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THE FEDERAL COURT ACROSS THE STREET: CONSTITUTIONAL LIMITS ON FEDERAL COURT ASSERTIONS OF PERSONAL JURISDICTION

*Pamela J. Stephens**

I. INTRODUCTION

Twenty years ago, in a clear break with accepted theory, it was suggested that there were certain constitutional limitations on a federal court's authority to exercise personal jurisdiction.¹ Such a departure from the traditional view might be expected to prompt an extensive examination of that issue by commentators. However, while assertions of personal jurisdiction by state courts have been the subject of intense scrutiny and ongoing constitutional refinements,² this has not been the case regarding assertions of personal jurisdiction by federal courts. Generally, federal district courts sitting in diversity cases must look to personal jurisdiction limitations inherent in the state long arm statute where the federal court

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1. According to Professor Gerald Abraham:

If a defendant is forced to litigate in the courts of a distant state with which he has had no contact, it is considered so unfair to him as to offend the "traditional notions of fair play and substantial justice" embodied in the due process clause of the fourteenth amendment. Might it not also be unfair to force him to litigate in the federal court across the street? Might this unfairness not offend the "traditional notions of fair play and substantial justice" embodied in the due process clause of the fifth amendment?

Abraham, *Constitutional Limitations Upon the Territorial Reach of Federal Process*, 8 VILL. L. REV. 520, 533-34 (1963).

2. See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 236 (1980); *Kulko v. Super. Ct.*, 436 U.S. 84 (1978); *Shaffer v. Heitner*, 433 U.S. 186 (1977); Jay, "Minimum Contacts" as a *Unified Theory of Personal Jurisdiction: A Reappraisal*, 59 N.C.L. REV. 429 (1981); Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U. L. REV. 33 (1978).

is located. This requirement is viewed as a statutory and perhaps constitutional mandate.³ Otherwise, federal courts which exercise federal question jurisdiction, or entertain issues where Congress has provided for nationwide service of process, suffer from no due process limits on their extraterritorial assertions of personal jurisdiction.⁴ Given the historical development of state court personal jurisdiction, with its increased emphasis on the fairness and reasonableness of asserting jurisdiction over a nonresident defendant, it seems logically inconsistent that there has been no corresponding development with regard to the federal courts to protect the interest of a defendant who resides far from the federal forum or who lacks a substantial relationship to that forum. This article will explore the history of personal jurisdiction doctrine in this country. The article then will address the concerns which indicate that the fifth amendment to the United States Constitution compels considerations in federal courts similar to those considerations the fourteenth amendment imposes upon state courts. This article will also suggest that judicial failure to impose such limitations on federal personal jurisdiction is based upon rejected notions of "power" and "territoriality." Because state court personal jurisdiction determinations have been the principal arena for development of personal jurisdiction doctrine in this country, the article will first address those determinations. Since the development of state court personal jurisdiction doctrine has been comprehensively dealt with elsewhere,⁵ however, it will be dealt with only briefly herein.

3. Compare Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts*, 66 CORNELL L. REV. 411, 457 n.1 (1981) with *Arrowsmith v. United Press Int'l*, 320 F.2d 219 (2d Cir. 1963) and Comment, *Personal Jurisdiction over Foreign Corporations in Diversity Actions: A Tiltyard for the Knights of Erie*, 31 U. CHI. L. REV. 752 (1964) (exploring application of a congressionally authorized federal standard in diversity actions).

4. D. LOISELL & G. HAZARD, *PLEADING AND PROCEDURE* 171, 171-72 (4th ed. 1979) (quoting RESTATEMENT (SECOND) OF JUDGEMENTS § 7 comment f (Tent. Draft No. 5, 1978)) ("At least within the territorial limits of the United States, the territorial jurisdiction of the federal courts is restricted only because of the constitutional restrictions on state court jurisdiction have been incorporated by reference in the legislation governing the federal courts."). *But cf.* Abraham, *supra* note 1.

5. For a comprehensive discussion of the development of personal jurisdiction doctrine in this country, see Silberman, *supra* note 2, at 39.

II. HISTORICAL DEVELOPMENT OF PERSONAL JURISDICTION IN STATE COURTS

A. *The Classic View*

The development of personal jurisdiction theory in this country is generally dated from the Supreme Court's decision in *Pennoyer v. Neff*.⁶ Justice Field's majority opinion identified three categories of judicial action: 1) in rem, a proceeding which purports to resolve the rights of all persons to a thing;⁷ 2) quasi in rem, an action which concerns the interests of particular persons in a thing;⁸ and 3) in personam, an action in which a court may impose personal liability or obligation upon the defendant.⁹ The theoretical basis for asserting personal jurisdiction in each of these categories was, according to Justice Field, the "power" or "territoriality" theory of jurisdiction. This theory, in turn, rested upon two other accepted principles of public law.¹⁰

The first of these principles was that "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory."¹¹ The second principle was that "no tribunal established by [a state] can extend process beyond [its] territory so as to subject either persons or property to its decisions."¹² As a result of adopting this theoretical framework for state court personal jurisdiction, a very rigid territorial rule developed. If a person or his property could be found within a state's boundaries, assertion of jurisdiction of a court of that state was proper; otherwise, assertion of jurisdiction was improper.¹³

The development of quasi in rem jurisdiction remained consistent with *Pennoyer's* explanation of the theoretical underpinnings of state jurisdiction.¹⁴ Attachment of a defendant's property in the forum state was often the only means by which a plaintiff forum

6. 95 U.S. 714 (1877).

7. *Id.* at 724-26.

8. *Id.*

9. *Id.*

10. *Id.* at 722.

11. *Id.*

12. *Id.*

13. *Id.* at 722-23 (quoting J. STORY, CONFLICTS OF LAWS § 539 (1834)) ("Any exertion of authority of this sort beyond this limit . . . is a mere nullity, and incapable of binding such persons or property in any other tribunals.").

14. See, e.g., *Pennington v. Fourth Nat'l Bank*, 243 U.S. 269 (1917); *Harris v. Balk*, 198 U.S. 215 (1905); *Wilcox v. Richmond Fredericksburg & P.R.R.*, 270 F. Supp. 454 (S.D.N.Y. 1967).

resident could obtain satisfaction against an absent nonresident defendant, short of following the defendant to another state.¹⁵ The application of the power theory in quasi in rem cases reached what is generally considered to be its high-water mark in the 1905 case of *Harris v. Balk*.¹⁶

The consequence of the holding in *Harris* that a "debt follows the debtor" greatly expanded the number of forums in which jurisdiction could be obtained over a nonresident defendant by attaching his property in the state.¹⁷ *Harris* was the rule with regard to quasi in rem jurisdiction until very recently.¹⁸

In personam jurisdiction, however, from its inception, deviated from pure sovereignty notions. Exceptions to the strict rule announced in *Pennoyer* were recognized within the opinion itself.¹⁹ Later cases have amended the *Pennoyer* rule, particularly with regard to nonresident corporate defendants.²⁰

The major change in the Supreme Court's analysis of in personam assertions of personal jurisdiction over nonresident defendants came in *International Shoe Co. v. Washington*.²¹ While viewed by some as merely supplementing the power theory, the case is more correctly viewed as a redefinition of the theoretical basis of state court personal jurisdiction.²² The Supreme Court de-

15. Beale, *The Exercise of Jurisdiction in Rem to Compel Payment of a Debt*, 27 HARV. L. REV. 107 (1913); Carpenter, *Jurisdiction Over Debts for the Purpose of Administration, Garnishment and Taxation*, 31 HARV. L. REV. 905 (1918).

