State that are a prerequisite to its exercise of power over him.

Id. at 251.

Finally, the Court in World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980), removed any doubt about the relevance of jurisdictional power and federalism concerns:

> [W]e have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution. . . . [T]he Framers . . . intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment.

Id. at 293. Justice White continued, stating that

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

Id. at 294.

14 In International Shoe Co. v. Washington, 326 U.S. 310 (1945), the Court held that personal jurisdiction could be exercised only when subjecting the defendant to trial in the forum was reasonable or fair. The Court suggested that a defendant could be brought to court only when he had sufficient "minimum contacts" with the forum to assure the fairness of the exercise of jurisdiction:

> [D]ue process requires only that in order to subject a defendant to a judgment

The power component of fourteenth amendment due process requires "minimum contacts"[15] between the defendant and the forum before the court may exercise personal jurisdiction.[16] The power requirement allows a state court to exercise jurisdiction within the state's

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> *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."

Id. at 316. (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)). Due process requirements could be met, suggested the Court, "by such contacts of the [defendant] with the state of the forum as make it reasonable, in the context of our federal system of government, to require the [defendant] to defend the particular suit which is brought there." *Id.* at 317.

In Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), the Court approved New York's exercise of jurisdiction over a proceeding to determine the rights of beneficiaries in a common trust fund. In deciding whether the state's exercise of jurisdiction was proper, the Court emphasized New York's interest in providing a forum that could determine the rights of parties in a trust created under its laws. *Id.* at 313. A number of cases prior to *International Shoe,* most notably *Pennoyer v. Neff,* 95 U.S. 714 (1878), categorized actions as *in rem, quasi in rem,* or *in personam.* Under *Pennoyer,* categorization was required to identify the target of the action so that the court could assess whether power existed over that target. *Mullane* rejected such categorization, 339 U.S. at 312-13, and in so doing may have been suggesting that jurisdiction could be exerted over the target of an action any time such jurisdiction was reasonable, regardless of whether "power," as conceived of in *Pennoyer,* is present. *See* Clermont, *supra* note 8, at 417.

McGee v. International Life Ins. Co., 355 U.S. 220 (1957), further elucidated the factors to be weighed in determining the reasonableness of a jurisdictional finding. Before deciding to impose jurisdiction on a corporate defendant, the *McGee* Court considered the interest of the forum, the plaintiff, and the defendant. *Id.* at 223-24.

Most recently, in World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980), the Court reasserted the importance of the reasonableness requirement. *Id.* at 291-92. The Court also expounded on the factors to be considered in analyzing reasonableness:

> The protection against inconvenient litigation is typically described in terms of "reasonableness" or "fairness." We have said that the defendant's contacts with the forum State must be such that maintenance of the suit "does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington,* [326 U.S., 310, 316 (1945)], quoting *Milliken v. Meyer,* 311 U.S. 457, 463 (1940). The relationship between the defendant and the forum must be such that it is "reasonable . . . to require the corporation to defend the particular suit which is brought there." 326 U.S., at 317. Implicit in this emphasis on reasonableness is the understanding that the burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including the forum State's interest in adjudicating the dispute; the plaintiff's interest in obtaining convenient and effective relief, at least when that interest is not adequately protected by the plaintiff's power to choose the forum; the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.

Id. at 292 (citations omitted).

15 The phrase "minimum contacts" first appeared in International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). The purpose of the minimum contacts test was ambiguously discussed in *International Shoe.* Minimum contacts, as discussed in *International Shoe,* can be read to ensure that the forum had "power" over the defendant or that the exercise of jurisdiction in that forum was "reasonable." *See* Clermont, *supra* note 8, at 415-16. In World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-92 (1980), the Court indicated that the minimum contacts standard was intended to accomplish both purposes.

16 *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-92 (1980).

boundaries, but forbids it from reaching into another state to force a defendant to appear for trial unless the defendant had prior contact with the forum.[17] The power requirement appears to rest on considerations of federalism, and protection of one state's sovereignty vis-a-vis other states'.[18] The power requirement focuses only on the relationship between the defendant and the forum.[19] Regardless of the interests of the plaintiff and the state, the power requirement precludes a finding of jurisdiction absent sufficient forum-defendant contacts.[20]

Reasonableness, the second component of fourteenth amendment due process, balances a broader range of interests, including those of the defendant, the plaintiff, and the state.[21] The Supreme Court has indicated that the burden on the defendant in litigating in the forum chosen by the plaintiff will always be a "primary concern" in deciding whether jurisdiction is "reasonable." In an "appropriate case," however, the determination of reasonableness will be made in light of other interests, including those of the plaintiff and the state.[22]

In practice, a court testing for personal jurisdiction under the fourteenth amendment first determines whether sufficient forum-defendant contacts exist.[23] If they do not exist, a court must dismiss the case for lack of personal jurisdiction.[24] If the forum-defendant contacts do exist, the court must also determine whether the exercise of jurisdiction is reasonable in light of the interests of the defendant, the plaintiff, and the forum. Only when both the power and reasonableness components of fourteenth amendment due process are satisfied is the exercise of personal jurisdiction proper.

When the fourteenth amendment governs jurisdictional decisions in federal courts, it creates jurisdictional restraints similar to those imposed on the courts of the forum state.[25] Thus, the reach of these federal

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17 *See id.* at 293-94; Hanson v. Denckla, 357 U.S. 235, 250-51 (1958).

18 *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-94 (1980); Hanson v. Denckla, 357 U.S. 235, 251 (1958); Pennoyer v. Neff, 95 U.S. 714, 722-23 (1878). The requirement that a state have a certain level of contacts with the defendant may have been intended to prevent a state with little or no interest in a dispute from adjudicating an action and denying a state whose interest in the dispute is high an opportunity to hear the case.

19 *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292-94 (1980) (proposing broad array of factors to be weighed in assessing amenability under reasonableness requirement, but mentioning only defendant-forum contacts when discussing power requirement); Clermont, *supra* note 8, at 424 ("[T]he common element in the modern power test is the focus on the out-of-court relation of the target of the action to the forum state.").

20 *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293-94 (1980) (jurisdiction must be denied if forum-defendant contacts are lacking, even when forum state has high interest in hearing action and defendant would suffer no inconvenience as result of litigation).

21 *See id.* at 292.

22 *Id.*

23 *See* Clermont, *supra* note 8, at 424-25.

24 *See, e.g.,* Kulko v. Superior Court, 436 U.S. 84 (1978).

25 *See, e.g.,* Hazen Research, Inc. v. Omega Minerals, Inc., 497 F.2d 151, 155-56 (5th Cir. 1974); *see also* 2 J. MOORE, J. LUCAS, H. FINK & C. THOMPSON, MOORE'S FEDERAL PRAC-

courts extends no further than that of the state courts "across the street."

The requirements of fifth amendment jurisdictional due process are less well defined than those of the fourteenth amendment.[26] A composite power-reasonableness test, similar to that invoked under the fourteenth amendment, may also apply under fifth amendment due process.[27] The power requirement of such a test, however, may be satisfied by showing defendant contacts with the United States as a whole, even when no contacts exist with the forum state. Similarly, when considering the interests of the forum to determine whether a jurisdictional finding would satisfy the reasonableness requirement under the fifth amendment, a court presumably weighs the interests of the United States, not those of the forum state.[28] Nonetheless, federal courts often look to the extensive fourteenth amendment case law for guidance on the limits of fifth amendment due process.[29] As a result, these courts may restrict their effective reach to that of the forum state's courts, even though such a restriction is not constitutionally mandated.

TICE ¶ 4.25[7], at 4-285 to -286, 4-286 n.20 (2d ed. 1983)[hereinafter cited as MOORE'S]; 4 C. WRIGHT & A. MILLER, *supra* note 6, § 1075, at 301-02.

26 *See* Note, *Fifth Amendment Limitations, supra* note 11, at 404, 411-16; *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 4 comment f (1982) (conjecturing as to limits of fifth amendment due process); Abraham, *Constitutional Limitations Upon the Territorial Reach of Federal Process,* 8 VILL. L. REV. 520, 531-36 (1963) (federal courts are still defining limits of fifth amendment due process); Foster, *supra* note 10, at 31 ("To date, the constitutional scope of amenability has been considered almost exclusively in terms of fourteenth amendment due process considerations . . . .").

27 *See* Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distribs., 647 F.2d 200, 203 n.4 (D.C. Cir. 1981); Clermont, *supra* note 8, at 436-37. Other sources, although not stating the proposition in terms of the dual requirements of power and reasonableness, have similarly suggested that the fifth amendment test is analogous to that of the fourteenth amendment. *See, e.g.,* Honeywell, Inc. v. Metz Apparatewerke, 509 F.2d 1137, 1143 (7th Cir. 1975); Cryomedics, Inc. v. Spembly, Ltd., 397 F. Supp. 287, 288 n.3 (D. Conn. 1975); 2 MOORE'S, *supra* note 25, ¶ 4.25[5], at 4-260 to -261; RESTATEMENT (SECOND) OF JUDGMENTS § 4 comment f (1982); Foster, *supra* note 10, at 36. *But see* Note, *Fifth Amendment Limitations, supra* note 11, at 412-16 (suggesting that most courts invoking fifth amendment standard under federal laws that allow for nationwide service of process do not apply reasonableness test to assess fairness of adjudicating in particular state or district).

28 *See, e.g.,* Stafford v. Briggs, 444 U.S. 527, 553-54 (1980) (Stewart, J., dissenting); Fitzsimmons v. Barton, 589 F.2d 330, 333-34 (7th Cir. 1979); Mariash v. Morrill, 496 F.2d 1138, 1143 (2d Cir. 1974); Cryomedics, Inc. v. Spembly, 397 F. Supp. 287, 290 (D. Conn. 1975); *see also* Foster, *supra* note 10, at 36; von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis,* 79 HARV. L. REV. 1121, 1123 n.6 (1966).

