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Constitutional Limits on Nationwide Personal Jurisdiction in the Federal Courts

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CONSTITUTIONAL LIMITS ON NATIONWIDE PERSONAL JURISDICTION IN THE FEDERAL COURTS

Maryellen Fullerton*

I. INTRODUCTION

If a former employee of a mom-and-pop grocery store in Florida files suit in federal court in Alaska, where she currently resides, alleging that her former employer violated the federal minimum wage laws,¹ can the employer claim any constitutional protection against litigating that claim in Alaska? If a corporation headquartered in Guam whose total operation consists of manufacturing beach umbrellas that are sold locally is sued by the United States Consumer Product Safety Commission in federal court in New Hampshire for allegedly selling a defective product,² does the Constitution provide the defendant with any protection from litigation in New Hampshire? In short, what are the constitutional limitations on the assertion of personal jurisdiction³ by federal courts?

In 1877, in the legendary *Pennoyer v. Neff*⁴ opinion, the Supreme Court held the enforcement of a judgment entered by a state court that lacked jurisdiction over the defendant unconstitutional. Since *Pennoyer*, the Supreme Court has on numerous occasions employed the due process clause of the fourteenth amendment⁵ to limit the exercise of personal jurisdiction by state courts over out-of-state defendants.⁶

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¹ The Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1982), prescribes the minimum wage for employees of enterprises engaged in commerce and sets the maximum number of hours that employees can be required to work at the base rate of pay. See *id.* §§ 206, 207.

² The Consumer Product Safety Act, 15 U.S.C. §§ 2051-2083 (1982), grants the Consumer Product Safety Commission the power to prosecute manufacturers who produce products in violation of established safety standards. See *id.* § 2076.

³ Personal jurisdiction is a threshold issue in every case. Personal jurisdiction refers to the power of a court to enter a binding judgment against a defendant. It must be distinguished from service of process, which refers to the mechanism for notifying a defendant that he has been sued. Service of process "provide[s] a ritual that marks the court's assertion of jurisdiction over the defendant." 4 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1063 (1969).

⁴ 95 U.S. 714 (1877).

⁵ Section 1 of the fourteenth amendment provides in pertinent part: "No State shall . . . deprive any person of life, liberty or property, without due process of law . . ." U.S. CONST. amend. XIV, § 1.

⁶ *E.g.*, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Kulko v. Superior Court*, 436 U.S. 84, *reh'g denied*, 438 U.S. 908 (1978); *Hanson v. Denckla*, 357 U.S. 235 (1958).

The Supreme Court, however, has never defined the limitations, if any, that the due process clause of the fifth amendment⁷ places on the exercise of personal jurisdiction by federal courts.

This Article concludes that the Constitution does limit the exercise of personal jurisdiction by federal courts and that Congress does not have unlimited power to authorize litigation at any location in the United States. Accordingly, a nationwide personal jurisdiction statute providing that a defendant located in or having minimum contacts⁸ with the United States can be sued on a federal question⁹ in any federal court in the country would be unconstitutional. Even though a defendant is present in or has minimum contacts with the United States, requiring him to litigate a case in a particular location within the United States may be an unreasonable burden. In those instances, the due process clause of the fifth amendment should prevent a federal court from asserting personal jurisdiction. In sum, the due process clause of the fifth as well as the fourteenth amendment requires courts to examine the unfairness to defendants caused by the location of litigation.

Despite the due process constraints on personal jurisdiction that should apply to federal question cases, Congress has enacted a number of statutes authorizing nationwide personal jurisdiction. While the first few nationwide personal jurisdiction statutes only applied in narrow circumstances,¹⁰ in recent years Congress has permitted nationwide jurisdiction in a much broader array of cases.¹¹ Indeed, one commentator has even interpreted the 1983 congressional revision of Rule 4 of the

⁷ The fifth amendment provides in pertinent part: "No person shall be . . . deprived of life, liberty, or property without due process of law" U.S. CONST. amend. V.

⁸ For a discussion of the minimum contacts doctrine, see *infra* text accompanying notes 32-36.

⁹ Congress has authorized federal district courts to adjudicate "all civil actions . . . aris[ing] under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331(a) (1982). In addition to this federal question jurisdiction, Congress has authorized federal district courts to adjudicate cases based on state law when the parties are citizens of different states. *Id.* § 1332(a). In these diversity cases, federal courts generally apply the jurisdictional standard of the state in which they are located. See, e.g., *Arrowsmith v. UPI*, 320 F.2d 219 (2d Cir. 1963). There is general agreement that this practice is not constitutionally mandated, however, *id.* at 226, and it has been criticized. E.g., 2 J. MOORE, J. LUCAS, H. FINK & C. THOMPSON, *MOORE'S FEDERAL PRACTICE* ¶ 4.25[7], at 4-288 to 4-290 (2d ed. 1983). The applicability of the *Erie* doctrine, which applies in diversity cases but not in federal question cases, to the issue of personal jurisdiction is beyond the scope of this Article.

¹⁰ For example, the first nationwide personal jurisdiction statutes were enacted in the nineteenth century as part of the early federal antitrust legislation and were generally limited to suits brought by the United States against nationwide business enterprises. See *infra* text accompanying notes 253-67.

¹¹ For example, nationwide personal jurisdiction provisions now appear in a wide variety of federal securities laws, in federal antitrust legislation, in the Bankruptcy Rules, in the Federal Interpleader Act, and in legislation regulating suits against federal officials. See *infra* text accompanying notes 258-81.

Federal Rules of Civil Procedure¹² as an authorization of nationwide personal jurisdiction in all federal court cases arising under federal law.¹³ As a result, federal courts are increasingly faced with constitutional challenges to their assertion of personal jurisdiction over defendants in federal question cases.¹⁴ These challenges, although still novel, cannot be dismissed as meritless. In fact, at least two of the current nationwide personal jurisdiction provisions, the bankruptcy¹⁵ and interpleader¹⁶ statutes, contain the potential for unconstitutional assertions of personal jurisdiction. Accordingly, the number of defendants protesting nationwide personal jurisdiction is sure to grow.

Although a number of federal courts have wrestled with due process challenges to their exercise of personal jurisdiction, the case law to date sets forth perfunctory and contradictory analyses of the constitutional dimension of this issue. While occasionally federal trial courts have refused to exercise jurisdiction over defendants who lacked any connection with the part of the country where the suit was filed,¹⁷ a majority of the appellate courts that have considered these challenges has decided that the Constitution imposes no impediment to the assertion of personal jurisdiction by federal courts over such defendants.¹⁸

This conclusion is incorrect. The courts that resolve the personal

¹² Rule 4(c) of the Federal Rules of Civil Procedure was amended February 26, 1983 to provide service of process by first-class mail. Rule 4(c)(2)(C)(ii) states:

(C) A summons and complaint may be served upon a defendant of any class referred to in paragraph (1) or (3) of subdivision (d) of this rule—

(ii) by mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to form 18-A and a return envelope, postage prepaid, addressed to the sender. If no acknowledgement of service under this subdivision of this rule is received by the sender within 20 days after the date of mailing, service of such summons and complaint shall be made under subparagraph (A) [service by a person 18 years or older] or (B) [service by federal marshal or person specially appointed by court] of this paragraph in the manner prescribed by subdivision (d)(1) or (d)(3).

FED. R. CIV. P. 4(c)(2)(C)(ii). See 51 U.S.L.W. 202 (March 22, 1983).

¹³ See Berger, *Acquiring In Personam Jurisdiction in Federal Question Cases: Procedural Frustration Under Federal Rule of Civil Procedure 4*, 1982 UTAH L. REV. 285.

¹⁴ Defendants have mounted substantial constitutional challenges to assertions of nationwide personal jurisdiction by federal courts in a wide variety of cases, including suits involving the collection of assets by a court-appointed receiver, see *infra* notes 69-72 and accompanying text, suits against federal officials, see *infra* notes 73-77 & 138-42 and accompanying text, suits involving federal securities law, see *infra* notes 74-81 and accompanying text, and suits arising under or related to the bankruptcy laws, see *infra* note 279. The number of personal jurisdiction challenges in bankruptcy-related cases appears to have increased significantly since the Bankruptcy Reform Act of 1978, with its broad grant of subject matter jurisdiction, was enacted. See *infra* note 277.

¹⁵ See *infra* notes 277-81 and accompanying text.

¹⁶ See *infra* notes 258-62 and accompanying text.

¹⁷ E.g., *Briggs v. Goodwin*, 384 F. Supp. 1228 (D.D.C. 1974), *rev'd*, 569 F.2d 1 (D.C. Cir. 1977), *rev'd on other grounds sub nom. Stafford v. Briggs*, 444 U.S. 527 (1980); *Mariash v. Morrill*, FED. SEC. L. REP. (CCH) ¶ 94,149 (S.D.N.Y. Sept. 5, 1973), *rev'd*, 496 F.2d 1138 (2d Cir. 1974).

¹⁸ See *infra* notes 69-81 & 138-42 and accompanying text.

jurisdiction issue solely on the basis of whether the defendant is present in, or has a significant connection with, some part of the United States ignore the Supreme Court's repeated holdings that protect a defendant from litigating in a distant or inconvenient forum.¹⁹ Federal courts should not presume that it is reasonable to assert personal jurisdiction over a defendant merely because the defendant is located in, resides in, or has minimum contacts with the United States. Rather, the courts should examine the circumstances of each case to determine whether the place of trial is unreasonably burdensome for the defendant. This Article proposes that federal courts should balance three factors in evaluating the constitutionality of an assertion of personal jurisdiction: (1) the severity of any inconvenience to the defendant; (2) the reasonable anticipation by the defendant of litigation at the challenged location; and (3) the degree to which the legitimate interests of the United States will be thwarted if litigation is not allowed to proceed at the challenged location. Pragmatic application of this balancing test, with an eye toward the real burdens imposed by litigation at a distant locale, will ensure litigants in federal court the due process protection to which they are entitled under the fifth amendment.

This Article first examines the three arguments generally cited to support the proposition that federal courts can, consistent with the due process clause, exercise personal jurisdiction over all defendants present in or having minimum contacts with the United States and discusses the insufficiencies of each argument. The Article then develops a standard that federal courts can apply when faced with constitutional challenges to personal jurisdiction. The Article also explores the practical difficulties that courts will encounter in applying the proposed test, noting particularly the difficulties entailed in defining the appropriate geographical scope of the pertinent forum. Finally, this Article addresses the implications of the proposed test on the application of current nationwide personal jurisdiction statutes and regulations. After pointing out the potential for unconstitutional assertions of jurisdiction under the current bankruptcy and interpleader schemes, and under the 1983 revisions to Rule 4 of the Federal Rules of Civil Procedure, this Article concludes by recommending that Rule 4 be interpreted to avoid such results.

II. THE DUE PROCESS CLAUSE AND THE PLACE OF TRIAL

Much of the current authority examining the constraints that the due process clause places on the location of trial in the federal court system has concluded that the Constitution does not restrict the location of litigation so long as a defendant is located in or has minimum contacts with the United States. Three arguments are often proffered

¹⁹ See *infra* text accompanying notes 32-58.

to support this contention: (1) the sovereignty of the federal government over all people within its territory permits Congress to authorize suit in any district against anyone in the United States; (2) the language of article III of the United States Constitution recognizes Congress's power to authorize suit in any district; and (3) the availability of transfer within the federal court system is an adequate remedy for any unfairness to the defendant caused by the location of the suit. Scrutiny of these three arguments reveals, however, that they inadequately support the contention that so long as a defendant can be sued in a federal court somewhere in the United States he can be sued anywhere in the country.

A. *Sovereignty*

The most frequently proffered justification for the view that the Constitution does not limit the place of trial within the United States in federal court cases arising under federal law is that the federal government has sovereign power over everyone within the United States.²⁰ A corollary of this postulate is that the federal government cannot exercise power over a defendant beyond the boundaries of the United States but may require any defendant within those boundaries to appear before any of its courts. This view of federal court jurisdiction has developed from the Supreme Court's analysis of state court jurisdiction. Therefore, a brief review of the seminal personal jurisdiction cases is necessary in order to explore the strengths and weaknesses of the argument that sovereign power authorizes nationwide personal jurisdiction.

1. *The Development of the Fourteenth Amendment Due Process Limits on the Exercise of Jurisdiction*— Since 1877 the Supreme Court has utilized the due process clause to limit the exercise of personal jurisdiction by the states. Yet over the years there has been a fundamental shift in the theoretical underpinnings of the Court's due process analysis. Initially, the Court focused on whether the exercise of personal jurisdiction over a defendant was consistent with the notion that a state, as a sovereign, could exert certain powers over people within its borders. Later the focus shifted and the element of fairness to the defendant became an indispensable ingredient. While the Court has not discarded the concept of sovereignty, the recent ascendancy of fairness concerns has reduced the importance of sovereignty in jurisdictional due process cases.

In *Pennoyer v. Neff*,²¹ the United States Supreme Court constitutionalized the law of personal jurisdiction in its decision that a judg-

²⁰ See *infra* text accompanying notes 63-81.

²¹ 95 U.S. 714 (1877).

ment entered by a state court against a defendant neither present in nor a resident of that state was invalid.²² While holding that it was a violation of the due process clause of the fourteenth amendment for a state court to enter a judgment against a defendant over whom it had no personal jurisdiction, the Court did make it clear, however, that a state could constitutionally exercise jurisdiction over persons within its borders. Justice Field, writing for the Court, based his opinion on the "well established [principle]. . . that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory."²³ Justice Field derived this conclusion from Justice Story's treatise on the Conflict of Laws,²⁴ which, in turn, was based on principles of international law that had been formulated largely by European scholars on the continent.²⁵ The jurisdictional principles developed in the international law context were generally designed to resolve conflicts among nations. The enforceability of judgments—particularly the ability and right of sovereigns to take action affecting people within their territory and the corresponding inability of sovereigns to act effectively and avoid interfering with the rights of other nations when taking action against people outside their borders—was also central to the development of these principles.²⁶

Justice Field did not explain why these principles of international law should apply in the context of disputes arising within a single nation,²⁷ nor did he elucidate the relationship between these jurisdictional principles derived from international law and the constitutional guarantee of due process.²⁸ This failure is curious since the jurisdictional

²² Prior to *Pennoyer*, some courts had refused on the basis of unfairness to enforce judgments entered by courts of sister states against nonresident defendants who had been unable to defend in the original forum. They did not base these decisions on the due process clause (the fourteenth amendment was not ratified until 1868) or on any other constitutional provision. Rather they viewed their denials of enforcement as justifiable exceptions, based on principles of international comity, to the full faith and credit clause of the Constitution. *E.g.*, *D'Arcy v. Ketchum*, 52 U.S. (11 How.) 165, 175-76 (1850). See Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U.L. REV. 1112, 1123-24 (1981).

²³ *Pennoyer v. Neff*, 95 U.S. at 722.

²⁴ J. STORY, *CONFLICT OF LAWS* ch. 2 (1834). See *Pennoyer v. Neff*, 95 U.S. at 722.

²⁵ See Hazard, *A General Theory of State Court Jurisdiction*, 1965 SUP. CT. REV. 241, 258-59.

²⁶ *Id.* at 259-60.

²⁷ While acknowledging that the states that comprise the United States are not independent nations with the rights and powers that nationhood entails, Justice Field stated that "except as restrained and limited by [the federal constitution, the states] possess and exercise the authority of independent States, and the principles of public law to which we have referred are applicable to them." *Pennoyer v. Neff*, 95 U.S. at 722.

²⁸ Justice Field stated that the term "due process of law" was incapable of precise definition, but that at the very least required valid judicial proceedings when courts resolved disputes involving private parties. Judicial proceedings, he asserted, were not valid unless the court had been granted power "to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance." *Id.* at 733. Justice Field made

concerns important in the international law context had played no part in the development of the Anglo-American concept of "due process." From its origin in the Magna Carta²⁹ through its expansion in post-Civil War America, the concept of "due process" had focused on the protection of an individual from government oppression, rather than on the proper sphere for adjudicating conflicts between sovereigns.³⁰ Notwithstanding this fundamental difference, the *Pennoyer* opinion implanted the sovereignty analysis of jurisdiction into the due process clause of the fourteenth amendment. Under this rationale, the due process clause prohibited a state court from exercising personal jurisdiction over a defendant located beyond state borders, but placed no bounds on a state court's exercise of jurisdiction over a defendant present in the state.

In the following decades courts struggled to define those circumstances in which a defendant was deemed "present" within a state for purposes of personal jurisdiction.³¹ Sixty-eight years after *Pennoyer*, the United States Supreme Court significantly expanded the *Pennoyer* holding when it enunciated the "minimum contacts" doctrine in *International Shoe Co. v. Washington*.³² *International Shoe* was the culmination of a line of cases that attempted to formulate standards to determine when a corporation that was neither incorporated in nor had its principal place of business within a state was "present" within the state under the *Pennoyer* rationale. Recognizing that the concept of corporate "presence" in a state had become analytically bankrupt, the Court in *International Shoe* jettisoned that test, noting that the term "presence" [is] used merely to symbolize those activities . . . within the state which courts will deem to be sufficient to satisfy the demands of due process."³³ The Court reiterated its view that the due process clause limits the power of a state court to exercise jurisdiction over out-of-state defendants,³⁴ but set a new standard for determining the con-

no attempt to explain this assertion about personal jurisdiction, nor to relate it to the origins of the due process clause as an instrument to secure individuals from arbitrary government action. See *infra* note 29 for a discussion of the origin of due process.

²⁹ The pledge in chapter 39 of the Magna Carta that the king would not deprive his subjects of life, liberty, or property except according to "the law of the land"—"*per legem terrae*"—is the origin of the "due process of law" guarantee in the United States Constitution. Corwin, *The Doctrine of Due Process Before the Civil War*, 24 HARV. L. REV. 366, 368-69 (1911).

³⁰ Corwin, *supra* note 29, at 369; Redish, *supra* note 22, at 1121-22.

³¹ E.g., *Philadelphia & Reading R.R. v. McKibbin*, 243 U.S. 264, 265 (1917) ("A foreign corporation is amenable to process to enforce a personal liability . . . only if it is doing business within the State in such a manner and to such extent as to warrant the inference that it is present there."); *Green v. Chicago, B. & Q. Ry.*, 205 U.S. 530 (1907) (mere solicitation of passengers and freight by employee in district where railroad did not operate does not constitute "doing business" such that railroad company in amenable to jurisdiction there).

³² 326 U.S. 310 (1945).

³³ *Id.* at 316-17.

³⁴ *Id.* at 319.

stitutional exercise of personal jurisdiction: a state court could enter a valid judgment against those corporate defendants that had sufficient connections with the forum state so that forcing them to defend a suit in that state did not offend "traditional notions of fair play and substantial justice."³⁵ In such circumstances, the Supreme Court stated, defendants are deemed to have "minimum contacts" with a state, and can be required to appear and defend in that state.³⁶

Although the Court in *International Shoe* asserted that the concept of "presence" is not helpful in determining whether a court can exercise jurisdiction over a non-resident corporation, it did not reject the holding in *Pennoyer* that service of process on an individual physically present in the forum state is a constitutional basis for the exercise of personal jurisdiction. Rather, it modified *Pennoyer* by allowing jurisdiction over out-of-state defendants who have minimum contacts with the forum as well as over those physically "present within the territory of the forum."³⁷ Only if a defendant's connection with a state is insubstantial—if the defendant neither possesses "minimum contacts" nor is physically present—would forcing the defendant to litigate in the state be unfair and violate due process.³⁸

The Supreme Court in *International Shoe* did not explicate the theoretical basis of its due process approach. Its only reference to the sovereign power rationale espoused in *Pennoyer* was a glancing one,³⁹ overshadowed by its emphasis on fair play. While it did not repudiate the theory that a sovereign can exercise jurisdiction over entities located within its territory, the Court in *International Shoe* elevated fairness to the defendant in determining the appropriate site of litigation to a constitutional concern.⁴⁰ Furthermore, the Court expressly directed that an "estimate of the inconveniences" which would result to the [defendant] from a trial away from its 'home' or principal place of business"⁴¹ should be made as a part of a court's evaluation of the

³⁵ *Id.* at 316 (citing *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

³⁶ *Id.* A defendant lacking "minimum contacts" could of course voluntarily appear and litigate.

³⁷ *Id.*

³⁸ Thus, at its inception the minimum contacts doctrine allowed states to expand their jurisdiction over out-of-state defendants. Subsequently, however, the doctrine functioned to restrict state courts' jurisdiction over such defendants. See *infra* text accompanying notes 45-51.

³⁹ "Historically the jurisdiction of courts to render judgment *in personam* is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (italics in original).

⁴⁰ The majority's references to fairness to defendants were not unwitting. Justice Black, in his separate opinion, severely chastised the majority for imposing "this Court's notions of 'natural justice' on the reach of the Washington state courts." *Id.* at 324. He decried the "elastic standards" of "fair play," "justice," and "reasonableness" that the majority read into the due process clause. *Id.* at 324-25.

⁴¹ *Id.* at 317.

reasonableness of the exercise of personal jurisdiction. In this regard the Court stressed that when a suit is based on the defendant's isolated activities within the state, or on the "casual presence"⁴² of his agent, requiring the defendant to litigate "away from [his] home or other jurisdiction where [he] carries on more substantial activities has been thought to lay too great and unreasonable a burden on the [defendant] to comport with due process."⁴³ Thus, the Court injected the traditional Anglo-American concept of due process as a protection of individuals⁴⁴ from governmental oppression and unfairness into the due process analysis of state courts' assertions of personal jurisdiction over defendants.

Both ideas—sovereign power and fairness—have continued to play a role in the Supreme Court's pronouncements regarding the due process limitations on state court jurisdiction. On occasion the two rationales have come into conflict. In *Shaffer v. Heitner*,⁴⁵ a case in which a state court asserted jurisdiction based on the attachment of the defendants' property within the state,⁴⁶ the emphasis on fairness to the defendant reached its zenith. The Court in *Shaffer* reasoned that allowing the exercise of jurisdiction over an individual who owned property within the forum state but lacked a substantial connection with the state would be unfair to the defendant. The Court rejected the notion that the mere presence of a defendant's property within a state provides a basis for jurisdiction. Instead, the Court explicitly extended the "minimum contacts" analysis developed in personal jurisdiction cases to quasi-in-rem suits brought in state courts.⁴⁷ Having adopted a fairness standard for quasi-in-rem cases, the Court ruled that the Delaware state court's exercise of jurisdiction over nonresidents of Delaware based solely on attachment of shares of stock they owned in a Delaware corporation was unconstitutional.⁴⁸

As in *International Shoe*, the Supreme Court shed little light in *Shaffer* on the theoretical underpinnings of its due process approach. In its emphasis and reasoning, however, the Court elevated concerns

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *International Shoe* set forth the minimum contacts analysis in the context of a corporate defendant. Many state long-arm statutes have extended this analysis to defendants who are natural persons, e.g., N.Y. CIV. PRAC. LAW § 302(a) (McKinney 1983), and the Supreme Court also applied it to private individuals in *Shaffer v. Heitner*, 433 U.S. 186 (1977), a suit in which individual directors of a corporation challenged the jurisdiction of a Delaware state court. See *infra* text accompanying notes 45-51.

⁴⁵ 433 U.S. 186 (1977).

⁴⁶ The plaintiff, owner of one share of Greyhound stock, filed a shareholder's derivative suit against a corporation incorporated in Delaware with its principal place of business in Arizona, a wholly-owned subsidiary incorporated in California with its principal place of business in Arizona, and 28 present or former officers or directors of the corporations. *Id.* at 189.

⁴⁷ *Id.* at 212.

⁴⁸ *Id.* at 216-17.

for fairness above concerns for sovereign power, and clearly revealed that the sovereignty approach to jurisdiction was no longer sacrosanct. Indeed, the Court's only reference to sovereignty announced its demise as a consideration in due process analysis: "Thus, the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of *Pennoyer* rest, [has become] the central concern of the inquiry into personal jurisdiction."⁴⁹

In fact, the fairness aspect of the due process analysis achieved such ascendancy in *Shaffer* that it limited a state's traditional power over property within its borders. The minimum contacts doctrine, which in *International Shoe* functioned to extend states' sovereign power over defendants,⁵⁰ now served to restrict states' power. Indeed, the strong emphasis on fairness in *Shaffer* has led a number of commentators to conclude that it bars a state court from exercising jurisdiction over persons actually located within, but lacking significant connection with, the state.⁵¹

Shortly after *Shaffer*, the Supreme Court in *World-Wide Volkswagen Corp. v. Woodson*⁵² once again explored the limits the due process clause imposes on personal jurisdiction. The Court enunciated a two-fold due process limitation on state court jurisdiction:

The concept of minimum contacts, in turn, can be seen to perform 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 out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.⁵³

Although *World-Wide Volkswagen* ascribed greater weight to the "sovereignty" concerns of sister states than had *Shaffer*, the Court explicitly reaffirmed that one of the primary functions of the due process clause is

⁴⁹ *Id.* at 204.

⁵⁰ As Justice Marshall noted in *Shaffer*, "The immediate effect of [*International Shoe's*] departure from *Pennoyer's* conceptual apparatus was to increase the ability of the state courts to obtain personal jurisdiction over nonresident defendants." *Id.*

⁵¹ See, e.g., Bernstine, *Shaffer v. Heitner: A Death Warrant for the Transient Rule of In Personam Jurisdiction?*, 25 VILL. L. REV. 38 (1979) (jurisdiction based solely on service of process on an individual temporarily present within the state may be unconstitutional); Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U. L. REV. 33 (1978).

⁵² 444 U.S. 286 (1980). Plaintiffs moving from New York to Arizona had a car accident as they passed through Oklahoma. They later brought a products liability suit in state court in Oklahoma against the automobile manufacturer, importer, regional distributor, and retail dealer. The retailer and the distributor, both New York corporations who did no business in Oklahoma, challenged the personal jurisdiction of the state court. The Supreme Court of Oklahoma upheld the court's exercise of jurisdiction, *World-Wide Volkswagen Corp. v. Woodson*, 585 P.2d 351 (Okla. 1979), but the Supreme Court of the United States reversed. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 291.

⁵³ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 291-92.

to serve as a "guarantor against inconvenient litigation."⁵⁴ Furthermore, the Court relied on both aspects of the due process analysis to strike down the state court's assertion of jurisdiction.⁵⁵

The most recent Supreme Court pronouncement on the constitutional limitations on personal jurisdiction occurred in *Insurance Corporation of Ireland v. Compagnie des Bauxites de Guinee*.⁵⁶ Although not a full exposition of the subject,⁵⁷ this opinion supports the assertion that a concern for fairness has replaced principles of sovereignty in personal jurisdiction analysis. Focusing on the rights of the defendant rather than the sovereign powers of states, the Court stated:

The requirement that a court have personal jurisdiction flows . . . from the Due Process Clause. The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction

⁵⁴ *Id.* at 292. The Court noted that "[t]he protection against inconvenient litigation is typically described in terms of 'reasonableness' or 'fairness.'" *Id.*

⁵⁵ In reversing the Oklahoma state court's exercise of personal jurisdiction, the Court emphasized that the defendants were located far from Oklahoma, that they engaged in absolutely no commercial activity in Oklahoma, and that they did not seek to serve the Oklahoma market indirectly. *Id.* at 295. These facts highlighted the inconvenience of the site. Further, the Court stressed that the plaintiffs had been New York residents when they bought the car and had merely been passing through Oklahoma when the accident occurred. *Id.* at 288, 292. In short, the defendants' connection with Oklahoma was isolated and totally fortuitous. Thus, Oklahoma's interest in the litigation was minimal, and Oklahoma's exercise of jurisdiction over out-of-state defendants triggered interstate federalism concerns. *Id.* at 295, 298.

⁵⁶ 456 U.S. 694 (1982). As this Article went to press, the Supreme Court issued three opinions examining the due process limits on state court jurisdiction: *Keeton v. Hustler Magazine*, 52 U.S.L.W. 4346 (U.S. March 20, 1984) (upholding jurisdiction of New Hampshire court in libel suit brought by nonresident against national magazine with 10,000 monthly circulation in New Hampshire); *Calder v. Jones*, 52 U.S.L.W. 4349 (U.S. March 20, 1984) (upholding jurisdiction of California court in libel suit filed by California resident against Florida reporter and Florida editor of national newspaper with 600,000 weekly circulation in California); and *Helicopteros Nacionales de Colombia v. Hall*, 52 U.S.L.W. 4491 (U.S. April 24, 1984) (reversing Texas court's assertion of jurisdiction over South American corporation in wrongful death action brought by non-domiciliaries of Texas based on helicopter crash in Peru). Each of these decisions relied on the analysis discussed in the text; they did not enunciate new jurisdictional principles. Although none of the opinions analyzed the relationship of sovereignty to the notions of fairness injected by *International Shoe* into the constitutional evaluation of state court jurisdiction, in *Keeton* Justice Brennan reiterated the Court's statement in *Compagnie des Bauxites* that the personal jurisdiction restriction on judicial power exists to protect defendants' liberty interests, not state sovereignty. *Keeton v. Hustler Magazine*, 52 U.S.L.W. 4346, 4349 (U.S. March 20, 1984) (Brennan, J., concurring).

⁵⁷ The discussion of personal jurisdiction arose in the context of a discovery dispute in a diversity case. A Delaware corporation whose principal place of business was the Republic of Guinea filed suit in the Western District of Pennsylvania against numerous insurance companies organized in England, Japan, Israel, the United States, Switzerland, Ireland, and Belgium. Some of the insurers filed motions to dismiss based on lack of personal jurisdiction. After the insurers had repeatedly failed to comply with discovery requests regarding their activities in Pennsylvania, the district court relied on the sanction provisions of FED. R. CIV. P. 37(b)(2)(A) and found the insurers subject to personal jurisdiction based on their business contacts with Pennsylvania. The Supreme Court affirmed. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. at 709.

on judicial power not as a matter of sovereignty, but as a matter of individual liberty. Thus, the test for personal jurisdiction requires that "the maintenance of the suit . . . not offend traditional notions of fair play and substantial justice."⁵⁸

As the historical development of the due process limitations on state court jurisdiction illustrates, the questionable injection of concerns regarding sovereign power into the due process clause has been ameliorated by a shift in the underlying conceptual framework of jurisdictional analysis. Sovereignty is no longer the only touchstone. Fairness to defendants has become a permanent concern, as has the location of litigation. Contemporary constitutional analysis of state court personal jurisdiction is now much more congruent with the history of the due process clause as a bulwark to protect individuals against government oppression.