16. 198 U.S. 215 (1905). The Supreme Court upheld a Maryland court's assertion of quasi in rem jurisdiction over an absent nonresident defendant, Balk, by attaching a debt owed to Balk by Harris, who was passing through Maryland. *Id.* at 217.

17. For an example of the extreme to which the *Harris* doctrine was taken, see *Seider v. Roth*, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966) (The New York Court of Appeals upheld personal jurisdiction based on the attachment of a contractual obligation running from an insurance company doing business in New York to the defendant, a nonresident insured.). *But see* *Rush v. Savchuk*, 444 U.S. 320 (1980) (holding the *Seider* doctrine to represent an unconstitutional assertion of personal jurisdiction).

18. *See* *Shaffer v. Heitner*, 433 U.S. 186 (1977).

19. The *Pennoyer* Court recognized that cases "affecting the personal status of the plaintiff," i.e., domestic relations cases and "cases in which [substituted] service may be considered to have been assented to in advance," fell outside the rule. *Pennoyer*, 95 U.S. at 733.

20. *See* Kurland, *The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of State Courts — From Pennoyer To Denckla: A Review*, 25 U. CHI. L. REV. 569 (1958). For an extension of the *Pennoyer* doctrine in a nonresident motorist context, see *Hess v. Pawlowski*, 274 U.S. 352 (1927).

21. 326 U.S. 310 (1945).

22. In *International Shoe*, Washington State sought to collect from International Shoe Co., a Delaware corporation with its principal place of business in Missouri, unpaid unemployment compensation taxes. The corporation's only business in Washington consisted of

clined to adopt an "implied consent" or "doing business" theory²³ to support the assertion of jurisdiction over the International Shoe Co. Instead, the Supreme Court, looking to the fourteenth amendment, found that due process requires a defendant to have "minimum contacts" with the state. Further, the Supreme Court found that these "minimum contacts" must be of the nature and quality which make the forum's assertions of jurisdiction just and reasonable in light of "traditional notions of fair play and substantial justice."²⁴

Although couched in terms of "contacts,"²⁵ *International Shoe's* emphasis was clearly upon the reasonableness and fairness of a state's assertion of jurisdiction over a nonresident defendant.²⁶ The Supreme Court, however, was not prepared to abandon sovereignty as an element of personal jurisdiction.

In *Hanson v. Denckla*,²⁷ the Supreme Court again indicated that sovereignty is an element of personal jurisdiction.²⁸ The Court, in finding that Florida courts lacked jurisdiction over a Delaware trustee, characterized the "minimum contacts" standards as a "consequence of the territorial limitations on the power of the re-

employing eleven to thirteen salesmen who solicited orders which were accepted and filled from St. Louis. *Id.* at 311-13.

23. *Id.* at 317-18.

24. *Id.* at 316.

25. Contacts is a term with obvious territorial connotations. *See supra* note 5 and accompanying text.

26. *See International Shoe Co.*, 326 U.S. at 317 (citing *Hutchinson v. Chase & Gilbert, Inc.*, 425 F.2d 139, 141 (2d Cir. 1930)) ("An 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business is relevant in this connection."). *See also* *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957) (Nonresident company met minimum contacts standard based upon the residency of the insured; the fact that the policy was mailed into the state; and that premiums were mailed from the state asserting jurisdiction); *Gray v. American Radiator Standard Sanitary Corp.*, 22 Ill. 2d 432, _____, 176 N.E.2d 761, 765 (1961) ("trend in defining due process of law is away from the emphasis on territorial limitations and toward emphasis on providing adequate notice and opportunity to be heard . . . toward the court in which both parties can most conveniently settle their dispute").

27. 357 U.S. 235 (1958).

28. *Hanson* involved a dispute between certain residuary legatees under a will executed in Florida by a Florida resident and beneficiaries of a Delaware trust, who were to receive trust funds by virtue of an exercise of a power of appointment by deceased. The Florida legatees were claiming that the power had been ineffectively exercised and, therefore, the remainder of the Delaware trust should pass to them under the will's residuary clause. Personal service could not be made on the Delaware trustee in Florida, so substituted service, by mail and publication, was used. Defendants challenged the Florida court's power to assert personal jurisdiction over the trustee who conducted no business in that state. *Id.* at 238-42.

spective States.”²⁹ *Hanson* held that “it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.”³⁰ Thus, it was clear that while fairness and reasonableness were increasingly relevant considerations in a personal jurisdiction determination, issues of territoriality and sovereignty continued to exert a strong influence.³¹

B. *The Modern View*

Although the development of quasi in rem and in personam jurisdictional doctrines took very different paths after *Pennoyer*,³² the Supreme Court drew them together again in *Shaffer v. Heitner*.³³ *Shaffer* questioned the constitutionality of Delaware’s sequestration statute.³⁴ The statute allowed Delaware courts to assert jurisdiction by sequestering a defendant’s property located in Delaware.³⁵ Plaintiff Heitner filed a shareholder’s derivative suit against twenty-eight present or former officers and directors of the Delaware-based Greyhound Corporation.³⁶

Delaware has a unique statutory provision which places the situs of stock ownership of all Delaware corporations in Delaware.³⁷ Since twenty-one of the named defendants owned stock or stock options in the Greyhound Corporation, Heitner moved, pursuant to Delaware procedure, for an order of sequestration.³⁸ The Dela-

29. *Id.* at 251.

30. *Id.* at 253 (citing *International Shoe Co.*, 326 U.S. at 319).

31. See *Hanson*, 357 U.S. at 251. (“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 ‘minimum contacts’ with that State that are a prerequisite to its exercise of power over him.”).

32. See Silberman, *supra* note 2.

33. 433 U.S. 186 (1977).

34. *Id.* at 189. See also DEL. CODE ANN. tit. 10, § 366 (1975).

35. DEL. CODE ANN. tit. 10, § 366 (1975).

36. *Shaffer*, 433 U.S. at 189-90. Heitner claimed a violation of fiduciary duties arising out of actions that were the basis for an antitrust judgment and a criminal contempt fine against the two companies. The events which led to the antitrust judgment occurred in Oregon, the criminal contempt fine was rendered in Illinois. *Id.* at 190 nn.2 & 3. See also *United States v. Greyhound Corp.*, 370 F. Supp. 881 (N.D. Ill.), *aff’d*, 508 F.2d 529 (7th Cir. 1974).

37. DEL. CODE ANN. tit. 8, § 169 (Repl. Vol. 1983) provides:

For all purposes of title, action, attachment, garnishment and jurisdiction of all Courts held in this State, but not for the purpose of taxation, the situs of the ownership of the capital stock of all corporations existing under the laws of this State, whether organized under this chapter or otherwise, shall be regarded as in this State.

38. *Shaffer*, 433 U.S. at 191-92.

ware courts upheld the assertion of jurisdiction,³⁹ noting that the presence of defendants' property in the state of Delaware allowed the court to assert quasi in rem jurisdiction without regard to the minimum contacts test.⁴⁰

Contrary to the Delaware courts' expectations, the Supreme Court reversed, finding the minimum contacts standard applicable to quasi in rem actions. The Court held that when property, which is completely unrelated to the plaintiff's cause of action, serves as a basis for state court jurisdiction, the standard set forth in *International Shoe* is not satisfied.⁴¹ Having established that the minimum contacts standard of *International Shoe* was to govern all state court assertions of personal jurisdiction,⁴² the Court subsequently decided three cases which further delineated this standard and its conceptual foundation.⁴³

In the most important of these cases, *World-Wide Volkswagen Corp. v. Woodson*,⁴⁴ the Supreme Court appeared to reject the contentions of those courts and commentators who read *Shaffer* as a clear move away from sovereignty as a rationale for personal jurisdiction. In *World-Wide Volkswagen*, the Court made it clear that the "minimum contacts" concept performs

two related, but distinguishable functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach beyond the limits imposed on them by their status as coequal sovereigns in a federal system.⁴⁵

39. *Id.* at 194. See also *Greyhound Corp. v. Heitner*, 361 A.2d 225 (Del. 1976).

