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## National Personal Jurisdiction

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# NATIONAL PERSONAL JURISDICTION

Jonathan Remy Nash\*

## ABSTRACT

*Personal jurisdiction has always constrained plaintiffs' access to courts. Recent Supreme Court decisions impose even more severe limits, especially in suits against nonresident foreign corporations. These limitations are magnified by the standard understanding that the relevant forum for purposes of the personal jurisdiction calculus is the state. The Court's Fourteenth Amendment jurisprudence relies on the state as the relevant forum, and the Federal Rules of Civil Procedure in the typical case direct a federal court to apply the same test as would a court of the state in which it sits.*

*This Article takes on the challenge of exploring the possibility of expanding the use of national personal jurisdiction, and thus revitalizing plaintiffs' access to courts. In so doing, it undertakes three distinct tasks. First, it argues that there is no Fifth Amendment Due Process Clause barrier to national personal jurisdiction. Second, it considers the viability of national personal jurisdiction as to various categories of claims, brought in federal court and state court. It argues that Congress has the power to introduce national personal jurisdiction as to all claims brought in the federal courts, but that Congress lacks authority to introduce national personal jurisdiction as to any claims brought in the state courts. However, Congress could open the federal courthouse doors wider to claims where national personal jurisdiction is deemed appropriate. Third, this Article considers what steps Congress is free to utilize to implement national personal jurisdiction. While two steps are obvious—Congress can enact statutory authority and can convey authority to a delegate—this Article focuses on a more controversial path to national personal jurisdiction: the common law. It argues that, while federal courts may enjoy interstitial common law powers in this area, they likely do not have broad powers to generate new instances of national personal jurisdiction.*

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## INTRODUCTION

Personal jurisdiction has always constrained plaintiffs' access to courts; recent Supreme Court decisions impose even more severe limits, especially in suits against nonresident foreign corporations. Consider Robert Nicastro, a New Jersey man who lost several fingers using a machine manufactured by an English corporation, who tried to bring a tort claim against the corporation. The Court reasoned that, even though the corporation deliberately sought to send its products into the United States as a whole, it did not target New Jersey in particular as a destination for its products.<sup>1</sup> As a result, Nicastro could not (absent the corporation's consent) obtain *specific* personal jurisdiction—that is, jurisdiction where the cause of action arises out of the defendant's contacts with the forum<sup>2</sup>—over the corporation in a New Jersey court. Neither could Nicastro have obtained *general* personal jurisdiction—that is, jurisdiction where the cause of action is unrelated to the defendant's forum contacts<sup>3</sup>—over the corporation, since New Jersey is neither its place of incorporation nor its principal place of business.<sup>4</sup>

These conclusions rest inexorably on the assumption that the relevant forum for purposes of the personal jurisdiction calculus is the state. Focusing on the forum *state* accords with the common understanding of the law of personal jurisdiction. Absent the defendant's consent or service of process while the defendant is physically present in the state, a state court may only exert personal jurisdiction over a defendant to the extent that the defendant has “minimum contacts” with the forum state and that assertion of personal jurisdiction is not manifestly unfair.<sup>5</sup> The Supreme Court has attributed this limitation to the Due Process Clause of the Fourteenth Amendment (and perhaps also to international law incorporated by the Constitution<sup>6</sup>), variously describing it as a (i) a personal liberty interest enjoyed by defendants,<sup>7</sup> and (ii) a recognition of the limits of state sovereignty beyond the state's borders.<sup>8</sup>

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<sup>1</sup> See *infra* notes 15–17 and accompanying text.

<sup>2</sup> *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984).

<sup>3</sup> *Id.* at 414 n.9.

<sup>4</sup> See *infra* notes 52–56 and accompanying text.

<sup>5</sup> See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291–92 (1980).

<sup>6</sup> See *infra* note 35.

<sup>7</sup> See *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982).