2. *The Applicability of the Fourteenth Amendment Analysis to the Federal Courts*—The Supreme Court precedents defining due process limitations on personal jurisdiction all have arisen in the state court context. In each case a defendant who was a nonresident of the forum state alleged that the state had overreached itself in attempting to draw the defendant within the power of that state's courts and had thus violated the defendant's rights under the due process clause of the fourteenth amendment to the United States Constitution.⁵⁹ Although the fourteenth amendment is inapplicable to the federal government, a litigant in federal court defending a federal question claim should be able to assert the same constitutional protection against litigation in an in-

⁵⁸ *Id.* at 702-03 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). In a footnote the Court attempted, not very successfully, to perpetuate the grafting of ideas of sovereignty and federalism onto the due process clause:

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

Id. at 702 n.10.

⁵⁹ See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (New York corporations challenged jurisdiction of Oklahoma state courts); *Shaffer v. Heitner*, 433 U.S. 186 (1977) (nonresidents of Delaware protested jurisdiction of Delaware courts); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) (Missouri corporation challenged the jurisdiction of Washington state court); *Pennoyer v. Neff*, 95 U.S. 714 (1877) (California resident challenged jurisdiction of Oregon state courts). See also *Kulko v. Superior Court*, 436 U.S. 84 (1978) (New York resident challenged jurisdiction of California state courts); *McGee v. International Life Ins. Co.*, 355 U.S. 228 (1957) (Texas company challenged jurisdiction of California state courts). Although in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982), European companies challenged the jurisdiction of a federal court, the federal court was sitting in diversity and following the jurisdictional law of the state of Pennsylvania. See *supra* note 9.

convenient forum as he can in state court. In its personal jurisdiction cases the Supreme Court has heavily emphasized the burdens that distant litigation imposes on defendants. These burdens are not any smaller when a party is sued in the federal court across the street from a distant state court. The New York defendants in *Volkswagen* would have faced the same inconveniences whether their suit was filed in federal or state court in Oklahoma.⁶⁰

Furthermore, in language virtually identical to the due process clause of the fourteenth amendment,⁶¹ the due process clause of the fifth amendment circumscribes the actions of the federal government. On many occasions the Supreme Court has interpreted the two clauses as imposing similar restraints on actions taken by either federal or state governments against individuals.⁶² Thus, the fact that the Supreme Court's personal jurisdiction cases have not interpreted the fifth amendment is, in itself, of little significance.

Some lower courts and commentators have acknowledged that the due process analysis of personal jurisdiction developed in the fourteenth amendment context may apply to defendants in federal court but assert that the analysis does not protect defendants from the burdens imposed by suits at distant sites within the United States.⁶³ They assert that the due process clause permits courts to exercise personal jurisdiction over any defendant who is located within or has minimum contacts with the forum creating the court. Since federal courts are created by the federal government, the pertinent forum is the entire nation. Supporters of this popular approach contend that so long as a defendant in federal court has a significant connection with any part of

⁶⁰ Although the distance from New York to Oklahoma, with the concomitant extra costs to the New York defendants that litigation far from home entails, remains the same whether the suit is filed in federal or state court in Oklahoma, it is possible that the defendants might have felt more comfortable litigating in the Oklahoma federal court which, of course, follows the Federal Rules of Civil Procedure rather than the state procedural law. The uniformity of federal procedural law across the nation is one factor that might make it somewhat easier—at least for those with federal litigation experience—to defend lawsuits in distant federal courts rather than in distant state courts. Even if the uniform federal procedural law ameliorates to some extent the burden imposed by litigation at distant locations, the extra expense and dislocation caused by transcontinental litigation may still be extremely burdensome. See *infra* text accompanying notes 183-87.

⁶¹ Compare *supra* note 5 with *supra* note 7.

⁶² E.g., *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) (in discussing procedural due process constraints on federal government, reliance is placed on cases interpreting the fourteenth amendment—*Board of Regents v. Roth*, 408 U.S. 564 (1972), *Bell v. Burson*, 402 U.S. 535 (1971), *Goldberg v. Kelly*, 397 U.S. 254 (1970)—as well as on cases interpreting the fifth amendment—*Arnett v. Kennedy*, 416 U.S. 134 (1974), *Richardson v. Belcher*, 404 U.S. 78 (1971)).

⁶³ E.g., *Haile v. Henderson Nat'l Bank*, 657 F.2d 816 (6th Cir. 1981) *cert. denied*, 455 U.S. 949 (1982); *Fitzsimmons v. Barton*, 589 F.2d 330 (7th Cir. 1979); *Driver v. Helms*, 577 F.2d 147 (1st Cir. 1978), *rev'd on other grounds sub nom.* *Stafford v. Briggs*, 444 U.S. 527 (1980); *Mariash v. Morrill*, 496 F.2d 1138 (2d Cir. 1974). See also Green, *Federal Jurisdiction In Personam of Corporations and Due Process*, 14 VAND. L. REV. 967 (1960-1961); Note, *Alien Corporations and Aggregate Contacts: A Genuinely Federal Jurisdictional Standard*, 95 HARV. L. REV. 470 (1981).

the United States, the due process clause requires only that such a defendant be accorded notice and an opportunity to be heard.⁶⁴

Either explicitly or implicitly, those who espouse this view focus solely on the sovereignty theory of personal jurisdiction. They adopt the international law principle discussed in *Pennoyer v. Neff*⁶⁵ that a sovereign has jurisdiction over persons and property located within its borders. They assert that the United States as sovereign has power over all individuals and entities found within its borders, and that the United States may authorize all of its courts to exercise jurisdiction over all such defendants.⁶⁶ They contend that whenever a federal court exercises jurisdiction over a defendant located within the borders of the United States the circumstances are analogous to those presented when a state exercises jurisdiction over one of its residents.⁶⁷ Since in such situations the defendant is physically present within the pertinent territory, the minimum contacts standard enunciated in *International Shoe* concerning jurisdiction over defendants beyond the territorial limits of the state does not even come into play. Accordingly, they assert, a federal court need only consider the minimum contacts doctrine when personal jurisdiction is challenged by defendants who are served outside the United States.⁶⁸ Adherents to this view presume that the fairness standard incorporated in the minimum contacts analysis activates the fifth amendment due process safeguard against litigation at a distant location only when federal courts attempt to exercise jurisdiction over defendants located beyond the borders of the United States. Because they disregard inconvenience and distance within the United States, these courts and commentators countenance requiring defendants to appear in federal court in circumstances in which the Supreme Court has expressly ruled that the distance from the defendant's home to the state court is so great as to preclude a constitutional assertion of personal jurisdiction.

3. *The Faulty Analogy: State Borders and National Borders.*—The flaws in the analysis that condones the exercise of personal jurisdiction by federal courts over all defendants located in or having minimum contacts with the United States can be seen by examining its recent application in the case law. A number of appellate courts have explicitly adopted the sovereignty approach described above in reviewing federal trial court decisions concerning the exercise of personal jurisdiction over out-of-state defendants. The appellate opinions evince a common disregard for the burdens that distant litigation can impose on

⁶⁴ *E.g.*, *Haile v. Henderson Nat'l Bank*, 657 F.2d at 826; *Driver v. Helms*, 577 F.2d at 157.

⁶⁵ 95 U.S. 714 (1877). See *supra* text accompanying notes 21-28.

⁶⁶ *E.g.*, *Mariash v. Morrill*, 496 F.2d at 1143.

⁶⁷ *Id.*

⁶⁸ *Id.* at 1143 n.9.

defendants. In *Haile v. Henderson National Bank*,⁶⁹ the Sixth Circuit rejected the defendants' protest that the due process clause protected them from litigation initiated by a court-appointed receiver in the federal district court in Tennessee.⁷⁰ Although the activity that tied the defendants to the suit had taken place in Alabama and the defendants had no contacts with Tennessee, the Sixth Circuit stated that the defendants could constitutionally be required to appear and defend in Tennessee. Reasoning that the minimum contacts doctrine had been developed to prevent a state from reaching beyond its borders, the court concluded that this personal jurisdiction doctrine was inapposite to federal courts' attempts to reach defendants within the United States borders.⁷¹ Whether defendants had a significant connection, or any connection at all, with the state where the litigation took place was irrelevant in the Sixth Circuit's view. Similarly, the inconvenience to defendants of litigation in a particular state was deemed unimportant. So long as the defendants were present within the United States, there were no due process restrictions on the location of the suit.⁷²

The Sixth Circuit did not develop the analytical basis for its conclusions but instead relied on *Driver v. Helms*,⁷³ a First Circuit case,

⁶⁹ 657 F.2d 816 (6th Cir. 1981), *cert. denied*, 455 U.S. 949 (1982).

⁷⁰ Haile, in his capacity as court-appointed receiver, had depended on 28 U.S.C. §§ 754 and 1692 to institute several ancillary proceedings in federal court in the Middle District of Tennessee against the defendants, none of whom resided in Tennessee. He relied upon 28 U.S.C. § 754 (1976), which provides in pertinent part: "[A receiver] shall have [the] capacity to sue in any [judicial] district without ancillary appointment," and upon 28 U.S.C. § 1692 (1976):

In proceedings in a district court where a receiver is appointed for property . . . situated in different districts, process may issue and be executed in any such district as if the property lay wholly within one district, but orders affecting the property shall be entered of record in each of such districts.

The district court found that John Barber, an itinerant evangelist, had appointed himself Bishop of the Apostolic Church of God Life Forever, Inc., and engineered a fraudulent bond issuance scheme:

The place of incorporation for the Apostolic Faith Church of God Live Forever, Inc. was a matter of some dispute The Church was founded in Louisville, Kentucky sometime in the early 1960's. It was later chartered as a non-profit religious corporation under the laws of the State of Kentucky In 1970, the Church's headquarters were moved to Decatur, Alabama, and it was later incorporated in Colbert County, Alabama. In 1971, the Church obtained a certificate to do business in the State of Georgia.

Haile v. Henderson Nat'l Bank, 657 F.2d at 818. The district court had found that related corporations were "all alter egos of John H. Barber and Apostolic Faith Church of God Live Forever, Inc., [existing] . . . only on paper" and thus were properly subject to receivership. *Id.* Nonetheless, the lower court dismissed these actions because the defendants did not have sufficient "minimum contacts" with the state of Tennessee. After reversing the district court, the Sixth Circuit remanded the case for a determination as to "whether the service was reasonably calculated to inform the defendants of the pendency of the proceedings against them in order that they might take advantage of the opportunity to be heard in their defense." *Id.* at 826.

⁷¹ *Id.*

⁷² *Id.*

⁷³ 577 F.2d 147 (1st Cir. 1978), *rev'd on other grounds sub nom.* *Stafford v. Briggs*, 444 U.S. 527 (1980).

which in turn relied on *Mariash v. Morrill*,⁷⁴ a Second Circuit case. In each of these federal question cases the defendants were served under federal nationwide service of process statutes,⁷⁵ were non-residents of the state in which the federal district court was located, and challenged the court's personal jurisdiction on due process grounds. Both courts rejected the challenges, concluding that Congress had expressly authorized personal jurisdiction over defendants located anywhere in the nation and could constitutionally exercise power over all those within the territory governed by the federal government.⁷⁶ Consistent with the sovereignty theory, both courts stated that the only constitutional limits on the exercise of personal jurisdiction by the federal courts over defendants present in the United States are those applicable to state courts' exercise of jurisdiction over defendants located within that state: notice reasonably calculated to inform the defendant of pending litigation and a reasonable opportunity to be heard.⁷⁷

The Seventh Circuit arrived at the same result based on a more convoluted analysis. In *Fitzsimmons v. Barton*,⁷⁸ a federal securities fraud action, a defendant from Oklahoma was sued in the United States District Court for the Northern District of Illinois.⁷⁹ In examin-

⁷⁴ 496 F.2d 1138 (2d Cir. 1974).

⁷⁵ In *Driver*, the plaintiffs relied on 28 U.S.C. § 1391(e) (1976) in filing a class action suit in federal court for the District of Rhode Island. They alleged that former and current federal officials had violated their constitutional rights by illegally intercepting their mail. The section relied on by plaintiffs provides in pertinent part:

The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.

28 U.S.C. § 1391(e) (1976). The defendants argued that since they had no contact with Rhode Island, the court had no personal jurisdiction over them. The district court denied defendants' motion to dismiss on these grounds. *Driver v. Helms*, 577 F.2d at 149.

In *Mariash*, the plaintiff brought an action in the Southern District of New York against Massachusetts residents for violation of the Securities Act of 1934. The plaintiffs argued that the court could exercise personal jurisdiction over the Massachusetts residents pursuant to what is now 15 U.S.C. § 78aa, which provides:

Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found.

15 U.S.C. § 78aa (1982).

The lower court dismissed the plaintiff's complaint, holding that the statute did not provide the court with jurisdiction. *Mariash v. Morrill*, 496 F.2d at 1140.

⁷⁶ *Driver v. Helms*, 577 F.2d at 156-57; *Mariash v. Morrill*, 496 F.2d at 1142-43.

⁷⁷ *Driver v. Helms*, 577 F.2d at 157; *Mariash v. Morrill*, 496 F.2d at 1143.

⁷⁸ 589 F.2d 330 (7th Cir. 1979).

⁷⁹ The plaintiff relied upon 15 U.S.C. § 78aa (1982), see *supra* note 75, to argue that the district court in Illinois had personal jurisdiction over the defendants. The lower court had dismissed the suit against an Oklahoma defendant for lack of personal jurisdiction since he lacked "minimum contacts" with Illinois. *Fitzsimmons v. Barton*, 589 F.2d at 331.

ing the fifth amendment due process restrictions on the exercise of federal court jurisdiction, the court expressly acknowledged that *Shaffer* and *International Shoe* had shifted the due process analysis of personal jurisdiction from a focus on sovereignty to a focus on fairness to the defendant.⁸⁰ The Seventh Circuit adopted the fairness approach as a limitation on the exercise of personal jurisdiction by federal courts, but redefined fairness to mean sovereignty:

[T]he fairness standard imposed by *Shaffer* relates to the fairness of the exercise of power by a particular sovereign, not the fairness of imposing the burdens of litigating in a distant forum. Applying this standard of fairness, it is clear that this instance of personal service satisfies Due Process. Here the sovereign is the United States, and there can be no question but that the defendant, a resident citizen of the United States, has sufficient contacts with the United States to support the fairness of the exercise of jurisdiction over him by a United States court.⁸¹

Under this definition of fairness, of course, the burdens imposed on the defendant by requiring him to litigate in a distant state were irrelevant.

The courts that follow the sovereignty analysis analogize the borders of the United States to the borders of a state and conclude that any defendant physically present within or having minimum contacts with the United States constitutionally can be required to litigate in any federal court. While the argument has the appeal of symmetry, it is unsatisfactory for two reasons. First, the sovereignty approach ignores the concern for fairness to defendants that the Supreme Court has consistently displayed since *International Shoe*, and disregards *International Shoe's* express requirement that before a court can constitutionally exert power over a defendant the court must make an "estimate of the inconveniences which would result to the [defendant] from a trial away from [his] home or principal place of business."⁸² By focusing solely on the boundaries of the forum and evaluating the burdens on defendants only when they are located beyond the borders of the United States, this approach necessarily countenances many instances of distant litigation in which a defendant may be seriously inconvenienced.⁸³

Second, the analogy ignores the huge difference in size between the territory of one state and the territory of the entire country. While it is undoubtedly true that the distance between courts within a vast state such as Texas or California may be great, the problem that geography can impose in terms of distant litigation is greatly reduced

⁸⁰ *Id.* at 332.

⁸¹ *Id.* at 333.

⁸² *International Shoe Co. v. Washington*, 326 U.S. at 317.

⁸³ The author does not contend that the particular facts in *Haile*, *Driver*, *Marias*, and *Fitzsimmons* necessarily lead to the conclusion that a due process violation occurred in any of those cases. It would be essential to have a more complete understanding of all the surrounding circumstances in each case, see *infra* text accompanying notes 176-79, before one could determine whether any of these assertions of personal jurisdiction were unconstitutional.

when the courts of the sovereign literally span the continent and beyond.⁸⁴ In terms of due process analysis, this difference in degree is significant.⁸⁵

Moreover, this sovereignty approach cannot be justified on the ground that it greatly simplifies litigation over the constitutional limits on the federal courts' exercise of personal jurisdiction. The Supreme Court in *Shaffer* warned that when "the cost of simplifying the litigation by avoiding the jurisdictional question may be the sacrifice of 'fair play and substantial justice,' [t]hat cost is too high."⁸⁶

In addition, a pure sovereignty approach to personal jurisdiction in the federal courts invites harassment of defendants, since it is not unknown for plaintiffs to file suit "at a most inconvenient place for an adversary, even at some inconvenience to [themselves]."⁸⁷ The sovereignty approach renders this practice constitutionally permissible, so long as the defendant is located within or has minimum contacts with the United States. Thus, a whole new dimension of forum shopping could result.

Although they have not articulated their reasons, three federal courts of appeals have indicated a general reluctance to adopt the sovereignty approach to personal jurisdiction. In *Fraley v. Chesapeake and Ohio Railway Company*,⁸⁸ the plaintiff, a West Virginia resident injured

⁸⁴ If due process is concerned with fairness to the defendant in terms of the site of the litigation, then the fact that the continental United States spans nearly 3,000 miles from east to west, 1,500 miles from north to south, and that Hawaii is 5,000 miles from Florida, cannot be ignored. In addition, some federal territory, such as Guam, lies many thousands of miles beyond the continental borders.

⁸⁵ Although the test proposed in this Article, see *infra* text accompanying notes 176-82, in some circumstances may preclude federal courts from exercising jurisdiction over United States domiciliaries located within the borders of the United States whereas state courts can generally exercise jurisdiction over state domiciliaries who are beyond the state borders, *Milliken v. Meyer*, 311 U.S. 457 (1940), this anomaly does not invalidate the suggested approach. Underlying the principle that state courts can assert personal jurisdiction over absent domiciliaries is the idea that the domiciliary has a significant connection with his "home" state, benefits from the laws of that state, and can reasonably be required to litigate in the state with which he has the most permanent attachment. *Id.* Additionally, there is a sense that there should be at least one state in which a defendant can be sued, and that the state of domicile—which is voluntarily chosen and can be changed—provides a good touchstone. These considerations also apply in the federal context and can be satisfied under the proposed test. United States domiciliaries would still be subject to suit in the United States, but would not necessarily be subject to suit in every single judicial district within the United States. Because the geographical vastness of the United States is a factor that differentiates the federal territory from the state territory, the distance between the federal judicial district chosen by the plaintiff and the one in which the defendant resides and works must be considered in an investigation of the due process constraints on federal government action.

⁸⁶ *Shaffer v. Heitner*, 433 U.S. at 211.

⁸⁷ *Gulf Oil v. Gilbert*, 330 U.S. 501, 507 (1947).

⁸⁸ 397 F.2d 1 (3d Cir. 1968). The suit was based on what is now codified at the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1982). Plaintiff, an employee of defendant's railroad, instituted this suit after suffering injuries during the course of employment. Plaintiff sued in federal court in the Western District of Pennsylvania, relying on section 56, which provides:

while employed in West Virginia, commenced his action in the Western District of Pennsylvania. The defendant was incorporated in Virginia, but maintained an office in the Western District of Pennsylvania. Concluding that the principles enunciated in *International Shoe* are applicable in federal question cases, the Third Circuit stated that "the question of whether [claims arising under federal law] are to be tried in one locality or another is now to be tested . . . simply by basic principles of fairness."⁸⁹ Because the record had not been developed regarding what inconvenience, if any, litigation in Pennsylvania would impose on the defendant, the court remanded the case with directions for further discovery.

The two other circuits that have addressed the issue have used a cursory fairness analysis. In *Lone Star Package Car Co. v. Baltimore & Ohio Railroad Co.*,⁹⁰ a district court in Texas had dismissed a claim

"Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action." 45 U.S.C. § 56 (1982). The plaintiff argued that the defendant was doing business in the Western District of Pennsylvania and was therefore subject to the jurisdiction of the court. The district court disagreed, finding that the defendant was not doing business in the Western District of Pennsylvania, and dismissed the suit for lack of personal jurisdiction. *Fraley v. Chesapeake & Ohio Ry.*, 397 F.2d at 2.

⁸⁹ *Id.* at 3 (quoting *Lone Star Packaging Car Co. v. Baltimore & Ohio R.R.*, 212 F.2d 147, 155 (5th Cir. 1954)). The Third Circuit has also stated this view in *Hartley v. Sioux City & New Orleans Barge Lines*, 379 F.2d 354, 356 (3d Cir. 1967) and *DeJames v. Magnificence Carriers*, 654 F.2d 280, 284, 286 n.3 (3d Cir.), *cert. denied*, 454 U.S. 1085 (1981), both of which relied on a state long-arm statute as a basis for personal jurisdiction. In addition, *Oxford First Corp. v. PNC Liquidating Corp.*, 372 F. Supp. 191 (E.D. Pa. 1974), *see infra* notes 243-49 and accompanying text, has addressed this fairness standard.

⁹⁰ 212 F.2d 147 (5th Cir. 1954). In *Lone Star* the defendant brought a third-party complaint against the Baltimore and Ohio Railroad in a suit filed in the Southern District of Texas. The defendant argued that the district court had jurisdiction over the third-party defendant railroad since the original suit was based on federal law regulating interstate carriers, 49 U.S.C. § 20 (repealed 1978), as well as on diversity of citizenship. Therefore, the defendant argued, the court should not apply the state jurisdictional law. The district court dismissed the third-party complaint based on its lack of personal jurisdiction over the third-party defendant, ruling that the railroad lacked sufficient contacts with the judicial district or the State of Texas. The Fifth Circuit reversed, finding sufficient contacts between the third-party defendant and Texas. *Lone Star Package Car Co. v. Baltimore & Ohio R.R.*, 212 F.2d at 155.

In *DeMelo v. Toche Marine, Inc.*, 711 F.2d 1260 (5th Cir. 1983), the Fifth Circuit recently reviewed its holding in *Lone Star*. Without repudiating the "basic fairness" test of *Lone Star*, the court concluded that Congress intended that federal courts exercising personal jurisdiction pursuant to state long-arm statutes should be guided by state, rather than general, standards of amenability to jurisdiction. In its review of prior Fifth Circuit decisions construing Fed. R. Civ. P. 4(d) and 4 (e), the court in *DeMelo* discovered conflicting statements on a number of issues affecting personal jurisdiction in federal question cases. One opinion had stated that in suits initiated pursuant to nationwide personal jurisdiction statutes the fifth amendment requires minimum contacts with the United States, not with the forum state, *Federal Trade Commission v. Jim Walter Corp.*, 651 F.2d 251 (5th Cir. 1981), but a later Fifth Circuit case questioned the validity of that assertion. *Burstein v. State Bar of California*, 693 F.2d 511, 515 n.8 (5th Cir. 1982). Without deciding the

against a railroad company that allegedly had damaged some machinery it had transported. The court had concluded that it lacked personal jurisdiction because the railroad was incorporated in Maryland, had no track west of St. Louis, and had only two agents with limited authority in Texas.⁹¹ The Fifth Circuit stated that Congress could provide for nationwide service of process in cases arising under federal law,⁹² but concluded that the policies expressed in *International Shoe* mandated that the location of litigation must be governed by "basic principles of fairness."⁹³ Applying the "[test] of fairness"⁹⁴ to these facts, the Fifth Circuit ruled that the district court could constitutionally exercise jurisdiction. In *Chem Lab Products, Inc. v. Stepanek*,⁹⁵ the Ninth Circuit dismissed a patent claim filed in federal court in California against a New York resident.⁹⁶ The plaintiff, a California resident, asserted that a letter sent by the defendant charging the plaintiff with patent infringement demonstrated that the defendant carried on activity in California. The court rejected this argument. Ruling that the letter alone was not sufficient to establish minimum contacts with California, the court held that its exercise of jurisdiction over the defendant would "violate 'federal due process.'"⁹⁷

In light of the historical use of the due process clause as a shield to protect individuals from burdensome government action, an assertion that a federal court can exercise jurisdiction over all defendants located in or having minimum contacts with the United States is unwarranted. The declining influence of the sovereignty principles derived from international law on the constitutional analysis of personal jurisdiction further undercuts the approach that looks solely to the defendant's connection with any part of the United States to determine whether a federal court can exercise jurisdiction. Moreover, the Supreme Court's increasing emphasis on evaluating whether the assertion of personal jurisdiction is fair to the defendant demonstrates that the sovereignty analysis is an inadequate approach to defining the due process limits on personal jurisdiction in the federal courts.

issue, the court in *DeMelo* emphasized the decline in sovereignty analysis in personal jurisdiction doctrine and the rise in concern for fairness. *DeMelo v. Toche Marine, Inc.*, 711 F.2d at 1270-72.

⁹¹ *Id.* at 149.

⁹² *Id.* at 154.

⁹³ *Id.* at 155.

⁹⁴ *Id.*

⁹⁵ 554 F.2d 371 (9th Cir. 1977).

⁹⁶ Plaintiff brought suit in the Central District of California to have a patent registered to the defendant declared invalid. The plaintiff relied solely on a letter written by defendant to plaintiff charging it with patent infringement as establishing the necessary contacts that would allow the district court in California to exercise personal jurisdiction over the New York defendant. The district court ruled that the defendant lacked sufficient contacts with the State of California and therefore dismissed the suit for lack of personal jurisdiction. The Ninth Circuit affirmed. *Id.* at 372.

⁹⁷ *Id.*

B. Article III and Personal Jurisdiction

Another rationale sometimes advanced to justify the view that there is no constitutional protection regarding the place of trial within the federal court system focuses on article III of the United States Constitution. Some courts and commentators argue that article III provides Congress with totally unfettered power to authorize federal courts to exercise nationwide personal jurisdiction.⁹⁸ They support their view with a textual argument, bolstered by dicta from a sextet of venerable cases written by Supreme Court Justices.⁹⁹

1. *The Textual Argument*—Article III provides that the federal judicial power be vested in the Supreme Court and in “such inferior Courts as the Congress may from time to time ordain and establish.”¹⁰⁰ Article III makes no mention of geographical constraints on the power of Congress to organize these lower federal courts. Thus, the congressional decision to organize federal judicial districts along state lines is not mandated by the Constitution, and can be changed. Indeed, the text of the Constitution does not prohibit Congress from creating one federal judicial district covering the entire country. Accordingly, some argue, if Congress can create a single federal district court and require all defendants to appear in that court, surely Congress has the power to authorize each federal court to exercise personal jurisdiction over all defendants located in or having minimum contacts with any portion of the United States.¹⁰¹

2. *The Early Cases*—In addition to making a textual argument, those who assert that article III gives Congress unfettered power to au-

⁹⁸ *E.g.*, *Fitzsimmons v. Barton*, 589 F.2d 330 (7th Cir. 1979); *Briggs v. Goodwin*, 569 F.2d 1 (D.C. Cir. 1978), *rev'd on other grounds sub nom.* *Stafford v. Briggs*, 444 U.S. 527 (1980). *See also* *Green*, *supra* note 63, at 985-86; *Note*, *supra* note 63, at 482-86. *See supra* note 63; *infra* notes 138-42.

⁹⁹ *Mississippi Publ. Co. v. Murphree*, 326 U.S. 43 (1946); *Robertson v. Railroad Labor Bd.*, 268 U.S. 619 (1925); *United States v. Union Pac. R.R.*, 98 U.S. 569 (1878); *Toland v. Sprague*, 37 U.S. (12 Pet.) 300 (1838); *Picquet v. Swan*, 19 F. Cas. 609 (C.C. Mass. 1828) (No. 11,134); *Ex parte Graham*, 10 F. Cas. 911 (C.C.E.D. Pa. 1818) (No. 5,657). *See infra* text accompanying notes 103-35. All six of the cases were written by members of the United States Supreme Court. The oldest two, however, *see infra* notes 103-15, were each written by a Supreme Court Justice sitting as a federal circuit court judge. The later four, *see infra* notes 116-35, were decided by the full Supreme Court.

¹⁰⁰ Article III, section 1 of the Constitution provides:

The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

U.S. CONST. art. III, § 1.

¹⁰¹ *See, e.g.*, *United States v. Union Pac. R.R.*, 98 U.S. 569, 602-04 (1878), discussed *infra* text accompanying notes 120-27.

thorize nationwide personal jurisdiction frequently cite six opinions authored by members of the Supreme Court. None of the cases is recent; only one is less than 50 years old. Each provides some support for the belief that Congress can authorize federal courts to issue "process to . . . run into every state in the Union."¹⁰²

The earliest case, *Ex parte Graham*,¹⁰³ was decided in 1818 by the Circuit Court for the Eastern District of Pennsylvania. The Rhode Island federal court had issued a writ of attachment authorizing the arrest of Graham, a Philadelphia merchant, and the seizure of \$2,000 of his goods.¹⁰⁴ The writ, signed by John Marshall,¹⁰⁵ was executed by a federal marshal in Pennsylvania. After his arrest, Graham immediately petitioned the federal court in Pennsylvania for a writ of habeas corpus.

Graham's challenge was jurisdictional. He asserted that a federal court lacked the power to issue process effective in another federal judicial district. Accordingly, he argued that the federal court in Rhode Island had no power to compel him to appear in Pennsylvania. Justice Washington,¹⁰⁶ sitting as a circuit judge, agreed. He ordered Graham discharged from custody, ruling that Congress had limited the scope of the process of federal courts to the territory of their own district. In addition to interpreting the federal jurisdictional statute,¹⁰⁷ Justice

¹⁰² *Picquet v. Swan*, 19 F. Cas. 609, 611 (C.C.D. Mass. 1828) (No. 11,134).

¹⁰³ 10 F. Cas. 911 (C.C.E.D. Pa. 1818) (No. 5,657). This may not be the earliest decision on the topic, but it is the earliest case upon which a Supreme Court case relied.