40. *Shaffer*, 433 U.S. at 195 (citing *Greyhound Corp.*, 361 A.2d at 229).

41. *Shaffer*, 433 U.S. at 213.

42. *Id.* at 212 ("We . . . conclude that all assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny.")

43. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Rush v. Savchuk*, 444 U.S. 320 (1980); *Kulko v. Superior Court*, 436 U.S. 84 (1978).

44. 444 U.S. 286 (1980). In *Kulko v. Superior Court*, 436 U.S. 84 (1978), the Supreme Court had already moved away from any such liberal reading of *Shaffer*. *Kulko* was a child custody and support case in which California asserted personal jurisdiction over a New York resident. The California Supreme Court held that due process requirements were satisfied by virtue of Mr. Kulko's purposefully availing himself of the benefits and protections of California by voluntarily sending his daughter into the state to live with her mother. *Kulko*, 19 Cal. 3d 514, 564 P.2d 353, 138 Cal. Rptr. 586 (1977), *rev'd*, 436 U.S. 84 (1978). The United States Supreme Court disagreed, holding that Kulko's activities and any "effects" which those activities may have caused in the state were insufficient "contacts" in the jurisdictional sense. *Kulko*, 436 U.S. at 92.

45. *World-Wide Volkswagen Corp.*, 444 U.S. at 291-92.

The Court further indicated that the sovereignty function is to operate as a threshold concern before issues of fairness will be reached. While acknowledging the importance of protecting defendants from burdensome litigation,⁴⁶ the Court stated that this function will not override the federalism concern.

Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum state is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.⁴⁷

The Court concluded that the Oklahoma court's assertion of jurisdiction was unconstitutional in light of the defendants' failure to "purposefully avail [themselves] of the privilege of conducting activities within the forum State."⁴⁸ Only passing mention was made of the reasonableness of Oklahoma's assertion of jurisdiction.⁴⁹

C. *Current State of the Law*

The Supreme Court's recent decisions suggest, despite the hopes of some commentators and courts,⁵⁰ that the Court has not moved, and has no present intention of moving, to a purely "fairness" oriented analysis.⁵¹ In addition to fairness, and perhaps as a threshold consideration, the Court requires defendant's actual connection or affiliation with the forum state—a purposeful availment of the benefits and protections of that forum state.⁵²

In light of this apparent consistency in the Court's recent opinions, its decision in *Insurance Corp. of Ireland v. Compagnie Des Bauxites De Guinee*⁵³ is difficult to understand. In this case, the

46. *Id.* at 292.

47. *Id.* at 294 (citing *Hanson v. Denckla*, 357 U.S. 235, 251, 254 (1958)).

48. *Id.* at 297-99 (quoting *Hanson*, 357 U.S. at 253).

49. *World-Wide Volkswagen Corp.*, 444 U.S. at 292. See also *Rush v. Savchuk*, 444 U.S. 320 (1980) (quasi in rem jurisdiction could not be based solely upon the fact that the non-resident defendant's insurance policy was issued by a company doing business in that state). See *supra* note 17 and accompanying text for a discussion of the *Seider* doctrine as rejected in *Rush*.

50. See *infra* notes 56-78 and accompanying text.

51. See *Clermont, supra* note 3.

52. See *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

53. 456 U.S. 694 (1982).

district court had, as a rule 37(b)(2)(A) sanction for defendants' failure to comply with a discovery order, entered an order which assumed the forum's personal jurisdiction over defendants.⁵⁴ The Supreme Court, apparently relying on the theory that lack of personal jurisdiction is a waivable defense, found that the defendants' actions constituted a waiver, and upheld the district court's holding.⁵⁵

The Court's opinion contains some very interesting language which appears to modify the standard recently applied in *Rush v. Sarchuck* and *World-Wide Volkswagen*:

The restriction on state sovereign power described in *World-Wide Volkswagen Corp.*, however, must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns. *Furthermore, if the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement: Individual actions cannot change the power of sovereignty, although the individual can subject himself to powers from which he may otherwise be protected.*⁵⁶

This language seems contrary to other recent Supreme Court opinions, particularly *World-Wide Volkswagen* which clearly establishes the federalism concept as an independent restriction on the state courts' power.⁵⁷

Justice Powell's concurrence recognizes the majority's departure from accepted personal jurisdiction doctrine which includes the notion that "[m]inimum' contacts represent[s] a constitutional prerequisite to the exercise of *in personam* jurisdiction over an unconsenting defendant."⁵⁸ An assertion of personal jurisdiction, absent such a showing of purposeful contacts would, in Justice Powell's view, "[a]ppear to transgress previously established constitutional limitations."⁵⁹ Justice Powell further states that:

54. *Id.* at 699. Defendants had failed to supply information relating to their contacts with the forum.

55. *Id.* at 705-07.

56. *Id.* at 703 n.10 (emphasis added).

57. See 444 U.S. at 291-92; see also *infra* notes 66-70 and accompanying text.

58. 456 U.S. at 712.

59. *Id.* at 713.

By finding that the establishment of minimum contacts is not a prerequisite to the exercise of jurisdiction . . . the Court may be understood as finding that "minimum contacts" no longer is a constitutional requirement for the exercise by a state court of personal jurisdiction over an unconsenting defendant. Whenever the Court's notions of fairness are not offended, jurisdiction apparently may be upheld.⁶⁰

Justice Powell also reads the majority opinion as "[f]or the first time . . . defin[ing] personal jurisdiction solely by reference to abstract notions of fair play."⁶¹ As tempting as it is to read *Insurance Corp. of Ireland* as Justice Powell does, the case is most likely limited to its specific facts.⁶²

Thus, in state assertions of in personam and quasi in rem jurisdiction, we are left with a due process test which requires both purposeful contact with the forum state by a nonresident defendant and fair and reasonable assertions of personal jurisdiction by the forum state in light of competing interests. One or the other, by itself, is insufficient. The Court has never held that purposeful availment, in the absence of fairness and reasonableness, is sufficient to justify personal jurisdiction over the nonresident.

III. PERSONAL JURISDICTION IN FEDERAL COURTS

The issue of personal jurisdiction in the federal courts has been subjected to much less analysis by courts and commentators than the state court concerns.⁶³ Views on assertion of personal jurisdiction in federal court more often reflect dicta from Supreme Court opinions. For example, in *Mississippi Publishing Corp. v. Murphy*,⁶⁴ the Court noted that "[C]ongress could provide for service of process anywhere in the United States."⁶⁵ However, the Su-

60. *Id.* at 713-14.

61. *Id.* at 714.

62. See *id.* at 703 n.10 for the statement of the Court that

[c]ontrary to the suggestion of Justice Powell . . . our holding today does not alter the requirement that there be "minimum contacts" between the nonresident defendant and the forum state. Rather, our holding deals with how the facts needed to show those "minimum contacts" can be established when a defendant fails to comply with court ordered discovery.

63. See *supra* notes 1-4 and accompanying text.

64. 326 U.S. 438 (1946).

65. *Id.* at 442. See also *Robertson v. Railroad Labor Bd.*, 268 U.S. 619, 622 (1925); *United States v. Union Pac. R.R.*, 98 U.S. 569, 604 (1878); *Toland v. Sprague*, 37 U.S. (12 Pet.) 300, 328 (1838).

preme Court has neither squarely addressed this issue, nor has it ruled out the possibility of fifth amendment limitations on assertions of personal jurisdiction over particular defendants, even though Congress may provide for nationwide service of process.