<sup>8</sup> See, e.g., *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 883–84 (2011) (plurality opinion). The Court in *Bristol-Myers Squibb Co. v. Superior Court of Cal., S.F. Cty.*, 137 S. Ct. 1773 (2017), again identified sovereignty and fairness as the keys to the Fourteenth Amendment calculus. See *id.* at 1780. The Court elevated fairness as the more dominant factor, though it also noted that, “at times, th[e] federalism interest may be decisive.” *Id.*

The requirement that a defendant must have minimum contacts with the forum state is not limited to state courts. Rule 4(k)(1) of the Federal Rules of Civil Procedure establishes the general rule that a federal court, no less than a state court, cannot exert personal jurisdiction over a defendant unless the defendant has minimum contacts with the *state* in which the court sits.<sup>9</sup> Rule 4(k)(2) provides for a limited exception: Where Congress provides for nationwide jurisdiction by statute, the Rule allows for nationwide service of process upon defendants.<sup>10</sup> But Congress has enacted such provisions very sparsely.<sup>11</sup> In short, while Rule 4 generally constrains federal courts more than the Constitution demands, the prerequisite that a defendant have minimum contacts with the state in which the court sits applies in almost all cases pending in U.S. courts, both state and federal.

The notion that personal jurisdiction looks to contacts with the forum *state* magnifies the scope of the constraints the Court has imposed on personal jurisdiction in recent years. For many years, most courts and commentators believed that national corporations—i.e., domestic corporations that do business in every state (McDonald’s, for example)—were subject to general jurisdiction in every state.<sup>12</sup> Over the last decade, the Court has instead made clear that a corporation is subject to general jurisdiction only where it is “at home,” which the Court has translated to mean essentially only at its place of incorporation and its principal place of business.<sup>13</sup> Yet, were contacts *with the United States as a whole* the proper standard, it is clear that general jurisdiction would be available throughout the country. The focus on contacts *with a particular state* thus emphasizes the Court’s limits on general jurisdiction. One also might imagine (assuming that a corporation’s principal place of business can depend on the location of the corporation’s sales<sup>14</sup>) a foreign corporation for which the

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<sup>9</sup> See FED. R. CIV. P. 4(k)(1)(A). The rule has been interpreted to import to federal court litigation state long-arm statutes as well. See *infra* note 68 and accompanying text.

<sup>10</sup> See FED. R. CIV. P. 4(k)(2).

<sup>11</sup> See *infra* notes 99–105 and accompanying text.

<sup>12</sup> See, e.g., Charles W. “Rocky” Rhodes & Cassandra Burke Robertson, *Toward a New Equilibrium in Personal Jurisdiction*, 48 U.C. DAVIS L. REV. 207, 214 (2014); William M. Richman, *Understanding Personal Jurisdiction*, 25 ARIZ. ST. L.J. 599, 614 n.88 (1993); Jonathan Remy Nash, *Rules, Standards, and General Jurisdiction* 25–26 (Working Paper No. 3228871, 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3228871](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3228871).

<sup>13</sup> See *Daimler AG v. Bauman*, 571 U.S. 117 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011); *infra* notes 52–56 and accompanying text.

<sup>14</sup> There are those who believe that a corporation’s “principal place of business” in the context of general jurisdiction should be defined by reference to the Court’s interpretation of the diversity jurisdiction statute. See 28 U.S.C. § 1332(c)(1) (2012) (“[A] corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business . . . .”); *Hertz Corp. v. Friend*, 559 U.S. 77, 92–93 (2010) (“We conclude that ‘principal place of business’ is best read as referring to the place

principal place of business is the entire United States, but for which the principal place of business is some other place once sales and employees are disaggregated on a state-by-state basis.