¹⁰⁴ The case arose because some cargo that had been captured during the War of 1812 was mistakenly given to the wrong person who departed with it. In the November, 1813 term the Federal Circuit Court for the District of Rhode Island ordered the person who had received the cargo to show cause why the merchandise should not be returned. When the defendant failed to appear, a writ of attachment was issued against him. Three years later the court was informed that the merchandise had been delivered to Peter Graham, who resided in Philadelphia. The Rhode Island Court granted an order to show cause why an attachment should not enter against Graham. When Graham did not appear in Rhode Island, a writ of attachment was issued, which provided that if Graham could not be found then up to two thousand dollars of Graham's property should be seized. This writ was not only directed to the federal marshal for Rhode Island, but to marshals for other judicial districts as well. *Id.* at 911-12.

¹⁰⁵ John Marshall was acting as circuit judge of the District of Rhode Island. *See id.* at 912. The writ was directed to the United States Marshals of New York, the Eastern and Western Districts of Pennsylvania, and the District of Rhode Island.

¹⁰⁶ Bushrod Washington was an Associate Justice of the United States Supreme Court from 1789 to 1829.

¹⁰⁷ Section 11 of the Judiciary Act of 1789 provided:

That the circuit courts shall have original cognizance, concurrent with the courts of the several states of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs, or petitioners; or an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State. And shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except where this act otherwise direct But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court. And no civil suit shall be brought before either of said courts against an inhabitant of the United States by any original process

Washington reviewed common law principles and concluded that even in the absence of the express congressional limitation, federal courts would have had no power to issue process effective in other federal districts, because Congress had organized federal courts into districts along geographical lines. He stated that the local character of the federal judicial districts and their local boundaries were significant, and that limits on process would serve to avoid clashes among various federal courts seeking jurisdiction over the same individual or property.¹⁰⁸ Moreover, he believed that unlimited process by the federal courts would lead to "an oppression upon suitors, too intolerable to be endured."¹⁰⁹

Washington did not discuss the constitutional limits on the assertion of personal jurisdiction by federal courts. Rather, he referred to the advisability of limiting federal courts' exercise of personal jurisdiction. While Washington may have believed that Congress lacked authority to allow federal courts to issue process effective beyond the district boundaries,¹¹⁰ it appears that he believed Congress could organize the federal courts into districts larger than states. Whether he believed that there are any geographical limits on Congress' power to restructure the federal judiciary is unclear, however.

Ten years later, Justice Story,¹¹¹ sitting as a circuit judge for the Circuit Court in Massachusetts, relied on *Ex parte Graham* in deciding a jurisdictional challenge raised by a nonresident defendant. In *Picquet v. Swan*,¹¹² a United States citizen who owned real estate in Boston but had resided in Paris for 20 years was sued in federal court in Boston. When Swan did not appear, the plaintiff sought the entry of a default judgment. Story denied the request and seized the opportunity to expound on the scope of process issued by federal courts. At bottom, his conclusion that the defendant was beyond the personal jurisdiction of

in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ . . .

Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78-79 (1789). The portion of section 11 dealing with the limits on a federal district court's process is codified at 28 U.S.C. § 1693 (1982): "Except as otherwise provided by Act of Congress, no person shall be arrested in one district for trial in another in any civil action in a district court."

¹⁰⁸ *Ex parte Graham*, 10 F. Cas. at 912.

¹⁰⁹ *Id.* It is important to note that Graham was not protesting the site of the litigation. He was from Philadelphia and appeared before the federal court in Philadelphia, not before the federal court in Rhode Island. Rather, he contested the power of the Rhode Island federal court to issue process effective beyond Rhode Island. The thesis of this Article would not lead to the conclusion that a violation of due process had occurred if process were nationwide but the place of trial were convenient to the defendant. Thus, to the extent Graham mounted a constitutional challenge, this paper would not support him.

¹¹⁰ Justice Washington's opinion did refer, however, to federal statutes authorizing the issuance of subpoenas beyond the district in certain instances. *Id.*

¹¹¹ Joseph P. Story was an Associate Justice of the United States Supreme Court from 1811 to 1845.

¹¹² 19 F. Cas. 609 (C.C.D. Mass. 1828) (No. 11,134).

the federal court rested on statutory analysis.¹¹³ Yet he also reviewed general jurisdictional principles, case law, and statutes. Like Washington in *Ex parte Graham*, he found it significant that Congress had chosen to organize federal courts essentially along state lines. He, too, asserted that, aside from any statutory restrictions on the scope of process issued by federal courts, "general principles" of law compelled the conclusion that "[w]hatever might be the extent of their jurisdiction over the subject matter of suits, in respect to persons and property, that jurisdiction is available only within the limits of the district."¹¹⁴ In dictum, Story stated that "[i]t was doubtless competent for congress to have authorized original as well as final process, to have issued from the circuit courts and run into every state in the Union."¹¹⁵ No amplification or explanation was provided for this assertion. Thus, it is unclear whether Story meant that a federal court in Massachusetts could authorize process to reach a defendant in Pennsylvania and compel that defendant to appear before a federal court in Pennsylvania (as attempted in *Graham*) or whether he meant that the Massachusetts court could compel the Pennsylvania defendant to appear in Massachusetts. Nonetheless, Story's words have been cited to support the proposition that article III permits nationwide personal jurisdiction.

Justice Story's statement that Congress possessed the power to authorize federal courts to issue nationwide process was repeated in 1838 in *Toland v. Sprague*,¹¹⁶ the first Supreme Court opinion to address the issue. Providing neither support for Story's assertion nor an analysis of its import, the Court quickly turned to the case at hand, a diversity suit brought in federal court in Pennsylvania by a Philadelphia merchant against a United States citizen residing abroad.¹¹⁷ Merely noting that Congress had limited the process of a federal court to the boundaries of

¹¹³ See Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78-79, reproduced *supra* note 107.

¹¹⁴ *Picquet v. Swan*, 19 F. Cas. at 611.

¹¹⁵ *Id.*

¹¹⁶ 37 U.S. (12 Pet.) 300 (1838).

¹¹⁷ Toland, the plaintiff, claimed that Sprague owed him money for an unsettled account. Because Sprague was then living in Gibraltar, the plaintiff commenced a suit in federal court in the Eastern District of Pennsylvania by way of a foreign attachment. Under the laws of Pennsylvania, a foreign attachment allowed a creditor to attach any of the debtor's property found in Pennsylvania in order to force the debtor to appear and respond to the suit. *Id.* at 327.

Because *Toland* was based on diversity of citizenship rather than on federal question jurisdiction, the opinion is not directly applicable to this Article's thesis that the due process clause limits the power of Congress to authorize litigation in federal question cases at any location in the United States. See *supra* note 9 and accompanying text. Nonetheless, the dictum in *Toland* is often cited to support the proposition that Congress can authorize nationwide personal jurisdiction in cases arising under federal law. Similarly, statements in *Mississippi Publ. Co. v. Murphree*, 326 U.S. 438 (1946) and *Picquet v. Swan*, 19 F. Cas. 609 (C.C. Mass. 1828) (No. 11,134), both of which were diversity cases, are often cited for the same proposition. See *supra* text accompanying notes 112-15 and *infra* text accompanying notes 131-35.

its judicial district,¹¹⁸ the Supreme Court held that the federal court in Pennsylvania lacked the power to compel the defendant's appearance, and that the attachment of his property in Pennsylvania was invalid.¹¹⁹

The Supreme Court next examined the geographical limits on federal court personal jurisdiction in *United States v. Union Pacific Railroad Company*,¹²⁰ in which it reviewed a federal court's attempt to exercise personal jurisdiction over many defendants who did not reside in its judicial district. This case, an outgrowth of the Credit Mobilier scandal,¹²¹ was authorized by special legislation,¹²² passed in 1873, permitting the Attorney General of the United States to sue the Union Pacific Railroad and persons who had defrauded the United States through various manipulations of Union Pacific and Credit Mobilier stock. Relying on this statute, which also authorized a federal circuit court to serve process on defendants beyond its district,¹²³ the Attorney General of the United States filed a suit in federal court in Connecticut naming as defendants the Union Pacific Railroad Company, the Credit Mobilier Company, the Wyoming Coal Company, and 150 individuals.

¹¹⁸ The Court did recognize three instances in which process could extend beyond the judicial district boundaries, however. One exception involved subpoenas for witnesses. The other two involved writs of execution after a judgment is entered. See *Toland v. Sprague*, 37 U.S. (12 Pet.) at 328-29.

¹¹⁹ Nonetheless, holding that Sprague had waived his objection to jurisdiction, the Supreme Court went on to consider the merits. Ultimately, the Court ruled for the plaintiff, affirming the lower court. *Id.* at 335-36.

¹²⁰ 98 U.S. 569 (1878).

¹²¹ Credit Mobilier of America was a construction and finance company that helped finance the building of the Union Pacific Railroad from 1865 to 1869. Oakes Ames and other men who controlled the Union Pacific Company used the Credit Mobilier Company to enrich themselves from construction contracts awarded to build the railroad. Credit Mobilier became a public scandal in 1867 when Ames, who also served as a congressman from Massachusetts, in an attempt to win influence sold shares of its stock at discount prices to members of Congress. The House of Representatives in 1873 censured Ames and James Brooks, a congressman from New York. The House took no action against the men who bought the discount shares, however. These men included Vice President Schuyler Colfax and Representative James Garfield who seven years later would become the twentieth president of the United States. 6 *ENCYCLOPEDIA BRITANNICA* 716 (14th ed. 1969). For a more detailed history of the Credit Mobilier scandal, see J. CRAWFORD, *THE CREDIT MOBILIER OF AMERICA* (1880); R. FOGEL, *THE UNION PACIFIC RAILROAD: A CASE IN PREMATURE ENTERPRISE* 17, 53 (1960); N. TROTSMAN, *HISTORY OF THE UNION PACIFIC: A FINANCIAL AND ECONOMIC SURVEY* 30-54, 71-91 (1923); H. WHITE, *HISTORY OF THE UNION PACIFIC RAILWAY* 21-32, 73-76 (1895).

¹²² Act of March 3, 1873, ch. 226, § 4, 17 Stat. 485, 509 (1873). This statute specifically authorized the Attorney General to sue the Union Pacific Railroad in federal circuit court.

¹²³ Section 4 provided in pertinent part:

Said suit may be brought in the circuit court in any circuit and all said parties may be made defendants in one suit. . . . The court where said cause is pending may . . . issue such process as it shall deem necessary to bring in new parties or the representatives of parties deceased, or to carry into effect the purposes of this act. On filing the bill writs of subpoena may be issued by said court against any parties defendant, which writ shall run into any district, and shall be served, as other like process, by the marshal of such district.

Id.

Many of the defendants were nonresidents of Connecticut and challenged the personal jurisdiction of the court. Without deciding the jurisdictional issues, the trial court dismissed the entire suit.¹²⁴ The Supreme Court affirmed.¹²⁵

In passing, however, the Supreme Court discussed jurisdiction. Because article III of the Constitution gives Congress discretion to create inferior courts without territorial restrictions, the Court reasoned that Congress could vary the geographical boundaries of the lower federal courts, and could even create one federal trial court with nationwide jurisdiction.¹²⁶ Accordingly, the Court concluded that Congress could, as "a matter of legislative discretion, which ought to be governed by considerations of convenience [and] expense,"¹²⁷ authorize federal courts to exercise jurisdiction beyond the borders of the judicial district in which they are located.

In 1925, in *Robertson v. Railroad Labor Board*,¹²⁸ the Supreme Court sustained the jurisdictional challenge of a defendant from Ohio to a suit filed in federal court in Illinois to enforce a subpoena issued by the Railroad Labor Board. The Court concluded that Congress had not authorized federal courts to assert personal jurisdiction over defendants beyond the lines of their judicial districts in enforcement actions brought by the Railroad Labor Board.¹²⁹ Citing *Union Pacific*

¹²⁴ *United States v. Union Pac. R.R.*, 28 F. Cas. 333, 341 (C.C.D. Conn. 1873) (No. 16,598). The Circuit Court for the District of Connecticut ruled that it was improper for Congress to make the United States the plaintiff in this suit. The court rejected the theory that the United States by granting land to Union Pacific became a trustee for the proper exercise of that land. The court held that either Union Pacific Railroad itself could bring suit against the defendants or, if the railroad refused to sue, then shareholders of the railroad could do so.

¹²⁵ *United States v. Union Pac. R.R.*, 98 U.S. at 620. The Court affirmed based on the same rationale as the circuit court below. In analyzing relief available under the statute, the Court found that the United States was not entitled to any relief in its own right. Because the Supreme Court agreed with the lower court that the United States was not a trustee, *see supra* note 124, it held that the United States was an improper plaintiff.

¹²⁶ *United States v. Union Pac. R.R.*, 98 U.S. at 603.

¹²⁷ *Id.* at 604.

¹²⁸ 268 U.S. 619 (1925).

¹²⁹ *Id.* at 627. The Railroad Labor Board had relied on the Transportation Act of 1920, § 310(a) & (b) to subpoena the defendant, a citizen of Cleveland, Ohio, to appear at the Labor Board's office in Chicago, Illinois. Section 310 of the Transportation Act provided in part:

For the efficient administration of the functions vested in the Labor Board by this title, any member thereof may require, by subpoena issued and signed by himself, the attendance of any witness . . . from any place in the United States at any designated place of hearing, and the taking of a deposition before any designated person having power to administer oaths. Transportation Act of 1920, ch. 91, § 310(a), 41 Stat. 456, 472, *repealed by* Act of May 20, 1926, ch. 347, § 14, 44 Stat. 587. The statute also provided:

In case of failure to comply with any subpoena [to testify] or in case of the contumacy of any witness appearing before the Labor Board, the Board may invoke the aid of any United States District Court. Such court may thereupon order the witness to comply with the requirements of such subpoena, or to give evidence touching the matter in question, as the case may be. *Id.* § 308(b). The Board interpreted these paragraphs as authorization of enforcement by any

and *Toland*, the Court observed in dictum that Congress has the power to provide for nationwide service of process and to authorize federal question suits to be filed in any federal district court.¹³⁰

Mississippi Publishing Corp. v. Murphree,¹³¹ the case most frequently cited for the proposition that there are no limits on Congress's power to authorize nationwide personal jurisdiction, was decided in 1946. A diversity action,¹³² *Murphree* featured an attack by the defendants on Rule 4(f)¹³³ of the Federal Rules of Civil Procedure, which permits federal courts to exercise jurisdiction over defendants in other judicial districts of the same state. The Supreme Court upheld the authorization of statewide personal jurisdiction. Applying a statutory analysis, the Court overruled the defendants' objection that they should not be required to leave the Southern District of Mississippi in order to defend a suit filed in the Northern District of that state.¹³⁴ Although the *Murphree* opinion did not mention the constitutional constraints on personal jurisdiction, it cited *Robertson*, *Union Pacific*, and *Toland* for the proposition that Congress could provide for nationwide service of process.¹³⁵

Surprisingly, although the line of cases ending with *Murphree* has been cited time and again as authority for the view that Congress has unlimited power to authorize nationwide personal jurisdiction, the six opinions do not support such a sweeping assertion. *Ex parte Graham*, *Picquet v. Swan*, *Toland v. Sprague*, and *Robertson v. Railroad Labor Board* all ruled that process served by a federal court beyond its district

district court. The Supreme Court, reading these paragraphs more narrowly, ruled that Congress had only authorized enforcement by any district court of competent jurisdiction. *Robertson v. Railroad Labor Bd.*, 268 U.S. at 627.

¹³⁰ *Id.* at 622.

¹³¹ 326 U.S. 438 (1946).

¹³² *Murphree*, a resident of the Northern District of Mississippi, filed a suit in that district for libel. The defendant, Mississippi Publishing Corporation, was incorporated in the State of Delaware but maintained an office and place of business in the Southern District of Mississippi. The defendant protested the location of the suit on venue grounds. The district court agreed with the defendant and dismissed the suit. The Fifth Circuit reversed in *Murphree v. Mississippi Publishing Corp.*, 149 F.2d 138 (5th Cir. 1945). It held that venue was proper under section 51 of the Judicial Code of 1911, then codified at 28 U.S.C. § 112, currently codified at 28 U.S.C. § 1391 (1982). It further held that Rule 4(f) of the Federal Rules of Civil Procedure authorized service in the Southern District of Mississippi of summons issued by the federal court in the Northern District of Mississippi. *Id.* at 140. The Supreme Court affirmed the appellate court. *Mississippi Publ. Corp. v. Murphree*, 326 U.S. 438, 446 (1946). For a discussion of the relevance of opinions in suits based on diversity to the analysis of constitutional limits on nationwide personal jurisdiction in federal question cases, see *supra* notes 9-117.

¹³³ FED. R. CIV. P. 4(f) provides in pertinent part: "All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held . . ."

¹³⁴ Defendants had objected on appeal that Rule 4(f) exceeded the scope of the Rules Enabling Act of 1934, ch. 651, 48 Stat. 1064 (1934) (codified at 28 U.S.C. § 2072 (1982)). See *Mississippi Publ. Corp. v. Murphree*, 326 U.S. at 443.

¹³⁵ *Mississippi Publ. Corp. v. Murphree*, 326 U.S. at 442.

is invalid. *United States v. Union Pacific Railroad Co.* precluded a federal court from proceeding against defendants scattered across the nation. *Mississippi Publishing Corp. v. Murphree*, while it upheld process served by a federal court beyond its judicial district, merely dealt with process served in another district within the same state. Thus, although five of the opinions state in dicta that there are no geographical limits on the power of Congress to authorize the service of process by federal courts, none of the rulings allowed a federal court to force a defendant to litigate at a place far from his residence or place of business. To the contrary, each opinion adopted a narrow, pro-defendant view of federal courts' power. Rather than supporting an expansive view of the power of the federal courts, the court's reluctance in all six cases to uphold a broad exercise of personal jurisdiction indicates a sensitivity to the burdens of litigating in a distant forum. Furthermore, the failure of these opinions to address the distinction between nationwide personal jurisdiction and nationwide process issued in conjunction with geographical limits on the place of trial undercuts their support for the view that the assertion of nationwide personal jurisdiction by federal courts is unfettered.

More important, in terms of the constitutional dimension of the problem under investigation, the dispositive issue in each of the six cases was one of statutory construction. None of the opinions analyzed the relationship of the due process clause to the powers granted to Congress under article III. Furthermore, three of the opinions were written before *Pennoyer* recognized due process constraints on personal jurisdiction,¹³⁶ and all but one of the cases antedate *International Shoe* and its elevation of fairness to the defendant with respect to the place of trial to a constitutional concern.¹³⁷ In light of the great changes wrought in constitutional analysis of personal jurisdiction by *Pennoyer* and *International Shoe*, the dicta in these older cases lose much of the persuasive power they might otherwise have had.

3. *Disregard of Due Process*—The United States Court of Appeals for the District of Columbia recently adopted the textual argument based on article III in *Briggs v. Goodwin*.¹³⁸ The defendants, who resided in Florida, challenged the personal jurisdiction of the federal court in the District of Columbia in a suit based on actions taken and statements made during grand jury proceedings in Florida.¹³⁹ The ap-

¹³⁶ See *supra* text accompanying notes 21-23.

¹³⁷ See *supra* text accompanying notes 32-44.

¹³⁸ 569 F.2d 1 (D.C. Cir. 1977), *rev'd on other grounds sub nom.* *Stafford v. Briggs*, 444 U.S. 527 (1980).

¹³⁹ The defendants who challenged jurisdiction included the United States Attorney for the Northern District of Florida, an Assistant United States Attorney for the Northern District of Florida, and an agent of the Federal Bureau of Investigation stationed in Florida. A fourth defendant, an attorney with the Department of Justice, resided in and was served in Washington

pellate court rejected the defendants' argument that their lack of minimum contacts with the District of Columbia precluded litigation there. The court characterized the defendants' contention as one based on fourteenth amendment due process clause cases limiting state court jurisdiction, and accordingly paid it no heed.¹⁴⁰ The court instead emphasized that the text of the Constitution did not restrict federal courts' power to the boundaries of the states.¹⁴¹ The court paid no attention to the due process clause of the fifth amendment.¹⁴²

Such disregard of the due process clause is not unusual. Adherents to the view that article III gives Congress unfettered power to authorize nationwide personal jurisdiction either ignore the due process clause of the fifth amendment or presume that it does not modify article III. They mistakenly read article III in isolation. Although other provisions of the Constitution limit action taken by the federal government, the fact that article III contains no limits on the power of Congress to organize the lower federal courts does not mean that Congress has totally unrestrained power in this matter. Rather, article III must be read as part of a unified document, and interpreted, to the extent possible, to be in harmony with other constitutional provisions, including the due process clause.¹⁴³

In fact, if the due process clause and article III conflict, the fifth amendment, the more recent part of the Constitution, takes precedence

D.C.. He did not raise a jurisdictional objection. The plaintiffs, members of Vietnam Veterans Against the War/Winter Soldier Organization, alleged that the defendants committed perjury when questioned in court about the presence of a government informer in the "defense camp." The plaintiffs alleged that the perjury violated their constitutional rights, for which they were entitled to declaratory relief and damages. The three defendants in Florida were served process via 28 U.S.C. § 1391(e) (1970). *Briggs v. Goodwin*, 569 F.2d at 2-3. See *supra* note 75.

¹⁴⁰ *Briggs v. Goodwin*, 569 F.2d at 8-9.

¹⁴¹ *Id.* at 9.

¹⁴² Although the Supreme Court reversed this case on non-jurisdictional grounds, Justices Stewart, Brennan, and Marshall dissented. They concluded that jurisdiction, as well as venue, did exist. In analyzing the due process constraints on jurisdiction, the dissent explicitly rejected any concern for the fairness or unfairness of requiring the defendant to bear the burden of defending suit in a distant, inconvenient forum. Instead the dissent adopted a sovereignty rationale, looking solely to whether the court was created by a sovereign with power over the defendant. As the suit involved citizens of the United States, the dissent reasoned that the due process requirements of minimum contacts between the defendant and the pertinent sovereign had been satisfied. *Stafford v. Briggs*, 444 U.S. at 553-54 (Stewart, J., dissenting). It is interesting to note that Justice Marshall, who authored *Shaffer v. Heitner*, which injected fairness standards into quasi in *rem* jurisdiction analysis, see *supra* text accompanying notes 45-51, adopted a sovereignty analysis in the *Stafford* dissent.

On the other hand, Justice Brennan, who joined in the sovereignty analysis in the *Stafford* dissent, later wrote that sovereignty was not a basis of the personal jurisdiction restriction on judicial power. *Keeton v. Hustler Magazine*, 52 U.S.L.W. 4346, 4349 (U.S. March 20, 1984) (Brennan, J., concurring). See *supra* note 56.

¹⁴³ See C. BLACK, *DECISION ACCORDING TO LAW: THE 1979 HOLMES LECTURES* (1981) (arguing for an approach to constitutional analysis that emphasizes the overall structure of the Constitution).

over article III.¹⁴⁴ Such conflicts might materialize. Even though grants Congress the power to create inferior federal courts, it is possible to conceive of statutory schemes that would reorganize the courts in an unconstitutional fashion.¹⁴⁵ For example, if Congress enacted a statute requiring all federal litigation arising in the continental United States to be pursued in the federal district court in Guam,¹⁴⁶ it is unlikely that such a statute would withstand a due process challenge. Similarly, if Congress required all federal suits arising out of actions in Florida to be litigated in federal courts in Alaska, and vice versa, the constitutionality of the statute would be suspect. Other arbitrary and oppressive court reorganization schemes are easy to imagine. Thus, although article III does not prohibit Congress from creating one nationwide federal judicial district, it does not follow that Congress can disregard the due process clause in authorizing the exercise of personal jurisdiction.

Furthermore, the population growth and dispersion that has occurred during the past 200 years may well limit in some respects the broad congressional power to create courts provided in article III. Whereas it might have seemed reasonable for an early Congress to have created only one nationwide federal judicial district with all litigation centered in the nation's capital or in a major population center, the premise that Congress now can constitutionally create one nationwide judicial district and direct that all proceedings take place in one city is questionable.

4. *The Constitutional Convention and the First Congress*—The proposition that article III should be interpreted in conjunction with the due process clause not only is logical, but also is supported by the fact that the "legislative history" of article III reveals that it was drafted with the need to protect defendants from litigation at distant locations in mind. The historical evidence indicates that organizing the federal courts so that each court can exercise personal jurisdiction over all defendants physically present in the United States is contrary to the intent of the framers of the Constitution. During the Constitutional Convention, the existence of federal trial courts and debate over the reach of their power sparked great controversy.¹⁴⁷ Many delegates, including ardent pro-constitutionalists, vigorously opposed the creation of federal trial courts, asserting that state courts could adequately handle all trials

¹⁴⁴ C. SANDS, SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION, §§ 22.30-32 (4th ed. 1972).

¹⁴⁵ *E.g.*, *Yakus v. United States*, 321 U.S. 414, 460-90 (1944) (Rutledge, J., dissenting).

¹⁴⁶ Congress has established a federal district court in Guam. 48 U.S.C. § 1424(a)(1982).

¹⁴⁷ J. GOEBEL, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 226 (1971); P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 11-17 (2d ed. 1973) [hereinafter cited as HART & WECHSLER].

arising under the federal power.¹⁴⁸ Others clearly feared the power that would accrue to a system of federal courts with authority to serve process throughout the country.¹⁴⁹ As a result, a version of article III that established inferior federal courts was defeated¹⁵⁰ in favor of a compromise bill that delegated to the elected legislature the responsibility for determining what, if any, federal courts were necessary.¹⁵¹ Thus, the document that emerged from the Constitutional Convention contemplated that perhaps all trials might be held in state courts.

Because the text of article III left open the possibility that Congress could create federal trial courts, many of the state conventions called to ratify the federal constitution featured sharp attacks on the power of Congress to establish inferior federal courts.¹⁵² These attacks were unsuccessful, and the compromise article III was ratified.¹⁵³ Similar debates about the desirability of federal courts occurred during the first Congress.¹⁵⁴ That Congress, attended by many men who had taken part in framing the Constitution,¹⁵⁵ was sensitive to complaints that requiring defendants to litigate in distant locations was a "greater oppression of the individual than any from which liberation had been expected by the Revolution."¹⁵⁶ Again, those who opposed the creation of federal trial courts were unsuccessful.¹⁵⁷ Senate Bill No. 1, which became known as the Judiciary Act of 1789,¹⁵⁸ established federal trial and appellate courts.¹⁵⁹ The trial courts were organized into judicial districts drawn along state boundaries,¹⁶⁰ and have remained

¹⁴⁸ See *supra* note 147.

¹⁴⁹ J. GOEBEL, *supra* note 147, at 226.

¹⁵⁰ H. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION 124-25 (1911) cited in HART & WECHSLER, *supra* note 147, at 11-12.

¹⁵¹ U.S. Const. art. III, § 1. See *supra* note 100.

¹⁵² HART & WECHSLER, *supra* note 147, at 21. For a discussion of the amendments to article III proposed during the ratification debates, see Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 56 (1923).

¹⁵³ The process of ratification by the states is discussed in J. GOEBEL, *supra* note 147, at 324-412.

¹⁵⁴ HART & WECHSLER, *supra* note 147, at 22-23; J. GOEBEL, *supra* note 147, at 460-61, 473-75, 494-95, 504.

¹⁵⁵ J. GOEBEL, *supra* note 147, at 459 n.8.

¹⁵⁶ *Id.* at 460. These sentiments were expressed by Robert Treat Paine, then Attorney General and later a judge of the Massachusetts Supreme Judicial Court, in correspondence with Caleb Strong, a member of the Senate committee charged with organizing the federal judiciary. This committee eventually produced the Judiciary Act of 1789.

¹⁵⁷ HART & WECHSLER, *supra* note 147, at 23.

¹⁵⁸ 1 Stat. 73 (1789). The correct title of the statute is "An Act to establish the Judicial Courts of the United States."

¹⁵⁹ Section 3 of the Judiciary Act of 1789 established district courts; sections 9 and 10 set forth the jurisdiction of these trial courts. Section 4 established circuit courts; section 11 granted the circuit courts appellate jurisdiction over the district court decisions, as well as original jurisdiction under certain circumstances. See Judiciary Act of 1789, ch. 20, §§ 3,4,9,10,11, 1 Stat. 73 (1789).

¹⁶⁰ Section 2 of the Judiciary Act of 1789 established 13 judicial districts, one in each of 11 states and one each in the territories of Maine and Kentucky. *Id.* § 2.

that way, with one brief exception,¹⁶¹ to the present time.¹⁶²

Sensitive to complaints about oppressive litigation at distant sites, the first Congress, in addition to drawing federal judicial districts to correspond with state lines, placed stringent geographical restrictions on the process and venue of federal courts. In a civil action a defendant could only be served with process issued by a court for the district in which he resided or by a court for the district in which he was actually present when served.¹⁶³ Furthermore, a civil suit could only proceed in the district that had issued process.¹⁶⁴ Together these provisions strictly limited the permissible places of trial within the federal system. They ensured that a defendant could always be sued in at least one federal trial court—in the defendant's home district. The provisions allowed a plaintiff to bring a defendant to trial in another judicial district, but only if the defendant had been served in that district with process issued by the federal court for that district. Thus, occasionally an individual could be required to defend suit away from home, but only in a district in which he had been served while physically present there.¹⁶⁵ In light of the limited mobility of late 18th century society, the Judiciary Act ensured that most defendants were not required to respond to private civil litigation instituted in a faraway place.

As indicated above, the Judiciary Act's limits on the place of trial within the federal court system were not accidental, but in part were drawn to quell public fears that the federal system would impose a new oppression on citizens by requiring them to answer suits filed a great distance away from their homes.¹⁶⁶ Because the structure of the federal court system was devised in response to concerns of inconvenience and unfairness to defendants,¹⁶⁷ it is significant that the boundaries of the federal judicial districts have remained congruent with state borders since 1789. While 200 years of history do not render such an arrangement constitutionally mandated, they do demonstrate a strong tradition that the federal courts should be somewhat localized. In addition, the continuous organization of federal courts along state lines may reveal a

¹⁶¹ The Judiciary Act of 1801, ch. 4, 2 Stat. 89 (1801), established a district of Potomac which encompassed the District of Columbia, part of Virginia, and part of Maryland. This act was repealed by the Judicial Reform Act, ch. 8, 2 Stat. 132 (1802).