Constitutional limitations upon assertions of personal jurisdiction by a federal court may arise in two contexts. First, there are those diversity or federal question cases in which rule 4 of the Federal Rules of Civil Procedure applies. Rule 4 provides that personal jurisdiction over nonresident defendants is to be asserted in accordance with the state law of the jurisdiction in which the federal district court is located.⁶⁶ The second context involves cases in which Congress has provided or may provide for nationwide, or other more limited, extraterritorial service of process.⁶⁷ Both of these contexts will be explored below.

A. *Rule 4 Limitations on the Exercise of Personal Jurisdiction*

Rule 4(e) of the Federal Rules of Civil Procedure provides that in cases involving a party who is "not an inhabitant of or found within the state in which the district court is held" and involving a cause of action for which no specific federal service is provided, the district court may serve process in accordance with any existing federal statute, or in lieu of such statute, in accordance with the applicable state statute or state rule in which the district court sits.⁶⁸ Federal circuit courts which have considered the application of rule 4(e) are in unanimous agreement that, absent an applicable federal rule or statute, rule 4(e) requires them to look to the state long arm statute.⁶⁹

There are two principal consequences of this general view. First, accessibility to federal courts may vary from state to state, de-

66. FED. R. CIV. P. 4(e).

67. *See, e.g.*, 15 U.S.C. § 5 (1982) (originally enacted as Act of July 2, 1890, ch. 647, § 5, 26 Stat. 210); 15 U.S.C. § 22 (1982) (originally enacted as Act of Oct. 15, 1914, ch. 323, § 12, 38 Stat. 736); 28 U.S.C. § 2321 (1982). The term "extraterritorial" as used in this article refers to service of process outside the *state* in which a federal district court sits.

68. FED. R. CIV. P. 4(e).

69. *See* *Arrowsmith v. United Press Int'l*, 320 F.2d 219 (2d Cir. 1963); *Stanza v. McCormick Shipping Corp.*, 268 F.2d 544 (5th Cir. 1959); *L.D. Reeder Contractors of Ariz. v. Higgins Indus. Inc.*, 265 F.2d 768 (9th Cir. 1959); *Electrical Equip. Co. v. Daniel Hamm Drayage Co.*, 217 F.2d 656 (8th Cir. 1954); *Partin v. Michaels Art Bronze Co.*, 202 F.2d 541 (3rd Cir. 1953); *Canvas Fabricators, Inc. v. William E. Hooper & Sons, Co.*, 199 F.2d 485 (7th Cir. 1952); *Steinway v. Majestic Amusement Co.*, 179 F.2d 681 (10th Cir. 1949); *Pulson v. American Rolling Mill Co.*, 170 F.2d 193 (1st Cir. 1948).

pending on differences in long arm statutes which represent only the *state* legislature's view of how best to protect *state* interests.⁷⁰ Second, many courts applying state long arm statutes have assumed they must apply the statutes subject to fourteenth amendment due process limitations.⁷¹ This interpretation of rule 4(e), mandating application of state long arm statutes, effectively precludes adoption of a uniform federal standard.

Some courts apparently feel compelled to apply state long arm statutes only as a result of what they perceive to be a congressional mandate.⁷² Those courts view rule 4(e) as imposing such a mandate, except in those few cases where Congress has expressly provided for a different rule.⁷³ Judicial pronouncements may not overrule Congress' evident intent that district courts exercise personal jurisdiction in accordance with state law in most cases involving nonresident defendants.⁷⁴ Nonetheless, courts following such a rule do not necessarily find it to be compelled by the Constitution. For example, the Second Circuit has "fully concede[d] that the constitutional doctrine announced in *Erie Railroad v. Tompkins* . . . , would not prevent Congress or its rule making delegate from authorizing a district court to assume jurisdiction over a foreign corporation in an ordinary diversity case, although the state court would not [assume jurisdiction]."⁷⁵

Other courts, however, with support from commentators, indicate that the *Erie* doctrine⁷⁶ requires deference to state law at least with regard to state created claims.⁷⁷ As one commentator concluded, "[t]oday *Erie* requires a federal court, on a state-created

70. "[C]ongress' failure to enact a general federal question competence statute has the result of bringing up to bear on federal claims, to which federalism concerns have no relevance, individual state legislatures' decisions in effect to protect out of state defendants from suit on state law claims." *De James v. Magnificence Carriers, Inc.*, 654 F.2d 280, 293 (3rd Cir.) (Gibbons, J., dissenting), *cert. denied*, 454 U.S. 1085 (1981).

71. *See, e.g.*, *Arrowsmith v. United Press Int'l*, 320 F.2d 219, 222 (2d Cir. 1963).

72. *Id.* at 226.

73. *Id.*

74. *Id.* ("[W]e find no federal policy that should lead federal courts in diversity cases to override valid state laws as to the subjection of foreign corporations to suit, in the absence of direction by federal statute or rule.")

75. *Id.*

76. *See Erie R.R. v. Tompkins*, 304 U.S. 64 (1938); *see also* *Hanna v. Plumer*, 380 U.S. 460 (1965); *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525 (1958); *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945).

77. *See, e.g.*, *National Equip. Rental Co. v. Szukhent*, 375 U.S. 311 (1964) (Black, J., dissenting); Comment, *Federal Jurisdiction Over Foreign Corporations and the Erie Doctrine*, 64 COLUM. L. REV. 685 (1964).

claim and in the absence of a federal statutory directive or rule, to apply the state's 'jurisdictional' law"⁷⁸

In view of cases which further explained the *Erie* doctrine and its rationale, this author is persuaded that no constitutional basis exists for the rule 4(e) provision.⁷⁹ Therefore, Congress is free to modify rule 4(e) to allow imposition of a uniform federal rule regarding personal jurisdiction. Even if *Erie* does, on some constitutional basis, require the application of rule 4(e) in a diversity case,⁸⁰ that requirement would have no relevance to federally created claims and Congress could therefore change rule 4 with respect to such claims.

B. *Extraterritorial or Nationwide Service of Process*

Congress has expressly provided, in the context of narrow statutory schemes, for nationwide service of process.⁸¹ Congress has also provided in The Federal Rules of Civil Procedure 4(f) for a more limited form of extraterritorial service, i.e. service outside a state in which the acting federal district court sits.⁸² Rule 4(f) allows for service of process on parties brought into a case pursuant to rule 14 impleader, or on parties necessary for just adjudication pursuant to rule 19, "at all places outside the state but within the United States that are not more than 100 miles from the place in which the action is commenced."⁸³ This so-called "bulge" provision was added to the Federal Rules in 1963,⁸⁴ along with language which sought to "assure the effectiveness of service outside the territorial limits of the State in all cases in which any of the rules authorize service beyond those boundaries."⁸⁵

In addition to these rather narrow examples of congressional

78. Clermont, *supra* note 3, at 457.

79. *See, e.g.,* Byrd v. Blue Ridge Elec. Coop., 356 U.S. 525 (1958) (the Court weighed the federal court's interest in applying its own federal procedural rule).

80. The *Erie* doctrine generally applies only in diversity cases or other cases which involve state law claims. "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the [s]tate." *Erie*, 304 U.S. at 78.

81. *See supra* note 67; *see also* 40 U.S.C. § 270(b) (1982); 42 U.S.C. § 405(g) (1982); 2 J. MOORE, W. TAGGART & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ 4.42 (2d ed. 1982).

82. FED. R. CIV. P. 4(f).

83. *Id.*

84. Rule 4(f), as originally promulgated, provided that "[a]ll process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held and, when a statute of the United States so provides, beyond the territorial limits of that state." FED. R. CIV. P. 4(f), 28 U.S.C.A. 4(f) (West 1960).