On the specific jurisdiction front, too, recent decisions highlight the importance of the relevant forum in the personal jurisdiction calculus. In *J. McIntyre Machinery Ltd. v. Nicaastro*<sup>15</sup> (the facts of which provided the basis for the opening paragraph), the Court held that New Jersey courts could not exercise jurisdiction over an English company accused of manufacturing a product that caused injury in the state, absent a showing that the company “engaged in conduct purposefully directed at New Jersey.”<sup>16</sup> It was not enough that the company “directed marketing and sales efforts at the United States” as a whole.<sup>17</sup> Under this rubric, one can readily conceive of a foreign corporation sued for breach of contract, where the steps of contract formation took place in numerous states (but no two steps took place in any one state): Specific jurisdiction would likely be available were contacts with the country as a whole the proper measure, but likely unavailable using a state-by-state calculus. The Court also has rejected the notion that a court may relax the “specific jurisdiction” requirement that the defendant’s contacts give rise to the claim against the defendant simply because the defendant has extensive forum contacts that are unrelated to the claim,<sup>18</sup> which hinders plaintiffs’ ability to bring nationwide mass actions.<sup>19</sup> Once again, the state-centered focus of personal jurisdiction analysis magnifies the limiting effect of constraints on the courts’ due process reach.<sup>20</sup> A national approach to personal jurisdiction could, were it available and implemented, mitigate this effect.

This Article takes on the challenge of exploring the possibility of expanding the use of national personal jurisdiction, and thus revitalizing plaintiffs’ access to courts. In so doing, it makes three distinct contributions. First, it examines carefully the contours of Fifth Amendment limitations on personal jurisdiction.

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where a corporation’s officers direct, control, and coordinate the corporation’s activities.”). However, the Supreme Court has never so held, and it can be argued that the Court’s interpretation of a statutory phrase in a subject matter jurisdiction statute ought not to have bearing in the context of constitutional personal jurisdiction. For an additional discussion, see Judy M. Cornett & Michael H. Hoffheimer, *Good-Bye Significant Contacts: General Personal Jurisdiction After Daimler AG v. Bauman*, 76 OHIO ST. L.J. 101, 147–49 (2015).

<sup>15</sup> 564 U.S. 873 (2011) (plurality opinion).

<sup>16</sup> *Id.* at 886; *see id.* at 888–90 (Breyer, J., concurring).

<sup>17</sup> *Id.* at 885 (plurality opinion).

<sup>18</sup> *See Bristol–Myers Squibb Co. v. Superior Court of Cal., S.F. Cty.*, 137 S. Ct. 1773, 1781 (2017).

<sup>19</sup> *See id.* at 1789 (Sotomayor, J., dissenting).

<sup>20</sup> *See, e.g., Robert C. Casad, Personal Jurisdiction in Federal Question Cases*, 70 TEX. L. REV. 1589, 1596 (1992); Graham C. Lilly, *Jurisdiction over Domestic and Alien Defendants*, 69 VA. L. REV. 85, 116–17 (1983); Janice Toran, *Federalism, Personal Jurisdiction, and Aliens*, 58 TUL. L. REV. 758, 773 (1984).

It argues first that there is no Fifth Amendment barrier to national personal jurisdiction where there are minimum contacts with the United States. It next explores three competing conceptions of fairness under the Fifth Amendment's Due Process Clause personal jurisdiction analysis: whether it is fair to require the defendant to litigate (i) within that particular state; (ii) at that particular location or (iii) within the United States (regardless of the particular location, or the state). It argues that the last of these conceptions is most logical and consistent with existing jurisprudence. To the extent that other considerations of fairness make good policy sense, they can and should be implemented, but they are not constitutionally required.

This Article's second contribution is to evaluate obstacles to the implementation of national personal jurisdiction in various settings. It considers the viability of national personal jurisdiction, first in federal court, as to claims brought under federal question jurisdiction, supplemental jurisdiction, and diversity jurisdiction. It argues that Congress has the power to introduce national personal jurisdiction as to claims under all these types of jurisdiction brought in the federal courts. It then turns to the viability of national personal jurisdiction in state court. It concludes, in sharp contrast to the setting of the federal courts, that Congress lacks the authority to introduce national personal jurisdiction as to any claims brought in the state courts. Instead, Congress could take steps to open the federal courthouse doors wider to claims where national personal jurisdiction is deemed appropriate.