¹⁶² See 28 U.S.C. §§ 81-131 (1982).

¹⁶³ Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78 (1789). See *supra* note 107.

¹⁶⁴ Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78 (1789).

¹⁶⁵ *Id.*

¹⁶⁶ J. GOEBEL, *supra* note 147, at 461, 473; HART & WECHSLER, *supra* note 147, at 32-33. See *supra* text accompanying note 156.

¹⁶⁷ The Judiciary Act also responded to these fears about inconvenience to defendants by expressly providing for the district courts to meet at different cities within the state in which the court was situated. J. GOEBEL, *supra* note 147, at 471.

continuing sensitivity on the part of Congress to the potential unfairness of distant litigation to defendants.

Thus, the argument that the text of article III grants Congress the power to authorize unlimited nationwide personal jurisdiction is not convincing. It does violence to the Constitution to interpret article III in isolation from the fifth amendment. Furthermore, the six cases that purportedly interpret article III as an authorization of unlimited nationwide personal jurisdiction provide only weak support for this textual analysis. Moreover, this approach is undermined by the historical evidence from the Constitutional Convention and the first Congress, and by Congress's continuous maintenance of a system of localized federal courts.

C. *The Availability of Transfer*

In 1948 Congress enacted a statute authorizing the transfer of civil actions from one federal district court to another.¹⁶⁸ Congress directed that motions to transfer a case to another district in which it might originally have been filed should be granted "[f]or the convenience of parties and witnesses, in the interest of justice."¹⁶⁹ It has been argued that under this statute a defendant sued in a truly inconvenient location can always transfer his case and that consequently there is no need for constitutional limits on the location of litigation in federal courts.¹⁷⁰ Similarly, some have argued that defendants can always rely on the discretionary doctrine of *forum non conveniens*, which allows a court to decline to exercise jurisdiction when an evaluation of the public interest and the private interests of the litigants convinces the court that it would be substantially preferable that the litigation take place in another forum.¹⁷¹

¹⁶⁸ Act of June 25, 1948, Pub. L. No. 80-773, § 1404(a), ch. 646, 62 Stat. 869, 937 (1948) (codified at 28 U.S.C. § 1404(a) (1982)).

¹⁶⁹ Section 1404(a) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a) (1982).

¹⁷⁰ E.g., *Driver v. Helms*, 557 F.2d 147, 157 (1st Cir. 1978); *Berger*, *supra* note 13, at 301; Chafee, *The Federal Interpleader Act of 1936* (pt.1), 45 YALE L.J. 963, 985 (1936) [hereinafter cited as *Federal Interpleader*]; Chafee, *Interstate Interpleader*, 33 YALE L.J. 685, 721 (1924) [hereinafter cited as *Interstate Interpleader*]. Chafee's views are elaborated *infra* note 289. See *Engineering Equip. Co. v. S.S. Selene*, 446 F. Supp. 706 (S.D.N.Y. 1978) (asserting personal jurisdiction over Monaco corporation and relying on transfer provisions to remedy difficulties created by plaintiff's choice of forum); *Holt v. Klosters Rederi A/S*, 355 F. Supp. 354 (W.D. Mich. 1973) (asserting personal jurisdiction over Norwegian shipowner, but transferring case to Florida where most of the witnesses resided); Note, *Personal Jurisdiction Over Alien Corporations in Antitrust Actions: Toward a More Uniform Approach*, 54 ST. JOHN'S L. REV. 330, 349 (1980) (federal statutes providing change of venue ameliorate inconvenience caused by broadened susceptibility to suit).

¹⁷¹ E.g., *Cryomedics, Inc. v. Spembley, Ltd.*, 397 F. Supp. 287, 290 (D. Conn. 1975) (*forum non conveniens* provides only limitation on place of trial of defendant with minimum contacts with United States). See also Note, *supra* note 63, at 482-85. In *Gulf Oil Corp. v. Gilbert*, 330 U.S.

While, as a practical matter, the availability of the transfer provision and the *forum non conveniens* doctrine may prevent most defendants in federal court from suffering serious disadvantages due to the place of trial, these measures do not obviate constitutional inquiry. A few observations illustrate this point. First, if protection of defendants against an inconvenient trial location is only a matter of legislative grace rather than constitutional requirement, then nothing prevents Congress from repealing the transfer statute and eliminating the *forum non conveniens* doctrine. In that event, if the due process clause provided no protection, a defendant would be unable to seek relief from litigation at a distant, inconvenient forum no matter how oppressive the circumstances.

Second, if, as is commonly believed, transfer and *forum non conveniens* dismissal lack a constitutional dimension, a defendant without resources to travel initially to the distant place of trial could not later attack a default judgment entered in favor of the plaintiff. The powerful weapon of collateral attack is reserved for those instances in which a court acted unconstitutionally by entering a judgment despite its lack of personal or subject matter jurisdiction.¹⁷² Therefore, when the plaintiff later seeks to enforce his default judgment in the defendant's home state, the defendant who had been unable to litigate at the distant forum would be precluded from mounting a collateral attack on transfer or *forum non conveniens* grounds. Thus, if each federal court is deemed to have personal jurisdiction over all defendants in the United States, the Alaska federal court in the first hypothetical presented could enter a valid judgment on the minimum wage claim against the Florida employer despite the employer's inability to travel to Alaska for trial. When the plaintiff attempted to enforce the judgment in Florida, the employer could not collaterally attack the judgment and argue that the suit should have been transferred to a more convenient location or dismissed on the basis of *forum non conveniens*.

501, 507-08 (1947), the Supreme Court stated that federal courts "may resist imposition upon [their] jurisdiction even when jurisdiction is authorized by the letter of a general venue statute." *Id.* at 507. To determine whether the remedy available under the *forum non conveniens* doctrine should be granted or denied,

[i]mportant considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.

Id. at 508. Although *Gulf Oil* was based on diversity of citizenship jurisdiction, the Supreme Court indicated that the *forum non conveniens* doctrine applied to cases involving federal rights, as well as to cases involving nonresidents or aliens. *Id.* at 504. While the "combination and weight of factors" might differ somewhat in litigation based on federal law rather than on diversity, many of the "practical problems that make trial of a case easy, expeditious and inexpensive" will be the same. *Id.* at 508.

¹⁷² *E.g.*, *Durfee v. Duke*, 375 U.S. 106, 108-11 (1963); *Kalb v. Feuerstein*, 308 U.S. 433, 438 (1940).

Third, even if the current law on transfer and *forum non conveniens* manages to protect defendants from most of the egregious scenarios, there may nonetheless be some instances in which courts deny motions to transfer or dismiss and allow litigation to proceed at an extremely inconvenient and unanticipated location. As a practical matter, unless a due process limitation on the place of trial is recognized, those defendants are unprotected. If the defendants have the resources to appear in the distant locale and litigate the transfer and *forum non conveniens* issues, they can, of course, seek a direct appeal of the court's adverse rulings on those issues. The opportunity to appeal is less than satisfactory, however, for two reasons. First, the denial of transfer or *forum non conveniens* dismissal is an interlocutory order, which generally cannot be appealed until the end of litigation.¹⁷³ As a result, the defendant would either have to litigate at the extremely burdensome site, which would essentially moot his later appeal as to the location, or default, which would entail sacrificing any defense he may have on the merits. Even if the defendant is allowed to file an interlocutory appeal, his interests are unlikely to receive much protection. Because transfer and the *forum non conveniens* doctrine both involve the exercise of discretion by the trial judge,¹⁷⁴ appellate courts are especially reluctant to overturn the lower court decisions.

In sum, although the transfer statute and the doctrine of *forum non conveniens* demonstrate an awareness that the place of trial in the federal system can cause major problems to defendants, they do not resolve the debate about the constitutional limits on the federal courts' exercise of personal jurisdiction. Indeed, they do not on their own terms even address the constitutional problem. Rather, courts use them to avoid reaching the due process limitations on the assertion of personal jurisdiction. Moreover, the availability of transfer and *forum non conveniens* provisions is not perceived as dispositive by either side of the constitutional debate. Those who believe that there are no due process constraints on nationwide personal jurisdiction view the transfer statute and *forum non conveniens* doctrine as pragmatic arrangements that merely further the efficiency of the federal court system. Those who believe that due process in certain instances protects defendants located in the United States from litigation in distant, inconvenient federal judicial districts within the country either perceive a constitutional

¹⁷³ The final order rule, codified at 28 U.S.C. § 1291 (1982), limits the jurisdiction of federal appellate courts to cases in which a final order has been entered. Limited exceptions to the final order rule are recognized by statute, *see id.* § 1292, and by case law. *See e.g.*, *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).

¹⁷⁴ *See, e.g.*, *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241, 249-51 (1981), *reh'g denied*, 455 U.S. 928 (1982); *Koster v. Lumbermens Mutual Casualty Co.*, 330 U.S. 518, 524-27 (1947); *Gulf Oil Corp. v. Gilbert*, 330 U.S. at 504-07 (1946); *Calavo Growers v. Belgium*, 632 F.2d 963, 966-67 (2d Cir.), *cert. denied*, 449 U.S. 1084 (1980); *Brown v. Grimm*, 624 F.2d 58, 59 (7th Cir. 1980).

dimension to the transfer and *forum non conveniens* provisions or view them as safeguards for defendants that exist in addition to those that the due process clause affords.

In conclusion, this examination of the three rationales advanced to support the proposition that federal courts can, consistent with the due process clause, assert personal jurisdiction over all defendants in the United States reveals that each argument is unpersuasive. Neither the outmoded sovereignty analysis of personal jurisdiction nor the power granted to Congress by article III of the Constitution nor the availability of transfer and *forum non conveniens* provisions justifies the exercise of unlimited personal jurisdiction by the federal courts. This Article now turns to the necessary, but more difficult, task of defining appropriate due process limitations on the personal jurisdiction of the federal courts.

III. THE FIFTH AMENDMENT CONSTRAINT ON THE PLACE OF TRIAL

The due process clause of the fifth amendment should be interpreted to limit the exercise of personal jurisdiction over defendants for whom the place of trial is unreasonably burdensome. The historical sensitivity of Congress and the courts to the oppression that litigation at a distant site can cause indicates that the exercise of personal jurisdiction by one federal court rather than another might, in certain circumstances, be constitutionally prohibited.¹⁷⁵ It is therefore necessary to fashion a standard that would enable federal courts to evaluate whether the exercise of personal jurisdiction over a particular defendant rises to the level of a due process violation.

A. *Constructing a Fairness Test*

In the jurisdictional analysis outlined in *International Shoe* and amplified in *Shaffer* and *Volkswagen*, the defendant is the focal point.¹⁷⁶ The Court's analysis emphasizes the extent of the inconvenience to the defendant and the reasonableness of requiring him to defend in a particular locale. The Court's increasing concern with fairness to the defendant has become the heart of the constitutional evaluation of personal jurisdiction. In investigating the fairness of the place of trial, the case-by-case approach mandated by the Supreme Court examines all the circumstances of the case, evaluating the burdens on the protesting defendant and the countervailing interests that the state court has in asserting jurisdiction.¹⁷⁷ A similar balancing test

¹⁷⁵ See *supra* text accompanying notes 147-67.

¹⁷⁶ See *supra* text accompanying notes 32-58.

¹⁷⁷ For example, in *Keeton v. Hustler Magazine*, 52 U.S.L.W. 4346, 4347-48 (U.S. March 20, 1984), the Supreme Court examined the particular circumstances of plaintiff's claim and of defendant's connection with the forum state, as well as the range of legitimate state interests fur-

should apply when federal courts inquire into the fairness of the location of an action. Nevertheless, because the inquiry arises in a federal rather than a state context, some of the relevant interests will vary from those enunciated in the state court jurisdiction cases.

In evaluating a due process challenge to the location of litigation in a federal question case, a federal court should consider two major elements. First, the court should appraise the burden that the location of litigation imposes on the individual defendant. As discussed below, this burden may consist of two separate factors: inconvenience and reasonable anticipation of litigation. Second, the court should consider the federal interests served by placing the suit at the site chosen by the plaintiff. While the historical purpose of the due process clause has been to protect individuals from government oppression,¹⁷⁸ the legitimate interests of the government have always been a factor in the due process calculus.¹⁷⁹ Therefore, no matter how severe the burden on the defendant, the burden must be weighed against the valid interests of the federal government, a category that, of course, subsumes the "public interest."

In evaluating whether the place of trial imposes a significant burden on the defendant, a number of factors are relevant: the distance, the additional expense due to the distance, the defendant's resources, the extent of the defendant's activities in the vicinity of the site of litigation, and the nature of the defendant's activities in that area. Roughly, these factors coalesce into two distinct categories: (1) the inconvenience to the defendant, and (2) the defendant's reasonable anticipation of litigation at the location that the plaintiff has chosen. The Supreme Court has recognized both aspects in the seminal personal jurisdiction cases.¹⁸⁰ It should be noted, however, that the Supreme Court has not always treated these two factors separately. The Court has often focused on only one aspect in determining the constitutionality of the assertion of personal jurisdiction over a particular defendant.¹⁸¹ Occa-

thered by requiring defendant to litigate in the forum. *See also* Shaffer v. Heitner, 433 U.S. 186, 207, 209 (1977); DeMelo v. Toche Marine, Inc., 711 F.2d 1260, 1271-72 (5th Cir. 1983).

¹⁷⁸ *See supra* text accompanying notes 29-30.

¹⁷⁹ *E.g.*, Mathews v. Eldridge, 424 U.S. 319 (1976) (government's interest in avoiding the fiscal and administrative burdens of post-termination hearings must be weighed against the individual's loss of funds if they have been erroneously deprived); Arnett v. Kennedy, 416 U.S. 134 (1974) (government's interest in expeditious removal of an unsatisfactory employee must be weighed against the interest of the affected employee in continued public employment), *reh'g denied*, 417 U.S. 977 (1974). *See also* Keeton v. Hustler Magazine, 52 U.S.L.W. at 4347-48.

¹⁸⁰ *E.g.*, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-92, 297 (1980) (fairness of assertion of personal jurisdiction protects defendant against burdens of litigating in inconvenient forum and gives degree of predictability to legal system).

¹⁸¹ For example, in two recent cases the Court has emphasized the defendants' reasonable anticipation of suit. In Keeton v. Hustler Magazine, 52 U.S.L.W. 4346, 4348 (U.S. March 20, 1984), the Court stressed that the defendant was aware of New Hampshire laws when it deliberately sold thousands of copies of its magazines in New Hampshire, and therefore reasonably should have

sionally, the Court has merged the two factors and taken a unified approach to evaluating the circumstances that allegedly make the place of trial unfair for the defendant.¹⁸² Nevertheless, these two factors, although they both focus on the unique circumstances of the defendant, are analytically distinct, and should therefore be considered separately. When these two factors are considered along with the interests of the federal government, a three-part balancing test emerges.

First, a court should evaluate the degree of inconvenience, if any, that the place of trial imposes on the defendant. While distant litigation often is more bothersome than litigation at home, inconvenience that is not substantial should be ignored for constitutional purposes; in such a case, the court can cease its examination and exercise jurisdiction. If the defendant would suffer substantial inconvenience, however, the court must evaluate the second factor: could the defendant reasonably have anticipated being sued at this location? If the answer to this second inquiry is affirmative—that is, although the location poses great inconvenience to the defendant, his purposeful activity is such that he should have expected to defend in that forum—then the court can cease its examination and exercise jurisdiction over the defendant. On the other hand, if the defendant could not reasonably have expected to defend in that location, the court must then investigate the third factor: do any important government interests justify the burden imposed on the defendant? Again, if the answer to this third question is affirmative the court may constitutionally exercise personal jurisdiction. Because society's interests outweigh the inconvenience to the defendant it does not violate due process to go forward with the litigation. On the other hand, if the court concludes that important government interests do not override the inconvenience to the defendant, the due process clause prohibits the exercise of personal jurisdiction.

Although the proposed test, like most balancing tests, is imprecise, it prescribes a reasonable method for ascertaining the constitutional limits on federal courts' exercise of personal jurisdiction over defend-

anticipated suit there in a libel action based on the magazine's contents. In *Calder v. Jones*, 52 U.S.L.W. 4349, 4351 (U.S. March 20, 1984), the Court stated that based on the defendants' intentional acts, which were aimed at a California resident with consequences likely to be felt in California, the defendants reasonably should have anticipated suit in California. Similarly, in *Volkswagen*, the Supreme Court emphasized lack of foreseeability of suit and said little about actual inconvenience. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 297-99. In *International Shoe*, on the other hand, more emphasis was placed on inconvenience. *International Shoe Co. v. Washington*, 326 U.S. at 317.

¹⁸² This in essence occurred in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 291-92, 297 (unfair to subject East Coast defendants to suit in Oklahoma based on one isolated, fortuitous occurrence when defendants do no business in Oklahoma and do not seek to benefit from Oklahoma law), and in *Kulko v. Superior Court*, 436 U.S. 84, 97-98, *reh'g denied*, 438 U.S. 908 (1978) (unfair to require New York defendant to litigate in California when defendant carried on no activities in California, controversy arose in New York, and plaintiff moved to California after claim arose).

ants. A pragmatic case-by-case approach, with an emphasis on the realities of contemporary society and the true costs that distant litigation imposes on defendants, is consonant with the idea that the due process clause protects individuals from actions that are oppressive. Because this approach is similar to the Supreme Court's jurisdictional analysis in the context of state courts, much of the fourteenth amendment case law is applicable, with appropriate modifications to federal interests. A closer examination of the factors comprising the proposed jurisdictional balancing test is appropriate, however, before case law is considered.

1. *Inconvenience to the Defendant.*—The distance between a defendant's home or business and the location of the trial is obviously a principal factor to consider in deciding whether that location poses severe inconvenience to the defendant. Furthermore, because many suits in the federal system involve extended discovery proceedings, the place where most of the discovery is likely to occur may be as important as the place of the trial itself. While there is no question that the growth of the domestic airline industry, the long-distance telephone network, and overnight express mail has eased the problems of cross-country litigation,¹⁸³ barriers do remain. The most obvious burden imposed by transcontinental litigation is its financial cost. Litigation at a distant forum is almost always more expensive than local litigation. Above and beyond the costs of the litigation itself, the defendant will incur additional expenses connected with: (1) travel by parties, witnesses, attorneys, and staff to and from the forum for court appearances, discovery, and other trial preparations, (2) lodging and meals for these individuals while they are away from home, (3) transportation of documents and exhibits, (4) time the defendant must spend away from work due to the time consumed by travel, (5) missed business opportunities at home, and (6) retention of local counsel.¹⁸⁴

Non-financial factors might also make litigation in one federal court rather than another extremely burdensome to a defendant. The unavailability of witnesses is one such consideration. There may well be instances in which a defendant has witnesses willing to testify but unwilling to go to a distant place to do so. There may also be witnesses important to the defense who are unwilling to testify and who are beyond the compulsory process of the distant court,¹⁸⁵ or third-party de-

¹⁸³ See, e.g., *McGee v. International Life Ins. Co.*, 355 U.S. 220, 222-23 (1957) ("[with] the fundamental transformation of our national economy over the years . . . has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.").

¹⁸⁴ See *Gottlieb, In Search of the Link Between Due Process and Jurisdiction*, 60 WASH. U.L.Q. 1291, 1325 (1983).

¹⁸⁵ FED. R. CIV. P. 4(f) limits the process other than a subpoena of a federal court to the state in

defendants who are not subject to the court's jurisdiction.¹⁸⁶ Such problems may greatly hinder the defendant's ability to mount an adequate defense in a distant forum.

In addition, other more subjective factors may bear on the difficulty of litigating in a distant forum. These include the difficulty of selecting attorneys in a community far from home¹⁸⁷ as well as the emotional distress induced by travel and the necessity of spending extended time away from home. Such factors, while difficult to quantify, may compound the burdens imposed on the defendant by distant litigation.

Obviously, in many cases, the financial resources of the defendant should be considered. The inability to pay the extra costs imposed by litigation in a distant forum may force some poorer defendants to default, while wealthier defendants may be able to absorb those expenses without much difficulty. In order to prevent the creation of a potent weapon for plaintiffs, there must be some protection for defendants of limited means. The defendant's ability to shoulder the added costs of distant litigation should not be the sole criterion, however, in determining fairness to the defendant. If it were, wealthy individuals and corporate defendants could be required to appear repeatedly before federal courts in the far reaches of the country, despite their lack of connection with such locations.

The factors listed above do not comprise an exhaustive list. It would be wise for courts assessing the inconvenience to a defendant to look also to the body of case law developed regarding transfer¹⁸⁸ and

which the court is located. In addition, Rule 4(f) allows process to be served beyond the state borders but within 100 miles of the courthouse in third-party complaints, *see* FED. R. CIV. P. 14, and in instances in which defendants are joined as necessary parties under Rule 19. *See* FED. R. CIV. P. 19.

Although the Federal Rules of Civil Procedure permit depositions by written questions, FED. R. CIV. P. 31, and by telephone, FED. R. CIV. P. 30(b)(7), and authorize subpoenas to compel witnesses to attend depositions in the district in which they reside, are employed, or transact business, FED. R. CIV. P. 45(d), defendants still may be disadvantaged by their inability to require witnesses to appear and testify in person at trial.

¹⁸⁶ FED. R. CIV. P. 19. *See* *Gulf Oil Corp. v. Gilbert*, 330 U.S. at 511.

¹⁸⁷ *Gottlieb*, *supra* note 184, at 1325.

¹⁸⁸ 28 U.S.C. § 1404(a) (1982), which permits transfer to another district court "[f]or the convenience of parties and witnesses, in the interest of justice," has been interpreted by a large number of courts. The statute is silent as to whether the plaintiff or defendant should shoulder the burden of proof in change of venue motions and as to the appropriate standard of proof. The courts have generally taken a pro-plaintiff attitude, in that they are reluctant to deprive the plaintiff of his choice of forum, *e.g.*, *United States Barite Corp. v. M.V. Haris*, 534 F. Supp. 328, 330-31 (S.D.N.Y. 1982) ("A plaintiff's choice of forum is entitled to great weight and will not be disturbed except upon a clear-cut showing by defendant that convenience and justice for all parties demands that the litigation proceed elsewhere."), and require the defendant to make a very strong showing of inconvenience and unavailability of witnesses in order to succeed on his motion. *E.g.*, *Bolton v. Gramlich*, 540 F. Supp. 822, 847 (S.D.N.Y. 1982) ("The defendants must show that the interests of

*forum non conveniens*¹⁸⁹ motions. Although these cases should not be controlling because the law in those areas has developed according to the perceived intent of Congress and notions of efficient judicial administration rather than according to a constitutional fairness test,¹⁹⁰ the factors described in those cases nonetheless should provide valuable guidance.

2. *Reasonable Anticipation of Litigation.*—The second factor in the evaluation of whether the place of trial imposes an unfair burden on a defendant—the defendant's reasonable anticipation of suit at the place chosen by the plaintiff—has been heavily emphasized by the Supreme Court in state court jurisdiction cases. The Court has stressed that personal jurisdiction cannot be asserted over a nonresident defendant based on unilateral activity initiated by the plaintiff in the forum state. Rather, the defendant must have purposefully availed himself of

convenience and justice weigh strongly in their favor before the Court will disturb the plaintiffs' choice of forum.")

¹⁸⁹ Perhaps the most renowned *forum non conveniens* case is *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). See *supra* note 170. In holding that the doctrine of *forum non conveniens* applied in federal courts, the Supreme Court listed a number of factors that district courts should consider in deciding a *forum non conveniens* motion:

An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability [*sic*] of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, "vex," "harass," or "oppress" the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.

Factors of public interest also have a place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.

Id. at 508-09. Since the statute permitting change of venue within the federal court system was enacted shortly after the *Gulf Oil* decision, thus obviating the need for *forum non conveniens* dismissal in most federal cases, there has been relatively little development of the federal *forum non conveniens* doctrine in recent years. The doctrine, however, survived the enactment of the transfer provisions, 15 C. WRIGHT, A. MILLER, & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE*, § 3828 (1976), as the Supreme Court recently emphasized in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), *reh'g denied*, 455 U.S. 928 (1982) (upholding *forum non conveniens* dismissal by federal district court of suit by Scottish citizens arising out of air crash in Scotland).

¹⁹⁰ This development is clearly demonstrated by the fact that transfer and *forum non conveniens* motions have been viewed as decisions addressed to the discretion of the courts, see *supra* text accompanying note 174, rather than as decisions compelled by the Constitution.

the benefits of the forum state's laws.¹⁹¹ The Supreme Court has pointed out that this restriction on the type of conduct that should lead a defendant reasonably to anticipate suit in a particular state "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."¹⁹²

This kind of predictability is important to potential defendants whether sued in federal or state court.¹⁹³ Translating the factor of the defendant's reasonable anticipation of suit from the state to the federal context, however, poses the problem of determining the correct geographical frame of reference. As argued earlier, examining a defendant's connection with the United States would be too lax a measure for determining whether that defendant reasonably should have anticipated litigation anywhere in the country. Defining the pertinent forum as the nation would eliminate constitutional protection for United States citizens who are sued on the opposite side of the continent from their totally localized operations.¹⁹⁴ If such a nationwide standard were adopted, the Florida employer discussed in the first hypothetical should not reasonably anticipate suit in any state court other than Florida's, but should reasonably anticipate suit in every federal court in the country. Because this result is unsatisfactory, several alternative suggestions for the appropriate geographical measure are next explored.

a. *The State as Reference Point.*—A number of federal courts have resolved challenges to personal jurisdiction in federal question cases by investigating the defendant's contacts with the state in which the federal court is located.¹⁹⁵ Although it may seem odd to rely on

¹⁹¹ *Keeton v. Hustler Magazine*, 52 U.S.L.W. at 4348; *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 297; *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

¹⁹² *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 297. See *supra* note 52.

¹⁹³ While predictability is certainly an important factor that affects individuals' peace of mind as well as their business decisions, in a sense the whole idea is circular as it is used in the context of personal jurisdiction. Whatever the Supreme Court defines as activities that give rise to jurisdiction, and as the pertinent forum in which those activities should be evaluated, will provide a basis for predicting the location of future litigation. If the Supreme Court changes the definition, the potential defendants will still have predictability; it will merely be based on a new standard.

¹⁹⁴ Perhaps the idea of measuring a defendant's contacts anywhere in the United States would be appropriate if the defendant were not a citizen or resident of the United States. In such circumstances it may well be that an important government interest would warrant the assertion of personal jurisdiction by a federal court over defendants that carried on only minimal activity at each of four or five locations in the United States. See *infra* notes 240-41 and accompanying text. The applicability of due process to the analysis of personal jurisdiction over aliens, foreign states, and international organizations is beyond the scope of this Article, however. For a discussion of appropriate standards for the assertion of personal jurisdiction over alien corporate defendants, see Note, *supra* note 63.

¹⁹⁵ *E.g.*, *Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distrib. Party Ltd.*, 647 F.2d 200 (D.C. Cir. 1981) (trademark); *Chem Lab Prods., Inc. v. Stepanek*, 554 F.2d 371 (9th Cir. 1977) (patent); *Fraley v. Chesapeake and Ohio Ry.*, 397 F.2d 1 (3d Cir. 1968) (Federal Employer's

state boundaries in an analysis of the limitations the federal constitution places on federal courts, there is strong historical support for the importance of state borders to the organization and operation of federal courts. As discussed previously,¹⁹⁶ beginning with the First Judiciary Act, Congress has ensured that federal judicial districts do not extend across state lines, and generally has limited the process that a federal court can issue to the state in which the federal court sits.¹⁹⁷ The significance of state borders to the federal court system is also reflected in the traditional practice whereby federal judges are largely chosen from lawyers residing in the state in which the federal court is located.

Pragmatic reasons also favor reliance on state boundaries in the analysis of personal jurisdiction. Viewing the states as the pertinent areas for inquiries into whether a defendant reasonably should have anticipated litigation at the site chosen by the plaintiff significantly narrows the geographical scope of the inquiry. Accordingly, federal courts would only need to examine the defendant's activity within one area, and the state borders would provide a bright line to define it. Moreover, a defendant would be required to defend only in those states with which he has a significant connection. The threat of litigation anywhere in the country when a defendant has a significant connection with only one state would be eliminated.

It is obviously true, however, that state boundaries are not the perfect measure of inconvenience to a defendant. A fairness test based solely on a defendant's minimum contacts with a state would be both overinclusive and underinclusive. Such a test would protect defendants who lack minimum contacts with a state but would not find it inconvenient to litigate there. For example, residents of Camden, New Jersey could successfully challenge the jurisdiction of the court in the Eastern District of Pennsylvania located directly across the Delaware River in Philadelphia so long as they lacked minimum contacts with Pennsylvania. On the other hand, such a test would fail to protect defendants who have a significant connection with one portion of a state, no matter how large the state or how inconvenient the site of litigation. A defendant doing business in a small town on the Texas-New Mexico border would be unable to challenge on constitutional grounds the jurisdiction of a federal court located 900 miles away in Houston.

Liability Act); *Hartley v. Sioux City and New Orleans Barge Lines, Inc.* 379 F.2d 354 (3d Cir. 1967) (Jones Act); *Lone Star Package Car Co. v. Baltimore & Ohio R.R.*, 212 F.2d 147 (5th Cir. 1954) (Carmack Amendment regulating interstate carriers).

¹⁹⁶ See *supra* text accompanying notes 158-62.

¹⁹⁷ See *supra* note 107. Since districts did not extend beyond state boundaries, see *supra* text accompanying notes 160-62, the scope of process was limited to one state. In 1938 Congress adopted the Federal Rules of Civil Procedure and expanded the scope of process to include all judicial districts within one state. See FED. R. CIV. P. 4(f). See *supra* notes 131-34 and accompanying text. For a fuller discussion of the developments affecting the scope of process, see *infra* note 209.