85. FED. R. CIV. P. 4(f).

willingness to extend the reach of federal process beyond state lines, there have been various proposals advocating that Congress make use of what proponents presume is the power to provide for nationwide service of process.⁸⁶ The American Law Institute, a chief proponent, has offered a plan for a sweeping change in the assertion of personal jurisdiction in federal courts.⁸⁷ According to the ALI proposal, nationwide service of process would be the norm in federal question cases with the limitation that suit may be brought only where a "substantial part" of the events occurred, where property in the suit is situated, or in the state where all defendants reside.⁸⁸ In diversity cases, the ALI retains the rule 4 scheme, thereby leaving the issue of personal jurisdiction to state law.⁸⁹ The ALI, however, offers little explanation or authority for the position it takes.⁹⁰

Courts and scholars have, for the most part, persisted in elevating Supreme Court dicta to an axiom: There are no due process limitations on congressional power to provide for nationwide service of process.⁹¹ However, this view is not without its critics.⁹² As the preceding portion of this article illustrates, the Supreme Court has moved away from a strict territorial/sovereignty approach to state court jurisdiction toward a standard which also requires that a state court's exercise of jurisdiction be reasonable.⁹³ In accordance with this shift of emphasis from sovereignty to reasonableness, some district courts have suggested that a reasonableness component be added to the federal courts' personal jurisdiction

86. See, e.g., Barrett, *Venue and Service Process in the Federal Courts—Suggestions for Reform*, 7 VAND. L. REV. 608 (1954); Green, *Federal Jurisdiction In Personam of Corporations and Due Process*, 14 VAND. L. REV. 967 (1961); AMERICAN LAW INSTITUTE, *STUDY ON THE DIVISION OF JURISDICTIONS BETWEEN STATE AND FEDERAL COURTS* (1969) [hereinafter cited as ALI STUDY].

87. ALI STUDY, *supra* note 86, §§ 2371, 2373-74.

88. *Id.* §§ 2371, 2373.

89. *Id.* § 2374.

90. See *id.* § 2374, at 437-41, Supporting Memorandum B (states the ALI's assumptions that due process does not restrict assertions of personal jurisdiction citing to the Supreme Court dicta in *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438 (1946)).

91. See *Haile v. Henderson Nat'l Bank*, 657 F.2d 816 (6th Cir. 1981), *cert. denied*, 455 U.S. 949 (1982); *Stern v. Gobeloff*, 332 F. Supp. 909, 912-14 (D. Md. 1971); *First Flight Co. v. National Car Loading Corp.*, 209 F. Supp. 730, 736 (E.D. Tenn. 1962); Barrett, *supra* note 86; Green, *supra* note 86.

92. See, e.g., *Haile v. Henderson Nat'l Bank*, 657 F.2d 816, 826 (6th Cir. 1981) (Keith, J., dissenting), *cert. denied*, 455 U.S. 949 (1982); *Oxford First Corp. v. PNC Liquidating Corp.*, 372 F. Supp. 191 (E.D. Pa. 1974).

93. See *supra* notes 26-88 and accompanying text.

considerations.⁹⁴ The source of this component is the due process clause of the fifth amendment. Drawing a parallel to the fourteenth amendment restrictions on assertions of personal jurisdiction, those courts would find such limitations applicable to the federal courts based upon the fifth amendment.⁹⁵

The most commonly cited formulation of that limitation is found in *Oxford First Corp. v. PNC Liquidating Corp.*,⁹⁶ a securities fraud case brought in the U.S. District Court for the Eastern District of Pennsylvania by a Philadelphia corporation against nonresident shareholders. Service of process was made in California pursuant to a federal securities act permitting nationwide service of process.⁹⁷ Defendants moved to dismiss the case for want of in personam jurisdiction, arguing that they lacked the minimum contacts necessary to meet due process requirements.⁹⁸

The district court addressed the jurisdictional issue directly, characterizing it as "the vexatious questions of whether there exist due process limitations upon the congressional grant of [nationwide] extraterritorial service under the securities acts and other acts."⁹⁹ The court first noted that "[m]ost courts and commentators assume or find some federal due process limits on federal service of process" but those minimal limits are often seen as served by proper notice requirements or venue provisions.¹⁰⁰ The court also discussed prior cases which rejected an application of the *International Shoe* standard to federal assertions of personal jurisdiction.¹⁰¹ The *Oxford First Corp.* court pointed out that those cases advance the outdated view that "the concept of personal jurisdiction is based primarily on the principle of territorial sovereignty and not on the notion of procedural fairness or substantial justice found in the due process doctrine."¹⁰²

94. See, e.g., *Lone Star Package Car Co. v. Baltimore & Ohio R.R.*, 212 F.2d 147 (5th Cir. 1954); *Oxford First Corp. v. PNC Liquidating Corp.*, 372 F. Supp. 191 (E.D. Pa. 1974); *Leasco Data Processing Equip. Corp. v. Maxwell*, 319 F. Supp. 1256 (S.D.N.Y. 1970), *vacated on other grounds*, 468 F.2d 1326 (2d Cir. 1972).

95. See, e.g., *Oxford First Corp. v. PNC Liquidating Corp.*, 372 F. Supp. 191 (E.D. Pa. 1974).

96. 372 F. Supp. 191 (E.D. Pa. 1974).

97. *Id.*

98. *Id.* at 196.

99. *Id.* at 198.

100. *Id.* at 198-99.

101. *Id.* at 199.

102. *Id.*

The *Oxford First Corp.* court rejected the view that there are no constitutional limitations upon extraterritorial service of process under federal statutes, stating, "the existence of the fifth amendment would indicate otherwise."¹⁰³ The court found there to be constitutional restrictions, but held that they did not necessarily parallel the due process restrictions on state courts as defined by *International Shoe*.¹⁰⁴ The court defined its fairness test in terms of defendant's contacts with the particular federal forum, the inconvenience to defendant of defending in that jurisdiction, judicial economy, situs of discovery proceedings and the nature of the activities giving rise to the claim.¹⁰⁵ Applying this standard to the facts of the case, the *Oxford First Corp.* court upheld the exercise of personal jurisdiction.¹⁰⁶

Other courts, after *Oxford First Corp.*, have held that the fifth amendment does impose due process limitations upon federal court assertions of personal jurisdiction.¹⁰⁷ However, many more courts have either ignored the issue or chosen not to apply the fifth amendment.¹⁰⁸ The Supreme Court has declined the opportunity to resolve the conflict.¹⁰⁹

The majority of scholars view the fifth amendment as imposing no limitation upon federal assertions of personal jurisdiction,¹¹⁰ except for a requirement of reasonable and fair notice as defined in

103. *Id.* at 201.

104. *Id.* at 203.

105. *Id.* at 203-04.

106. *Id.* at 204.

107. *See, e.g.*, *Black v. Acme Mkts., Inc.*, 564 F.2d 681, 686 n.8 (5th Cir. 1977); *Fraley v. Chesapeake & Ohio R.R.*, 397 F.2d 1 (3d Cir. 1968); *Lone Star Package Car Co. v. Baltimore & Ohio R.R.*, 212 F.2d 147, 155 (5th Cir. 1954).

108. *See, e.g.*, *Haile v. Henderson Nat'l Bank*, 657 F.2d 816 (6th Cir. 1981), *cert. denied*, 455 U.S. 949 (1982); *First Flight Co. v. National Car Loading Corp.*, 209 F. Supp. 730, 736 (E.D. Tenn. 1962).