This Article's third contribution is to identify what steps are available to Congress should it wish to implement national personal jurisdiction. Two steps are obvious: Congress can (as it has) enact statutes authorizing national personal jurisdiction, and it can convey authority to a delegate—the Supreme Court (through committees of the Judicial Conference)—to generate rules that make national personal jurisdiction available.<sup>21</sup> It then focuses on a more controversial path to national personal jurisdiction: the common law. Litigants have argued for national personal jurisdiction based on the federal courts' common lawmaking power,<sup>22</sup> and many courts and commentators believe that supplemental national personal jurisdiction—that is, national personal jurisdiction as to claims (perhaps even claims brought against additional parties) that are closely related to a claim properly under federal jurisdiction as to which there is clear authorization for national personal jurisdiction—is a product of the

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<sup>21</sup> See 28 U.S.C. §§ 2071–77 (2012); *infra* notes 292–93.

<sup>22</sup> See *United Rope Distribs., Inc. v. Seatrion Marine Corp.*, 930 F.2d 532, 534–35 (7th Cir. 1991) (rejecting the argument).

federal courts' common lawmaking power.<sup>23</sup> This Article argues that, while federal courts likely enjoy interstitial common law powers in this area, they likely do not have broad powers to generate new instances of national personal jurisdiction. Had Congress chosen to rely upon a unitary national federal trial court, perhaps a common law path to national personal jurisdiction would be open; but Congress has made a different choice, and that choice forecloses such a path.

While different aspects of national personal jurisdiction have attracted the attention of scholars over the years, this Article differs substantially from that of others who have discussed the topic. Several commentators argue, contrary to this Article, that the Fifth Amendment poses serious obstacles to national personal jurisdiction.<sup>24</sup> Their concerns lie less with plaintiffs and more with defendants being forced to defend suits in inconvenient forums under laws they could not have anticipated. This Article argues that these commentators misconstrue the Fifth Amendment limits on personal jurisdiction. Further, as a policy matter, their concerns are adequately addressed by restrictions on venue and choice of law.

Despite the wealth of commentary against national personal jurisdiction, other commentators endorse the concept but largely take the constitutionality of national personal jurisdiction as a given, focusing instead on policy questions.<sup>25</sup> While this Article ultimately concludes that national personal jurisdiction is constitutional, it undertakes a careful assessment of the arguments against constitutionality;<sup>26</sup> considering the extent to which national personal jurisdiction can be introduced for various types of claims and in federal and state court, and the propriety of common law-based national personal jurisdiction.<sup>27</sup>

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<sup>23</sup> See *infra* note 168 and accompanying text.

<sup>24</sup> See Jeffrey T. Ferriell, *The Perils of Nationwide Service of Process in a Bankruptcy Context*, 48 WASH. & LEE L. REV. 1199, 1247–53 (1991); Maryellen Fullerton, *Constitutional Limits on Nationwide Personal Jurisdiction in the Federal Courts*, 79 NW. U. L. REV. 1, 14–85 (1984); Robert A. Lusardi, *Nationwide Service of Process: Due Process Limitations on the Power of the Sovereign*, 33 VILL. L. REV. 1, 32–48 (1988).

<sup>25</sup> Professor Stephen Sachs provides some discussion of the constitutionality of national personal jurisdiction (including its consistency with the *Erie* doctrine). See Stephen E. Sachs, *How Congress Should Fix Personal Jurisdiction*, 108 NW. U. L. REV. 1301, 1318–22 (2014). But he quickly turns to the desirability of national personal jurisdiction and how it could be implemented (including draft legislation). See *id.* at 1322–53. Professor Benjamin Spencer advocates greater use of national personal jurisdiction as a policy matter, see A. Benjamin Spencer, *Nationwide Personal Jurisdiction for Our Federal Courts*, 87 DENV. U. L. REV. 325, 327–29 (2010), but largely takes its constitutionality as a given. See *id.* at 325–27.