Because the purpose underlying the use of state borders as a reference point is to protect defendants' constitutional rights,¹⁹⁸ the overinclusiveness presents less of an analytical problem than the underinclusiveness. If some defendants are protected who do not need

¹⁹⁸ Although the due process clause does not guarantee every defendant a convenient forum, it does guarantee that a defendant is not forced to litigate at a site that, all circumstances considered, is unreasonable. The proposed three-part analysis attempts to provide a structure for evaluating the unreasonableness of a particular location. This approach preserves the pro-defendant bias that historically has been part of due process jurisdictional analysis, yet it does not totally ignore the plaintiff's interest in the location of litigation. Ensuring that plaintiffs have at least one forum in which to litigate is surely a legitimate government interest, and has played a significant part in the adoption of nationwide jurisdiction statutes. The analysis offered herein provides more than this minimum safeguard for the plaintiff, however. Under the proposed constitutional standard, a plaintiff's choice of forum is not displaced unless the defendant demonstrates great inconvenience as well as lack of reasonable anticipation of being sued in that area. Nevertheless, under the proposed analysis proposed there may be situations in which the plaintiff must bear the burdens of distant litigation and travel to the defendant's home if he wants to pursue his claim. For penniless plaintiffs this may pose an insuperable obstacle.

Notwithstanding the fact that occasionally plaintiffs may lack financial resources and be unable to interest attorneys through a contingency fee arrangement to proceed with litigation at a distant site, the proffered analysis is justifiable, as well as workable. Although the analysis is not even-handed, in that it prefers the defendant over the plaintiff in those situations in which one party must bear the heavy burden of distant litigation and no countervailing interests favor maintaining the suit in the forum chosen by the plaintiff, this approach is consonant with the Constitution and with the litigation system that has developed in this country.

A pro-defendant personal jurisdiction analysis finds support in the Constitution. The due process clause has protected defendants from the jurisdiction of overreaching courts. It is the defendants against whom the machinery of the government, through its courts, is activated. It is the defendants against whom the government may enter judgments. It is the defendants whose property may be seized by government officials and sold in order to satisfy the judgments. While plaintiffs may have lost property due to defendants' actions or may have been injured in some way by them, the plaintiffs' loss is caused by private parties. Because government action is not involved, the due process clause is not activated.

Furthermore, the theory that a plaintiff generally should litigate where the defendant is located has remained stable throughout the expansion in personal jurisdiction doctrine. Although the historical justification for suing a defendant at home—the necessity of physically seizing a defendant in order to commence a trial—is no longer pertinent, the preference for suing at the defendant's rather than the plaintiff's home or business continues to make sense. The defendant is an involuntary party to the suit. To the extent he remains in a defensive posture, the defendant stands only to lose. That is, for the defendant, "winning" consists of losing nothing but his litigation expenses; the plaintiff, on the other hand, stands to gain from the action. While he too faces litigation costs, the plaintiff will, if successful, be awarded affirmative relief from the defendant. Thus, the plaintiff has an incentive to litigate, even if required to pursue his action at the defendant's home. In addition, the pro-defendant stance regarding place of trial constitutes a deterrent to frivolous litigation. When a plaintiff may incur some costs in initiating an action, there is a disincentive to bringing nuisance suits.

It is true, however, that the equities that favor protecting the defendant against the plaintiff's choice of forum will vary depending upon the particular facts of the case, including the defendant's conduct and the relative resources of the parties. On the other hand, although the constitutional analysis may prefer the defendant over the plaintiff if forced to make a choice between the two, the statutory and common law provisions that regulate the place of trial above and beyond the constitutional minimum standard do favor plaintiffs over defendants. *See supra* note 188.

to be, that in itself should not invalidate the measure. Furthermore, the proposed test makes actual inconvenience the first step of the due process analysis, which effectively eliminates any problem of overinclusiveness.¹⁹⁹

The underinclusive aspect of using state borders as a measure of inconvenience is more problematic, however. If fairness to defendants in terms of the site of litigation warrants constitutional protection, it does not seem appropriate to ignore such unfairness just because the defendant should reasonably anticipate litigation in another portion of a very large state. Although the state court jurisdiction cases have not addressed this issue, their constitutional analysis countenances underinclusiveness. Because the focus initially was on sovereignty, and states were considered sovereign over all persons within their borders, a defendant's location within a state was deemed irrelevant so long as he was somewhere within the state. Even *International Shoe*, which introduced inconvenience to defendants into the due process analysis, retained sufficient notions of sovereignty to ignore intrastate inconvenience. Thus, there is precedent for tolerating a certain degree of underinclusiveness.

Despite the flaw of underinclusiveness, there are practical advantages to having the courts of a nation that spans a continent look to state boundaries to determine whether it would be fair to require defendants to appear and litigate in a particular location. As mentioned earlier, a state border furnishes a bright line delineating the relevant area. Notwithstanding the sense of arbitrariness that might be experienced in cases close to either side of the line, such a test is useful because it increases the ability to predict and plan, and thus results in a certain decrease in litigation.

In addition to the clear boundaries that state lines provide, states have historically been perceived as distinctly delineated geographical and political entities. Individuals generally pay some attention to the states they visit and to the states in which they carry on commercial activity. This is because states pride themselves on their unique history and publicize their comparative advantages over sister states; because laws vary from state to state, so that individuals or companies that spend substantial time in a state often take steps to comply with state law;²⁰⁰ and because states literally post signs at their borders and air-

¹⁹⁹ The defendant in Camden, New Jersey will be unable to show that litigation in Philadelphia will be truly burdensome. Therefore, the court can exercise personal jurisdiction over him without ever reaching the issue of the defendant's reasonable anticipation of litigation in Pennsylvania.

²⁰⁰ For example, in California, there is a two year statute of limitations on contracts that are not founded on a written instrument, CAL. CIV. PROC. CODE § 339 (West 1982), while in Florida the analogous statute of limitations is four years, FLA. STAT. ANN. § 9511(3) (West 1982), and in Kansas it is three years, KAN. STAT. ANN. § 60-512 (1983). Under Pennsylvania contracts law consideration is not required for a written release or promise that contains an express statement that the signer intends to be bound, 33 PA. CONS. STAT. ANN. § 6 (Purdon 1967), while Indiana

ports welcoming travelers to their territory. As a result of such factors, people are cognizant of state boundaries. Accordingly, even though litigation may be based on federal law, it seems workable and reasonable to conclude that a defendant who has a substantial connection with a state should be able to anticipate that he might be sued in a federal court in that state.²⁰¹

There are also some obvious disadvantages to the use of state lines to determine the geographical areas in which defendants reasonably should anticipate litigation. First, as indicated above, state borders often do not provide an accurate measure of inconvenience to defendants. Second, the standard imposes state territorial limits as a constitutional restraint on a federal system. The measure requires units of the federal government to function in as circumscribed a manner as units of the constituent state governments, and forecloses the possibility of federal courts responding to litigation problems that are national in scope. Because it essentially limits federal courts "by the due process restrictions imposed on the states by the fourteenth amendment as opposed to those imposed on the federal government by the fifth amendment,"²⁰² this approach presents a jarring anomaly.

Furthermore, this standard might impede congressional experiments with multistate districts. While no such legislation is pending, federal judicial districts that cover more than one state might be particularly appropriate in some instances. For example, if Congress created a set of specialized federal courts to hear water pollution cases, a sensible organization would be to assign one court to each of the major river basins in the United States. Under such a scheme, the district for the Colorado River basin would cover territory in Colorado, Utah, Ari-

law provides that consideration is an essential element of every contract. *Poetz v. Cozmas*, 237 Ind. 500, 147 N.E.2d 227 (1958). In California, strict liability in tort does not extend to economic losses, *Seely v. White Motor Co.*, 63 Cal. 2d 9, 45 Cal. Rptr. 17, 403 P.2d 145 (1965), while New Jersey permits strict liability for commercial losses as well as for physical harm to person and property, *Santor v. A & M Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965).

Differences in state laws also loom large in noncommercial activity. For example, in Nevada noncompatibility is a recognized ground for divorce, *NEV. REV. STAT. § 125.010* (1983), and the statute requires only that one party to the marriage reside in Nevada for at least six weeks preceding the commencement of the action, *NEV. REV. STAT. § 125.020* (1983). Incompatibility is not a ground for divorce in Ohio, *see OHIO REV. CODE ANN. § 3105.01* (1983), and the law requires that the plaintiff in a divorce proceeding have resided in Ohio for a minimum of six months, *OHIO REV. CODE ANN. § 3105.03*.

²⁰¹ For a discussion of the circularity involved in defining reasonable anticipation of suit, see *supra* note 193. The priority is to select a standard and identify it publicly, so that people and businesses can plan their affairs accordingly. Yet, selecting the state as the appropriate territory has the advantage of symmetry. Based on the same type of activities in the same area, the defendant can reasonably anticipate suit in state or federal court.

²⁰² *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280, 284 (3d Cir.), *cert. denied*, 454 U.S. 1085 (1981).

zona, Nevada, and California.²⁰³ Thus, a constitutional test that limited a federal court's assertion of personal jurisdiction by only questioning whether a defendant carried on activity in the state in which the federal court was located would be too restrictive.

b. The Judicial District As Reference Point—Rather than using state borders as the pertinent measure of whether a defendant's activity should have led him to anticipate being sued in the court chosen by the plaintiff, it may be more appropriate to rely on the boundaries of the federal judicial districts. In fact, some courts have responded to jurisdictional challenges by investigating whether the defendant has minimum contacts with the federal judicial district in which the court is located.²⁰⁴ Under the current organization of the federal courts the judicial district approach is often identical to the state approach. Indeed, twenty-six of the federal judicial districts are statewide districts.²⁰⁵ The other twenty-four states are divided into sixty-three districts, with two to four districts per state.²⁰⁶ Under a judicial district approach, when faced with a constitutional challenge to personal jurisdiction that necessitates an evaluation of a defendant's reasonable expectation of litigation, approximately one-third of the federal courts would examine the defendant's statewide activity, while two-thirds of the districts would examine his activity in a portion of a state.

As discussed earlier,²⁰⁷ the judicial district approach has some historical support. Although the Constitution does not require that the federal courts be arranged into any particular system of judicial districts, throughout the history of the nation the federal judicial districts have always been organized so that none is larger than a single state.²⁰⁸

²⁰³ Similarly, a district that encompassed the Mississippi River basin might include the states of Minnesota, Wisconsin, Iowa and Illinois.

²⁰⁴ See *Hartley v. Sioux City & New Orleans Barge Lines*, 379 F.2d 354, 359 (3d Cir. 1967); *Lone Star Package Car v. Baltimore & Ohio R.R.*, 212 F.2d 147, 152 (5th Cir. 1954).

²⁰⁵ See 28 U.S.C. §§ 81-131 (1982). The statewide judicial districts include: Alaska, Arizona, Colorado, Connecticut, Delaware, Hawaii, Idaho, Kansas, Maine, Maryland, Massachusetts, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Oregon, Rhode Island, South Carolina, South Dakota, Utah, Vermont, and Wyoming. In addition, the District of Columbia comprises one judicial district, 28 U.S.C. § 88 (1982), as does Puerto Rico, 28 U.S.C. § 119 (1982). There are also federal district courts in Guam, 48 U.S.C. § 1424 (1976), the Northern Mariana Islands, 48 U.S.C. §§ 1694-94a (1976 & Supp. V 1981), and the Virgin Islands, 48 U.S.C. §§ 1611-12 (1982).

²⁰⁶ There are two federal judicial districts in the following states: Arkansas, Indiana, Iowa, Kentucky, Michigan, Mississippi, Missouri, Ohio, Virginia, Washington, West Virginia, and Wisconsin. There are three federal judicial districts in the following states: Alabama, Florida, Georgia, Illinois, Louisiana, North Carolina, Oklahoma, Pennsylvania and Tennessee. There are four federal judicial districts in the following states: California, New York, and Texas. See 28 U.S.C. §§ 81-131 (1982).

²⁰⁷ See *supra* text accompanying notes 163-65.

²⁰⁸ The one brief exception is described in *supra* note 161. See also *supra* text accompanying note 160.

In addition, for 150 years Congress limited federal courts' process to their own districts.²⁰⁹ Both the creation of localized judicial districts and the limitations on process served to ensure that defendants sued in the federal system would not be required to litigate at a great distance from home.

Using judicial districts as reference points for measuring a defendant's reasonable anticipation of suit has many of the advantages and disadvantages of the state approach. Again, the judicial district boundaries provide a bright line, clearly defining a limited geographical area within which to evaluate the nature and extent of the defendant's activity. Again, the measure is not perfectly correlated to the defendant's convenience; instances of overinclusiveness and underinclusiveness would still occur. Because many judicial districts are smaller than the states in which they are located, the judicial district approach is likely to be more overinclusive and less underinclusive than the state approach. Thus, the defendant's potential exposure is more limited, as is his potential inconvenience. Since, as explained above,²¹⁰ the extent of underinclusiveness is more troubling than the extent of overinclusiveness, in this regard the judicial district approach is superior to the state

²⁰⁹ Section. 11 of the Judiciary Act of 1789, quoted in pertinent part *supra* note 107, limited the process issued by a federal court to the district in which the court was located. See *supra* text accompanying note 163. When the Judiciary Act was revised in 1887, service of process was limited to the district where the defendant resided. Act of Mar. 3, 1887, ch. 373, § 1, 24 Stat. 5521.

The Judicial Code of 1911, Act of Mar. 3, 1911, ch. 231, 36 Stat. 1087, retained the general rule that process was limited to the district where the federal court was located (§ 51), but permitted five exceptions (§§ 52, 54-57). Three of the exceptions permitted process to be served in other districts within the same state: (1) in non-local suits when the defendants lived in different districts within the same state (§ 52); (2) in local suits when the defendant lived in the same state but in a different district from the one in which suit was filed (§ 54); (3) in local suits when the claim concerned land or other subject matter of fixed character lying in more than one district within the same state (§ 55). Service of process was permitted beyond the state but within the judicial circuit in which the court was located when the claim concerned land or other property of fixed character lying in different states within the same judicial circuit (§ 56). In addition, service of process was permitted throughout the country in *in rem* suits filed to enforce or remove a lien on the title to real or personal property when the defendant was not an inhabitant of the district in which the property was located (§ 57). 36 Stat. 1099-1103. Thus, throughout the nineteenth and early twentieth centuries a federal court generally could not issue effective process beyond the boundaries of the federal judicial district in which it was located. On rare occasions, however, process was authorized beyond the state in certain limited areas of the law. See *infra* text accompanying notes 253-79 (discussion of nationwide service of process statutes).

The adoption of the Federal Rules of Civil Procedure in 1938 significantly expanded the scope by allowing process to be served anywhere within the state in which the federal court is located. See FED. R. Civ. P. 4(f). The Rules also allowed a federal court to rely on state statutes authorizing process on out-of-state defendants. See FED. R. Civ. P. 4(e). In 1963, the Federal Rules were amended to allow process on defendants located beyond the state (1) when a state long-arm statute would permit it or (2) when certain defendants are within 100 miles from the federal courthouse. Consequently, in terms of federal service of process, the current geographical focus tends to be on the state.

²¹⁰ See *supra* text accompanying note 198.

approach. In addition, as mentioned earlier,²¹¹ overinclusiveness would not be a problem because the constitutional analysis is not triggered unless the defendant demonstrates that the place of trial would present a significant inconvenience.

Viewing the federal judicial district rather than the state as the pertinent territory for evaluating whether a defendant could reasonably anticipate the place of trial selected by a plaintiff avoids the anomaly of endowing state borders with constitutional significance in the context of fifth amendment due process analysis. Instead, the assessment of the fairness of the exercise of a federal court's power would depend on boundaries defined by federal statute. Furthermore, focusing on judicial districts rather than states would permit greater flexibility for rearrangement of the federal court system to meet special federal needs.²¹²

On the other hand, there is a major disadvantage in viewing the federal judicial district as the appropriate reference point. In contrast to state borders, the boundaries of federal judicial districts are largely invisible to the general population. More important, federal judicial districts generally are not perceived as separate government entities, with distinct histories and laws that differ from those of neighboring judicial districts.²¹³ Therefore, people, organizations, and businesses have little reason to pay attention to the federal judicial districts in which they are active. Accordingly, their reasonable expectations regarding the potential location of litigation are much more likely to be framed in terms of the states, rather than the judicial districts, in which they carry on their activities.

c. *The Regional Approach.*—Whatever bright line is chosen—the state or the federal judicial district—instances of overinclusiveness and underinclusiveness may occur. In metropolitan areas that stretch across state lines and encompass more than one judicial district,²¹⁴ distinctions based on state or judicial district boundaries are particularly unsatisfactory as elements of a test for evaluating the constitutionality of assertions of jurisdiction over defendants. An alternative method of

²¹¹ See *supra* text accompanying notes 198-99.

²¹² This is not a concession that a reorganization of the federal courts into one nationwide district or even three or four districts that encompass the whole country would necessarily lead to constitutional assertions of personal jurisdiction over all defendants within the district or districts. Again, distance might magnify the inconvenience to a defendant to such an extent that, in the absence of overwhelming federal interests, there would be instances of unconstitutional assertions of personal jurisdiction even by the federal court in its own district. This is a problem to be left to the future since no such rearrangement is pending now.

²¹³ Although federal judicial districts often adopt local court rules, these largely concern administrative and procedural technicalities that do not affect the general public.

²¹⁴ For example, the metropolitan area surrounding New York City stretches into three states (New York, New Jersey, and Connecticut) and five federal judicial districts (Southern District of New York, Eastern District of New York, Northern District of New York, District of New Jersey, and District of Connecticut).

investigating the defendant's reasonable anticipation of litigation is to eschew political divisions and adopt a regional approach. Under this approach, which takes a commonsense view of the realities of contemporary society and recognizes the increase in widespread commercial activity and in personal mobility, courts would evaluate the extent of the defendant's activity in the general region where the federal court is located. Relying on public perception and economic and social realities to define the pertinent region, courts could decide on a case-by-case basis whether the nature and quality of the defendant's activity in a particular region make it reasonable to require a defendant to litigate there. A regional approach would allow federal courts situated in a megalopolis to exercise personal jurisdiction over defendants from the nearest two or three states.²¹⁵ In addition, it might yield rare situations in which a federal court could not exercise jurisdiction over a defendant located in the hinterlands of the state in which the court is located.²¹⁶

The greatest disadvantage to the regional approach is its lack of bright lines. The standard has the potential to generate a great deal more constitutional litigation. Litigants would no doubt dispute the definition of the pertinent region as well as the extent of the defendant's activity within the region. Yet, while these disputes may be time-consuming, they do not present insoluble problems. The courts have proven themselves competent to resolve similar arguments that arise in other contexts, such as quarrels concerning the relevant labor market in employment discrimination suits.²¹⁷ Therefore, leaving the determination of the appropriate region with regard to a particular case to the courts is not unworkable.

The more serious problem posed by the lack of bright lines in the regional approach is the possibility that the pertinent region may not be well enough defined in advance that one can accurately say that a defendant's acts in that region should have led him to anticipate litigation in that region. For example, while a defendant who carries on activity in Newark, New Jersey, probably would not dispute a statement char-

²¹⁵ See *supra* note 214.

²¹⁶ For example, the federal court for the Eastern District of Texas in Beaumont might lack jurisdiction over a defendant who resides in El Paso, which is located across the state in the Western District of Texas. The distance between Beaumont and El Paso is further than the distance between Portland, Maine and Raleigh, North Carolina—a distance that incidentally traverses the borders of 12 states. *Cf. Oxford First Corp. v. PNC Liquidating Corp.*, 372 F. Supp. 191, 201 (E.D. Pa. 1974).

²¹⁷ In discrimination cases based on statistical proof, a number of factors affect the definition of the proper scope of the statistics. "The relevant geographic area may be the city or county in which the employer is located, the standard metropolitan statistical area [SMSA] or, in unusual circumstances, an entire state, region or nationwide. [*sic*]" B. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 326 (1979 Supp.). See *Hazelwood School Dist. v. United States*, 433 U.S. 299, 308, 312 (1977); *Lim v. Citizens Sav. & Loan Ass'n*, 430 F. Supp. 802 (N.D. Cal. 1976).

acterizing his activity as occurring within the New York City metropolitan region, a defendant whose activity is limited to Trenton, New Jersey, might be quite surprised to discover that his acts occurred within either the New York City or the Philadelphia metropolitan region or both. Similarly, it might be unclear whether actions taken in Portland, Maine, 120 miles from the Boston city hall, fall within the Greater Boston region. On the other hand, as the case law developed, the definitions of appropriate regions for certain types of defendants and cases would probably become quite well-known. Therefore, most defendants would be able to forecast accurately the pertinent region in which they should anticipate suit.²¹⁸

Despite its disadvantages, the regional standard may be the most satisfactory approach. It accurately reflects the amount of contemporary interstate commerce and travel. It ignores artificial boundaries, a step that is appropriate to an analysis that attempts to protect defendants against actions that are fundamentally unfair. Further, since courts would not examine a defendant's reasonable anticipation of litigation in a region unless the defendant had satisfied the first requirement by demonstrating that the site of litigation is truly inconvenient, whatever difficulties the regional approach entails would be raised in relatively few instances. In those instances the courts would be able to take into account the nature and extent of the defendant's activity, as well as the particular circumstances of the case, in defining the appropriate region.²¹⁹

If courts are uncomfortable with the regional approach, it would be possible to combine two different approaches to yield an alternative measure for determining the geographical area in which a defendant

²¹⁸ See *supra* note 193.

²¹⁹ Although the issue of constitutional limitations on state court assertion of personal jurisdiction in federal question cases is beyond the scope of this Article, adopting a regional standard for the proposed test raises the possibility that this test could only be applied to litigation in the federal court system. But see *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280, 292-93 (3d Cir. 1981) (Gibbons, J., dissenting) ("[W]ere a state court adjudicating a federal claim, the relevant due process standard should remain the fifth amendment. The nature of the claim, not the identity of the court, should determine the appropriate due process test. . . . [I]f the New Jersey legislature has placed no restriction on the constitutionally exercisable scope of jurisdiction, . . . a New Jersey court need consider only the issue of fifth amendment fairness in determining whether to assert personal jurisdiction over the foreign defendant.").

If a state court hearing a suit arising under the federal law cannot constitutionally assert jurisdiction over a defendant who is beyond the state's borders but within the region that encompasses a state, then selection of a regional approach or a hybrid state-regional analysis, see *infra* text accompanying notes 220-21, would yield jurisdictional disparities between federal and state courts. Such disparities could, lead to forum shopping. On the other hand, disparities in the scope of personal jurisdiction exercised by federal and state courts currently exist, and have not been identified as major factors in forum shopping. Furthermore, it may be appropriate that the constitutional standard for jurisdiction asserted by state courts differs from that applied to federal courts, which form one branch of a larger and more powerful national government.

should reasonably anticipate litigation. For example, a court could use the state territory as the floor and the regional territory as the ceiling for determining the appropriate area. That is, if a defendant reasonably could have anticipated litigation in the state in which the federal court is located, then an assertion of personal jurisdiction would satisfy due process and the court would not need to concern itself with determining the pertinent region. If the defendant could not reasonably have anticipated litigation in the state in which the court is located, however, the court would not automatically conclude that it would be unconstitutional to exercise personal jurisdiction. Instead, the court would then determine the appropriate region, given the nature and extent of the defendant's activities and the type of claim asserted, and evaluate whether the defendant's activities in that region should have led the defendant to anticipate litigation in that region. For example, if a defendant headquartered in California whose only out of state activity entails an extensive amount of business with a local concern in Trenton, New Jersey, could show that litigation in New Jersey would impose a real hardship, the New Jersey federal court would nonetheless be able to assert personal jurisdiction because the defendant should reasonably have anticipated litigation in New Jersey. If the same defendant were sued in a federal court located in New York City, however, before the court exercised personal jurisdiction, it would have to examine whether the defendant should reasonably have anticipated being sued in the region that included New York City.²²⁰ If the defendant could not reasonably have had such an expectation, then the court should refuse to assert jurisdiction unless the third factor of the due process test came into play and countervailing government interests overrode the inconvenience and surprise to the defendant.

Although this hybrid approach relies in part on state boundaries, it would avoid the anomaly of imposing state territorial limits as a constitutional restraint on federal courts. The state borders would not limit the fifth amendment due process analysis. Instead, by serving only as a minimum definition of the territory in which a defendant should reasonably anticipate litigation, the state borders would merely furnish a convenient bottom line to assist federal courts in resolving constitutional challenges to personal jurisdiction.

It should be noted that such a hybrid state-regional approach has already been adopted by the federal courts in certain limited contexts. When third-party claims are filed and when parties are joined pursuant to Rule 19 of the Federal Rules of Civil Procedure, Rule 4(f) allows federal courts to exercise personal jurisdiction not only over defendants

²²⁰ Because the facts of this hypothetical indicate that the defendant had no connection at all with New York, the first inquiry of the hybrid approach—whether the defendant reasonably could have anticipated suit in the state in which the federal court is located—would be answered in the negative. Thus, the regional evaluation would be necessary.

within the state, but also over defendants who are beyond the state, as long as they are within 100 miles of the courthouse.²²¹ In those circumstances, the federal courts essentially rely on state boundaries, but also can reach out into the surrounding 100 mile region. While the 100 mile radius is probably too small to be used in a fifth amendment analysis of personal jurisdiction,²²² the adoption of a hybrid state-regional approach under the Federal Rules of Civil Procedure is a useful precedent for the constitutional analysis proposed in this Article.

Finally, it should be emphasized that Congress can reduce due process challenges to federal courts' assertions of personal jurisdiction by setting precise guidelines that localize the site of litigation more than the due process clause requires.²²³ If Congress followed such a course, and, for example, only permitted federal courts to exercise personal jurisdiction in the federal judicial districts in which the claim arose, in which the defendant does business, or in which the defendant resides—all of which are places where the defendant should reasonably anticipate suit—the constitutional challenges to personal jurisdiction would drastically diminish.²²⁴ The due process test proposed here would then

²²¹ FED. R. CIV. P. 4(f) provides:

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

²²² Nevertheless, since factors such as ease of transportation so significantly affect the burden that geographical distance may impose on litigants, even a 150 mile trip might be onerous in some circumstances. Consequently, in developing a constitutional fairness test it is unwise to place great emphasis on distance alone.

²²³ Some commentators have suggested federal legislative schemes to regularize the exercise of personal jurisdiction by federal courts and to ensure a reasonably convenient federal forum. See, e.g., Barrett, *Venue and Service of Process in the Federal Courts—Suggestions for Reform*, 7 VAND. L. REV. 608, 627-35 (1954); Currie, *The Federal Courts and the American Law Institute* (pt. 2), 36 U. CHI. L. REV. 268, 299-311 (1969); Foster, *Judicial Economy: Fairness and Convenience of Place of Trial: Long-Arm Jurisdiction in District Courts*, 47 F.R.D. 73, 105-11 (1968). See also Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289 (1956) (proposing legislation to allow interstate transfer of cases, regulated by venue rules based on the reasonable connection of the lawsuit to the forum); von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966) (proposing rules to guide assertion of personal jurisdiction, emphasizing litigation convenience and relationship of parties and underlying controversy to forum).

²²⁴ The general venue provisions currently in effect limit the site of a suit based on a claim arising under federal law or based on other non-diversity grounds to the district in which all defendants reside or in which the claim arose. 28 U.S.C. § 1391(b)(1982). Corporations are deemed to reside in any judicial district in which they are incorporated, licensed to do business, or doing business. 28 U.S.C. § 1391(c)(1982). Thus, when these sections are applicable, they limit

be needed only in those instances in which Congress authorized personal jurisdiction over defendants who lacked such a connection with the district in which the federal court is located.

As this discussion indicates, the second factor of the proposed test is not without difficulty. The Supreme Court has emphasized the defendant's reasonable anticipation of litigation in the state court jurisdiction cases because of the importance of providing potential defendants with a degree of predictability about the site of future litigation. While predictability is also important to litigants in the federal court system, selecting the appropriate frame of reference is problematic. Adopting either a regional measure or a hybrid state-regional approach, however, appears to present a satisfactory solution.

3. *Government Interests*—Despite the great inconvenience to a particular defendant and the fact that he could not have anticipated being sued in the place chosen by the plaintiff, significant government interests may be furthered by allowing the suit at the challenged location. Yet to date, few federal interests have been identified that would justify imposing a seriously burdensome place of trial on a defendant. Congress has not enacted an extensive legislative scheme regulating the personal jurisdiction of federal courts.²²⁵ As a result, federal courts generally rely on the long-arm statute of the state in which they sit when they assert jurisdiction over defendants located great distances from the site of the litigation.²²⁶ These statutes reflect the views of state legislatures as to the necessity and wisdom of obtaining personal jurisdiction over nonresidents,²²⁷ and consequently reveal nothing about the federal interests that might be furthered by permitting litigation in

the site of litigation to one that a defendant could reasonably anticipate. The provisions of 28 U.S.C. § 1391(a)(1982), however, permit diversity suits to be filed in the district in which all the plaintiffs reside, as well as the one in which all the defendants reside or in which the claim arose. Obviously under this provision suits may be filed in areas of the country where the defendant could have had no reasonable expectation of litigation.

²²⁵ Other than in the relatively few instances in which nationwide personal jurisdiction statutes enacted in certain specified areas of the law apply, see *infra* notes 253-81 and accompanying text, the only regulation guiding the exercise of personal jurisdiction by the federal courts is Rule 4(f) of the Federal Rules of Civil Procedure. Rule 4(f) limits process to the territorial limits of the state in which the federal court is held unless a federal statute or rule provides otherwise. See *supra* notes 133 & 185. Rule 4(e) permits a federal court to rely on state long-arm statutes to serve process beyond the territory of the state.

²²⁶ *FED. R. CIV. P. 4. See, e.g., DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280, 284 (3d Cir.) (New Jersey federal district court hearing admiralty claim relied on New Jersey long-arm rule), *cert. denied*, 454 U.S. 1085 (1981); *Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distrib. Party Ltd.*, 647 F.2d 200, 204 (D.C. Cir. 1981) (federal court in District of Columbia relied on District of Columbia's long-arm statute in suit alleging violation of federal trademark law).