109. *Haile v. Henderson Nat'l Bank*, 657 F.2d 816 (6th Cir. 1981), *cert. denied*, 455 U.S. 949 (1982) (issue clearly raised by Judge Keith's dissent); *see also United States v. Scopphony Corp.*, 333 U.S. 795, 804 n.13 (1948), in which the Supreme Court stated:

[T]he [g]overnment, however, suggests that, in view of our recent decision in *International Shoe Co. v. Washington* . . . which was concerned with the jurisdiction of a state over a foreign corporation for purposes of suit . . . and in view of aspects of similarity between that problem and the one now presented, we extend to this case and to § 12 [of the Clayton Act] the criteria there formulated and applied. There is no necessity for doing so. The facts of the two cases are considerably different and, as we have said, we are not concerned here with finding the utmost reach of Congress' power.

110. *See supra* note 86 and accompanying text.

*Mullane v. Central Hanover Bank & Trust Co.*¹¹¹ Critics, such as Professor Abraham, argue that the fifth amendment due process clause does impose some, though indefinite, constitutional limits on federal service of process.¹¹² More recently, Professor Currie has also proposed recognition of such constitutional limitations on personal jurisdiction.¹¹³ Others, taking a different approach, propose that existing constitutional objections be dealt with in the context of limitations on venue provisions,¹¹⁴ or in Professor Clermont's view, by creating a constitutional construct, separate but derived from both personal jurisdiction and venue, called "forum reasonableness."¹¹⁵

The remainder of this article will consider why, in light of the Supreme Court's evolving view of the basis for limiting personal jurisdiction, a fifth amendment due process limitation is compelled. The article will discuss the various forms which such a limitation might take, and will propose a form arguably consistent with both fourteenth amendment analysis and the special concerns of a unified federal court system.

IV. TOWARD A NEW FEDERAL STANDARD

Conventional wisdom regarding personal jurisdiction in federal courts rests upon the notions of sovereignty and territoriality derived from international law, and best articulated by Justice Field's opinion in *Pennoyer v. Neff*.¹¹⁶ From the notion that the sovereign has jurisdiction over all persons and things within its borders, the conclusion was reached that the federal government has no limits in asserting personal jurisdiction within its own borders.¹¹⁷ This view was in accord with the European view of juris-

111. 339 U.S. 306, 314 (1950). To comply with due process, *Mullane* requires "notice reasonably calculated . . . to apprise interested parties of the pendency of the action . . ." In addition, the Court defined the right protected by the fifth amendment's due process clause as the "[o]pportunity to be heard." *Id.* at 314.

112. See Abraham, *supra* note 1, at 531-36.

113. See Currie, *The Federal Courts and the American Law Institute, Part II*, 36 U. CHI. L. REV. 268, 299-311 (1969).

114. See Barrett, *supra* note 86, at 627-35 ("There is no constitutional impediment to Congress treating the entire country as a single jurisdiction and permitting service of process anywhere within it."). *Id.* at 630; see also Seidelson, *Jurisdiction of Federal Courts Hearing Federal Cases: An Examination of the Propriety of the Limitations Imposed by Venue Restrictions*, 37 GEO. WASH. L. REV. 82 (1968).

115. Clermont, *supra* note 3, at 451-55.

116. 95 U.S. 714 (1877).

117. *Id.* at 722-23.

diction articulated by Justice Story¹¹⁸ and relied upon by Justice Field in *Pennoyer*.¹¹⁹

This sovereign/territorial view of personal jurisdiction's basis was far from universal even at the time of *Pennoyer*.¹²⁰ However, if sovereign/territorial view remained the sole touchstone of personal jurisdiction, the accepted view of federal power might be justifiable. Since *International Shoe*, it is clear that the Supreme Court, in the context of state court assertions of personal jurisdiction, has abandoned the pure power test and replaced it with a standard which considers both sovereignty and reasonableness.¹²¹ According to the Court, this two part standard stems from the due process clause of the fourteenth amendment.¹²² No court or commentator has advanced an adequate or even credible explanation of why fourteenth amendment due process and fifth amendment due process concerns should differ so drastically that the latter would impose no constraints on a federal court's authority to exercise personal jurisdiction. This is especially puzzling in light of the extent to which these two clauses parallel each other in other respects.¹²³

No one who has carefully considered the subject would suggest that a federal standard for personal jurisdiction be identical to a state standard. There are several differences in state and federal court systems. The most obvious difference is the unitary nature of the federal court system.¹²⁴ Moreover, to the extent that sovereignty and territoriality continue to be concerns in determining personal jurisdiction, the federal government's sovereign power extends to its borders. However, similar considerations of reasonableness and fairness seem relevant to federal courts as well as state courts. The burden of compelling a California resident, with no connection to New York, to litigate in a New York federal court clearly parallels the burden upon the same nonresident to litigate in a New York state court. Why should the California resident

118. J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS 19-21 (1834). For a more complete discussion of Story's position, see Hazard, *A General Theory of State Court Jurisdiction*, 1965 SUP. CT. REV. 241, 258-62.

119. 95 U.S. at 722.

120. See Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Non Conveniens*, 65 YALE L.J. 289, 293-303 (1956).

121. See *supra* notes 26-90 and accompanying text.

122. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-94 (1980).

123. See, e.g., *Fuentes v. Shevin*, 407 U.S. 67, 80-82 (1972) (discussing procedural due process requirements of fifth and fourteenth amendments).

124. See generally Foster, *Long-Arm Jurisdiction in Federal Courts*, 1969 WIS. L. REV. 9 (1969); Green, *supra* note 86.

have less constitutional protection because the plaintiff has chosen a federal forum? Before suggesting a new standard, one should consider previously offered approaches.

A. *Why doesn't Mullane suffice?*

Several courts and scholars, while acknowledging a fifth amendment due process requirement imposed upon personal jurisdiction assertions in federal court, find such requirement met by notice which complies with the Supreme Court's decision in *Mullane v. Central Hanover Bank & Trust Co.*¹²⁵ While *Mullane* certainly does require federal courts to ensure that interested parties be given reasonable notice, that case does not address the issue of a court's power to assert jurisdiction. Rather, it addresses the *procedural requirements* of asserting such jurisdiction once power exists.¹²⁶ Therefore, those courts and scholars who see *Mullane* as representing the only constitutional concern simply fail to recognize the nature of the inquiry necessary to determine personal jurisdiction. That failure could be remedied simply by considering the role of the reasonable notice requirement in state court proceedings. A state court cannot cure an assertion of personal jurisdiction which fails to meet the *International Shoe* "minimum contacts" standard by giving "good" notice.¹²⁷ Because notice and minimum contacts must be met in state court, a standard for federal personal jurisdiction should also incorporate both requirements.

B. *Venue as a Constitutional Safeguard*

There are those who have suggested that, rather than revising the accepted view of personal jurisdiction, courts should address due process concerns by elevating venue considerations to a constitutional level.¹²⁸ Professor Edward L. Barrett, Jr., proposed a scheme of nationwide service of process predicated upon a new broadened federal venue statute which would deal with all reason-

125. 339 U.S. 306 (1950).

126. *Id.* at 312-15. In *Mullane*, the Court seems to assume that jurisdictional power over the nonresidents does exist, although the Court is less than clear in setting forth whether the basis of that jurisdiction is in rem, or in personam.

127. Nor is the reverse true. "Good" personal jurisdiction in the constitutional sense will fail for lack of notice. *See, e.g., Greene v. Lindsey*, 456 U.S. 444 (1982).