<sup>26</sup> See *infra* Part II.

<sup>27</sup> See *infra* Parts III–IV.



Some commentators focus their analytic heft on the constitutionality of national personal jurisdiction in *federal question* cases pending in federal court;<sup>28</sup> this Article's analysis extends to federal diversity and supplemental jurisdiction. Personal jurisdiction, after all, addresses the question of what forum(s) may properly host litigation, not what law(s) may apply to resolve litigation.

Other commentators argue that national personal jurisdiction is applicable not only in the federal courts, but in the state courts as well.<sup>29</sup> This Article rejects this contention: The Fourteenth Amendment restricts state courts from exercising national personal jurisdiction, and the Constitution does not authorize Congress to waive that restriction.<sup>30</sup>

Another group of commentators argues not in favor of the constitutionality of national personal jurisdiction writ large, but rather for a subset of federal court cases involving foreign nonresident defendants;<sup>31</sup> two sets of these commentators further argue in favor of such jurisdiction in cases brought against foreign nonresident defendants in the state courts.<sup>32</sup> These commentators are correct about the propriety of national personal jurisdiction in federal court but for the wrong reason: National personal jurisdiction is simply constitutional in any federal court case, independent of whether the defendant is a foreign nonresident defendant. And this Article disagrees with those commentators who argue in favor of the propriety of national personal jurisdiction in state court cases brought against foreign nonresident defendants.<sup>33</sup>

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<sup>28</sup> See Casad, *supra* note 20, at 1599–1615.

<sup>29</sup> See Casad, *supra* note 20, at 1615–19; Lilly, *supra* note 20, at 145–49; Israel Packer, Guest Commentary, *Congressional Power to Reduce Personal Jurisdiction Litigation*, 59 TEMP. L.Q. 919, 925–26 (1986); David Carlebach, Note, *Nationwide Service of Process in State Courts*, 13 CARDOZO L. REV. 223, 245 (1991); Charles W. Adams, *A Call for a Federal Long Arm Statute to Confer Lawful Authority over Nonresidents on the State Courts* 76–102 (Univ. of Tulsa Legal Studies Research Paper, Working Paper No. 2012-07, 2012).

<sup>30</sup> See *infra* Section III.B.1.

<sup>31</sup> See Patrick J. Borchers, *Comparing Personal Jurisdiction in the United States and the European Community: Lessons for American Reform*, 40 AM. J. COMP. L. 121, 155 (1992); Wendy Perdue, *Aliens, the Internet, and “Purposeful Availment”: A Reassessment of Fifth Amendment Limits on Personal Jurisdiction*, 98 NW. U. L. REV. 455, 456 (2004).

<sup>32</sup> See Ronan E. Degnan & Mary Kay Kane, *The Exercise of Jurisdiction over and Enforcement of Judgments Against Alien Defendants*, 39 HASTINGS L.J. 799, 816–17 (1988); William S. Dodge & Scott Dodson, *Personal Jurisdiction and Aliens*, 116 MICH. L. REV. 1205, 1208 (2018). Professor Peter Hay argues that case law is arguably consistent with a national approach to minimum contacts in federal question cases (though that result is less clear in state law cases). Peter Hay, *Judicial Jurisdiction over Foreign-Country Corporate Defendants—Comments on Recent Case Law*, 63 OR. L. REV. 431, 434–35, 435 n.23 (1984).

<sup>33</sup> See *infra* Section III.B.4.