²²⁷ See *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 440 (1952) ("Provisions for making foreign corporations subject to service in the State is a matter of legislative discretion . . .") (quoting *Missouri Pac. R.R. v. Clarendon Boat Oar Co.*, 257 U.S. 533, 535 (1922)). See also *Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distrib. Party Ltd.*, 647 F.2d at 204

certain locations. Nonetheless, since Congress has expressed little dissatisfaction with this arrangement,²²⁸ it appears that in its view the interests of the federal government are in general adequately served when federal courts are subject to the same personal jurisdiction standards as state courts. This state of affairs provides strong evidence that federal courts should be reluctant to exercise personal jurisdiction over defendants who reside at distant locations when the place of trial would seriously inconvenience those defendants and they could not reasonably have anticipated being sued there.

Congress has, however, enacted statutes on occasion that authorize federal courts to exercise personal jurisdiction over defendants located beyond the state in which the federal court sits.²²⁹ Indeed, a few federal statutes, examined below, allow personal jurisdiction over defendants located anywhere in the United States.²³⁰ Only in relatively rare instances has Congress indicated that it believes important government interests necessitate a broad exercise of personal jurisdiction by federal courts. The infrequency of nationwide personal jurisdiction statutes during the 200 years since the federal court system was organized provides further evidence that federal courts should hesitate before asserting personal jurisdiction over defendants located far beyond the region surrounding the court.

This is not to say that significant government interests should be ignored under the proposed due process test. There may be occasions when the interests of the federal government outweigh the burden imposed on a defendant. If a plaintiff makes such a contention, the court should afford it due consideration, evaluating both the importance of the government interests²³¹ asserted and the extent to which they would be thwarted by a denial of personal jurisdiction.

Although it is difficult to identify all pertinent federal interests in

("[T]he local long-arm statute . . . was drafted from the point of view of the District [of Columbia] community, not from the perspective of the nation as a whole.").

²²⁸ Rule 4 of the Federal Rules of Civil Procedure has been in effect since the Federal Rules of Civil Procedure were promulgated in 1938. See *supra* note 209. When the Rules were amended in 1963, Rule 4(e), which had only referred to service on nonresidents of the state pursuant to a federal statute, was revised to include express authorization for federal courts to rely on state long-arm statutes for service on nonresidents. The rule's proscription against service of process beyond the state was retained. See FED. R. CIV. P. 4(f). The revisions of the Rules of Civil Procedure in 1966, 1970, 1980, and 1983 made no substantive changes in Rule 4(e) or 4(f). But see *infra* notes 318-29 and accompanying text.

²²⁹ See *supra* note 11. For a description of the historical development of the expansion of federal court process, see *supra* note 209.

²³⁰ See *infra* notes 252-75 and accompanying text.

²³¹ See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 347 (1976) ("[E]xperience with the constitutionalizing of government procedures suggests that the ultimate additional cost in terms of money and administrative burden would not be insubstantial."). *Arnett v. Kennedy*, 416 U.S. 134, 168 (Powell, J., concurring) ("[T]he Government's interest in being able to act expeditiously to remove an unsatisfactory employee is substantial."), *reh'g denied*, 417 U.S. 977 (1974).

the abstract, surely one such interest would be the desire to provide a forum for suits beyond the effective reach of any state.²³² For example, the current federal interpleader statute permits a broad exercise of personal jurisdiction in order to circumvent the difficulties that state courts confront in multi-party, multi-state controversies.²³³

The interest of the federal courts in judicial economy also would be an important factor to consider.²³⁴ As a general proposition, the duplication that occurs in having parts of the same lawsuit conducted in different federal courts should be avoided.²³⁵ In addition, the adverse impact on litigation caused when no court hears the whole controversy should be taken into account.²³⁶ These very concerns prompted the oldest nationwide personal jurisdiction statute, which was enacted to allow the United States to sue all members of a nationwide business monopoly in a single court.²³⁷ The concern for judicial economy has never been deemed absolute, however. If it were, due process protection for defendants would vanish, in contravention of the Supreme Court's admonition in *Shaffer* that the objective of simplifying litigation cannot be allowed to override the objectives of fair play

²³² See AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 437-41 (1969).

²³³ 28 U.S.C. § 2361 (1982) provides:

In any civil action of interpleader or in the nature of interpleader under section 1335 of this title, a district court may issue its process for all claimants and enter its order restraining them from instituting or prosecuting any proceeding in any State or United States court affecting the property, instrument or obligation involved in the interpleader action until further order of the court. Such process and order shall be returnable at such time as the court or judge thereof directs, and shall be addressed to and served by the United States marshals for the respective districts where the claimants reside or may be found.

Such district court shall hear and determine the case, and may discharge the plaintiff from further liability, make the injunction permanent, and make all appropriate orders to enforce its judgment.

The genesis of the federal interpleader provisions is described *infra* notes 258-62 and accompanying text.

²³⁴ The federal interest in judicial economy has been clearly expressed in the liberal joinder of claims and parties provisions contained in the Federal Rules of Civil Procedure. See FED. R. CIV. P. 18, 20.

The underlying policy of the Rules of Civil Procedure is the settlement at one time of all controversies between all parties whose disputes involve common questions of law and fact, and such objective cannot be achieved without proceeding in civil cases beyond some of the limitations once associated with equity's rules of joinder.

6 CYCLOPEDIA OF FEDERAL PROCEDURE § 20.18 (3d ed. 1981)(footnote omitted).

²³⁵ See, e.g., *Oxford First Corp. v. PNC Liquidating Corp.*, 372 F. Supp. 191, 202 (E.D. Pa. 1974) ("The work of this Court in managing this piece of litigation will be substantial, whether or not the St. Claire defendants are part of the suit before us. In terms of judicial economy, would it not be shamefully wasteful to require what is all part of a single litigation to proceed in two districts at once?"), discussed *infra* text accompanying notes 243-49.

²³⁶ See, e.g., *id.* at 202 ("[Allowing] what is part of a single litigation to proceed in two districts at once . . . would markedly impair the present litigation by shearing off an integral part thereof, as well as lead to duplication of effort by counsel and the courts."). See also *supra* note 234.

²³⁷ The Sherman Act of 1890, 26 Stat. 209, contained a provision authorizing unlimited personal jurisdiction. See *infra* notes 253-57 and accompanying text.

and substantial justice.²³⁸

The federal government's interest in suits involving other nations and their citizens, an interest fraught with diplomatic and international law overtones, is another significant factor that could justifiably affect the scope of personal jurisdiction authorized by Congress. For example, Congress might decide that this interest justifies limiting the assertion of personal jurisdiction over a foreign state or ambassador to the federal court in Washington, D.C., the nation's capital.²³⁹ Similarly, the interest of the federal government in regulating activity undertaken in the United States by foreign nationals or foreign corporations is also a factor that might affect the scope of personal jurisdiction authorized by Congress. Congress might deem it important that federal courts, in determining whether to assert personal jurisdiction, examine the aggregate of an alien defendant's contacts with the United States,²⁴⁰ thus ensuring that a foreign defendant who carried on a small amount of activity in a number of different states could be sued in at least one federal court in the United States.²⁴¹

No doubt other legitimate federal interests will be identified by courts and advanced by Congress.²⁴² Because the protection of indi-

²³⁸ *Shaffer v. Heitner*, 433 U.S. at 211. See *supra* text accompanying note 86.

²³⁹ In fact, Congress adopted a different approach in the Foreign Sovereign Immunities Act of 1976. The Act confers jurisdiction on the federal district courts of suits involving foreign states that conduct commercial activity in the United States or elsewhere, if the activity causes a direct effect in the United States. 28 U.S.C. § 1605(a)(2)(1982). The Act also confers jurisdiction over foreign states in other limited circumstances. *Id.* § 1605 (a)(1)-(5). The Act authorizes the federal courts to exercise personal jurisdiction over all foreign states subject to suit under the Act, *id.* § 1330(b), and permits suit to be filed in any district in which a substantial part of the relevant activity occurred or the property is located, *id.* § 1391(f)(1); in any district in which the instrumentality of a foreign state is doing business or is licensed to do business, *id.* § 1391(f) (3); or in the District of Columbia. *Id.* § 1391(f)(4).

²⁴⁰ *Holt v. Klosters Rederi*, 355 F. Supp., 354, 358 (W.D. Mich. 1973) (district court exercised personal jurisdiction over Norwegian corporation that had no contacts with Michigan because "[t]aken as a whole, defendant's contacts with the United States, both qualitatively and quantitatively are constitutionally sufficient It has promoted its product on a national scale"). See also *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 416 (9th Cir. 1977) (Congress must adopt nationwide approach to personal jurisdiction). See also Note, *supra* note 63.

²⁴¹ See *Centronics Data Computer Corp. v. Mannesmann, A.G.*, 432 F. Supp. 659, 664 (D.N.H. 1977) (in antitrust suit by U.S. corporation against multinational conglomerate headquartered in Germany, New Hampshire federal court upheld personal jurisdiction after finding that the place of trial posed no inconvenience to the defendant despite defendant's lack of purposeful activity in New Hampshire, stating: "[I]t is possible for a foreign corporation to have very substantial contacts with the nation as a whole in different states without having sufficient contacts with any one state so as to give that state jurisdiction. Such a corporation could commit serious torts or contract breaches without ever having enough contacts with any one forum to give those injured an opportunity to seek redress."). See also *Marc Rich Co. v. United States*, 707 F.2d 663, 667 (2d Cir. 1983); Note, *supra* note 63, at 474-78.

²⁴² See *infra* text accompanying notes 253-81 for a discussion of federal interests that are furthered when federal courts are allowed to exercise personal jurisdiction over defendants in a broad geographical area.

viduals from government oppression is at the heart of the determination of the proper exercise of personal jurisdiction, it is impossible to evaluate these interests in advance. As federal courts are faced with actual challenges to statutes or rules permitting assertions of jurisdiction over defendants for whom place of trial is inconvenient and unanticipated, they will be able to develop guidelines based on concrete factual situations.

B. Case Law

The one reported decision that attempted to formulate a detailed test for evaluating the fifth amendment limitations on the exercise of personal jurisdiction by federal courts fashioned an analysis that is substantially similar to the balancing test proposed in this article. In *Oxford First Corp. v. PNC Liquidating Corp.*,²⁴³ Judge Becker of the United States District Court for the Eastern District of Pennsylvania reasoned that the *International Shoe* requirement of minimum contacts between a defendant and the state in which the court is located does not apply directly to the exercise of federal court jurisdiction.²⁴⁴ Nevertheless, the court concluded that *International Shoe* mandates that federal courts apply a broad fairness standard in exercising jurisdiction over defendants located beyond the state in which the court sits.²⁴⁵ To give content to its constitutional fairness test, the court listed five fac-

²⁴³ 372 F. Supp. 191 (E.D. Pa. 1974). A Pennsylvania corporation, Oxford First Corporation (Oxford), contracted to purchase the assets of Paragon National Corporation (Paragon), an auto leasing business. This contract was based in part on Paragon's planned acquisition of another auto leasing concern, St. Claire Finance Corporation (St. Claire). Oxford later filed suit in federal court in Pennsylvania alleging violations of the federal securities laws, and naming as defendants some St. Claire shareholders who resided in California. The defendants were served pursuant to the federal statute authorizing nationwide service of process in securities cases, 15 U.S.C. § 78aa (1970). Asserting that they had no connection with Pennsylvania, the California defendants challenged the jurisdiction of the federal court in Pennsylvania on statutory and constitutional grounds.

The district court ruled that the due process clause of the fifth amendment places some limitations on nationwide service of process. Although other federal question cases have adopted a fairness standard in evaluating constitutional challenges to the assertion of personal jurisdiction over defendants who are beyond the boundaries of the state in which the federal court is located, see *supra* notes 88-97 and accompanying text, *Oxford First* is the only reported opinion that attempted to fashion explicit criteria to guide such a fairness inquiry. The Third Circuit was not presented with an appeal of the Oxford decision. The Third Circuit has indicated, however, that it also takes a fundamental fairness rather than sovereignty view of the scope of personal jurisdiction that may be exercised by the federal courts. See *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280, 284 (3d Cir.), cert. denied, 454 U.S. 1085 (1981); *Fraleigh v. Chesapeake & Ohio Ry.*, 397 F.2d 1, 3 (3d Cir. 1968); *Hartley v. Sioux City & New Orleans Barge Lines*, 379 F.2d 354 (3d Cir. 1967).

²⁴⁴ *Oxford First Corp. v. PNC Liquidating Corp.*, 372 F. Supp. at 203.

²⁴⁵ *Id.* The court's approach specifically evaluated the inconvenience to the defendant caused by the litigation site as well as the interests related to the orderly administration of justice. See *infra* note 246.

tors that a federal court should evaluate before exercising personal jurisdiction: (1) the extent of the defendant's contacts with the site of the litigation; (2) the inconvenience the site imposes on the defendant; (3) the effect, from a judicial economy perspective, of dismissing the defendant from the suit; (4) the likely location of discovery proceedings in the case, and (5) the impact of the defendant's activity beyond his state of residence.²⁴⁶

The second and fourth factors enumerated in *Oxford First* both relate to the amount of inconvenience a defendant would suffer due to the location of litigation. The first and fifth factors can be subsumed under the reasonable anticipation of litigation category of the three-part test proposed in this Article. The third factor, which focuses on judicial economy, falls within the government interests component discussed here.

The court in *Oxford First* did not assign weights to the various factors, nor did it prescribe a sequence in which they should be considered. The court did, however, in its inventory of subsidiary considerations affecting each of the factors,²⁴⁷ indicate that careful attention should be paid to the practical concerns of contemporary litigation.²⁴⁸

²⁴⁶ The court stated:

First, a court should determine the extent of the defendant's contacts with the place where the action was brought; i.e., the *International Shoe* type criteria. *Second*, a court should weigh the inconvenience to the defendant of having to defend in a jurisdiction other than that of his residence or place of business. Subsidiary considerations here might include the nature and extent and interstate character of the defendant's business, the defendant's access to counsel, and the distance from the defendant of the place where the action was brought. *Third*, the matter of judicial economy should be evaluated. In particular, a court should gauge: (a) the potentiality and extent of any adverse impact upon the litigation that may result from having a part of the action sheared off; and (b) the prospect of duplication of effort by counsel and the courts in conducting two parts of the same lawsuit in different jurisdictions at the same time. As a barometer of the potential scope of the litigation in this regard, a court should also examine whether the case might involve a class action including far flung plaintiffs or defendants. *Fourth*, a court should consider the probable situs of the discovery proceedings in the case and the extent to which the discovery proceedings will, in any event, take place outside the state of defendant's residence or place of business, thus muting the significance of his claim that he is inconvenienced by the distant forum. *Fifth*, a court should examine the nature of the regulated activity in question and the extent of impact that defendant's activities have beyond the borders of his state of residence or business.

Id. at 203-04.

²⁴⁷ See *supra* note 246.

²⁴⁸ For example, the court reiterated that the fifth amendment limits the personal jurisdiction of federal courts, but stated:

[The] practical considerations emanating from the realities of contemporary litigation, especially in the securities and antitrust areas, are, for the reasons which follow, persuasive justification for upholding the view that any constitutional due process limitations upon a federal extraterritorial (nationwide) service of process statute must be broadly defined.

Anyone with experience in handling or managing litigation today in fields like securities and antitrust law knows that the place of trial is usually less important than the place of discovery. The present case is no exception: a recent conference with counsel revealed that the discovery contemplated in what is only a medium-sized 10b-5 case is massive and will consume weeks at a time for many months. Moreover, even if the St. Clair defendants' motions were granted and they had to be sued in California where they have their places of business or reside, most of the discovery in the case against them would still have to be done

Applying its approach to the securities fraud claim before it, the *Oxford* court found that the inconvenience to the defendants due to the distance between their home in California and the court in Pennsylvania was outweighed by the following factors: (1) the defendants benefited from the transactions in Pennsylvania and knew that their financial statements would be relied on in Pennsylvania, (2) the bulk of discovery would take place in Pennsylvania and New York, (3) there would be substantial duplication of litigation if these defendants were severed from the case, and (4) severing these defendants would adversely affect the ongoing suit.²⁴⁹ Therefore, the defendants' jurisdictional challenge was overruled. Without more details as to the defendants' activities and resources, it is difficult to apply the due process test proposed by this Article to the *Oxford* facts, but it seems likely that under this test the federal court also would have been permitted to exercise personal jurisdiction.

IV. THE DUE PROCESS CLAUSE AND THE NATIONWIDE PERSONAL JURISDICTION STATUTES

Although nationwide personal jurisdiction statutes are relatively rare, Congress has enacted legislation that authorizes federal courts to exercise personal jurisdiction over defendants located anywhere in the nation, as well as over defendants who have minimum contacts with the United States. An examination of these statutes identifies a number of federal interests that in the view of Congress justify requiring defendants to appear for trial far away from home or business. Scrutiny of these statutes also reveals, however, that Congress on most occasions has attempted to protect defendants from trial at fundamentally unfair locations by simultaneously enacting restrictive venue provisions.²⁵⁰ Sometimes, however, the legislation does not contain any significant limits on the place of trial.²⁵¹ Unfortunately, Congress has demonstrated greater willingness to omit such restrictions on the location of litigation in recent years.²⁵² As a result, there are an increasing number

in this district or in New York. The importance of the fact that the place of trial does not necessarily govern the place of discovery is that the alleged inconvenience or unfairness to a party extrajurisdictionally [sic] summoned cannot be measured by the distance from his home to the place of the trial.

Oxford First Corp. v. PNC Liquidating Corp., 372 F. Supp. at 201-02 (footnotes omitted).

²⁴⁹ *Id.* at 204-05.

²⁵⁰ See *infra* notes 287-91 and accompanying text.

²⁵¹ For example, under the Federal Interpleader Act an interpleader action may be filed in any judicial district in which any claimant resides. 28 U.S.C. § 1397 (1982). The bankruptcy code also has broad venue provisions. 28 U.S.C. § 1473 (1982). See *infra* notes 292-93 and accompanying text.

²⁵² For example, the Bankruptcy Reform Act of 1978, 28 U.S.C. §§ 151-160, 771-775, 1471-1482 (1982) established a bankruptcy court in each judicial district as an adjunct to the district court. *Id.* § 151. The Act provides that the proper venue for all proceedings arising in or related to a bankruptcy case is the bankruptcy court in which the case is already pending. 28 U.S.C.

of circumstances in which a federal court's assertion of personal jurisdiction pursuant to a congressional authorization of nationwide jurisdiction may be unconstitutional.

A. *The Objectives of the Nationwide Personal Jurisdiction Statutes*

The nationwide personal jurisdiction statutes, which can be grouped into five categories for the sake of convenience, by and large were passed in response to intractable procedural problems that made it impossible for a court with jurisdiction limited to one state to grant complete relief in a controversy. This can be seen quite clearly in the federal antitrust laws, which contain the oldest nationwide jurisdiction statute.²⁵³ Believing that the nationwide nature of monopolies and cartels could only be dealt with effectively by litigation that included all

§ 1473(a) (1982). There are only two exceptions to this venue provision: (1) a proceeding commenced by a trustee to recover property worth less than \$1,000 or a consumer debt of less than \$5,000 must be filed in the bankruptcy court for the district in which the defendant resides, *see id.* § 1473(b); (2) a proceeding commenced by a trustee based on a claim arising from the operation of the debtor's business after the bankruptcy petition was filed must be brought in the judicial district in which the claim would have been brought under applicable nonbankruptcy venue provisions, *see id.* § 1473(d).

Although the Supreme Court in *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982), declared that the jurisdictional provisions of the Act established an unconstitutional delegation of judicial power to article I bankruptcy courts, this ruling did not invalidate the venue provisions of the Act. The bankruptcy courts are currently operating as adjuncts to the district courts under an interim emergency rule proposed by the Judicial Conference of the United States. *White Motors Corp. v. Citibank*, 704 F.2d 254, 256-57 (6th Cir. 1983) ("Each of the eleven Judicial Councils of the circuits ordered the district courts to adopt the interim rule with only minor modifications."). The proposed emergency rule, only in effect in those district courts that adopt it, has been adopted by the majority of district courts. *Id.* Four appellate courts have upheld its constitutionality. *In re Kaiser*, 722 F.2d 1574 (2d Cir. 1983); *In re Braniff Airways, Inc.*, 700 F.2d 214 (5th Cir. 1983); *White Motor Corp. v. Citibank*, 704 F.2d 254 (6th Cir. 1983); *In re Hansen*, 702 F.2d 728 (8th Cir. 1983). *See also In re Color Craft Press* 27 Bankr. 962 (Bankr. D. Utah 1983) (Federal district courts retain bankruptcy subject matter jurisdiction despite invalidity of Bankruptcy Reform Act of 1978's delegation of broad jurisdiction to article I bankruptcy courts); *In re Northland Point Partners*, 26 Bankr. 860 (Bankr. E.D. Mich. 1983) (same). *But see In re Conley*, 26 Bankr. 885 (Bankr. M.D. Tenn. 1983) (adoption of emergency rule is unconstitutional and does not confer subject matter jurisdiction on bankruptcy courts); *In re Motion to Dismiss: Constitutionality of Jurisdiction of the Bankruptcy Court*, 23 Bankr. 334 (Bankr. N.D. Ga. 1982) (invalidity of jurisdiction provisions of Bankruptcy Reform Act 1978 deprives bankruptcy court of all subject matter jurisdiction, requiring dismissal of all bankruptcy proceedings); *In re Shear Realty & Investment Co.*, 25 Bankr. 463 (Bankr. S.D. Ohio 1982) (in absence of legislative authorization, circuit judicial council cannot confer jurisdiction on district courts or bankruptcy courts). The courts are continuing to apply the venue provisions contained in the 1978 Act. Under these provisions the hypothetical discussed *infra* in text accompanying notes 295-301 would be allowed to proceed in Alaska.

²⁵³ Although the revelations of the Credit Mobilier scandal, *see supra* note 121, led Congress to authorize suit in one judicial district against all those involved in the fraud, *see supra* notes 122-25 and accompanying text, this legislation was limited to suits brought by the attorney general to recover for fraud practiced on the United States. Seventeen years later Congress authorized na-

members of a business combination,²⁵⁴ Congress added a provision to the Sherman Act that allows federal courts to exercise jurisdiction over defendants anywhere in the country if "the ends of justice" so require.²⁵⁵ The legislative history clearly indicates that Congress wanted to ensure that federal courts would have the power to order effective remedies through nationwide injunctions, if necessary.²⁵⁶ Furthermore, it reveals Congress's recognition that the federal government would

tionwide personal jurisdiction in federal antitrust suits. The personal jurisdiction provisions contained in § 5 of the Sherman Act of 1890, ch. 647, 26 Stat. 209, are still in effect.

Whenever it shall appear to the court . . . that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof.

15 U.S.C. § 5 (1982).

In 1914 when Congress passed its second antitrust law, the Clayton Act, ch. 323, 38 Stat. 730 (1914) (codified at 15 U.S.C. §§ 12-27 (1982)), it inserted a jurisdictional provision identical to that in the Sherman Act for suits filed by the United States. See 15 U.S.C. § 25 (1982). Congress also included a provision allowing federal courts to exercise jurisdiction beyond their state borders in antitrust suits filed against corporations. See *id.* § 22. The latter provision addressed venue and service of process in one sentence:

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

Id. Although written in terms of service of process, as are many of the nationwide jurisdiction statutes, this statute has been interpreted as authorizing federal courts to gain personal jurisdiction over defendants located anywhere in the nation. *E.g.*, *Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distrib. Party Ltd.*, 647 F.2d at 204 n.6; *United States v. Asbestos Corp.*, 34 F.2d 182 (S.D.N.Y. 1929) (relying on § 12 of Clayton Act for jurisdiction over defendant not doing business in New York).

²⁵⁴ See 21 CONG. REC. 2640 (1890). Senator Spooner (Wis.) stated:

Most if not all of the combinations, however they may be called, aimed at by the bill, are detrimental to the public interest. I think of them all it will be agreed that two of them, whose ramifications extend throughout the whole country and who directly affect the people generally in the country, the sugar trust and what is called the beef combine, are infamous in their oppression, the sugar trust dealing with an article which goes into the daily consumption of the people, which goes into every house, to every family. I believe 52 pounds per year per capita are used by the people of the United States. The object of this trust is to keep up to consumers the price of sugar. The beef combine . . . has been so successful as to maintain at the war rate the price of beef to consumers throughout the United States, and to depress it among those, the farmers and others, who raise cattle, so as to render that industry no longer a profitable one.

The sugar trust is made up, as I understand it, of seventeen different corporations, some of them citizens of different States. Manifestly to deal sufficiently with a trust or combination of that character it must be possible to bring into one action, into one court, the essential parties defendant.

²⁵⁵ 15 U.S.C. § 5 (1982). See *supra* note 253.

²⁵⁶ See 21 CONG. REC. 2640-41 (1890). Senator Spooner (Wis.) also stated:

For myself, I think the efficacious remedy will be found to be, not the criminal prosecution provided for by the Senator from Texas [Sen. Reagan], but the vigorous and drastic use of the writ of injunction. Under the law as it stands to-day [sic] that writ can only be served and punishment for its disobedience enforced within the district over which the court has jurisdiction. By the amendment which I have sent to the desk, this writ of injunction may be served anywhere within the United States, and if it is disobeyed the attachment for contempt may be served anywhere within the United States. I think the amendment ought to be adopted.

Id.

have to initiate multiple identical suits in separate judicial districts unless it could join the relevant defendants in a single suit.²⁵⁷ Both reasons—the desire for an effective remedy and the attempt to conserve government resources by avoiding duplicative litigation—convinced Congress to expand federal court jurisdiction.

The second nationwide personal jurisdiction statute was the Federal Interpleader Act, passed in 1917.²⁵⁸ Since interpleader actions by definition involve a number of claims against one fund,²⁵⁹ the most efficient way to handle such litigation is to join all potential claimants against the fund in one suit. Otherwise, separate suits might lead to inconsistent judgments imposing multiple liability on the stake-

²⁵⁷ See 21 CONG. REC. 2642 (1890). Senator Spooner (Wis.) further stated:

[A]ll of these trusts, or nearly all of them, are made up of different firms, of corporations, and of citizens of different States [A]s the law now stands, . . . the statutory rule is that no man shall, with a single exception or so, be sued in the United States courts except in the district where he happens to reside or where he happens to be found. So, then, in prosecuting the sugar trust under the provisions of this act, made up of seventeen distinct corporations, as I understand it, only one of which, if you please, is a citizen of the State of New York, there would be no power to obtain jurisdiction in a single suit except over one. Seventeen different suits would be necessary, possibly. That, it seemed to me, was a weakness in this bill which ought to be remedied.

²⁵⁸ Act of February 22, 1917, ch. 113, 39 Stat. 929 (1917). The Act authorized insurance companies and fraternal beneficial societies to file bills of interpleader in federal district courts when the claimants were citizens of different states, and provided that the process of those courts might run into all parts of the United States.

The Act was amended on February 25, 1925, *see* ch. 317, 43 Stat. 976 (1925), to allow, among other improvements, insurance associations to file bills of interpleader. *See* H.R. REP. NO. 1428, 68th Cong., 2d Sess. (1925). On May 8, 1926, the Act was repealed and a new and improved statute enacted, *see* ch. 273, 44 Stat. 416 (1926), extending benefits to casualty and surety companies. *See* H.R. REP. NO. 719, 69th Cong., 1st Sess. (1926). Finally, the Act was amended on January 20, 1936, *see* 49 Stat. 1096 (1936), to extend its coverage further, simplify its provisions, and make other improvements. *See* S. REP. NO. 558, 74th Cong., 1st Sess. (1935); H.R. REP. NO. 1437, 74th Cong., 1st Sess. (1935).

The Act was originally codified as § 24(26) of the Judicial Code, and was later placed in title 28 of the United States Code. Under the Judicial Revision Act of 1948, its provisions were redistributed so they appear in Title 28 as follows: § 1335 deals with jurisdiction; § 1397 with venue; and § 2361 with process and procedure. They appear this way today. *See* 28 U.S.C. §§ 1335, 1397, 2361 (1982). Section 2361, *see supra* note 233, which by its terms refers only to service of process, has been interpreted as a grant of personal jurisdiction. *See* *Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distrib. Party Ltd.*, 647 F.2d at 204 n.6; *Metropolitan Life Ins. Co. v. Chase*, 294 F.2d 500, 502 (3d Cir. 1961).

Prior to the enactment of this legislation, interpleader actions could be filed in state or, if diversity of citizenship existed, in federal court. In either instance, however, the court could only exercise personal jurisdiction over defendants who resided or were located in the state where the court was located.

²⁵⁹ Black's Law Dictionary defines interpleader as follows:

When two or more persons claim the same thing (or fund) of a third, and he laying no claim to it himself, is ignorant which of them has a right to it, and fears he may be prejudiced by their proceeding against him to recover it, he may file a bill in equity against them, the object of which is to make them litigate their title between themselves, instead of litigating it with him, and such a bill is called a "bill of interpleader."

BLACK'S LAW DICTIONARY 953 (4th ed. 1958).

holder.²⁶⁰ A court in one state can successfully exercise personal jurisdiction over all defendants residing or located within that state, but often lacks power over those potential claimants residing in different states.²⁶¹ Thus, in cases with far-flung claimants no state court—and no federal court limited to state-wide jurisdiction—can conclusively determine the rights to a fund. In order to alleviate this recurring problem that was beyond the ability of any single state to solve, Congress enacted a statute allowing federal courts in interpleader actions to exercise personal jurisdiction over claimants located throughout the United States.²⁶²

Another thorny litigation problem prompted Congress in 1936 to enact a statute allowing federal courts to exercise personal jurisdiction in shareholder derivative suits over defendant corporations located anywhere in the United States.²⁶³ Plaintiffs who filed shareholder derivative suits often found their cases dismissed and no alternative forum available.²⁶⁴ The dismissals were based on the plaintiffs' failure to

²⁶⁰ Indeed, the Federal Interpleader Act of 1917 was a direct response to the injustice of the Supreme Court's decision in *New York Life Ins. Co. v. Dunlevy*, 241 U.S. 519 (1916). See H. REP. NO. 677, 64th Cong., 1st Sess. (1916). In that suit the proceeds of the same insurance policy were the subject of litigation in two separate proceedings, one in Pennsylvania and one in California. In the Pennsylvania suit the claimants were Gould and a creditor of Dunlevy, who was Gould's daughter and had alleged the policy had been assigned to her. Notice of the suit was given to Dunlevy in California, but she did not respond. The court determined that the policy had not been assigned and directed the proceeds be paid to Gould. Meanwhile, Dunlevy initiated suit in California against Gould and the insurance company. The California court concluded that there had been a valid assignment, and directed that the proceeds be paid to Dunlevy. Although the insurance company protested that it had already paid the proceeds to Gould pursuant to a valid judgment, the United States Supreme Court affirmed the California decision.