128. *See Barrett, supra* note 86. *But see Clermont, supra* note 3, at 449.

ableness and convenience concerns.¹²⁹ His scheme would include, among other things, provisions for liberal transfer of cases. The previously discussed ALI proposal¹³⁰ also retained a scheme which, with regard to federal question cases, would rely upon venue to determine the appropriate location for a trial to the exclusion of any personal jurisdiction standard.¹³¹ Therefore, venue in federal court would encompass issues usually designated jurisdictional. Although the ALI does not explain its choice of the venue label rather than the jurisdiction label to protect constitutional rights, it may have based its reasoning on concerns over finality of judgments. A default judgment based upon faulty jurisdiction may be collaterally attacked, while a default judgment based upon faulty venue generally may not be challenged.¹³²

At first glance, the idea is attractive because venue does concern issues of convenience and fairness. However, there are several problems with this approach. First, unlike personal jurisdiction, venue has not been traditionally viewed as a constitutional requirement.¹³³ Second, although venue does deal with issues of convenience and fairness, the venue provisions address such issues only generally. That is, venue provisions consider fairness for a class of litigants or convenience for a category of lawsuits, rather than considering the fairness or convenience to a particular litigant in a particular lawsuit.¹³⁴ It has been argued that retention of the transfer of venue statutes will provide the needed flexibility to ensure the most reasonable and fair venue for particular parties in a particular case.¹³⁵ However, it is clear that venue statutes do not, at least in their present form,¹³⁶ protect the constitutional rights of particular parties. For example, consider a case with multiple defendants, several of whom reside in State A, one of whom resides in State B, while the claim arose in State C. The case is originally brought in State D, plaintiff's residence, and defendants seek to transfer it to State A, which appears to be, and which all defendants agree, is the most convenient and fair site in which to liti-

129. Barrett, *supra* note 86, at 628-30.

130. See ALI STUDY, *supra* note 86.

131. *Id.* § 1314.

132. See Currie, *supra* note 113.

133. See C. WRIGHT, LAW OF FEDERAL COURTS § 42 (4th ed. 1983).

134. "The distinction must be clearly understood between jurisdiction, which is the power to adjudicate, and venue, which relates to the place where judicial authority may be exercised, and which is intended for the convenience of the litigants." *Id.* § 42, at 239.

135. See Barrett, *supra* note 86, at 630.

136. See 28 U.S.C. §§ 1404, 1406 (1982).

gate. The Supreme Court's interpretation of the "where it might have been brought" language of the transfer statutes¹³⁷ precludes transfer except to a jurisdiction where *all* defendants reside or where the claim arose. This is so even if the nonresident defendant of State A is willing to waive venue and personal jurisdiction objections to that forum.¹³⁸

Perhaps the most serious objection to superimposing on venue statutes the new role of protecting due process rights, is that it seems a tortured and unnecessary exercise in legal obfuscation. Since the Judiciary Act of 1887, Congress has distinguished between venue and personal jurisdiction.¹³⁹ Developments since 1887 have further separated the concepts of territorial jurisdiction and venue.¹⁴⁰ Thus, there is a longstanding tradition of treating these concepts as separate and distinct. The notion of the limits of a court's constitutional authority or power over a person has been, at least since *Pennoyer*, expressed in terms of personal jurisdiction rather than venue. Venue principally deals with the distribution of the judicial business of the courts.¹⁴¹ It is unnecessary to use venue to perform the "double-duty" of imposing constitutional limitations on the court's authority over individuals and legislative preferences as to the proper place of suit. Personal jurisdiction concepts already exist to limit the court's constitutionally permissible authority to deal with the rights of persons, without confusion or distortion.

C. *Is "Forum Reasonableness" the Answer?*

Professor Clermont places jurisdiction and venue on opposite ends of a continuum.¹⁴² He places jurisdictional concerns of sovereignty and territoriality at one extreme designated "pure jurisdiction."¹⁴³ He places venue concerns of efficient distribution of judicial business at the other extreme labeled "mere venue."¹⁴⁴ As these concepts approach each other on the continuum, they share

137. *Hoffman v. Blaski*, 363 U.S. 335, 342-43 (1960).

138. *Id.* at 343-44.

139. Judiciary Act of March 3, 1887, ch. 373, § 1, 24 Stat. 552 (codified at 28 U.S.C. § 1391(a)-(b) (1982)).

140. *See, e.g.*, 28 U.S.C. § 1397 (1982) (enacting various special venue statutes); FED. R. Civ. P. 4(f) (authorizing statewide service of process).

141. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-94 (1980).

142. *See Clermont, supra* note 3, at 437.

143. *Id.*

144. *Id.*

overlapping constitutional concerns with the fairness and reasonableness of the place of trial. These shared concerns Clermont would designate "forum reasonableness."¹⁴⁵

Arguably, this analytical structure allows one to view constitutional issues of fairness and reasonableness apart from existing assumptions of proper jurisdiction or venue in a given case.¹⁴⁶ This structure also allows one to identify "pure jurisdiction" in terms of territorial affiliating circumstances, to fix venue according to congressional instruction, and to decide whether the chosen forum meets constitutional standards of fairness and reasonableness.¹⁴⁷

To the extent that Professor Clermont recognizes that both state and federal assertions of personal jurisdiction must be measured against constitutional due process standards, his analysis is consistent with that of this article.¹⁴⁸ To the extent his analysis facilitates the examination of due process limitations upon federal courts' exercise of personal jurisdiction,¹⁴⁹ it is a helpful and welcome one. However, Professor Clermont's analysis rests upon an underlying assumption which this author does not accept. His position seems to be that the "forum reasonableness" concept will reconcile fourteenth amendment due process constraints on state court personal jurisdiction with fifth amendment due process limits on federal court venue. It is the position of this article that, because fifth amendment constraints on federal personal jurisdiction parallel those of the fourteenth amendment, no such reconciliation is necessary.

Professor Clermont's analytical framework fails to adequately address the relevant issues in the context of current Supreme Court doctrine. For almost thirty years the Supreme Court has included the reasonableness of the forum as a component of personal jurisdiction.¹⁵⁰ The source of the Supreme Court's personal jurisdiction test, for both its territoriality and reasonableness components, is the due process clause.¹⁵¹ Venue, on the other hand, while incorporating some convenience and fairness concerns, is not a

145. *Id.*

146. *Id.* at 438.

147. *Id.* at 438-40.

148. *Id.* at 439.

149. *Id.*

150. See *supra* notes 26-90 and accompanying text.

151. See *Insurance Corp. of Ireland v. Compagnie Des Bauxities De Guinee*, 456 U.S. 694 (1982).

constitutional concept.¹⁵² Consistent with the Court's prior treatment of venue and jurisdiction, constitutionally based fairness/reasonableness concerns seem to fall within the sphere of jurisdiction, not venue. Separating these concerns and labeling them "forum reasonableness" may aid in their definition and delineation. This may be the principal benefit of the "forum reasonableness" approach.

The concern of this article, however, is that issues of fairness and reasonableness in exercises of personal jurisdiction should be consistently addressed by federal courts. It is an underlying assumption of the following section that courts will be willing and able to address these issues in the context of a constitutionally proven analysis.

D. *Proposed Standard*

While the recent discussions by courts and commentators have been helpful in terms of exploring the need for a federal due process standard in personal jurisdiction determinations, it is the position of this article that the standards thus far proposed fall short for the reasons previously outlined.¹⁵³ Any standard applied by the federal district courts to solve the problem, must have both a sound theoretical basis and a practical approach. Much of the scholarly writing in the personal jurisdiction area reflects academic wishful thinking in terms of perceived judicial trends away from territorial concerns toward pure reasonableness concerns. Whether or not one believes that sovereignty issues have no place in determining jurisdiction,¹⁵⁴ the reality is that the Supreme Court, after recent consideration, continues to recognize such issues.¹⁵⁵ However, formulating a due process scheme for federal courts may offer the chance to engage in the closest thing to a "pure reasonable-

152. Professor Clermont asserts that district courts "adopting as federal common law the due process limits on state court jurisdiction . . . are in effect, applying this [fairness] constitutional aspect of venue." Clermont, *supra* note 3, at 435 n.117. But courts clearly believe they are limiting personal jurisdiction, not venue. *See, e.g., Oxford First Corp. v. PNC Liquidating Corp.*, 372 F. Supp. 191 (E.D. Pa. 1974).