This Article proceeds as follows. Part I provides a general overview of Fourteenth Amendment personal jurisdictional jurisprudence. It discusses how state courts, and for the most part federal courts as well, are obligated (absent consent or presence within the state) to consider the defendant's contacts with the state and whether the exercise of personal jurisdiction would be manifestly unfair. Part II explores the analogous question in the context of the Fifth Amendment's Due Process Clause. It concludes that (i) there is no Fifth Amendment barrier to national personal jurisdiction, and (ii) the best answer is that concerns of fairness in this context should relate only to whether the exercise of personal jurisdiction *in the United States* is fair, not whether the particular location of the forum within the United States is fair. Importantly, the key conclusion is not that this is a good *policy* outcome, but rather that the Constitution has little, if anything, to say on the subject.

Part III examines whether Congress has the power to install national personal jurisdiction as the relevant standards in various settings. In turn, it considers different types of claims in federal court, and then in state court. Part IV then considers various methods that Congress might employ to establish a national personal jurisdictional standard. It focuses on the possibility of Congress doing nothing, with courts generating such a standard on a common law basis. It concludes that such a possibility is, at best, severely limited. It should fall to Congress to implement national personal jurisdiction in appropriate settings.

## I. FOURTEENTH AMENDMENT LIMITS ON PERSONAL JURISDICTION

This Part offers a short primer on the constitutional limit<sup>34</sup> on personal jurisdiction<sup>35</sup> with which most lawyers are familiar—the limit prescribed by the

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<sup>34</sup> Professor Sachs has argued that the Constitution imposes no direct limit on personal jurisdiction; rather, federal general law incorporates preexisting background principles on sovereignty. *See* Stephen E. Sachs, *Pennoyer Was Right*, 95 TEX. L. REV. 1249, 1255–84 (2017). States remained free to extend personal jurisdiction beyond these background principles, although courts of other sovereigns remained free to decline to recognize such extensions. *See id.* at 1284–87. In turn, according to Professor Sachs, the Fourteenth Amendment changed this landscape by providing for direct federal review—and therefore direct constraint—of state judgments, rather than leaving the issue to a subsequent suit for recognition of earlier state court judgments. *See id.* at 1297–1313. Importantly, however, the Fourteenth Amendment notwithstanding, the Full Faith and Credit Clause empowers Congress to override federal general law and constrict the jurisdictional reach of the state courts or expand them beyond the background principles' limitations. *See id.* at 1317–18.

<sup>35</sup> There is an argument that the ratification of the Constitution itself incorporated background principles of international law that put limits on extraterritorial assertions of personal jurisdiction. *See* *Burnham v. Superior Court of Cal., Cty. of Marin*, 495 U.S. 604, 616–17 (1990) (plurality opinion) (“[The discussion in *Pennoyer*] for its statement of the principle that the Fourteenth Amendment prohibits the exercise of discretion, in fact set forth only as dictum [since the judgment had been rendered before the Amendment's ratification.]”); *see also* Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L.

Fourteenth Amendment's Due Process Clause.<sup>36</sup> Fourteenth Amendment Due Process limits apply when a state tries to assert personal jurisdiction over a defendant<sup>37</sup> outside its territorial limits<sup>38</sup> and without the defendant's consent.<sup>39</sup> Through its long-arm statute, or by not adopting a long-arm statute at all, a state also may constrain its courts' personal jurisdictional reach even more than does the Fourteenth Amendment.<sup>40</sup>

Section A discusses the limits of personal jurisdiction under the Fourteenth Amendment Due Process Clause. Section B explains that, while the Fourteenth Amendment by its terms naturally applies to state court litigation, it also typically—but not always—applies in federal court litigation. Section B then details settings in which the Fourteenth Amendment does not apply in federal court litigation.

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REV. 1217, 1220–21 (1992) (federal long-arm statutes may be limited by the Fifth Amendment and international law); Wendy Collins Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and Pennoyer Reconsidered*, 62 WASH. L. REV. 479, 499–500 (1987) (describing the *Pennoyer* Court's consideration of the Fourteenth Amendment as "startling"). The logic of restrictions on personal jurisdiction originating in background public international law principles notwithstanding, the Court has suggested that due process is the sole progenitor of personal jurisdiction requirements. *See* *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982).

<sup>36</sup> U.S. CONST. amend. XIV, § 1.