29 *See, e.g.,* Honeywell, Inc. v. Metz Apparatewerke, 509 F.2d 1137, 1143 (7th Cir. 1975) (listing cases looking to fourteenth amendment standard); Fraley v. Chesapeake & O. Ry., 397 F.2d 1, 3 (3d Cir. 1968) (noting that jurisdiction should be decided under federal standard but finding fourteenth amendment due process principles applicable); R. FIELD, B. KAPLAN & K. CLERMONT, *supra* note 8, at 768-69 (due process standard where service of process is made under Federal Rule of Civil Procedure 4(d) with suit based on federal question); HART & WECHSLER, *supra* note 8, at 1118-19 (same); Clermont, *supra* note 8, at 428; Note, *Fifth Amendment Limitations, supra* note 11, at 411-12 (fourteenth amendment standard sometimes applied when assessing jurisdiction under federal statute allowing for nationwide service of process).

B. The Application of Federal Rule of Civil Procedure 37(b)(2)(A) to Jurisdictional Facts

Federal Rules 26 to 37 govern discovery in federal court.[30] Rule 37 deals with the consequences of failing to make or cooperate in discovery. Under rule 37, a court can impose sanctions for failure to comply with discovery orders. Among the sanctions available to the court is an order under rule 37(b)(2)(A)[31] that certain facts be taken as established for the purposes of an action.[32]

When a defendant challenges a court's personal jurisdiction,[33] the

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30 The Supreme Court in Hickman v. Taylor, 329 U.S. 495 (1947), characterized the purpose of the discovery rules as follows: "The various instruments of discovery now serve (1) as a device . . . to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts . . . relative to those issues." *Id.* at 501.

31 Federal Rule of Civil Procedure 37(b)(2)(A) reads as follows:

> (b) **Failure to comply with order.**
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> . . . .
>
> (2) *Sanctions by court in which action is pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> (A) An 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.

32 Among the other sanctions available to the court under rule 37(b)(2) is an order refusing to allow the party failing to obey to support or oppose designated claims or defenses, FED. R. CIV. P. 37(b)(2)(B); an order striking out pleadings or parts of pleadings, or dismissing all or part of the action, or rendering a judgment by default, *id.* at 37(b)(2)(C); a finding of contempt of court against the uncooperative party, *id.* at 37(b)(2)(D); and an assessment of expenses and attorney's fees, *id.* at 37(b)(2).

33 A defendant wishing to challenge personal jurisdiction has two options. First, the defendant may appear in the original action and move that the claims asserted be dismissed for lack of personal jurisdiction. If a court denies this motion and enters a judgment for the plaintiff, the defendant may directly attack the judgment on appeal by renewing the contention that the trial court lacked jurisdiction. *See, e.g.,* Hess v. Pawloski, 274 U.S. 352 (1927).

Alternatively, the defendant may stay away from the original action entirely and risk a default judgment. If the plaintiff attempts to enforce that default judgment in another state, the defendant may collaterally attack the judgment by asserting that jurisdiction was improper in the original action. *See, e.g.,* McGee v. International Life Ins. Co., 355 U.S. 220 (1957). A judgment is not open to collateral attack on the grounds that it was simply erroneous. *See* Milliken v. Meyer, 311 U.S. 457, 462 (1940). *See generally* 1B J. MOORE, J. LUCAS & T. CURRIER, MOORE'S FEDERAL PRACTICE ¶ 0.405 [4.—1], at 196-99 (2d ed. 1983). A defendant, however, may challenge the personal jurisdiction of the original court in a collateral attack and, if successful, the judgment will be voided. *See, e.g.,* Pennoyer v. Neff, 95 U.S. 714 (1877) (successful collateral challenge to original court's jurisdiction over res in a quasi in rem proceeding). *See generally* 1B J. MOORE, J. LUCAS & T. CURRIER, *supra,* at 206-09.

Once a court in an original action determines that it has personal jurisdiction over the defendant, that jurisdictional determination is binding in all collateral proceedings. Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522 (1931). Thus, if a defendant appears in an action and the court finds that personal jurisdiction is proper, res judicata precludes a successful collateral challenge to the validity of the original judgment for want of personal jurisdiction. In effect then, the defendant is left with the choice of appearing in the original action,

burden is on the plaintiff to show that jurisdiction is proper.[34] If a court cannot exercise jurisdiction based solely on the pleadings, the plaintiff may resort to discovery devices to obtain the facts necessary to prove jurisdiction.[35] If the defendant refuses to comply with a discovery request,[36] the court may order the defendant to cooperate and may take coercive action if the defendant disobeys such an order.[37] One sanction available to the court is to invoke rule 37(b)(2)(A), taking as established the facts necessary to find personal jurisdiction over the defendant.[38]

Jurisdictional findings made under rule 37(b)(2)(A) must be consistent with the constitutional requirement of jurisdictional due process. Although the fifth amendment would appear to provide the appropriate standard for assessing the constitutionality of using rule 37 to establish jurisdictional facts,[39] one can argue that the fourteenth amendment should apply.[40] Under either standard, the imposition of jurisdiction on a recalcitrant defendant is probably reasonable, thus satisfying one com-

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adjudicating the question of personal jurisdiction, and being bound by the court's jurisdictional determination, or staying away from the original action and attacking personal jurisdiction collaterally. *See id.* at 525.

34 *See* Uston v. Grand Resorts, Inc., 564 F.2d 1217, 1218 (9th Cir. 1977) (per curiam); Product Promotions v. Cousteau, 495 F.2d 483, 490-91 (5th Cir. 1974); *cf.* McNutt v. General Motors Acceptance Corp., 298 U.S. 178 (1936) (burden on plaintiff to show subject matter jurisdiction). *See generally* 5 C. WRIGHT & A. MILLER, *supra* note 6, § 1351, at 565.

35 8 C. WRIGHT & A. MILLER, *supra* note 6, § 2009, at 52-54 (1970).

Federal Rule of Civil Procedure 26(b)(1) stipulates that the permissible scope of discovery includes all nonprivileged, relevant materials relating to any claim or defense. Because lack of jurisdiction over the person is a defense specifically mentioned in rule 12(b), jurisdictional issues are within the scope of discovery.

The district judge has broad discretion to allow discovery on jurisdictional issues, and the judge may determine these issues by receiving affidavits, interrogatories, depositions, oral testimony, or any combination of recognized discovery methods. Washington v. Norton Mfg., Inc., 588 F.2d 441, 443 (5th Cir.), *cert. denied,* 442 U.S. 942 (1979). The district court must, however, allow the plaintiff an opportunity to prove jurisdiction. To deny the plaintiff this opportunity would be an abuse of discretion. *See* Surpitski v. Hughes-Keenan Corp., 362 F.2d 254 (1st Cir. 1966) (per curiam) (plaintiff, total stranger to defendant foreign corporation, should not be required, unless he has not been diligent, to try issue of jurisdiction without benefit of full discovery). *But see* Russell v. City State Bank, 264 F. Supp. 572 (W.D. Okla. 1967) (plaintiff not entitled to discovery to support long-arm jurisdiction when plaintiff failed to present evidence at hearing establishing necessary "minimum contacts" relating to cause of action).

One Commentator suggests that because the Federal Rules tend to deemphasize pleadings, the information available to the plaintiff to establish jurisdiction may not be as complete as it might be under other systems. Therefore, discovery may have to be used more frequently to settle jurisdictional disputes under the Federal Rules. Note, *The Use of Discovery to Obtain Jurisdictional Facts,* 59 VA. L. REV. 533, 533 (1973).

36 *See* Note, *supra* note 35, at 534.

37 *See, e.g.,* Lekkas v. Liberian M/V Caledonia, 443 F.2d 10 (4th Cir. 1971) (per curiam) (suggesting that rule 37 sanctions may be appropriate); *supra* notes 31-32.

38 *See, e.g.,* English v. 21st Phoenix Corp., 590 F.2d 723 (8th Cir.), *cert. denied,* 444 U.S. 832 (1979).

39 *See infra* notes 94-120 and accompanying text.

40 *See* Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 711-13 (1982) (Powell, J., concurring).

ponent of the composite test for personal jurisdiction.[41] The court, however, must also satisfy the power requirement.[42] If a court invokes a fifth amendment standard to test the constitutionality of a rule 37(b)(2)(A) sanction, it must find sufficient contacts between the defendant and the United States.[43] If a court invokes a fourteenth amendment standard, contacts must exist between the defendant and the forum state.[44] Whether a court applies a fifth or a fourteenth amendment standard, it is impossible for the court to determine if the defendant has the requisite "minimum contaets" to establish that the "power" exists to invoke jurisdiction when information concerning such contacts is unavailable.[45] Courts lacking sufficient information face a paradox. They may hesitate to impose jurisdiction because they lack the information necessary to satisfy the power requirement, but the defendant may have exclusive control of this information and be unwilling to surrender it unless

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41 *See* Compagnie des Bauxites de Guinea v. Insurance Co. of N. Am., 651 F.2d 877, 892 n.4 (3d Cir. 1981) (Gibbons, J., dissenting), *aff'd sub nom.* Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982).

A court assessing reasonableness must balance a broad array of interests in deciding whether to impose jurisdiction. *See supra* notes 21-22 and accompanying text. Among the interests considered are those of the plaintiff and the forum. A defendant refusing to cooperate in jurisdictional discovery deprives the plaintiff of the opportunity to choose the forum and flouts the authority of the forum's courts. Thus, a court could conclude that, in view of the strong interests of both plaintiff and forum, the exercise of jurisdiction over such a defendant would be reasonable.

42 Argnably, the defendant's appearance in court to challenge personal jurisdiction is by itself sufficient to satisfy the power requirement of either the fifth or the fourteenth amendment. *See infra* note 128. Similarly, jurisdiction might be found through implied consent. *See* Comment, *The Use of a Rule 37(b)(2)(A) Sanction to Establish In Personam Jurisdiction,* 1982 B.Y.U. L. REV. 103, 116-20. The Court, however, did not appear to rely on either of these approaches to find jurisdiction in *Compagnie des Bauxites. See infra* note 130 and accompanying text.

43 *See supra* notes 27-28 and accompanying text.

44 *See supra* notes 15-20 and accompanying text.