²⁶¹ In *New York Life Ins. Co. v. Dunlevy*, 241 U.S. 518 (1916), the Supreme Court ruled that the Pennsylvania court lacked jurisdiction over Dunlevy, who resided in California.

²⁶² For a discussion of the history of federal interpleader legislation, see *supra* notes 258-60. In order to make the federal courts easily accessible in interpleader cases, Congress reduced the requisite jurisdictional amount to \$500, and in diversity cases changed the requirement from complete diversity (all plaintiffs must be diverse from all defendants) to minimal diversity (at least two adverse claimants must be diverse). 28 U.S.C. § 1335 (1982). See *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 530-31 (1967). In addition to the Federal Interpleader Act, Fed. R. Civ. P. 22 also authorizes interpleader actions. Litigants in Rule 22 actions must satisfy the \$10,000 jurisdictional amount and complete diversity requirements, and are bound by the general venue provisions of 28 U.S.C. § 1391 (1982) rather than by the extremely broad provision of 28 U.S.C. § 1397 (1982). 7 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* §§ 1703, 1712 (1972); *Georgia Savings Bank & Trust Co. v. Sims*, 321 F. Supp. 307 (N.D. Ga. 1971); *Pan American Fire & Casualty Co. v. Revere*, 188 F. Supp. 474 (E.D. La. 1960).

²⁶³ Act of April 16, 1936, ch. 230, 49 Stat. 1213 (codified at 28 U.S.C. § 1695 (1982)). This statute provides: "Process in a stockholder's action in behalf of his corporation may be served upon such corporation in any district where it is organized or licensed to do business or is doing business." *Id.*

²⁶⁴ *E.g.*, *Busch v. Mary A. Riddle Co.*, 283 F. 443 (D. Del. 1922). Plaintiff, a citizen and resident of Florida and a shareholder in the Riddle Company of Pennsylvania, sued in the District of Delaware the Riddle Company of Pennsylvania, the Riddle Company of Delaware, to which the Pennsylvania Company's assets had been transferred, and certain individuals. There was com-

join both the parent and subsidiary corporations, each deemed an indispensable party to the suit.²⁶⁵ If the parent and subsidiary were incorporated and doing business in different states, however, each would be beyond the personal jurisdiction of the courts located in the other state.²⁶⁶ The federal statute closed a "loophole in judicial procedure through which holding companies and parent corporations are [able] to strip a subsidiary corporation of all of its assets to the loss of minority stockholders of the subsidiary corporations without the possibility of being brought to account in any court."²⁶⁷

The Mandamus and Venue Act of 1962,²⁶⁸ which is limited to suits seeking mandamus relief against the United States, federal agencies, and federal officers or employees,²⁶⁹ also had its origins in the problem of jurisdiction over indispensable parties. Prior to the Act, litigants suing federal officers for actions taken in the litigant's home state often discovered that superior federal officers whose official residence was Washington, D.C. were considered indispensable parties.²⁷⁰ As a result, such suits could only be filed in federal court in Washington, D.C.²⁷¹ After investigating this problem, Congress changed the law. Realizing that mandamus actions against federal officers and agencies are, in reality, defended in each federal judicial district by the local United States Attorney's office,²⁷² and that federal officials stationed in Washington, D.C. travel at government expense if required to litigate

plete diversity between plaintiff and defendants, but no state could exercise personal jurisdiction. Delaware courts could not assert jurisdiction over the Pennsylvania defendant; Pennsylvania courts could not assert jurisdiction over the Delaware defendant; and Florida courts could not assert jurisdiction over either. Because the process of federal courts did not extend beyond the federal judicial district, the plaintiff could not gain relief in either federal or state court.

²⁶⁵ *Busch v. Mary A. Riddle Co.*, 283 F. at 444.

²⁶⁶ *Id.*

²⁶⁷ H. REP. NO. 2257, 74th Cong., 2d Sess. 2 (1936).

²⁶⁸ Act of October 5, 1962, Pub. L. No. 87-748, 76 Stat. 744. Section 1(a) of the Act is codified at 28 U.S.C. § 1361 (1982); section 2 of the Act, which is pertinent here, is codified at 28 U.S.C. § 1391(e) (1982).

²⁶⁹ Section 1(a) of the Act expressly limits suits to "action[s] in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361 (1982).

²⁷⁰ *E.g.*, *Williams v. Fanning*, 332 U.S. 490, 493 (1947). ("[T]he superior officer is an indispensable party if the decree granting the relief sought will require him to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him."). See *Stafford v. Briggs*, 444 U.S. 527, 534 (1980).

²⁷¹ The Supreme Court has stated:

Because of the legal fiction that officers of such rank resided only where they were stationed—usually the District of Columbia—effective service could be obtained only there. And with the restrictive venue provisions then in effect, joinder of such an official required that the action be brought in the District of Columbia. . . . The net result was that persons in distant parts of the country claiming injury by reason of the acts or omissions of a federal officer or agency were faced with significant expense and inconvenience in bringing suits for enforcement of claimed rights.

Stafford v. Briggs, 444 U.S. at 534 (citation omitted).

²⁷² *Id.* at 543-44.

in their official capacity elsewhere,²⁷³ Congress authorized mandamus actions in the plaintiff's judicial district.²⁷⁴ Accordingly, plaintiffs may initiate litigation in local federal courts, and courts may exercise nationwide personal jurisdiction over federal defendants.

Congress has also provided the federal courts with nationwide personal jurisdiction in cases arising under the federal securities laws. Like the antitrust legislation passed a generation earlier, this legislation was a congressional response to a nationwide economic problem.²⁷⁵ Each of the six federal statutes enacted between 1933 and 1940 to regulate securities contains a provision authorizing federal courts to exercise nationwide personal jurisdiction.²⁷⁶ Although the legislative history of the securities laws is silent as to the government interests furthered by nationwide personal jurisdiction, one can easily assume that Congress believed that allowing investors to litigate securities

²⁷³ *Id.*

²⁷⁴ Section 2 of the Act, 28 U.S.C. § 1391(e) (1982), provides:

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

The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.

28 U.S.C. § 1391(e) (1982). Although it is titled a venue provision and is silent about personal jurisdiction, this statute, which provides for delivery of summons and complaint by certified mail beyond the territorial limits of the federal judicial district, has been interpreted as a grant of nationwide personal jurisdiction in mandamus actions. *See Driver v. Helms*, 577 F.2d 147, 154-57 (1st Cir. 1978), *rev'd on other grounds sub nom. Stafford v. Briggs*, 444 U.S. 527 (1980); *Smith v. Campbell*, 450 F.2d 829, 833-34 (9th Cir. 1971). *See also Stafford v. Briggs*, 444 U.S. at 534 (Congress passed 1962 Mandamus and Venue Act to cure inability of plaintiff injured by federal action at home to gain jurisdiction over federal officials who officially resided in the District of Columbia).

²⁷⁵ The legislation regulating securities was passed in the aftermath of the stock market crash of 1929 and the attendant revelations of stock manipulations and fraud. By regulating securities, Congress attempted to restore investor confidence in the national stock markets. L. LOSS, SECURITIES REGULATION 119-21 (1961).

²⁷⁶ Section 22 of the Securities Act of 1933 grants jurisdiction of offenses and violations of the Act to the federal district courts. It provides:

Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found.

15 U.S.C. § 77v(a)(1982).

Section 27 of the Securities Act of 1934 provides:

Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabit-

fraud issues anywhere in the nation was a beneficial approach to policing the stock market, and an important step in furthering the public interest in a stable financial community.

Although no statute authorizes nationwide personal jurisdiction in bankruptcy cases,²⁷⁷ the Bankruptcy Rules provide that process may be served anywhere within the United States.²⁷⁸ Equating service of

ant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found.

15 U.S.C. § 78aa (1982).

Section 25 of the Public Utility Act of 1935 provides:

Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this chapter or rules, regulations, or orders thereunder, may be brought in any such district or in the district wherein the defendant is an inhabitant or transacts business, and process in such cases may be served in any district of which the defendant is an inhabitant or transacts business or wherever the defendant may be found.

15 U.S.C. § 79y (1982).

Section 322 of the Trust Indenture Act of 1939, 15 U.S.C. § 77vvv (1982), incorporates by reference the service and venue provisions of the Securities Act of 1933.

Section 44 of the Investment Companies Act of 1940 (1982), provides:

Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this subchapter or rules, regulations, or orders thereunder, may be brought in any such district or in the district wherein the defendant is an inhabitant or transacts business, and process in such cases may be served in any district of which the defendant is an inhabitant or transacts business or wherever the defendant may be found.

15 U.S.C. § 80a-43 (1982).

Section 214 of the Investment Advisers Act of 1940, provides:

Any suit or action to enjoin any violation of this subchapter or rules, regulations, or orders thereunder, may be brought in any such district or in the district wherein the defendant is an inhabitant or transacts business, and process in such cases may be served in any district of which the defendant is an inhabitant or transacts business or wherever the defendant may be found.

15 U.S.C. § 80b-14 (1982).

²⁷⁷ The jurisdictional provisions of the Bankruptcy Reform Act of 1978, 28 U.S.C. § 1471 (1982), refer only to subject matter jurisdiction.

Section 1471. Jurisdiction

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11.

(c) The bankruptcy court for the district in which a case under title 11 is commenced shall exercise all of the jurisdiction conferred by this section on the district courts.

(d) Subsection (b) or (c) of this section does not prevent a district court or a bankruptcy court, in the interest of justice, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11. Such abstention, or a decision not to abstain, is not reviewable by appeal or otherwise.

(e) The bankruptcy court in which a case under title 11 is commenced shall have exclusive jurisdiction of all of the property, wherever located, of the debtor, as of the commencement of such case.

28 U.S.C. § 1471 (1982). Some courts have read into these provisions a grant of personal jurisdiction. *See, e.g., In re Coby Glass Prods. Co.*, 22 Bankr. 961, 962-63 (E.D. Tenn. 1981). There appears to be no support for this view. The legislative history gives no indication that Congress intended this Section of the statute to authorize personal jurisdiction.

²⁷⁸ Bankruptcy Rule 7004(d) provides: "The summons and complaint and all other process except a subpoena may be served anywhere in the United States." Bank. R. 7004(d), *reprinted in*

process with jurisdiction, many bankruptcy courts have construed this provision as a grant of nationwide jurisdiction.²⁷⁹ Because there is no statutory grant of personal jurisdiction, there is, of course, no record of congressional intent. Nonetheless, important substantive policies of bankruptcy law may be furthered by nationwide personal jurisdiction. The orderly and speedy administration of the bankrupt's estate²⁸⁰ and the ability to conserve his remaining assets²⁸¹ are both enhanced by consolidating bankruptcy proceedings before one court and by limiting the number of suits the bankrupt or trustee must litigate in different states.

In summary, the federal interests in the exercise of nationwide personal jurisdiction by federal courts that Congress has recognized to date include the following:

1) the need to provide a forum for litigation to correct and control severe problems in the national economy that are likely to involve defendants across the nation acting in a concerted fashion;²⁸²

2) the need to provide a forum for litigation involving defendants in different states that can only be completely resolved in one proceeding, where no single state has the power to adjudicate;²⁸³

3) the need to provide a convenient forum for litigation involving local actions taken by federal officers who are represented by government attorneys stationed in the local judicial district;²⁸⁴

4) the need to provide a forum for litigation to regulate securities problems affecting the national economy that are likely to involve defendants whose actions have affected many plaintiffs in distant locations;²⁸⁵

5) the need to provide a convenient forum for litigation to marshal and conserve the assets of an insolvent party.²⁸⁶

Although the third category only applies to suits against the federal government, its genesis is nevertheless instructive in devising a fairness standard that should apply in suits against private litigants. Congress decided to permit nationwide personal jurisdiction in certain suits involving the federal government because Congress recognized that in those situations the defense of federal officials would in reality

11 U.S.C.A., *Bankruptcy Rules and Official Forms* (1983). This rule took effect August 1, 1983, replacing an identical provision in Bankruptcy Rule 704(f), which had been enacted in 1976.

²⁷⁹ *E.g.*, *In re Coby Glass Prods. Co.*, 22 Bankr. 961 (E.D. Tenn. 1981); *In re G. Weeks Securities, Inc.*, 3 Bankr. 215 (W.D. Tenn. 1980); *In re Fotochrome, Inc.*, 4 Bankr. Ct. Dec. (CRR) 861 (E.D.N.Y. 1978).

²⁸⁰ See 1 COLLIER ON BANKRUPTCY ¶ 3.02 (L. King, 15th ed. 1982).

²⁸¹ *Id.*

²⁸² See *supra* notes 253-57 and accompanying text.

²⁸³ See *supra* notes 258-67 and accompanying text.

²⁸⁴ See *supra* notes 268-79 and accompanying text.

²⁸⁵ See *supra* notes 275-76 and accompanying text.

²⁸⁶ See *supra* notes 277-81 and accompanying text.

be provided by federal attorneys stationed in the local district, and that the federal government would pay the expenses of any officials from other areas who might need to be present for litigation. Thus, the specter of extremely burdensome litigation at distant locations compounded by the difficulty of selecting and hiring local counsel would be unlikely to materialize. This type of pragmatic view of the consequences of nationwide personal jurisdiction should inform courts' analyses under the constitutional test proposed in this Article.

B. *The Limits Imposed by the Venue Statutes*

While these nationwide personal jurisdiction statutes and regulations indicate an intent to protect the government interests identified, Congress did not intend that these interests should always override concerns about hardship and inconvenience to defendants. In fact, many of the nationwide personal jurisdiction statutes were opposed initially by members of Congress who feared they would cause great injustice to defendants who could be compelled to stand trial anywhere in the United States.²⁸⁷ The congressional debates on this aspect of the legislation were impassioned.²⁸⁸ Although not framed in constitutional terms, the discussions expressly addressed the potential unfairness to defendants caused by litigation at distant locations.²⁸⁹ Congress attained a compromise: in order to ameliorate unfairness, yet further the government interests underlying the statutes, Congress enacted venue

²⁸⁷ See, for example, the remarks of Rep. Volstead, *infra* note 288, and remarks of Sen. Pomerene, *infra* note 289, in opposition to the Federal Interpleader Act.

²⁸⁸ In objecting to the nationwide service of process provisions of the Federal Interpleader Act, Rep. Volstead of Minnesota stated:

We rebelled against England because she compelled us to go beyond the seas to try our cases, where we could not go without great loss. Why should we now change our policy and insist that a man has no right to try his case at home, no matter how poor or otherwise unable he may be to prosecute his claim at a great distance away from home?

53 CONG. REC. 9444 (1916). Rep. Volstead indicated that he did not oppose nationwide service of process in all instances, but he was wary of such authorization in suits initiated by private individuals:

Unless the Government is a party we have never in any instance, so far as I am aware, permitted the Federal courts to extend their jurisdiction beyond the State or a hundred miles beyond the place where the court is held. That is the policy we have uniformly pursued ever since the beginning of our Government. This changes that policy and permits jurisdiction to be taken no matter where the persons may be located. Suppose here is a person with a small claim of \$500 and there is another claimant to that money possibly a thousand or two thousand miles away. If this bill becomes a law, the district court can take jurisdiction of them. It seems to me this should not be permitted.

Id. at 9443.

²⁸⁹ *Antitrust*

During the debate on the Sherman Act, the sponsor of the amendment authorizing the broad exercise of personal jurisdiction by federal courts responded to objections by emphasizing:

I would not agree to that in any ordinary case; I would not agree to it in controversies between citizens of different States [to recover damages for antitrust violations]; but it has seemed to me, as it was necessary to make this an efficient bill in view of the fact that we were dealing with a set of combinations of great power whose oppressions are criminal, that we

standards limiting the places where defendants can be sued at the same time that it adopted the nationwide personal jurisdiction statutes.

ought to make these writs of injunction run throughout the country and to be served anywhere.

21 CONG. REC. 2642 (1890) (remarks of Sen. Spooner (Wisc.)).

Similar concerns were raised during the debate over the Clayton Act in 1914. Rep. Dickinson of Missouri offered an amendment to restrict the venue provisions so that antitrust suits against corporations would be proper in the districts in which the corporation "is an inhabitant . . . or may be found doing business and the cause of action may accrue" rather than in the districts in which the corporation "is an inhabitant . . . or may be found." See 51 CONG. REC. 9414, 63rd Cong., 2nd Sess. (1914). In defense of his amendment, Rep. Dickinson stressed: "My amendment seeks to be fair both to the corporation and to the person and to the plaintiff." *Id.* at 9417. He amplified his comment with an example:

Take a New Jersey corporation doing business in Texas and doing business in Illinois. It may commit no violation of the law, no wrong, no damage in Texas; and if so, a suit ought not to be brought there. If this same corporation does some one an injury, does do damage in Illinois, ought not the suit to be brought there? I give the widest liberty of bringing suits where the damage is done and where the action arose.

Id. Rep. Dickinson later withdrew his amendment in favor of the amendment proposed by the Judiciary Committee, which provided for venue where the defendant is an inhabitant, has an agent, or is found. *Id.* at 9466.

In opposition to another Clayton Act measure seen as broadening the permissible locations of trial, Rep. Scott of Iowa stated:

The amendment enlarges the present interpretation of the word "found" as applied to the corporate jurisdiction, and permits suit to be brought, with absolute discretion on the part of the plaintiff, in any district in which the defendant may have an agent, without defining the character of the agent.

Now, we all know that there is an almost infinite number of characters of agents. Corporations transacting interstate business have agents, we may say, in practically every State of the Union for some purpose. Surely it can not be possible that the gentleman would attempt to confer jurisdiction and venue upon the Federal court in every district in the United States where any agent can be found, regardless of the question whether the corporation is domiciled in that State or district, or whether it is doing business there.

. . . If we are to open this venue or jurisdiction to any district in the United States where any agent may be found, we are going to have a great deal of confusion and great injustice is to be done. It is going to open the door wide for annoyances to business, if any man can go anywhere in the United States and institute his action, if he can obtain any colorable service and compel the business institutions of the country to follow him about.

Id. at 9467.

Rep. Graham of Pennsylvania also was concerned about proposed legislation that would impose great hardship on defendants. In a colloquy with two other congressmen, Rep. Graham urged that subpoenas in antitrust cases be limited to the judicial district in which the court is located plus 100 miles from the courthouse:

Mr. GRAHAM. . . . Mr. Chairman, § [sic] 11, as I understand it, has been introduced for the purpose of enlarging the scope of the service of a subpoena. By its terms as the Section stands the subpoena will run now throughout the whole of the United States without any limit or hindrance; and when one remembers that a subpoena is a writ of right and that upon paying the fee a subpoena may issue one can readily see how this bill puts it in the power of a person to summon an individual from California to come to New Jersey and vice versa, or from one end of the country to the other. Now, that is an extraordinary power that would expose all of our citizens to a severe hardship. It might lead to the ruin and destruction of a man's business, besides the severe inconveniences to which it would subject him.

Mr. CARLIN. I think if the gentleman would change the amendment so as to read the writ should run to the judicial district the committee might accept it.

Mr. GRAHAM. . . . I want to say in answer I am perfectly willing although the existing law permits service of a subpoena . . . for . . . 100 miles from the court.

The pertinent venue provisions are on the whole quite restrictive.

Mr. FLOYD. . . . I understand the existing law permits the running of a subpoena 100 miles outside of the State. If it was limited to 100 miles within the State, there are plenty of judicial districts in the United States—

Mr. GRAHAM. . . . I beg leave to say that I am correct in my statement about the service.

Mr. FLOYD. . . . Anywhere in the judicial district?

Mr. GRAHAM. . . . And 100 miles from the courthouse for citizens living outside of the district. That is the law as it stands to-day [sic]. It may be necessary in some cases. . . in which the power given in this bill ought to be exercised; but while we grant this power we should put a certain limitation upon it, that it must be made upon proper application and cause shown. It seems to me to be in the interest of all our citizens that this amendment should be allowed.

Id. at 9675.

Interpleader

In debate on the Federal Interpleader Act in 1916, Sen. Pomerene of Ohio protested that the insurance societies

seek to have all of this litigation in the Federal courts, and it will compel poor litigants who may be beneficiaries under this legislation to go perhaps a hundred or two hundred or three hundred miles in order to litigate their claims, and in my judgment it will operate as a substantial denial of justice to many of these people.

53 CONG. REC. 12,150 (1916).

In response to the comment that the suit must be brought in the district where the beneficiary named upon the face of the policy resided, Sen. Pomerene replied:

[E]ven in that instance, Mr. President, in my own State, for example, many of these poor people—who may be workmen, or may be widows, or may be orphans—will have to go 200 miles to court to have their claims adjudicated. Now, I realize that the associations are put to some inconvenience; but they have their staffs of attorneys and agents all over the country everywhere.

Id.

Rep. Volstead, whose impassioned objections to the Federal Interpleader Act, *see supra* note 288, was concerned with unfairness toward small claimants, particularly since insurance companies were being given the “special privilege” of nationwide service. For this reason, Rep. Volstead advocated raising the jurisdictional amount from \$500 to \$2,000, as the House Committee on the Judiciary had recommended. A person with a \$2,000 claim, he argued, can better afford to spend money on litigation than one who has only a \$500 claim, thus lessening the injustice of forcing the former to litigate away from home. 53 CONG. REC. 9444 (1916). The amendment to raise the jurisdictional amount was defeated.

Neither Rep. Volstead nor Sen. Pomerene referred in their criticisms to constitutional limitations. The House Report pronounced the law constitutional: “Congress has the authority to do this, as there are no constitutional prohibitions to the contrary, and it is given power under the Constitution to establish courts without limitation as to service of process.” H. REP. NO. 677, 64th Cong., 1st Sess. 3 (1916). Although the original federal interpleader statute limited suits to the district where the named beneficiary resided, problems arose when beneficiaries resided in more than one district and when policies were assigned. Therefore, the statute was amended in 1936 to broaden venue and permit suit in any district in which any one claimant resides. Act of 1936, ch. 13, § 1, 49 Stat. 1096. That provision, with slightly different language, is still in effect. *See* 28 U.S.C. § 1397 (1982).

Zechariah Chafee, Jr., who drafted the federal interpleader statutes, noted that the venue provision enacted in 1936 was criticized for causing “occasional injustice to the particular claimant who lives outside the district in which the interpleader is brought.” Chafee, *Federal Interpleader*, *supra* note 170 at 984. Discussing the example of a California claimant forced to litigate in a Massachusetts district court because another claimant resides in Massachusetts, Chafee argued that “the court having statutory jurisdiction may occasionally decline, in the interests of justice, to exercise jurisdiction . . .” *Id.* He stated that district courts are “free to use their discretionary powers to refuse relief and send the stakeholder to another forum,” adding that

In most instances the venue limitations only permit suits to be filed under the federal nationwide personal jurisdiction statutes in those judicial districts in which the defendant resides, transacts business, does business, is licensed to do business, or is found.²⁹⁰ These restrictions ensure that the place of trial, even if inconvenient to a defendant, will

"[t]he judge's discretion will depend upon the facts of each particular case, which make his forum more or less inconvenient for the various claimants and the stakeholder." *Id.* at 985. In an earlier article, Chafee addressed a similar hypothetical and directed the courts to weigh the competing hardships on the litigants:

In opposition to this proposed legislative extension of power over parties and witnesses, it may be urged that it would be . . . [too] much of a hardship on [a claimant] in California to compel him to appear in the United States Court in Pennsylvania. . . . Our answer must be that . . . the Pennsylvania Federal Court would have to balance the hardship on the California claimant against the hardship of the stakeholder if he is subjected to double vexation and the possibility of double recovery; and grant or deny relief accordingly. Sometimes the Pennsylvania Federal Court could tell the stakeholder to transfer his interpleader to the United States Court in California, if the distance would bear less hardly on the Pennsylvania claimant than on the California claimant. In other words, these difficulties should go to the exercise of the undoubted jurisdiction *in personam*.

Chafee, *Interstate Interpleader*, *supra* note 170 at 721. In short, Chafee urged that the doctrine of *forum non conveniens* would satisfy any concerns about unfairness. It should be noted that the broad venue provision of the Federal Interpleader Act does not apply to interpleader actions initiated pursuant to Fed. R. Civ. P. 22. See *supra* note 262.

Shareholder Derivative Suits.

In amending the venue provisions in 1936 regarding derivative actions, Congress authorized shareholders to file derivative suits in any district in which the corporation could have filed suit against the named defendants. See Act of April 16, 1936, ch. 230, 49 Stat. 1213-14 (codified at 28 U.S.C. § 1401 (1982)). Congress clearly intended to broaden venue in order to provide a forum for derivative suits that were beyond the reach of any state court. See *supra* notes 263-67 and accompanying text. For the same reasons Congress expanded the service of process provisions. Congress limited service of process on corporations in stockholder derivative actions, however, to the districts in which a corporation is organized, doing business, or licensed to do business. See 28 U.S.C. § 1695 (1982). Furthermore, if a plaintiff brings a derivative suit and utilizes the general venue provisions, see 28 U.S.C. § 1391(a) to (c), discussed *supra* note 224, rather than the special venue provision described above, she may not invoke the broadened service provisions of 28 U.S.C. § 1695. See *Greenberg v. Giannini*, 140 F.2d 550, 552 (2d Cir. 1944) (discussing predecessor to § 1695); *Norte & Co. v. Huffines*, 222 F. Supp. 90 (S.D.N.Y.) *appeal dismissed*, 319 F.2d 336 (2d Cir. 1963); *Clay v. Thomas*, 185 F. Supp. 809 (S.D.N.Y. 1960). This limitation indicates concern that the extraterritorial service provision be restricted to those cases in which the evil it was intended to remedy is present. See *Developments in the Law—Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 874, 961-63 (1958).

²⁹⁰ *Securities*

For a description of the venue provisions in the securities laws, see *supra* note 276. One of the securities laws contains venue provisions that differ from the terms mentioned in the text. The Securities Act of 1933 allows a suit to be filed in the district where the offer or sale took place if the defendant participated in the offer or sale. In addition, the 1933 Act allows a suit to be commenced in the district in which the defendant is an inhabitant, transacts business, or is found. 15 U.S.C. § 77v (1982). The venue provisions of the 1933 Act are incorporated by reference in the Trust Indenture Act. See 15 U.S.C. § 77vvv (1982).

Antitrust

The venue provision applicable to the Sherman Act and the Clayton Act is codified at 15 U.S.C. § 22 (1982). It provides:

Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it

be one in which he reasonably could have anticipated suit. Thus, under the proposed due process test for personal jurisdiction in the federal courts, the second factor would be satisfied. Because a defendant's activity in the region surrounding the location of litigation would be substantial enough that he should not be surprised at the place of trial,

may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

Id. In addition, antitrust suits may be filed under the general venue provisions contained in 28 U.S.C. § 1391 (1982), which provides in pertinent part:

(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

Id. See, e.g., *Board of County Commissioners v. Wilshire Oil Co.*, 523 F.2d 125 (10th Cir. 1975); *New York v. Morton Salt Co.*, 266 F. Supp. 570 (E.D. Pa.), *aff'd*, 385 F.2d 122 (3d Cir.), *cert. denied*, 390 U.S. 995 (1967).

Shareholder Derivative Suits

When Congress amended the general venue statute in 1936 in order to provide a stockholder with at least one proper forum for his derivative suit, *see* H.R. REP. NO. 2257, 74th Cong., 2d Sess. (1936), it added the following language to the existing venue provision, section 51 of the Judicial Code of 1911, then codified at 28 U.S.C. § 112 (1940):

[S]uit by a stockholder on behalf of a corporation may be brought in any district in which suit against the defendant or defendants in said stockholders' action, other than said corporation, might have been brought by such corporation and process in such cases may be served upon such corporation in any district wherein such corporation resides or may be found.

Act of April 16, 1936, ch. 230, 49 Stat. 1213, 1214 (1936).

In the Judiciary Revision Act of 1948, the former section 51 of the Judicial Code of 1911, as amended in 1936, 28 U.S.C. § 112 (1940), was subdivided into several sections. The general venue provision became section 1391 of title 28, *see supra* note 224, the special venue provision for stockholders suits became section 1401, and the extraterritorial service provision for stockholders suits became section 1695. Section 1401 provides: "Any civil action by a stockholder on behalf of his corporation may be prosecuted in any judicial district where the corporation might have sued the same defendants." 28 U.S.C. § 1401 (1982). Section 1695 provides: "Process in a stockholder's action in behalf of his corporation may be served upon such corporation in any district where it is organized or licensed to do business or is doing business." 28 U.S.C. § 1695 (1982).

Suits Against Federal Officials

The venue provision added to the Judicial Code by the Act of Oct. 5, 1962, Pub. L. No. 87-748, § 2, 76 Stat. 744 (1963) (codified at 28 U.S.C. § 1391(e)(1982)), applies to suits in the nature of mandamus filed against federal officials. *See* *Stafford v. Briggs*, 444 U.S. 527 (1980). The original § 1391(e) provided in part:

(e) A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.

28 U.S.C. § 1391(e) (1982). Section 1391(e) was amended in 1976 to emphasize that the broad venue provisions did not extend to suits against non-government defendants. The 1976 revision, Pub. L. No. 94-574, § 3, 90 Stat. 2721 (1976), added the following sentence to the end of the sentence quoted above:

Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party.

28 U.S.C. § 1391(e) (1982).

the federal court can constitutionally assert personal jurisdiction.²⁹¹

Two nationwide personal jurisdiction measures do not follow this pattern, however. Instead they contain very broad venue provisions. In interpleader actions venue is permitted in any district in which a claimant resides.²⁹² The bankruptcy code allows debtors, with two minor exceptions, to bring all proceedings arising in or related to a bankruptcy matter in the bankruptcy court in which the bankruptcy petition is pending.²⁹³ As the next section demonstrates, the breadth of the interpleader and bankruptcy provisions may result in unconstitutional exercises of personal jurisdiction.