153. *See supra* notes 125-52 and accompanying text.

154. This author is persuaded that by making use of the reasonableness test alone, courts could adequately protect not only the rights of the parties involved but the sovereignty interests of the forum and other jurisdictions. To the extent that the Supreme Court has refused to move toward the reasonableness of the forum as the sole test of personal jurisdiction, other approaches must be considered.

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

ness" standard.

In order to facilitate the uniform application of the constitutional standard to be addressed below, congressional action is necessary to revise or abolish existing restrictions rule 4 places upon the use of a federal standard.¹⁵⁶ The new rule should take the form of a federal long arm statute, as suggested in detail by Professor Currie.¹⁵⁷ It may be as simple as language authorizing service of process to the extent of fifth amendment limitations. A more complex version of the rule could include specific factors to be weighed in making a personal jurisdiction decision.¹⁵⁸ Such a rule would enable the constitutional limits of federal due process to be consistently applied in both diversity and federal question cases. Until the rules with regard to assertions of federal personal jurisdiction are changed, the standard outlined below should, nonetheless, apply in cases in which Congress has prescribed specific rules for extraterritorial service.¹⁵⁹

A traditional personal jurisdiction analysis would begin with an examination of those affiliating circumstances which connect a nonresident to the forum. The analysis might end at this stage if insufficient circumstances are found. However, given the nature of the federal system, certain accommodations must be made in applying the constitutional analysis to federal courts. Since the sovereignty of the United States government extends to its borders, any defendant residing or engaging in activities within the borders of the United States will meet the threshold consideration of actual purposeful contacts with the forum.¹⁶⁰ It should be made clear at this point in the analysis that the contacts or affiliating circumstances which will meet concerns of a federal personal jurisdiction standard are contacts with the sovereign, the United States, and not contacts with the particular state or district within which the district court is situated. The *Oxford First* case could be read as requiring that as a threshold consideration, a defendant be found to have affiliating circumstances with the state in which the dis-

156. See *supra* notes 96-109 and accompanying text.

157. See Currie, *supra* note 113, at 305 (suggesting that federal courts do not require enabling legislation to assume personal jurisdiction under federal standards); see also *Jaftex Corp. v. Randolph Mills, Inc.*, 282 F.2d 508 (2d Cir. 1960), *overruled by Arrowsmith v. United Press Int'l*, 320 F.2d 219 (2d Cir. 1963).

158. See *infra* note 163 and accompanying text.

159. See *supra* notes 110-14 and accompanying text.

160. See Clermont, *supra* note 3, at 438.

trict court is located.¹⁶¹ At least one district court has taken the position that, in the context of the 100-mile "bulge" provision, the Constitution requires a defendant to have contacts both in the district where the district court sits and in the district within the 100-mile radius in which service is actually made.¹⁶² This view of the limits of federal personal jurisdiction is very restrictive and arguably erroneous.

In the usual federal case, defendant's affiliating contacts with the sovereign will be apparent. However, the existence of such contacts is only the initial consideration. It must also be determined, with regard to the particular defendant and case involved, whether it is reasonable for the forum to assert jurisdiction under the fifth amendment's due process clause. Accordingly, the particular federal district in which the action is initiated must be considered.

The focus of this inquiry should be, not only upon the convenience to the defendant and the fairness of requiring him to defend in this forum, but also upon consideration 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 . . . [and] the . . . judicial system's interest in obtaining the most efficient resolution of controversies."¹⁶³ The ultimate purpose of this inquiry will be to determine whether the forum is a reasonable one. In this determination an examination of the nature and quality of defendant's contacts with the forum will be a relevant factor. Inconvenience factors such as expense to litigate at a particular forum, location of witnesses, and situs of discovery proceedings should also be considered. In addition, the court may consider the availability of another, perhaps more convenient, forum and the applicable law in the case.

If this standard were applicable in both federal question and diversity cases, it could accommodate the different natures of these cases. For example, in federal question cases the law applied in the case would be a neutral factor in the overall reasonableness determination. However, in a diversity case, given the rule in *Klaxon*

161. *Oxford First Corp.*, 372 F. Supp. at 203-04.

162. *Karlsen v. Hanff*, 278 F. Supp. 864 (S.D.N.Y. 1967). *Contra* *Coleman v. American Export Isbrandtsen Lines Inc.*, 405 F.2d 250 (2d Cir. 1968).

163. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

Company v. Stentor Electric Manufacturing Co.,¹⁶⁴ the determination of which state's law was to be applied would definitely influence the reasonableness of the forum. Moreover, in a diversity case in which state substantive laws apply, the relationship between the events giving rise to the case and the forum state may also be an important aspect of the determination. Should such a standard apply only in federal question cases, at least reasonableness determinations in such cases parallel similar determinations under state law and the fourteenth amendment in diversity cases.¹⁶⁵

Federal district courts in diversity and other cases falling within rule 4(e), have, in essence, applied such a constitutional standard since *International Shoe*.¹⁶⁶ By adopting a federal personal jurisdiction standard based upon the fifth amendment, courts can rule consistent with their decisions based upon the fourteenth amendment due process clause. That consistency is supported by both logic and the Constitution.

V. CONCLUSION

While commentators and circuit courts continue to abide by the view that the federal courts suffer no due process constraints on assertions of personal jurisdiction, some federal district courts have reached the contrary conclusion.¹⁶⁷ District courts, finding it difficult to accept that fifth amendment and fourteenth amendment due process are not consistent and parallel, continue to struggle with an accepted rule which runs counter to their own notions of justice and fairplay.¹⁶⁸

Those who continue to recite the axiomatic view should recognize that it rests upon an outdated and no longer subscribed to notion of the primary basis for personal jurisdiction. The sovereign power to exert jurisdiction over those within its borders is not questioned. However, in the United States, that sovereign authority, although necessary, should no longer be seen as sufficient to

164. 313 U.S. 487 (1941) (holding that in order to promote uniform application of State law, a principal goal of *Erie*, a federal district court in a diversity case must apply the conflict-of-law rules of the state in which it is sitting).

165. *See supra* notes 26-89 and accompanying text.

166. *Id.*

167. *See, e.g.,* Lone Star Package Car Co. v. Baltimore & Ohio R.R., 212 F.2d 147 (5th Cir. 1954); Oxford First Corp. v. PNC Liquidating Corp., 372 F. Supp. 191 (E.D. Pa. 1974).

168. *See supra* note 167.

support personal jurisdiction.¹⁶⁹ The concept of due process, with its inherent requirements of fundamental fairness and reasonableness, limits what in other countries might be an unlimited assertion of sovereign power. Arguably, congressional power to provide for nationwide service of process is consistent with the notion that the due process clause might impose some restrictions upon exercise of that power, just as due process may restrict the exercise of any other constitutionally granted congressional power.¹⁷⁰

The standard proposed by this article for federal exercise of personal jurisdiction would, in almost all cases, render the defendant subject to the sovereignty of the federal courts. However, it would require that a court determine that challenged personal jurisdiction, in a given case, be asserted only if it is reasonable and fair. As a consequence, assertions of personal jurisdiction would be consistent whether in state court or in the "federal court across the street."¹⁷¹

169. See *supra* notes 26-89 and accompanying text.

170. The issue, thus, is not whether sovereign power generally extends to the country's borders, but rather whether in any given case it is reasonable for the sovereign to exercise that power.

171. Abraham, *supra* note 1, at 533-34.