45 As Judge Gibbons stated in his dissent in Compagnie des Bauxites de Guinea v. Insurance Co. of N. Am., 651 F.2d 877 (3d Cir. 1981), *aff'd sub nom.* Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982):

> Exercise of personal jurisdiction pursuant to a state long-arm statute involves both a fairness and a power analysis. *See, e.g., World-Wide Volkswagen*. . . . It may not be unfair to subject the [defendants] to suit in [the forum state]. They have certainly had notice and an opportunity to be heard. Fairness, however, is not all. The district court must also have some power over these defendants. On the facts available to the district court, it lacked that power. It is questionable whether a district court may concoct adjudicatory authority by virtue of defendant's flaunting the court's apparent lack of power. However frustrating defendant's recalcitrance, it does not imply, any more than does these defendants' partial compliance, that defendant in fact has maintained forum affiliations sufficient to justify assertion of . . . jurisdiction.

Id. at 892 n.4 (Gibbons, J., dissenting); *see also* Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 715-16 (1982) (Powell, J., concurring) (arguing that district court could impose its jurisdiction because it had sufficient information about defendant's contacts with forum without additional facts sought in discovery).

threatened by the imposition of jurisdiction.[46]

II
THE CASE

In December 1975, Compagnie des Bauxites de Guinee[47] (CBG) filed a diversity action[48] in the Western District of Pennsylvania against a group of twenty-one foreign insurers.[49] CBG charged the defendants with failure to honor an insurance policy that the plaintiffs had obtained to protect against business losses resulting from breakdowns at its mineral processing plant in Guinea.[50] The defendants' answer denied

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46 In Familia de Boom v. Arosa Mercantil, 629 F.2d 1134 (5th Cir. 1980), *cert. denied,* 451 U.S. 1008 (1981), the Fifth Circuit noted that its refusal to approve a rule 37(b)(2)(C) default order as a sanction for failure to comply with jurisdictional discovery left "the district judge in a quandary in trying to enforce his discovery order, but that is a necessary result of the limitations of sovereignty under due process." *Id.* at 1139.

Prior to the Supreme Court's decision in *Compagnie des Bauxites,* four circuit courts of appeals had addressed the question of the application of rule 37 sanctions to jurisdictional facts. *See* Compagnie des Bauxites de Guinea v. Insurance Co. of N. Am., 651 F.2d 877, 885 (3d Cir. 1981) (approving of jurisdictional application of rule 37(b)(2)(A): "As long as discovery orders are permissible in aid of the jurisdictional determination, we think it fairly follows that a district court may respond to noncompliance by the party resisting a finding of jurisdiction with an appropriate rule 37(b)(2)(A) sanction."), *aff'd sub nom.* Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982); Familia de Boom v. Arosa Mercantil, 629 F.2d 1134, 1139 (5th Cir. 1980) (reversing district court's rule 37 default finding made for failure to cooperate with jurisdictional discovery: "Although the district court undoubtedly has jurisdiction to determine its own jurisdiction, it cannot, on its own, establish jurisdiction."), *cert. denied,* 451 U.S. 1008 (1981); English v. 21st Phoenix Corp., 590 F.2d 723 (8th Cir.) (holding that defendant's failure to cooperate in jurisdictional discovery was tantamount to waiver of personal jurisdiction, thus allowing district court, under its jurisdiction to determine jurisdiction, to invoke rule 37(b)(2)(A) sanction), *cert. denied,* 444 U.S. 832 (1979); Lekkas v. Liberian M/V Caledonia, 443 F.2d 10 (4th Cir. 1971) (per curiam) (suggesting approval of jurisdictional application of rule 37 sanctions). In addition, the Fifth Circuit disallowed the use of a rule 37 sanction against a defendant improperly served with process who had failed to comply with discovery. *See* Aetna Business Credit, Inc. v. Universal Decor & Interior Design, Inc., 635 F.2d 434 (5th Cir. 1981). With the Third, Fourth, and Eighth Circuits approving of the jurisdictional use of rule 37(b)(2)(A), and the Fifth Circuit disapproving, the Supreme Court granted certiorari to *Compagnie des Bauxites,* 454 U.S. 963 (1981), to resolve the split in the circuits.

47 CBG is a Delaware corporation, 49% of which is owned by the Republic of Guinea and 51% by Halco (Mining) Inc. Halco, also a Delaware corporation, does business in Pennsylvania. CBG's principal place of business is in the Republic of Guinea in western Africa where it mines and processes bauxite, the material from which aluminum is derived. 456 U.S. at 696. CBG does not do any business in the United States. Preliminary Statement, Findings of Fact, Conclusions of Law, and Order *In re* Permanent Injunction, August 5, 1980, in 2 Joint Appendix of Petition for Writ of Certiorari at 343a, *Compagnie des Bauxites,* 456 U.S. 694 (1982).

48 Process was served on the Pennsylvania Commissioner of Insurance. Brief for Cross-Petitioners at 4, *Compagnie des Bauxites,* 456 U.S. 694 (1982).

49 456 U.S. at 698. CBG also named the Insurance Company of North America a defendant in the original action, but that defendant did not contest personal jurisdiction and therefore was not involved in the appeal to the Supreme Court. *Id.*

50 456 U.S. at 697-98. Halco (Mining) Inc. procured the insurance for CBG through an American insurance broker, Marsh & McLennan, Inc. The total coverage was for $20 mil-

personal jurisdiction.[51] CBG then sought to discover information from the defendants to prove that personal jurisdiction was proper,[52] but the defendants repeatedly refused to cooperate. The court then issued an order compelling cooperation.[53] After the defendants failed to comply with the discovery order within the time initially allowed by the court,[54] the court granted the defendants two extensions.[55] Before granting the second extension, the court warned the defendants that failure to comply would result in a rule 37(b)(2)(A) sanction establishing the existence of personal jurisdiction.[56] CBG later moved in district court to enjoin the defendants from prosecuting an action the insurers had brought in

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lion. The Insurance Company of North America issued a policy to cover the first $10 million in losses. Marsh & McLennan requested Bland Payne Company, a British broker, to obtain policies to cover any losses in excess of $10 million, up to a limit of $20 million. Bland Payne arranged with 21 foreign insurers, most of whom were British, to provide the excess coverage. These insurers signed a "placing slip" indicating the portion of the excess of $10 million each was willing to insure. Bland Payne then issued a "cover slip" showing the amount of coverage and specifying the percentage of the coverage each insurer had agreed to insure. No separate policy existed. The foreign insurers adopted the Insurance Company of North America policy "as far as applicable." *Id.*

51 *Id.* at 698. The Insurance Company of North America and four of the foreign insurers did not contest personal jurisdiction in the district court. *Id.* at 697 n.3, 698.

52 *Id.* at 698. CBG made its first discovery request in August 1976, asking the defendants for copies of all policies that they had issued from 1972-75 insuring against losses due to interruptions in business. *Id.*

53 *Id.* In January 1977, the defendants objected to CBG's August 1976 request for documents as being overly burdensome. CBG filed a motion to compel discovery in May 1977. In that same month, 17 of the 21 foreign insurers moved for summary judgment, claiming that the court lacked personal jurisdiction over them. Compagnie des Bauxites de Guinea v. Insurance Co. of N. Am., 651 F.2d 877, 880-81 (3d Cir. 1981). In June 1978, the district court orally overruled the defendant's discovery objection of January 1977. *Compagnie des Bauxites,* 456 U.S. at 698. CBG then narrowed its discovery request to policies issued by the defendants that were delivered in Pennsylvania or that covered risks located in Pennsylvania. The defendants objected to this request, claiming that the documents sought by CBG were not in their control, but were kept by brokers in London. Finally, in July 1978, the court ordered the defendants to produce information on Pennsylvania-related policies they had issued between 1971 and the date of the hearing. Compagnie des Bauxites de Guinea v. Insurance Co. of N. Am., 651 F.2d at 881-82.

54 651 F.2d at 882. The original discovery order of July 1978 gave the defendants 90 days to comply. *Id.*

55 The district court granted the first extension in November 1978 after the defendants had assured the court that they probably would be able to complete their responses within that time. 651 F.2d at 882; Petition for Extension of Time to Answer Interrogatories, Nov. 8, 1978, in 1 Joint Appendix for Writ of Certiorari 97a, *Compagnie des Bauxites,* 456 U.S. 694 (1982). The defendants then offered to make their records, allegedly consisting of four million files, available for inspection in London. The court seemed unimpressed with the defendants offer of inspection, and in December of 1978, after noting that no conscientious effort had been made to produce the requested information, granted a final 60 day extension. 456 U.S. at 699.

56 456 U.S. at 699. After granting the defendant 60 additional days to produce the requested information, the court warned the defendants:

> [I]f you don't get it to him in 60 days, I am going to enter an order saying that because you failed to give the information as requested, that I am going to assume, under Rule of Civil Procedure 37(b), subsection 2(A), that there is jurisdiction.

the British High Court of Justice[57] to rescind the insurance contracts that formed the basis of CBG's claim.[58] Before granting that CBG motion, the district court followed through on its earlier warning and invoked a rule 37 sanction to establish personal jurisdiction.[59] By this time, the second deadline extension had passed and the defendants still had not substantially complied with the discovery order.[60] Over two and one-half years had elapsed since CBG's original discovery request.[61]

The defendants appealed the order enjoining prosecution of the British action.[62] On appeal, seventeen of the twenty-one foreign insurers maintained that the district court lacked personal jurisdiction and therefore could not issue such an order.[63] The Third Circuit rejected this argument, holding that the district court properly found jurisdiction through the imposition of a rule 37(b)(2)(A) sanction.[64] The court of appeals noted that the finding of personal jurisdiction did not violate the defendants' fifth amendment due process rights. Although the district court had found alternative grounds for its imposition of personal jurisdiction over the insurers,[65] the court of appeals rested its jurisdictional finding solely on the use of a rule 37 sanction.[66]

On certiorari,[67] the foreign insurers argued that the district court had created jurisdiction "by judicial fiat" in violation of their due pro-

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Id. (quoting Proceedings of Status Conference, Dec. 21, 1978, in 1 Joint Appendix for Writ of Certiorari 105a, 115a, *Compagnie des Bauxites,* 456 U.S. 694 (1982)).