C. *The Limits Imposed by the Due Process Clause*

Because the venue provisions of most federal nationwide personal jurisdiction statutes protect defendants from litigation in locations with which they have no meaningful connection, it will rarely be necessary for courts to undertake a due process analysis when challenges to personal jurisdiction are made in cases arising under the current statutes. In contrast, the permissive venue standards for interpleader and bankruptcy actions yield a number of circumstances that pose difficult constitutional questions. These potential problems and their resolution under the due process test proposed in this Article can best be examined by means of two hypothetical cases.²⁹⁴

²⁹¹ See *supra* note 274. Because the Mandamus and Venue Act permits mandamus suits against federal officials to be litigated in the judicial district in which the plaintiff resides, such litigation may proceed in a region in which the official could not reasonably have anticipated suit. The location of litigation, however, will rarely, if ever, be extremely burdensome to the defendant because the local United States Attorney's office will defend the suit and the government will pay all the travel costs that the litigation entails. Thus, the first factor of the proposed due process test would not be satisfied. Accordingly, it appears that federal courts exercising personal jurisdiction over distant defendants pursuant to this Act will not transgress constitutional limits.

²⁹² The Federal Interpleader Act provides:

Any civil action of interpleader or in the nature of interpleader under section 1335 of this title may be brought in the judicial district in which one or more of the claimants reside.

28 U.S.C. § 1397 (1982).

²⁹³ Section 1473 of the Bankruptcy Code provides:

(a) Except as provided in subsections (b) and (d) of this Section, a proceeding arising in or related to a case under title 11 may be commenced in the bankruptcy court in which such case is pending.

(b) Except as provided in subsection (d) of this Section, a trustee in a case under title 11 may commence a proceeding arising in or related to such case to recover a money judgment of or property worth less than \$1,000 or a consumer debt of less than \$5,000 only in the bankruptcy court for the district in which a defendant resides.

(d) A trustee may commence a proceeding arising under title 11 or arising in or related to a case under title 11 based on a claim arising after the commencement of such case from the operation of the business of the debtor only in the bankruptcy court for the district where a State or Federal court sits in which, under applicable nonbankruptcy venue provisions, an action on such claim may have been brought.

28 U.S.C. § 1473 (1982).

²⁹⁴ Under current venue and jurisdiction provisions the hypothetical lawsuits posed at the be-

Suppose a small struggling corporation in Alaska responds to a bid solicitation issued by the New York office of the Defense Communications Agency for production of 40,000 electronic tool kits.²⁹⁵ The corporation represents that it can produce 20,000 kits quickly, but its bid is rejected because it lacks the capacity to perform the entire contract, and the corporation is informed of that decision. Unable to meet its payroll, and with no other prospective contracts, the corporation files a petition for bankruptcy in the federal bankruptcy court in Anchorage, Alaska.²⁹⁶ A few weeks later, the corporation's president discovers that

ginning of this Article, see *supra* text accompanying notes 1-3, would not be permitted to proceed in the district in which the plaintiff filed suit. Congress has not provided nationwide personal jurisdiction in the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1982), see *supra* note 1, or in the Consumer Product Safety Act, 15 U.S.C. §§ 2051-2083 (1982), see *supra* note 2. Under the Fair Labor Standards Act an employee may sue his employer for violating the minimum wage standard in "any court of competent jurisdiction." 29 U.S.C. § 216(b). Because the Act contains no special venue provisions, the general venue provisions of 28 U.S.C. § 1391 apply. *Goldberg v. Wharf Constructors*, 209 F. Supp. 499 (N.D. Ala. 1962). This general venue statute provides that cases arising under federal law may be filed in the judicial district in which all the defendants reside or in which the cause of action arose. 28 U.S.C. § 1391(b). Thus, in the minimum wage hypothetical the only permissible venue would be in Florida.

The Consumer Product Safety Act permits enforcement actions against manufacturers who produce products in violation of established safety standards in the district in which "any act, omission, or transaction constituting the violation occurred, or in . . . the district wherein the defendant is found or transacts business." 15 U.S.C. § 2071(a). Thus, the current law appears to limit venue in the second hypothetical to Guam.

If the venue provisions of the Fair Labor Standards Act and the Consumer Product Safety Act were changed to allow suits in any judicial district in the United States, then the constitutional dimension of the two hypothetical cases could not be avoided. In order to apply the test proposed in this Article to these hypotheticals, it would be necessary to develop more facts about the defendants' activities and resources and about the government interests that might be at stake. From the sketchy facts provided it appears likely that each defendant could demonstrate that the site of litigation chosen by the plaintiff would be seriously burdensome and that the defendant could not reasonably have anticipated suit at that site. Therefore, the third factor of the proposed test, the federal interests furthered by allowing the suit to proceed at the challenged location, would probably be dispositive. In the absence of any legislative history or other evidence about the potential government interests involved in the not yet existent nationwide personal jurisdiction and venue statutes that might affect these hypotheticals, it is impossible to evaluate this third factor. Thus, the ultimate resolution of the due process problems raised by the initial hypotheticals must await changes in the law and more extensive factual development.

²⁹⁵ See *B.K. Instrument, Inc. v. United States*, 715 F.2d 713 (2d Cir. 1983). Although none of the litigants were involved in bankruptcy proceedings, in this action an unsuccessful bidder from New York filed suit in the Eastern District of New York against the United States, various federal officials, and the successful bidder, a California corporation. The Second Circuit directed on remand that the district court determine whether the successful bidder was an indispensable party under Rule 19(b) of the Federal Rules of Civil Procedure, *id.* at 730-32, indicating that it might be impossible for the district court, relying on Rule 4, to exercise general personal jurisdiction over the California corporation, which apparently carried on no activity in New York. *Id.* at 731-32. If this suit had been filed by an unsuccessful bidder who had filed a petition for bankruptcy, however, as in the hypothetical in the text, the nationwide service of process provision would have overcome that hurdle. See *supra* notes 277-79 and accompanying text.

²⁹⁶ An individual or a corporation may initiate bankruptcy proceedings by filing a bankruptcy

the contract for electronic tool kits was awarded to two corporations, one in Florida and one in Guam, each of which had agreed to produce 20,000 tool kits. Outraged, the president files an adversary proceeding on behalf of the Alaska corporation in the federal bankruptcy court in Alaska,²⁹⁷ naming as defendants the government and both successful bidders. The United States, the Florida corporation, and the Guam corporation each is properly served pursuant to Bankruptcy Rule 7004.²⁹⁸ The defendant corporations, never having been informed of the competing bid, are surprised by the suit. Although the United States Attorney for the District of Alaska will represent the government in the litigation, neither of the corporations has local counsel in Alaska. Indeed, neither has ever had any connection at all with Alaska or the Pacific Northwest. Accordingly, they decide to challenge the jurisdiction of the Alaska court.

When the bankruptcy court, faced with two motions to dismiss for lack of personal jurisdiction, turns to the case law, it will discover that many bankruptcy courts have interpreted the Bankruptcy Rule permitting nationwide service of process²⁹⁹ as an authorization of personal jurisdiction over all defendants in or having minimum contacts with the United States.³⁰⁰ It will also discover that the venue provisions permit the litigation to proceed in Alaska.³⁰¹ Accordingly, the current law allows the Alaska federal court to assert jurisdiction over all of the defendants.

Under the three-part analysis advanced by this Article, however, the exercise of jurisdiction over the Florida and Guam corporations would almost certainly violate due process. First, it is likely that both of the corporations could demonstrate that litigation in Alaska would cause them substantial inconvenience.³⁰² Second, they could show that they could not reasonably have anticipated suit in Alaska or the surrounding region. Third, they would probably be able to convince the

petition. 11 U.S.C. § 301 (1982). The proper venue for filing the petition is the federal judicial district where the debtor is domiciled, resides, has its principal place of business, or has had its principal assets in the United States in the 180 days immediately preceding the filing. 28 U.S.C. § 1472 (1982).

²⁹⁷ The Supreme Court's decision in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), which invalidated the broad congressional grant of subject matter jurisdiction to non-article III bankruptcy courts, *see supra* note 252, has left some confusion concerning which matters related to bankruptcy proceedings may be referred to bankruptcy judges and which must be adjudicated by district judges. Whether the hypothetical case were assigned to a bankruptcy court or a federal district court, however, the personal jurisdiction analysis would be identical.

²⁹⁸ *See supra* note 278.

²⁹⁹ *See supra* note 278.

³⁰⁰ *See supra* notes 277-79 and accompanying text.

³⁰¹ *See supra* note 289.

³⁰² It is possible, of course, that an assessment of the particular circumstances of corporate defendants might convince the court that litigation in Alaska would not be very burdensome to either or both of the parties. *See supra* text accompanying notes 182-89.

court that any federal interests that favored holding the litigation in Alaska were insufficient to overcome their inconvenience and surprise.

Here the government interests that might justify bringing the contract action in Alaska, where the bankruptcy petition was filed, would be two: furthering the orderly and speedy administration of a debtor's estate by consolidating all bankruptcy and related proceedings before one tribunal,³⁰³ and conserving the assets of a debtor in order to maximize compensation to the creditors.³⁰⁴ If the Alaska court refused to exercise personal jurisdiction over the defendants, the trustee in bankruptcy would still be able to litigate the contract claim but to do so would likely have to go to New York, Florida, Guam, or to some other place where the defendants could reasonably have anticipated being sued. Although inconvenient for the trustee, this would not pose a major obstacle to the orderly administration of the debtor's estate because litigating an isolated contract claim is tangential to the central tasks involved in administration, such as marshalling the major assets of the debtor and ranking the creditors. Clearly, though, if the trustee were required to file suit someplace—or in two separate places—other than Alaska, the distance would make the litigation more time consuming and more costly. As the extra expense would diminish the debtor's estate, this course of action would thwart to some extent the objective of conserving the debtor's assets. Similarly, it would make the proceedings less speedy.

The denial of personal jurisdiction in this situation would not entail the total obstruction of the legitimate federal interests, however. Therefore, the Alaska court should weigh the hardship on the defendants of litigation in Alaska against the degree to which prohibiting the litigation from proceeding against the Florida and Guam defendants in Alaska would have a negative effect on federal interests. Because it appears that the major negative impact that the denial of jurisdiction would have on the pertinent government interests would be the additional costs occasioned if the trustee must litigate outside of Alaska, the effect of denying personal jurisdiction is quite small. Weighing this minor impact against the burden that litigating in Alaska would impose on the defendants who had no reasonable expectation of suit there, the court should conclude that the due process clause prohibits the exercise of personal jurisdiction over the defendants.

On the other hand, a similar hypothetical might lead to a different result under the Federal Interpleader Act.³⁰⁵ Suppose a resident of New York dies in New York leaving the proceeds of a substantial life insurance policy to her sister, who had assigned it to two creditors. Suppose the sister, a resident of Alaska, files a suit in federal court

³⁰³ See *supra* note 280.

³⁰⁴ See *supra* note 280.

³⁰⁵ 28 U.S.C. §§ 1335, 1397, 2361 (1982).

there against the insurance company, a New York corporation with a branch office in Anchorage, Alaska. The insurance company interpleads the creditors, who reside in Florida and Guam, respectively. Of course, neither of the creditors has ever had any connection with Alaska or the Pacific Northwest.

The Federal Interpleader Act provides for nationwide personal jurisdiction,³⁰⁶ and provides that venue is proper in each judicial district in which any claimant resides.³⁰⁷ Because the sister lives in Alaska, the venue requirement is satisfied. Accordingly, so long as the creditors are properly notified and served, the statute permits the Alaska federal court to assert jurisdiction over them.

Under the due process test proposed in this Article, the court's exercise of jurisdiction in this situation probably would be deemed constitutional. A brief evaluation of the pertinent factors will illustrate this point. First, unless the creditors are wealthy individuals or corporations with far-flung enterprises, it is likely that litigation in Alaska would pose substantial burdens on them. Second, the creditors' lack of connection with Alaska or any part of the United States near Alaska indicates that neither of them reasonably could have anticipated suit in Alaska. Third, the creditors would have to demonstrate that the federal interests furthered by permitting litigation in Alaska did not outweigh the hardship imposed on them.

The federal interests underlying the interpleader act are clear. Congress intended to provide a forum for suits beyond the effective reach of state courts and thus to prevent potentially inconsistent judgments leading to multiple liability against the stakeholder.³⁰⁸ These interests are legitimate and clearly are at stake in this hypothetical suit. It appears that there is no state in which all three claimants could be sued in one proceeding. It appears that there is no mutually convenient forum. Yet, if the insurance company were required to initiate separate proceedings for each claimant, it might be faced with separate verdicts, each awarding the total proceeds to a different claimant. If the federal court refuses to exercise personal jurisdiction in this interpleader hypothetical, the legitimate government interests would be totally thwarted. Therefore, the court could justifiably conclude that the federal interest at stake outweighs the inconvenience and surprise to the defendants occasioned by the place of trial and could, consistent with the due process clause, exercise personal jurisdiction.

D. *Federal Rule of Civil Procedure 4*

Rule 4 of the Federal Rules of Civil Procedure, which prescribes

³⁰⁶ 28 U.S.C. § 2361 (1982). Section 2361 is reproduced *supra* note 233.

³⁰⁷ 28 U.S.C. § 1397 (1982). Section 1397 is reproduced *supra* note 292.

³⁰⁸ See *supra* notes 258-62 and accompanying text.

the issuance and delivery of process, contains no reference to personal jurisdiction.³⁰⁹ According to the weight of authority, it merely regulates the mechanics of service of process, and does not itself provide any basis for the assertion of jurisdiction.³¹⁰ Some commentators and courts, however, have interpreted Rule 4 as a grant of power authorizing the federal courts to exercise personal jurisdiction over defendants.³¹¹ Because Rule 4 is silent on the issue of jurisdiction, the minority who view it as a jurisdictional grant have exhibited some confusion as to the pertinent bases of amenability to jurisdiction under Rule 4. At least one scholar has suggested that Rule 4 authorizes jurisdiction based on the physical presence of defendants within the United States.³¹² In a similar fashion a number of courts have read into Rule 4 a federal standard regarding corporate presence, and have concluded that federal courts are authorized to assert personal jurisdiction on this basis.³¹³ These courts are split as to the appropriate geographical measure for this corporate presence standard; most of them indicate that Rule 4 grants jurisdiction to federal courts over those corporations present in the state in which the court is located,³¹⁴ but a few interpret

³⁰⁹ The titles of FED. R. CIV. P. 4 and its subsections illustrate its focus on the mechanics of service of process:

Rule 4

Process

(a) Summons: Issuance

(b) Same: Form

(c) Service

(d) Summons and Complaint: Person to be Served

(e) Same: Service Upon Party Not Inhabitant of or Found Within State

(f) Territorial Limits of Effective Service

(g) Return

(h) Amendment

(i) Alternative Provisions for Service in a Foreign County

(j) Summons: Time Limit for Service

³¹⁰ *E.g.*, 2 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 4.25[7], at 4-282 n.9 (2d ed. 1981); 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1063-64 (1969); Kaplan, *Amendments of the Federal Rules of Civil Procedure, 1961-63* (pt. 1), 77 HARV. L. REV. 601, 619-42 (1964); Note, *supra* note 63, at 478 n.48. As most succinctly stated to generations of law students, "Rule 4(d)(3) of the Rules of Civil Procedure tells how service of process is to be made upon a corporation which is subject to service; but does not tell when the corporation is so subject." HART & WECHSLER, *supra* note 147, at 959. But see *DeMelo v. Touche Marine Inc.*, 711 F.2d 1260, 1265 (5th Cir. 1983) ("Fed. R. Civ. P. 4 [is] the general statutory basis for assertion of personal jurisdiction in the federal courts").

³¹¹ *E.g.*, *Jim Fox Enter. v. Air France*, 664 F.2d 63, 64-65 (5th Cir. 1981); *Donald Manter Co. v. Davis*, 543 F.2d 419, 420 (1st Cir. 1976); *Koupetoris v. Konkak Intrepaid Corp.*, 535 F.2d 1392, 1395 (2d Cir. 1976); *Berger, supra* note 13, at 290-92; *Foster, Long-Arm Jurisdiction in Federal Courts*, 1969 WIS. L. REV. 9, 16-17 n.28.

³¹² *Berger, supra* note 13, at 290-92.

³¹³ See, *e.g.*, *Fraleigh v. Chesapeake & Ohio Ry.*, 397 F.2d 1 (3d Cir. 1968); *Scott v. Middle East Airlines Co.*, 240 F. Supp. 1 (S.D.N.Y. 1965); *Goldberg v. Mutual Readers League, Inc.*, 195 F. Supp. 778 (E.D. Pa. 1961); *Clifton Prods., Inc. v. American Universal Ins. Co.*, 169 F. Supp. 842 (S.D.N.Y. 1959); *Hedrick v. Canadian Pac. Ry.*, 28 F. Supp. 257 (S.D. Ohio 1939).

³¹⁴ See, *e.g.*, *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972);

Rule 4 as a grant of jurisdiction to federal courts over corporations present anywhere in the United States.³¹⁵ Each view finds a scintilla of support in the terms of Rule 4: in describing the adequate methods of serving process and the appropriate persons to receive service, Rule 4 sets forth federal standards,³¹⁶ but also authorizes federal courts to follow the standards used by the local state courts.³¹⁷

In 1983 Congress amended Rule 4(c), which sets forth the permissible methods of delivering the process issued by federal courts. The amendment greatly liberalized the acceptable manner of service. Whereas the old rule required personal delivery of process,³¹⁸ the new rule allows a plaintiff to initiate suit against an individual or a corporate defendant by simply placing a copy of the summons and complaint in the regular mail.³¹⁹ This section of the Rule obviously simplifies the commencement of litigation by eliminating the requirement that a federal marshal or a specially appointed process server deliver the summons and complaint. It has been asserted, however, that this provision does more than modify the mechanics of delivery of process.³²⁰ Under the minority view that Rule 4 is a grant of jurisdiction, it follows that the 1983 amendment not only streamlines the method of serving process, but also further simplifies the initiation of federal court litigation

Fraley v. Chesapeake & Ohio Ry., 397 F.2d 1 (3d Cir. 1968); *Scholnick v. National Airlines, Inc.*, 219 F.2d 115 (6th Cir. 1955); *Lone Star Package Car Co. v. Baltimore & Ohio R.R.*, 212 F.2d 147 (5th Cir. 1954); *Scott Paper Co. v. Scott's Liquid Gold, Inc.*, 374 F. Supp. 184 (D. Del. 1974); *Scott v. Middle East Airlines Co.*, 240 F. Supp. 1 (S.D.N.Y. 1965).

³¹⁵ *Holt v. Klosters Rederi*, 355 F. Supp. 354 (W.D. Mich. 1973); *First Flight Co. v. Bowman Transp., Inc.*, 209 F. Supp. 730 (E.D. Tenn. 1962).

³¹⁶ See FED. R. CIV. P. 4(c)(1), 4(c)(2)(A), (B) & (C)(ii), 4(d)(1) & (3).

³¹⁷ See FED. R. CIV. P. 4(c)(2)(C)(i), 4(d)(6), 4(e).

³¹⁸ Before the 1983 amendments took effect, FED. R. CIV. P. 4(c) provided:

Service of all process shall be made by a United States marshal, by his deputy, or by some person specially appointed by the court for that purpose, except that a subpoena may be served as provided in Rule 45. Special appointments to serve process shall be made freely (when substantial savings in travel fees will result). Service of all process may also be made by a person authorized to serve process in an action brought in the courts of general jurisdiction of the state in which the district court is held or in which service is made.

³¹⁹ FED. R. CIV. P. 4(c)(2)(C)(ii) provides:

(c) A summons and complaint may be served upon a defendant of any class referred to in paragraph (1) or (3) of subdivision (d) of this rule—

(ii) by mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to form 18-A and a return envelope, postage prepaid, addressed to the sender. If no acknowledgment of service under this subdivision of this rule is received by the sender within 20 days after the date of mailing, service of such summons and complaint shall be made under subparagraph (A) or (B) of this paragraph in the manner prescribed by subdivision (d)(1) or (d)(3).

³²⁰ See *Berger*, *supra* note 13, at 290-92. See also *William B. May Co. v. Hyatt*, 98 F.R.D. 569 (S.D.N.Y. 1983) (rejecting view that in absence of authorization by federal or state statute service of process by mail pursuant to Fed. R. Civ. P. 4(c)(2)(E)(ii) on defendant located beyond forum state provides basis for personal jurisdiction); *San Miguel & Campana v. International Harvester Export Co.*, 98 F.R.D. 572 (D.P.R. 1983).

by authorizing federal courts to exercise personal jurisdiction over all defendants who receive the mailed summons and complaint. In other words, Rule 4 can be interpreted as a congressional grant of personal jurisdiction to the federal courts over all defendants within reach of the United States mail.

Two justifications for this interpretation have been advanced. First, this view of Rule 4 ensures uniformity in the federal courts.³²¹ Because federal courts would no longer need to rely on state long-arm statutes, the situation in which a federal court in one state could not exercise personal jurisdiction over an out-of-state defendant while a federal court in a third state could reach the same out-of-state defendant would no longer occur. Second, this interpretation eliminates the anomaly of federal courts relying on state jurisdictional statutes to hear cases arising under federal law. Because a federal standard would always be available, all federal courts could hear all federal question cases filed, no matter what limitations the state legislatures had imposed on state court long-arm jurisdiction.³²²

Despite any surface appeal that the uniformity and federal standard arguments may have, a number of reasons counsel against interpreting the newly amended Rule 4 as a grant of nationwide personal jurisdiction. First, the language of the Rule refers only to service of process, not to jurisdiction.³²³ While the "plain meaning" of a statute or regulation is often elusive, the canons of statutory construction require courts to give effect to the intent actually expressed by Congress.³²⁴ Second, the legislative history of the 1983 amendments to Rule 4 indicates that the whole impetus behind the revision was to relieve federal marshals from the task of serving process.³²⁵ There is no indication of

³²¹ Berger, *supra* note 13, at 293-98.

³²² Berger, *supra* note 13, at 329-31. In Berger's view there is no need to worry about a defendant's due process rights under such a scheme because the federal question itself would provide a sufficient nexus among the defendant, the forum, and the litigation. *Id.* at 336. So long as the claim is appropriate for a federal court to consider, Berger believes that due process would not be violated by an exercise of jurisdiction over the defendant. This constitutional analysis equates subject matter jurisdiction with personal jurisdiction, and eliminates from the due process analysis all concern that the place of trial might be fundamentally unfair to the defendant.

³²³ See *supra* notes 309 & 319.

³²⁴ See C. SANDS, *supra* note 144, §§ 46.01 & 46.03.

³²⁵ Pursuant to the grant of authority in the Rules Enabling Act, 28 U.S.C. § 2072 (1982), the Supreme Court, on April 28, 1982, transmitted to Congress several proposed amendments to the Federal Rules of Civil Procedure, including a proposed revision of Rule 4(c), which was described as primarily intended to relieve the federal marshals from serving process in private civil suits. H.R. REP. NO. 662, 97th Cong., 2d Sess. 1-4 (1982), reprinted in 1982 U.S. CODE CONG. & AD. NEWS 596. Congress postponed the effective date of the proposed amendments to Rule 4, Act of Aug. 2, 1982, Pub. L. No. 97-227, 1982 U.S. CODE CONG. & AD. NEWS 246, and subsequently drafted and enacted legislation significantly changing Rule 4(c), Act of March 22, 1983, Pub. L. No. 97-462, § —, 51 U.S.L.W. 202 (1983). This statute, the Federal Rules of Civil Procedure Amendments Act of 1982, took effect on February 26, 1983. It contains provisions regarding

any congressional intent to use the 1983 amendments to Rule 4 as a vehicle for a sweeping grant of personal jurisdiction to the federal courts.

Third, if the recent revisions of Rule 4 were interpreted as a grant of nationwide personal jurisdiction, this would conflict with another provision of the Rule. Rule 4(f) expressly limits the scope of process issued by a federal court to the territorial limits of its home state or, in limited circumstances, to places beyond state borders but within 100 miles of the courthouse.³²⁶ Exceptions to Rule 4(f) are permitted when a federal statute or rule authorizes wider service.³²⁷ If the 1983 amendments to Rule 4(c) allow personal jurisdiction wherever a defendant can be reached by the United States mails, the territorial limits of Rule 4(f) would be totally nullified. The legislative history provides no support for such a result.³²⁸

Last, and most important, Rule 4 should not be interpreted as a grant of nationwide personal jurisdiction because this view would increase the likelihood of litigation at locations distant from the defendant's residence and embroil the courts in a great deal of litigation concerning the place of trial. It would likely lead to frequent unconstitutional exercises of personal jurisdiction. In addition, such an interpretation would create enormous opportunities for harassment. If the 1983 amendments do authorize nationwide personal jurisdiction, a plaintiff can effectively activate the power of the federal government against defendants anywhere in the United States, no matter how little connection the defendant has with the site chosen by the plaintiff. If

service of summons and complaint by first-class mail. The background report to the Amendments Act of 1982 stated:

The Supreme Court's proposed modifications of Rule 4 were designed to alleviate the burden on the Marshals Service of serving summonses and complaints in private civil actions. Appendix II, Report of the Committee on Rules of Practice and Procedure and Advisory Committee Note. While the Committee received no complaints about the goal of reducing the role of the Marshals Service, the Court's proposals simply failed to achieve that goal. See House Report No. 97-662, at 2-3 (1982).

The Court's proposed Rule 4(c)(2)(B) required the Marshals Service to serve summonses and complaints "pursuant to any statutory provision expressly providing for service by a United States Marshal or his deputy." One such statutory provision is 28 U.S.C. 569(b), which compels marshals to "execute all lawful writs, process and orders issued under authority of the United States, including those of the courts" (Emphasis added.) Thus, any party could have invoked 28 U.S.C. 569(b) to utilize a marshal for service of a summons and complaint, thereby thwarting the intent of the new subsection to limit the use of marshals. The Justice Department acknowledges that the proposed subsection did not accomplish its objectives.

HR 7154 cures this problem and achieves the desired reduction in the role of the Marshals Service by authorizing marshals to serve summonses and complaints "on behalf of the United States." By so doing, HR 7154 eliminates the loophole in the Court's proposed language and still provides for service by marshals on behalf of the Government.

1982 U.S. CODE CONG. & AD. NEWS 4438-39 (footnotes omitted).

³²⁶ See *supra* note 221.

³²⁷ See *supra* note 221.

³²⁸ See *William B. May Co. v. Hyatt*, 98 F.R.D. 569, 570 (S.D.N.Y. 1983).

the defendant fails to appear or to make a timely objection based on any protection that venue statutes might provide, the court can enter a valid default judgment against the defendant. The harassment that might arise from this interpretation of Rule 4 would truly aggravate the flood of litigation protesting an unreasonable place of trial that such a nationwide jurisdiction scheme would engender. Harassment is especially likely in light of the ease—a letter sent by first-class mail—with which service can now be accomplished.³²⁹ When these costs are calculated and the significance of the legislative history and the plain meaning of the words selected by Congress are considered, the case against interpreting the 1983 amendments to Rule 4 as a grant of nationwide personal jurisdiction is overwhelming.

V. CONCLUSION

The due process clause of the fifth amendment limits the exercise of personal jurisdiction by federal courts. In addition to requiring that all defendants be provided notice and an opportunity to be heard by an impartial tribunal, the clause forbids a court from exercising personal jurisdiction if the site of the litigation is unreasonably burdensome to the defendant. The mere fact that a defendant resides in, is located in, or has minimum contacts with the United States does not make it reasonable for all federal courts to exert personal jurisdiction over him in all cases arising under federal law. A defendant must be afforded the opportunity to demonstrate that the location of the litigation is fundamentally unfair to him. If the defendant can make such a showing, it would violate due process to force him to litigate in the federal forum chosen by the plaintiff.

To determine whether the location of litigation places an unreasonable burden on a defendant, courts should evaluate the place of trial in light of three factors: (1) the severity of the inconvenience, if any, to the defendant; (2) the defendant's reasonable anticipation of litigation at the site chosen by the plaintiff; (3) the federal interests furthered by permitting litigation to proceed at that location. Only if the interests of society outweigh the substantial inconvenience suffered by the defendant can a federal court, consistent with the due process clause, exercise personal jurisdiction over a defendant who has demonstrated that the place of trial imposes a heavy, unanticipated burden on him.

In applying this analysis to the circumstances of a particular case, the courts should take a pragmatic view of the burdens imposed by distant litigation in contemporary society. Courts must evaluate a defendant's constitutional challenge to the place of trial in light of today's complex, interdependent economy, improved transportation and communication networks, and great increase in personal mobility and in

³²⁹ See *supra* note 319.

the amount of litigation undertaken. In the final analysis, however, courts must be sensitive to the circumstances of a particular defendant. They must weigh the hardship to the defendant as realistically as possible against the nature and extent of the relevant federal interests, and against the degree to which those interests would be thwarted if the litigation were not allowed to proceed at the challenged location.

If Congress continues to restrict the territorial jurisdiction of federal courts to their local state boundaries plus the 100 mile bulge area, and to enact nationwide personal jurisdiction statutes that limit the place of trial to locations with which the defendant has had a significant connection, courts will rarely need to engage in the constitutional analysis set forth above. If, however, Congress countenances nationwide personal jurisdiction provisions that do not restrict the site of the litigation, as it has in the interpleader and bankruptcy statutes, the courts will be confronted with legitimate due process challenges by defendants who reside far from the place of trial. To avoid such difficult constitutional questions, the 1983 amendments to Rule 4 of the Federal Rules of Civil Procedure should not be interpreted as an unrestricted grant of nationwide personal jurisdiction to the federal courts.

Unrestricted nationwide personal jurisdiction provisions would work sweeping changes in the federal court system that are uncalled for by 200 years of experience. They would permit harassment by plaintiffs, and greatly increase the amount of litigation regarding the statutory and constitutional limitations on the place of trial. While the test proposed in this Article would equip the courts to resolve due process challenges arising in litigation initiated under expansive personal jurisdiction statutes, a heightened awareness in Congress of the potential difficulties defendants face may lead to more carefully delineated standards of jurisdiction and venue.