57 456 U.S. at 710-11 (Powell, J., concurring).

58 651 F.2d at 883.

59 Proceedings on Plaintiff's Motion for Preliminary Injunction, April 18, 19, 1979, in 1 Joint Appendix for Writ of Certiorari 144a, 199a, *Compagnie des Bauxites,* 456 U.S. 694 (1982). Aside from the rule 37 sanction, the district court found two alternative grounds supporting personal jurisdiction over the defendants. First, the defendants' known activities in Pennsylvania indicated that the defendants were doing business in Pennsylvania for the purposes of that state's long-arm statute. Second, the defendants' adoption of the provisions of the Insurance Company of North America's Pennsylvania policy was sufficient to subject the foreign insurers to suit in that state. *Id.* The district court also relied on alternative grounds to exercise personal jurisdiction when it issued a permanent injunction enjoining the British action. Preliminary Statement, Findings of Fact, Conclusions of Law, and Order *In re* Permanent Injunction, August 5, 1980, in 2 Joint Appendix of Petition for Writ of Certiorari at 342a, 356a-57a, *Compagnie des Bauxites,* 456 U.S. 694 (1982).

60 The court granted the second extension, which was to last for a period of 60 days, on December 21, 1978. It imposed the rule 37(b)(2)(A) sanctions on April 19, 1979. 456 U.S. at 699.

61 The plaintiffs made their first discovery request in August, 1976. *Id.* at 698.

62 *Id.* at 699 n.6.

63 Compagnie des Bauxites de Guinea v. Insurance Co. of N. Am., 651 F.2d 877, 880 n.2 (3d Cir. 1981). Four foreign insurers conceded personal jurisdiction, but appealed the order granting the injunction as well as the denial of a motion to dismiss for forum non conveniens. *Id.*

64 *Id.* at 886.

65 *See supra* note 59.

66 651 F.2d at 886 n.9.

67 456 U.S. 694 (1982).

cess rights.[68] The Court rejected this argument, noting that the defendants effectively waived personal jurisdiction by refusing to cooperate with jurisdictional discovery. The Court thus permitted application of rule 37(b)(2)(A).[69]

Justice White, writing for the Court, began by stating that personal jurisdiction is a due process right of the individual, an "individual liberty interest," and not a right intended to protect the sovereignty of the forum.[70] The Court then contrasted personal jurisdiction with subject matter jurisdiction,[71] stating that the latter is intended to protect the integrity of the federal system. Because personal jurisdiction is intended to protect the individual,[72] not the federal system, the individual may waive that right. In support of its conclusion, the Court noted that parties have traditionally waived personal jurisdiction through a number of "legal arrangements" including appearance, contractual agreement, stipulation, agreements to arbitrate, and failure to enter a timely objection under Federal Rule of Civil Procedure 12(h). Analogous to these arrangements is a refusal to cooperate in jurisdictional discovery.[73] Thus, the Court claimed that the jurisdictional use of rule 37(b)(2)(A) is no more offensive to due process than is a waiver of personal jurisdiction for failure to raise a timely objection:

> The expression of legal rights is often subject to certain procedural rules: The failure to follow those rules may well result in a curtailment of the rights. Thus, the failure to enter a timely objection to personal jurisdiction constitutes, under Rule 12(h)(1), a waiver of the 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(h) waiver.[74]

The foreigu insurers also contended that because a defendant has no obligation to obey an order issued prior to the establishment of personal jurisdiction,[75] a court cannot invoke a sanction for failure to comply. The Court rejected this argument, noting that the foreign insurers could have stayed away from the Pennsylvania action entirely and, if necessary, attacked jurisdiction in a collateral proceeding.[76] By choosing to appear before the court in the original action, the defendants

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68 *Id.* at 696.
69 *Id.* at 708-09.
70 *Id.* at 702-03.
71 *Id.* at 701-03.
72 *Id.* at 703.
73 *Id.* at 703-05.
74 *Id.* at 705.
75 *Id.* at 706.
76 *Id.*

were obligated to abide by the court's jurisdictional determination, whether made by conventional fact finding or by the imposition of a "variety of legal rules and presumptions" including rule 37(b)(2)(A).[77]

In his concurrence,[78] Justice Powell offered two interpretations of the Court's opinion in an attempt to determine whether the Court had based its jurisdictional finding in *Compagnie des Bauxites* on the due process clause of the fourteenth or the due process clause of the fifth amendment.[79] First, Justice Powell suggested that the district court ultimately invoked the Pennsylvania long-arm statute to obtain personal jurisdiction in *Compagnie des Bauxites,* obligating the Court to apply fourteenth amendment due process.[80] If this were the case, Justice Powell argued, the Court's assertion that due process is not intended to protect state sovereignty contradicts the power requirement of the fourteenth amendment.[81] The Court responded to this charge in footnote 10 by admitting that the fourteenth amendment "reflects an element of federalism" and denying that their opinion altered the requirement of minimum contacts.[82] The Court, however, also stated that the power requirement "must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause."[83]

Alternatively, Justice Powell suggested that the Court might have relied exclusively on rule 37, and not the state long-arm statute, to find jurisdiction in *Compagnie des Bauxites.*[84] Justice Powell, however, appeared to reject this interpretation. Exclusive reliance on rule 37 would imply that the Court applied a fifth amendment due process standard in *Compagnie des Bauxites.*[85]

Having established the general principle that a court may invoke

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77 *Id.* at 707.

78 *Id.* at 709.

79 *Id.* at 710-15. In the introductory portion of Part I of his concurrence, Justice Powell suggested that the Court's opinion must have invoked a fourteenth amendment jurisdictional due process standard. Part IA explores the implications of this suggestion. Part IB discusses the possibility that the Court, rather than relying on the state long-arm statute to find jurisdiction, and thus necessitating the use of the fourteenth amendment, relied solely on rule 37. Justice Powell never explicitly stated that the fifth amendment, and not the fourteenth, would provide the appropriate constitutional standard if the court relied solely on rule 37. This conclusion, however, is implicit in Justice Powell's assertion that, if the Court based its opinion solely on rule 37, the result would not affect "state jurisdiction". *Id.* at 714.

80 *Id.* at 713.

81 *Id.* at 710-14.

82 *Id.* at 702 n.10.

83 *Id.*

84 *Id.* at 714-16.

85 *See id.* at 713. Justice Powell first concluded that, under the Rules of Decision Act, "the relevant constitutional limits would not be those imposed directly on federal courts by the Due Process Clause of the Fifth Amendment, but those applicable to state jurisdictional law under the Fourteenth." *Id.* Although admitting that the Court's opinion could be read, in the alternative, to rely exclusively on rule 37 and the fifth amendment, Justice Powell contended that the Court "does not cast its decision in these terms." *Id.* at 714.

rule 37(b)(2)(A) to find personal jurisdiction, the Court examined the district court's application of rule 37 to the facts of *Compagnie des Bauxites.*[86] Justice White asserted that both rule 37's general requirement that a court may order only those sanctions as are "just,"[87] and the due process clause of the fifth amendment as interpreted in *Hammond Packing Co. v. Arkansas,*[88] restrict the use of rule 37(b)(2)(A). Justice White found, however, that the district court's use of rule 37(b)(2)(A) in *Compagnie des Bauxites* was permissible and not in violation of these restrictions.[89]

III
ANALYSIS

Compagnie des Bauxites held that the jurisdictional use of rule 37(b)(2)(A) does not offend constitutional due process. Nevertheless, the Court in *Compagnie des Bauxites* spoke generally of the "Due Process Clause" without indicating whether it was invoking the due process clause of the fifth amendment or the fourteenth amendment.[90] The first part of this analysis contends that the Court's holding, when narrowly construed, pertains only to fifth amendment due process.[91] In strongly worded dicta, however, *Compagnie des Bauxites* calls into question long-established fourteenth amendment jurisdictional doctrines that the

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86 *Id.* at 707-09.

87 *Id.* at 707; *see* FED. R. CIV. P. 37(b)(2).

88 212 U.S. 322 (1909). The Advisory Committee note to original rule 37, 28 U.S.C. at 463 (1976), states: "The provisions of this rule . . . are in accord with *Hammond Packing Co. v. Arkansas* . . . ."

In *Hammond Packing,* the Supreme Court upheld a lower court ruling striking a defendant's answer and entering a default judgment against him after the defendant had refused to produce documents as ordered by the court. The Court concluded that it was reasonable to presume that the defendant's refusal to produce the documents indicated that his defense was meritless. 212 U.S. at 350-51. The Court held that entering a default judgment under such a presumption was consistent with due process. It distinguished the earlier case of Hovey v. Elliott, 167 U.S. 409 (1897), in which it had held that a lower court had denied due process by imposing a similar sanction as "mere punishment" for failure to obey a court order. 212 U.S. at 350.

89 The Court pointed to a number of factors in support of its contention that the district court's imposition of rule 37(b)(2)(A) was "just." 456 U.S. at 707-08. Among these factors were the defendant's recalcitrance after repeated promises to deliver the requested information, the independent indications that jurisdiction was proper, and the ample warning that the district court gave the defendants concerning the possible invocation of the sanction.

Furthermore, the Court claimed that the defendant's failure to comply with jurisdictional discovery after objecting to personal jurisdiction led to a presumption that jurisdiction was proper and thus met the test of *Hammond Packing. Id.* at 709.

90 The Court's discussion in footnote 10 specifically refers to state court jurisdiction and thus pertains to the fourteenth amendment. 456 U.S. at 702 n.10. The Court, however, does not indicate whether it intended its textual analysis of due process to apply to the fourteenth amendment, the fifth amendment, or both.

91 *See infra* notes 94-120 and accompanying text.

Court expressly had endorsed only three years earlier.[92] The second part of this analysis discusses inconsistencies between *Compagnie des Bauxites* and recent fourteenth amendment jurisdictional precedent and suggests that the Court may be prepared to adopt a new approach to deal with questions of personal jurisdiction.[93]

A. Fifth Amendment Jurisdictional Due Process

As has been suggested,[94] the Court in *Compagnie des Bauxites* failed to indicate whether it was employing fifth amendment or fourteenth amendment jurisdictional due process.[95] The Court apparently intended that many of its statements apply to both the fourteenth and the fifth amendments. Nevertheless, determining which constitutional provision the Court invoked in approving the jurisdictional use of rule 37(b)(2)(A) is important for precedential reasons. If the Court relied on the fifth amendment, its pronouncements concerning the nature of per-

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92 *Compare Compagnie des Bauxites,* 456 U.S. at 702 n.10 ("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.") *with* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 294 (1980) ("Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State . . . the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.") (citation omitted).

93 *See infra* notes 121-58 and accompanying text.

94 *See supra* note 90 and accompanying text.

95 This question does not arise regarding the jurisdictional reach of the state courts, which is limited by the due process clause of the fourteenth amendment. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 24 comment e (1969). The fourteenth amendment, however, does not form a mandatory constraint on the personal jurisdiction of federal courts exccpt when those courts apply state jurisdictional law. *See supra* note 11. Frequently the *Erie* doctrine, *see, e.g.,* Arrowsmith v. UPI, 320 F.2d 219, 231 (2d Cir. 1963), or Federal Rule of Civil Procedure 4, will require that federal courts apply state jurisdictional law. State jurisdictional law, in turn, requires the application of fourteenth amendment due process. *See, e.g.,* Pulson v. American Rolling Mill Co., 170 F.2d 193, 194 (1st Cir. 1948); *see also* Clermont, *supra* note 8, at 428 n.86; Foster, *supra* note 10, at 38-39.

When state jurisdictional law does not apply, the due process clause of the fifth amendment limits the personal jurisdiction of federal courts. For example, when a federal statute allows for nationwide or worldwide service of process, *see, e.g.,* Securities Exchange Act of 1934, § 27, 15 U.S.C. § 78aa (1982), amenability is limited only by the fifth amendment. When service is made under these statutes federal courts will often require only that the defendant have contacts with the United States as a whole. It is not necessary to establish contacts with the forum state. *See* Stafford v. Briggs, 444 U.S. 527, 553-54 (1980) (Stewart, J., dissenting); Fitzsimmons v. Barton, 589 F.2d 330 (7th Cir. 1979); Mariash v. Morrill, 496 F.2d 1138, 1143 (2d Cir. 1974) (when nationwide service of process is authorized by Congress and defendants live within United States "the 'minimal contacts' principle does not . . . seem particularly relevant in evaluating the constitutionality of in personam jurisdiction based on nationwide, but *not* extraterritorial, service of process") (emphasis in original).

Similarly, in a suit based on federal question jurisdiction, the fourteenth amendment does not apply when rule 4(d)(3) controls service of process. In such cases, however, federal courts will often look to the restraints imposed by the fourteenth amendment to guide their jurisdictional decisions. Thus, the resulting standard is similar to that imposed on state courts. *See supra* note 11.

sonal jurisdiction only apply to the fourteenth amendment as dicta, thus weakening their impact on the jurisdiction of state courts.

Apparently concerned by the Court's failure to indicate whether it was invoking the fourteenth or the fifth amendment, Justice Powell explored two possible readings of the Court's opinion in his concurrence.[96] Justice Powell concluded that the Court decided *Compagnie des Bauxites* under the fourteenth amendment[97] and offered two interrelated arguments[98] in support of this conclusion: (1) that the *Erie* doctrine obligates federal courts to apply state jurisdictional law and a fourteenth amendment jurisdictional standard in diversity actions such as *Compagnie des Bauxites;*[99] and (2) that the district court ultimately invoked the state long-arm statute to find jurisdiction over the foreign insurers, thus requiring the application of a fourteenth amendment jurisdictional standard.[100]

Careful analysis suggests that, contrary to Justice Powell's interpretation, the Court may have applied a fifth amendment standard in *Compagnie des Bauxites.*[101] Justice Powell's arguments provide a convenient and helpful framework for exploring the due process issues in *Compagnie des Bauxites.*

1. *The* Erie *Doctrine*

In his concurrence, Justice Powell argued that, in the absence of a federal rule or statute establishing a federal basis for asserting personal jurisdiction, the Rules of Decision Act[102] and the *Erie* doctrine[103] require that state law determine the jurisdictional reach of the federal

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96 The introductory portion (Part I and Part IA) of Justice Powell's concurrence interprets the Court's opinion to have been decided under the fourteenth amendment. Part IB suggests that the Court invoked the fifth amendment. *See supra* note 79.

97 *See supra* notes 78-85 and accompanying text.

98 Justice Powell does not offer these arguments separately. For the purposes of exposition, however, they will be examined individually here.

99 456 U.S. at 711-12.

100 *Id.* at 711-12.

101 Prior to the Supreme Court's decision in *Compagnie des Bauxites,* two courts of appeals had upheld district court decisions finding jurisdiction under rule 37(b)(2)(A). Both these courts applied a fifth amendment standard. *See* Compagnie des Bauxites de Guinea v. Insurance Co. of N. Am., 651 F.2d 877, 886 (3d Cir. 1981) ("The sanction did not violate the fifth amendment due process rights of the [defendants]."), *aff'd sub nom.* Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982); English v. 21st Phoenix Corp., 590 F.2d 723, 728 (8th Cir.) ("The imposition of this sanction did not deny the [defendant] its fifth amendment rights to due process."), *cert. denied,* 444 U.S. 832 (1979).

102 28 U.S.C. § 1652 (1976).

103 A thorough discussion of the *Erie* doctrine is beyond the scope of this Note. For a more complete treatment, see 19 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE §§ 4501-15 (1982). For a discussion of the *Erie* doctrine as it relates to personal jurisdiction, see 4 C. WRIGHT & A. MILLER, *supra* note 6, § 1075; Comment, *Personal Jurisdiction over Foreign Corporations in Diversity Actions: A Tiltyard for the Knights of* Erie, 31 U. CHI. L. REV. 752 (1964).

courts in diversity cases.[104] As a result, Justice Powell argued, the constitutional restrictions on personal jurisdiction in diversity actions such as *Compagnie des Bauxites* should be those imposed on the states by the fourteenth amendment.

Contrary to Justice Powell's argument, state law should not govern the jurisdictional reach of federal courts sitting in diversity in those instances where there is a strong federal interest in following a federal standard. In *Arrowsmith v. United Press International,*[105] the "leading case"[106] calling for the application of state jurisdictional law in diversity actions, the Second Circuit applied state law because the court could find "no federal policy that should lead federal courts in diversity cases to override valid state laws."[107] However, when a defendant challenges the jurisdiction of a federal court and then refuses to obey a jurisdictional discovery order, he flouts the power of the court. In such a situation, a strong federal interest exists in maintaining respect for the federal court system by forcing the defendant to comply with the discovery order.[108] This strong federal interest constitutes "affirmative countervailing considerations"[109] sufficient to sway the *Erie* balance in favor of

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104 456 U.S. at 711.

105 320 F.2d 219 (2d Cir. 1963).

106 456 U.S. at 712 n.3.

107 320 F.2d at 226. In *Arrowsmith,* the Second Circuit held that a federal court should apply state law to determine jurisdictional reach in a diversity action when plaintiff served process in-state under Federal Rule of Civil Procedure 4(d)(3). The court noted that rule 4(d)(3) regulates only the "manner of service" and thus does not itself dictate that state law be applied to the question of amenability to suit. *Id.* The court, however, concluded that the state had a strong interest in applying its own jurisdictional provisions and that in the absence of a comparable federal interest, state law should prevail. *Id.*

In a strongly worded dissent, Judge Clark relied on Byrd v. Blue Ridge Elec. Coop., Inc., 356 U.S. 525 (1958), to argue that the federal interest in a uniform and independent federal court system dictated the application of federal law. 320 F.2d at 235. *See generally* 4 C. WRIGHT & A. MILLER, *supra* note 6, § 1075, at 303-16; Comment, *supra* note 103.

108 In National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976), the Supreme Court implicitly recognized the strong federal interest in preventing failure to obey discovery orders issued by federal courts. In that case, the Court held that a rule 37(b)(2)(C) dismissal was not an unduly harsh sanction when the plaintiffs had shown "flagrant bad faith" in failing to respond to written interrogatories as ordered by the district court. *Id.* at 643. The Court imposed the severe dismissal sanction both to penalize the plaintiff in the case at hand and to deter others who, without such a deterrent, might feel free "to flout other discovery orders of other district courts." *Id.*

109 The Supreme Court employed the phrase "affirmative countervailing considerations" in Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 537 (1958), to describe the federal interest in applying federal law to determine judge-jury roles in diversity actions. In *Byrd,* the Court admitted that applying federal law in place of state law might affect the outcome of the case. *Id.* The Court's earlier decision in Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945), seemed to require the use of state law in any instance when the application of federal law might affect the outcome of a suit. The *Byrd* Court argued, however, that under the facts, strong federal interests—"affirmative countervailing considerations"—outweighed any outcome determinative effect and dictated the application of federal law. 356 U.S. at 536-40.

applying a federal jurisdictional standard.[110]

Federal law applies in a number of areas analogous to the jurisdictional use of rule 37(b)(2)(A). Generally, the *Erie* doctrine allows the application of federal jurisdictional law when a court imposes jurisdiction over the defendant as a result of the defendant's actions during litigation.[111] For example, federal law determines whether the assertion of a counterclaim,[112] or participation in a hearing on a preliminary injunction,[113] constitutes a submission to personal jurisdiction in federal

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110 *See* Note, *The Use of Rule 37(b) Sanctions to Enforce Jurisdictional Discovery,* 50 FORDHAM L. REV. 814, 833-35 (1982).

In a similar vein, Professors Wright and Miller suggest that "countervailing considerations" supply an exception to the *Arrowsmith* rule to permit the application of federal jurisdictional law to multiparty litigation. 4 C. WRIGHT & A. MILLER, *supra* note 6, § 1075, at 311-12. The use of federal law in this area would facilitate joinder of parties and further the federal interest in "encouraging the complete determination of all issues in one suit." *Id.* at 311. *See also* Foster, *supra* note 10, at 26-28.

111 R. FIELD, B. KAPLAN & K. CLERMONT, *supra* note 8, at 772 ("[F]ederal law determines which acts committed in the course of litigating will confer jurisdiction over the person; thus, federal law will determine whether a defendant has made a general appearance."); 5 C. WRIGHT & A. MILLER, *supra* note 6, § 1344, at 524 ("The sufficiency of an appearance or notice of appearance is tested by federal principles and not by state practice.").

112 *See* Neifeld v. Steinberg, 438 F.2d 423, 425-26 (3d Cir. 1971).

Federal Rule of Civil Procedure 12(b) does not indieate whether the assertion of a counterclaim constitutes a waiver of objections to personal jurisdiction. Hasse v. American Photographic Corp., 299 F.2d 666, 668-69 (10th Cir. 1962); 5 C. WRIGHT & A. MILLER, *supra* note 6, § 1397, at 876-77. *But see* Keil Lock Co. v. Earle Hardware Mfg. Co., 16 F.R.D. 388 (S.D.N.Y. 1954) (because counterclaim is "defense" under rule 12(b), assertion of such claim does not waive objections to personal jurisdiction).

Neifeld v. Steinberg applies alternate reasoning to conclude that federal law should govern whether or not the assertion of a noncompulsory counterclaim constitutes a waiver of personal jurisdiction. The court argues first that rules 12(b) and 12(h) "manifest an intent to 'occupy the field' with respect to questions relating to the waiver of jurisdictional defenses by a defendant." *Id.* at 426. Thus, the Third Circuit suggests that the Supreme Court's decision in Hanna v. Plummer, 380 U.S. 460 (1965), which held that the federal rules should apply in all diversity actions when on point, dictates the application of federal law. The *Neifeld* court, however, asserted that it would not follow state law "even if the Federal Civil Rules did not implicitly cover the instant case." *Id.* Again, the court relied on *Hanna v. Plummer* to find that a federal rule should apply when, as in this instance, its application will not encourage forum-shopping or affect substantially "inequitable administration of the laws." *Id.* (quoting Hanna v. Plummer, 380 U.S. at 468).

For examples of other diversity cases apparently applying federal law to decide whether the assertion of a counterclaim constitutes a waiver of personal jurisdiction, see Hasse v. American Photographic Corp., 299 F.2d 666, 668-69 (10th Cir. 1962); Kinkade v. Jeffery-De Witt Insulator Corp., 242 F.2d 328, 332-33 (5th Cir. 1957); *In re* Arthur Treacher's Franchise Litig., 92 F.R.D. 398, 413-15 (E.D. Pa. 1981) (applying federal law to find that assertion of counterclaim and inaction of defendant between filing of answer and motion to dismiss for lack of personal jurisdiction did not constitute waiver of jurisdictional objections); *cf.* Merz v. Hemmerle, 90 F.R.D. 566 (E.D.N.Y. 1981) (applying federal law to find that assertion of cross-claim and subsequent grant of court's approval to file third party claim constituted waiver of objection to improper service of process).

113 *See* Wyrough & Loser, Inc. v. Pelmor Laboratories, Inc., 376 F.2d 543, 545-47 (3d Cir. 1967) (citing only federal law in finding that participation in four days of hearings on preliminary injunction constituted waiver of objections to personal jurisdiction). For other examples of federal courts following federal law in deciding whether in-court actions constitute submis-

diversity actions. Applying federal law to determine whether a court should invoke jurisdiction against a defendant as a result of his refusal to obey a jurisdictional discovery order appears consistent with the application of federal law in these analogous areas.

Furthermore, the Court's use of precedent in *Compagnie des Bauxites* suggests that such a waiver is a matter of federal law. Had the Court applied a state jurisdictional standard, it would have examined Pennsylvania law on the question of jurisdictional waiver. The Court, however, never discussed whether Pennsylvania law recognizes jurisdictional waiver nor whether failure to obey a jurisdictional discovery order would be analogous to such a waiver under the laws of that state. Thus, the *Erie* doctrine does not require the Court to invoke a fourteenth amendment due process standard in *Compagnie des Bauxites.*

2. *The State Long-Arm Statute*

Justice Powell suggested that the district court found jurisdiction over the foreign insurers by first using rule 37 to establish facts showing that the defendants had contacts with Pennsylvania and then relying on those facts to satisfy the requirements of the state long-arm statute.[114] Because Justice Powell concluded that the district court ultimately relied on state law to find personal jurisdiction over the foreign insurers, he asserted that fourteenth amendment due process governed the jurisdictional determination in *Compagnie des Bauxites.*[115] This argnment mis-

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sions to personal jurisdiction, see Wright v. Yackley, 459 F.2d 287, 291 & n.9 (9th Cir. 1972); Panhandle Eastern Pipe Line Co. v. Brecheisen, 323 F.2d 79, 83-84 (10th Cir. 1963) (state rule that filing an answer constitutes waiver of defective service will not be followed in federal diversity action).

Federal law may also determine whether the use of fraud or force to procure personal jurisdiction nullifies an otherwise proper jurisdictional finding in federal court. *See* R. FIELD, B. KAPLAN & K. CLERMONT, *supra* note 8, at 772 ("[Q]uestions . . . of the effect of fraud or force in the attempted acquisition of personal jurisdiction are generally held to be governed in all federal actions by federal law."). The following cases decide the fraud or force issue without express reference to the law of the forum state, or make reference to state law, but apparently do not consider that law controlling: Buchanan v. Wilson, 254 F.2d 849 (6th Cir. 1958) (citing no cases on issue); Tope v. Beal, 98 F.2d 548 (3d Cir. 1938) (same); Sunshine Kitchens, Inc. v. Alanthus Corp., 65 F.R.D. 4 (S.D. Fla. 1974) (citing one federal and no state cases on issue); Century Brick Corp. v. Bennet, 235 F. Supp. 455 (W.D. Pa. 1964) (citing one case from forum state, and numerous other federal and state cases on issue); Oliver v. Cruson, 153 F. Supp. 74 (D. Mont. 1957) (same). *But see* Schwarz v. Artcraft Silk Hosiery Mills Inc., 110 F.2d 465 (2d Cir. 1940) (apparently following law of forum state but also citing federal cases); Keane v. McGeady, 36 F.R.D. 682 (E.D. Pa. 1965) (citing only one case from forum state).

Finally, federal law controls questions of immunity from service of process in federal diversity actions. *See, e.g.,* Marlowe v. Baird, 301 F.2d 169, 170 (6th Cir. 1962) ("Immunity from process is certainly a procedural matter . . . . The holding in Erie Railroad Co. v. Tompkins . . . has no application."). *See generally* 2 MOORE'S, *supra* note 25, ¶ 4.20, at 4-168 ("*Erie R. Co. v. Tompkins* and its progeny do not make state law controlling.").

114 456 U.S. at 711 & n.2.

115 *Id.* at 713.

construes, however, the manner in which courts apply rule 37 to jurisdictional findings.

Justice Powell's assertion that the Pennsylvania long-arm statute was the ultimate source of the district court's jurisdictional determination suggests that a court would perform a two-step analysis before deciding to apply rule 37(b)(2)(A) to find personal jurisdiction. First, a court would establish a set of jurisdictional facts under rule 37 and then, in a separate step, decide whether those facts show sufficient contacts between the defendant and the forum to satisfy the state long-arm statute.

It seems unlikely, however, that a court using rule 37 to find personal jurisdiction actually applies the two step process proposed by Justice Powell.[116] Instead, as the emphasis on waiver in *Compagnie des Bauxites* suggests, a court simply decides that the defendant's refusal to participate in jurisdictional discovery is sufficiently heinous to permit a finding of jurisdictional waiver.[117] A court employs rule 37(b)(2)(A) only as a convenient mechanism to effectuate such a waiver.[118]

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116 It is unlikely, for example, that a judge would apply rule 37(b)(2)(A) to jurisdictional facts and then decide that the facts taken as established are insufficient to establish jurisdiction.

117 The district court took this approach in *Compagnie des Bauxites,* relying on alternate grounds to find personal jurisdiction. *See supra* note 59 and accompanying text. As one ground, the court held that the admitted and known facts were themselves sufficient to support a determination that the defendants were doing business in Pennsylvania. Proceedings on Plaintiff's Motion for Preliminary Injunction, April 18, 19, 1979, in 1 Joint Appendix for Writ of Certiorari 144a, 196a, *Compagnie des Bauxites,* 456 U.S. 694 (1982). Based on that determination, the court expressly invoked the state long-arm statute to find that personal jurisdiction existed: "The Court . . . finds that under the admitted facts and known facts, that the [defendants] are, in fact, doing business in Pennsylvania . . . . *And the Court, under those circumstances, invokes the Pennsylvania Long-Arm Statute* . . . ." *Id.* at 199a. (emphasis added).

In addition, the district court applied rule 37(b)(2)(A) to support its jurisdictional finding. *Id.* When invoking rule 37, however, the district court did not mention reliance on the state long-arm statute. The court's statements suggested that it viewed the jurisdictional use of rule 37 as a "one-step process" tantamount to a finding of waiver. The court did not suggest that it was first establishing jurisdictional facts under rule 37 and then employing those facts to find jurisdiction under the state long-arm statute:

> The Court has looked through the voluminous documents and papers in this case, and the Court finds, as a fact, that the material promised this Court by the [defendants] . . . has not been forthcoming, and the Court, at this point, will rule and impose a sanction, and does find that the Excess Insurers are, in fact, subject to the in personam jurisdiction of this court.

Id.

118 Admittedly, the Court in *Compagnie des Bauxites* never went so far as to state categorically that the foreign insurers' refusal to cooperate in jurisdictional discovery constituted a jurisdictional waiver. The closest the Court came to categorically asserting that a jurisdictional finding under rule 37(b)(2)(A) is, in effect, a finding of jurisdictional waiver, occurred when the Court discussed rule 12(h)(1): "[T]he failure to enter a timely objection to personal jurisdiction constitutes, under Rule 12(h)(1), a waiver of the objection. A sanction under

3. *Application of the Fifth Amendment*

In sum, the *Erie* doctrine suggests that federal law should control the determination of jurisdiction under rule 37(b)(2)(A). Incidental reliance on state long-arm statutes does not argue against the application of a federal standard.

When a federal court applies federal jurisdictional law to obtain personal jurisdiction, the fifth amendment provides the due process standard.[119] If the Court in *Compagnie des Bauxites* applied federal law to decide jurisdiction, its opinion, when read most narrowly, holds only that the jurisdictional application of rule 37(b)(2)(A), being analogous to waiver, is consistent with fifth amendment due process. Such a narrow holding does not directly affect the constitutional standard applied to state court jurisdictional findings made under the fourteenth amendment.[120] Nor does it affect the constitutional standard applied in federal courts in those instances in which federal statutory or decisional law requires the application of fourteenth amendment jurisdictional due process in federal proceedings.

B. Fourteenth Amendment Jurisdictional Due Process

1. *Applicability of Holding to Fourteenth Amendment Due Process*

Although one can read *Compagnie des Bauxites* narrowly to apply only to fifth amendment due process,[121] the Court's opinion may affect fourteenth amendment due process as well. The fifth amendment jurisdictional standard, although ill-defined, is similar to that of the four-

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Rule 37(b)(2)(A) consisting of a finding of personal jurisdiction has precisely the same effect." 456 U.S. at 705.

In other portions of the opinion, however, the Court appeared to envisage a two-step process relying on the state long-arm statute: "The sanction took as established the facts—contacts with Pennsylvania—that CBG was seeking to establish through discovery. That a particular legal consequence—personal jurisdiction of the court over the defendants—follows from this, does not in any way affect the appropriateness of the sanction." *Id.* at 709.

Were a categorical waiver recognized in *Compagnie des Bauxites,* the use of rule 37 to establish jurisdictional facts would have been superfluous. The defendant's refusal to cooperate in jurisdictional discovery would have been sufficient alone to waive jurisdiction. The court need not have invoked rule 37 to establish jurisdictional facts once jurisdiction had already been found through waiver. *See* Note, *Sanctions to Enforce Jurisdictional Discovery: Constitutional and Prudential Limitations,* 68 VA. L. REV. 921, 930 (1982). Nevertheless, the emphasis on jurisdictional waiver in *Compagnie des Bauxites, see supra* notes 70-74 and accompanying text, indicates that the Court viewed rule 37 as simply a means of effectuating jurisdictional waiver. The Court based its analysis on the concept of waiver, not on the use of rule 37 to establish jurisdictional facts.

119 *See supra* note 11 and accompanying text.

120 Justice Powell apparently concluded that the Court relied on the fourteenth amendment, but conceded that a holding based solely on rule 37 would not affect "state jurisdiction." 456 U.S. at 714-15. A rationale relying exclusively on rule 37 would presumably be tested against a fifth amendment due process standard.

121 *See supra* notes 94-120 and accompanying text.

teenth amendment.[122] In light of this similarity, the Court's failure to indicate that it based its opinion on the fifth amendment, and its ambiguous discussion of the "due process clause," logically suggest that the Court intended its opinion to apply equally to the fourteenth amendment. Moreover, the Court relied almost exclusively on fourteenth amendment cases to support its jurisdictional argument.[123] Although such reliance is not unusual in cases decided under the fifth amendment,[124] it does strongly suggest that the Court would reach a similar result if it expressly founded its holding on a fourteenth amendment standard. Given these indications that the Court intended to implicate fourteenth amendment due process, it is fruitful to compare the Court's holding with fourteenth amendment jurisdictional precedent.

Prior to the Court's pronouncements in *Compagnie des Bauxites,* jurisdictional due process required both that a court have power over the defendant and that the exercise of jurisdiction be reasonable.[125] In *Compagnie des Bauxites,* the Court clearly invoked the reasonableness component of this composite test, which is based primarily on fairness to the defendant,[126] by demanding that any finding of jurisdiction not offend the defendant's "individual liberty interests."[127] Whether the Court demanded satisfaction of the power requirement is less clear.

Although the Court in *Compagnie des Bauxites* could have held that the district court had power over the defendant because of the defend-

122 *See supra* notes 26-27 and accompanying text.

123 One exception, perhaps the only one, may be Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354 (2d Cir. 1964), in which the court construed a Spanish government agency's agreement to arbitrate in the United States as consent to personal jurisdiction. The plaintiff in the case served process in accord with the United States Arbitration Act, 9 U.S.C. § 4 (1982), which dictates that service conform to the Federal Rules of Civil Procedure.

124 Courts deciding jurisdictional cases under the fifth amendment will often look to the fourteenth amendment standard, and cases construing that standard, for guidance. *See supra* note 29 and accompanying text.

125 *See supra* notes 12-24 and accompanying text.

126 *See supra* notes 21-22 and accompanying text.

127 The Court measured the imposition of jurisdiction in *Compagnie des Bauxites* against the standards established by Hammond Packing Co. v. Arkansas, 212 U.S. 322 (1909), and the "as are just" requirement of rule 37. 456 U.S. at 705-08. The Court employed these standards to ensure fairness to the defendant.

ant's appearance in court[128] or because of implied consent,[129] it adopted neither of these approaches.[130] Instead, the Court emphatically disavowed any sovereignty protections embodied in jurisdictional due process, the rationale on which the power requirement is traditionally thought to rest.[131] The Court rejected these concerns, claiming that personal jurisdiction "represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty."[132] This rejection of sovereignty protections, and the Court's failure to confront the power requirement, suggest that the Court may have discarded that requirement. Examination of the Court's discussion of fourteenth amendment due process in footnote 10, however, may indicate otherwise.

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128 The defendant's very appearance in court to challenge personal jurisdiction was perhaps sufficient to grant that jurisdiction. Support for such an interpretation can be found in York v. Texas, 137 U.S. 15, 20-21 (1890).

In *York,* a Texas court served the defendant in St. Louis in a suit brought by the State of Texas for nonpayment of rent. Defendant's counsel attempted to make a special appearance solely to challenge personal jurisdiction. Texas, however, did not recognize special appearances and construed all appearances by a defendant to be submissions to the court's jurisdiction. The court entered a judgment against the defendant, basing personal jurisdiction on the defendant's appearance. The Supreme Court found the Texas jurisdictional statute constitutional, claiming that fourteenth amendment due process required only that the defendant have an opportunity to contest jurisdiction prior to deprivation of liberty or property: "If at that time of immediate attack [upon the liberty of property of the defendant] protection is afforded, the substantial gnarantee of the [fourteenth] amendment is preserved, and there is no just eause of complaint." 137 U.S. at 20. In *York,* the defendant could have provided himself such protection, reasoned the Court, had he stayed away from Texas completely and collaterally attacked any attempt to enforce a Texas default judgment. Thus, the defendant was left with a choice of coming to Texas, submitting to personal jurisdiction by his appearance and defending on the merits, or staying in Missouri and attacking jurisdiction collaterally.

The Supreme Court decided *York* well before *International Shoe Co. v. Washington,* 326 U.S. 310 (1944), which established the reasonableness component of jurisdictional due process. *See supra* note 14. Nonetheless, *York* does suggest that any appearance by a defendant satisfies the power requirement of personal jurisdiction. Thus, under *York,* a federal court might possess jurisdictional power over any defendant who appears, makes a direct attack on personal jurisdiction, and later refuses to cooperate in jurisdictional discovery.

129 *See* Comment, *supra* note 42, at 116-20 ("[A] contractual agreement, appointment of an agent . . . , [a]n agreement to arbitrate, the initiation of a prior related action . . . , a request for some form of affirmative relief, or a stipulation . . . will also waive the defense . . . .") (footnotes omitted).

130 The Court centered its argument on the concept of jurisdictional waiver. *See supra* notes 70-74, 117-18 and accompanying text. Furthermore, the Court noted that the defendant could have stayed away from the original action and attacked any resulting default judgment in a collateral proceeding. *See supra* notes 75-77 and accompanying text. This emphasis suggests that the Court may have relied on a theory of implied consent or appearance to find personal jurisdiction. Because the Court emphasized the protection of "individual liberty interests" and eschewed the protection of state sovereiguty, however, it may not have intended that the implied consent or jurisdiction through appearance arguments apply to the power requirement.

131 *See supra* note 18 and accompanying text.

132 456 U.S. at 702.

2. *Footnote 10: The Court's Reappraisal of Fourteenth Amendment Jurisdictional Due Process*

The Court in *Compagnie des Bauxites* did not expressly state in the text of its opinion whether it intended its holding to apply to both fourteenth amendment and fifth amendment due process. In footnote 10,[133] however, the Court unambiguously indicated, although admittedly by way of dicta, that it intended its rejection of sovereignty concerns to extend to the fourteenth amendment. Referring specifically to the fourteenth amendment, the Court asserted that "[t]he restriction on state sovereign power . . . must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause."[134]

The Court suggested two reasons for its disavowal of sovereignty concerns in fourteenth amendment due process. First, the Court found no historical basis to support considerations of sovereignty in determining jurisdictional reach under the due process clause.[135] The due process clause, the Court noted, "is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns."[136] Second, the Court acknowledged the inconsistency inherent in allowing a defendant to waive personal jurisdiction, a right that supposedly belongs to, and protects, the sovereignty of the states.[137] As the Court indicated, "[i]ndividual actions cannot change the powers of sovereiguty."[138]

In his concurrence, Justice Powell criticized the Court's opinion "as finding that 'minimum contacts' no longer are a constitutional requirement for the exercise by a state court of personal jurisdiction over an unconsenting defendant."[139] Justice Powell added that the Court had rewritten the doctrine of personal jurisdiction to allow jurisdiction "[w]henever the Court's notions of fairness are not offended."[140] The Court, however, claimed that "[c]ontrary to the suggestion of JUSTICE POWELL," its holding did "not alter the requirement that there be 'minimum contacts' between the nonresident defendant and the forum

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133 *Id.* at 702 n.10.

134 *Id.*

135 *Id.* Several commentators writing prior to *Compagnie des Bauxites* noted the lack of historical basis for injecting federalism concerns into the determination of personal jurisdiction. *See* Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation,* 75 NW. U. L. REV. 1112, 1113-14 (1981); *see also* Abraham, *supra* note 26, at 532-33; Clermont, *supra* note 8, at 446 n.161.

136 456 U.S. at 702 n.10.

137 *Id.* Commentators also have noted the inconsistency between an individual's waiver of jurisdiction and the protection purportedly afforded the states by the due process clause. *See, e.g.,* Hill, *Choice of Law and Jurisdiction,* 81 COLUM. L. REV. 960, 978 (1981).

138 456 U.S. at 702 n.10.

139 *Id.* at 713 (footnote omitted).

140 *Id.* at 713-14.

State."[141]

The power requirement of the traditional composite test for personal jurisdiction[142] looks only to the relationship of the defendant to the forum. Unless sufficient defendant-forum contacts exist, regardless of the interests of the plaintiff and the forum state, a court cannot exercise jurisdiction. If sufficient forum-defendant contacts are present, a court, under the second component of the composite test, inquires into the reasonableness of a jurisdictional finding.

Notions of state sovereignty underlie the power requirement of fourteenth amendment due process,[143] which originally derived from *Pennoyer v. Neff*.[144] The Court's rejection of sovereignty concerns in footnote 10 might suggest a total abandonment of the power requirement and its absolute demand of forum-defendant contacts. Such a reading of the Court's position would leave only a reasonableness standard with which to judge a court's exercise of jurisdiction under the fourteenth amendment. The Court's assertion, however, that its opinion "does not alter the requirement that there be 'minimum contacts' between the nonresident defendant and the forum State"[145] appears incompatible with such an interpretation. Perhaps the Court is suggesting not that it is abandoning the power requirement's absolute demand of forum-defendant contacts, but that it is altering that requirement's theoretical basis.[146] A dual power-reasonableness test may still be required, but the power component of that test, rather than being based on notions of state sovereignty, would now be based, like the reasonableness requirement, on "individual liberty interests."

Thus, under *Compagnie des Bauxites,* as in the past,[147] a court assessing personal jurisdiction under the fourteenth amendment would first check for sufficient forum-defendant contacts. If such contacts were lacking, the court would dismiss the action. Such dismissal would be necessary not because a finding of jurisdiction would offend state sovereignty, but because it would offend the defendant's "individual liberty interests." The court would go on to examine the broader spectrum of

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141 456 U.S. at 702 n.10.

142 *See supra* notes 12-24 and accompanying text.

143 *See supra* notes 17-20 and accompanying text. *See generally* Hazard, *A General Theory of State-Court Jurisdiction,* 1965 SUP. CT. REV. 241, 262-81.

144 95 U.S. 714 (1878).

145 456 U.S. at 702 n.10.

146 If, contrary to this suggestion, footnote 10, in fact, indicates a willingness on the part of the Court to abandon the power requirement of the fourteenth amendment, it could have a substantial impact on the law of personal jurisdiction. The Court's discussion of fourteenth amendment due process, however, may be significant even if one reads footnote 10 only to suggest a disavowal of sovereignty concerns that underlie the power requirement. Any rejection of the concerns that form the foundation of the power requirement could eventually lead to a rejection of the requirement itself and the fashioning of a new test for personal jurisdiction. *See infra* notes 148-58 and accompanying text.

147 *See supra* notes 23-24 and accompanying text.

criteria analyzed under the reasonableness requirement only if forum-defendant contacts were present.

3. *An Opportunity to Redefine the Requirements of Personal Jurisdiction Under the Fourteenth Amendment*

Read literally, the fourteenth amendment due process clause mandates only that a state, and thus a state court in its exercise of jurisdiction, not "deprive any person of life, liberty, or property without due process of law."[148] The Court has developed two bases on which to rest its restrictions of personal jurisdiction under the due process clause: protection of state sovereignty and protection of the rights of the defendant, or, using the terminology of *Compagnie des Bauxites,* the defendant's "individual liberty interests."[149]

Concerns of state sovereignty as portrayed in *Pennoyer v. Neff*[150] gave rise to the power requirement with its absolute demand for forum-defendant contacts.[151] In *Compagnie des Bauxites,* however, the Court asserted that concerns of state sovereignty do not underlie due process restrictions on personal jurisdiction.[152] Thus, the Court rejected the theoretical underpinnings of the power requirement and left only one justification for the regulation of personal jurisdiction under the due process clause—individual liberty interests.[153]

Eliminating sovereignty concerns as a basis of the due process restrictions on personal jurisdiction allows the Court to alter the fourteenth amendment jurisdictional test. Any test is doctrinally acceptable, provided it protects the individual liberty interests of the defendant and is otherwise reasonable. The Court may eliminate the composite power-reasonableness test and replace it with any test that adequately ensures fairness to the defendant.

The power requirement's absolute demand that the defendant have contact with the forum before a court may exercise jurisdiction may help to ensure fairness and protect the defendant's "individual liberty interests." Concerns of fairness and "individual liberty interests," however, do not necessarily require forum-defendant contacts in every exercise of personal jurisdiction. Although the power requirement does embody an element of fairness to the defendant by guaranteeing forum contacts, a court may also achieve fairness under a more flexible standard. Fairness does not require unyielding adherence to forum-defendant contacts. For example, in *Compagnie des Bauxites,* the Court found

148 U.S. CONST. amend. XIV, § 1.
149 *See supra* notes 12-14 and accompanying text.
150 95 U.S. 714 (1878).
151 *See supra* notes 15-20 and accompanying text.
152 *See supra* notes 130-32 and accompanying text.
153 *See supra* notes 143-46 and accompanying text.

the imposition of jurisdiction fair, even though it had no proof of forum-defendant contacts.

The Court may ensure fairness to defendants through a wide variety of tests that weigh numerous factors. A personal jurisdiction test could measure the interests of the plaintiff in litigating in a particular forum against the defendant's interest in litigating elsewhere.[154] A more inclusive test would examine other factors, such as the interests of the forum.[155] The reasonableness component of the present composite power-reasonableness test exemplifies such a multifactor analysis.[156]

Several commentators have favored more flexible tests[157]—tests that measure factors in addition to the defendant's contacts with the forum—over the present composite test that requires examining forum-defendant contacts as a first level of inquiry before examining the reasonableness of the jurisdictional finding. It now appears that the stumbling block of sovereignty has been removed from the law of personal jurisdiction. Thus, the Court[158] is free to reevaluate the doctrine of personal jurisdiction and adopt a test that most equitably and fairly determines the reach of state and federal courts.

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154 The test would take into account the relationship of both parties to the forum. If, for example, the plaintiff had no connection to the forum, the defendant's interest in being heard in another forum probably would be stronger. Several commentators endorse similar approaches. *See, e.g.,* Martin, *Constitutional Limitations on Choice of Law,* 61 CORNELL L. REV. 185, 192-93 (1976); Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses (Part Two),* 14 CREIGHTON L. REV. 735, 843 (1981).

Any forum interests under a jurisdictional test that considers only plaintiff and defendant interests could be accounted for under the full faith and credit clause by limiting freedom in the selection of choice of law. *See, e.g.,* Martin *supra;* Silberman, Shaffer v. Heitner: *The End of an Era,* 53 N.Y.U. L. REV. 33, 82 (1978).

155 Numerous commentators have recommended that personal jurisdiction tests consider all interests—plaintiff's, defendant's, and forum's—in determining whether jurisdiction is proper. *See, e.g.,* Carrington & Martin, *Substantive Interests and the Jurisdiction of State Courts,* 66 MICH. L. REV. 227, 230-31 (1967); Clermont, *supra* note 8, at 451-55; Jay, *"Minimum Contacts" as a Unified Theory of Personal Jurisdiction: A Reappraisal,* 59 N.C.L. REV. 429, 459-72 (1981); McDougal, *Judicial Jurisdiction: From a Contacts to an Interest Analysis,* 35 VAND. L. REV. 1, 17-45 (1982); Redish, *supra* note 135, at 1137-42; 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, 890-98 (1978); Note, World-Wide Volkswagen Corp. v. Woodson: *A Limit to the Expansion of Long-Arm Jurisdiction,* 1981 CALIF. L. REV. 611, 628-31 (1981); Comment, *Federalism, Due Process, and Minimum Contacts:* World-Wide Volkswagen Corp. v. Woodson, 80 COLUM. L. REV. 1341, 1357-61 (1980); *Developments, supra* note 5 at 923-25.

156 *See, e.g.,* McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957). *But see* Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction,* 1980 SUP. CT. REV. 77 (1980).

157 *See supra* notes 154-55 and accompanying text.

158 The Supreme Court will shortly hear other cases dealing with personal jurisdiction. *See* Keeton v. Hustler Magazine, 682 F.2d 33 (1st Cir. 1982), *cert. granted,* 103 S. Ct. 813 (1983); Calder v. Jones, 138 Cal. App. 3d 128, 187 Cal. Rptr. 825 (1982), *prob. juris. noted,* 103 S. Ct. 1766 (1983); Hall v. Helicopters De Columbia, 638 S.W.2d 870 (Tex. 1982), *cert. granted,* 103 S. Ct. 1270 (1983).

CONCLUSION

Compagnie des Bauxites, read narrowly, applies only to fifth amendment due process. Nevertheless, the Court's failure to expressly restrict its opinion to the fifth amendment suggests application to the fourteenth amendment as well. The opinion, however, is inconsistent with fourteenth amendment precedent. In particular, footnote 10, which ironically was written to rebut a seeming mistake in a concurrence, rejects the notion that state sovereignty forms one of the bases of fourteenth amendment jurisdictional due process. This rejection of state sovereignty calls into question over 100 years of precedent and provides the Court an opportunity to redefine the law of personal jurisdiction.

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