<sup>37</sup> It is almost completely, but not entirely, uncontested that foreign defendants can invoke the Fourteenth Amendment Due Process Clause's limitations on personal jurisdiction. A couple of commentators have relied upon Supreme Court authority limiting the applicability of other constitutional provisions in the context of foreign nonresidents. *See, e.g.,* *United States v. Verdugo-Urquidez*, 494 U.S. 259, 261 (1990). Specifically, their arguments focus on the assertion that foreign defendants ought not enjoy the benefits of the Fourteenth Amendment's Due Process Clause with respect to personal jurisdiction. *See* Gary A. Haugen, *Personal Jurisdiction and Due Process Rights for Alien Defendants*, 11 B.U. INT'L L.J. 109, 115–17 (1993); Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1, 28–41 (2006). Professors Dodge and Dodson reject this line of argument, pointing out that (i) the Court has never suggested that its holdings limiting the applicability to foreigners of particular constitutional provisions have application to the Fourteenth or Fifth Amendments, (ii) "a U.S. court exercising adjudicatory authority over an alien in violation of a Due Process Clause is by definition violating the Constitution within the United States," and (iii) the Court has regularly applied the Fourteenth Amendment's Due Process Clause to foreign defendants. *See* Dodge & Dodson, *supra* note 32, at 1221–22. This Article assumes, along with the vast majority of commentators, that foreign nonresident defendants enjoy the benefits of Due Process limitations on personal jurisdiction. *See, e.g.,* Karen Nelson Moore, *Aliens and the Constitution*, 88 N.Y.U. L. REV. 801, 846 (2013). Dean Austen Parrish argues that, to the extent that foreign nonresident defendants can at all claim the benefit of Due Process Clause limitations on personal jurisdiction, they should be able to invoke sovereignty-based, but not liberty-based, aspects of those limitations. *See* Parrish, *supra*, at 54–56. This argument lies beyond the scope of this Article.

<sup>38</sup> A defendant's presence within the forum state is enough to satisfy the Due Process Clause. *See Burnham*, 495 U.S. at 608–22; *id.* at 629 (Brennan, J., concurring).

<sup>39</sup> A defendant as to whom personal jurisdiction would otherwise be improper can nevertheless consent to a court's exercise of personal jurisdiction. *See, e.g., Ins. Corp. of Ir.*, 456 U.S. at 703.

<sup>40</sup> *See, e.g.,* Casad, *supra* note 20, at 1592.

### A. *The Limits of the Fourteenth Amendment's Due Process Clause*

The Supreme Court has attributed Fourteenth Amendment personal jurisdiction protections to two sources. First, the Court has highlighted the importance of restricting a state's ability to exert its sovereignty beyond its borders. Second, the Court has depicted Due Process protections as a liberty interest personal to defendants. In a 1982, the Court used language that seemed to disavow the sovereignty basis for personal jurisdiction limitations.<sup>41</sup> More recently, however, the Court has once again emphasized the importance of sovereignty in the Fourteenth Amendment Due Process calculus.<sup>42</sup>

The modern approach to Fourteenth Amendment personal jurisdictional limits dates to the Supreme Court's 1945 opinion in *International Shoe, Co. v. Washington*.<sup>43</sup> There, the Court explained that whether a court had permissible personal jurisdiction over a defendant was a function of (A)(i) the extent of the defendant's contacts with the forum state, and (ii) the extent to which those contacts gave rise to the plaintiff's cause of action, as balanced by (B) consideration of the extent to which requiring the defendant to litigate in the forum would be fair.<sup>44</sup>

In the 1980s, the Supreme Court adopted from legal academics a fundamental dichotomy in the permissible types of personal jurisdiction.<sup>45</sup> "Specific jurisdiction" is personal jurisdiction under circumstances where the cause of action against the defendant *arises out of* the defendant's contacts with the forum.<sup>46</sup> "General jurisdiction" is personal jurisdiction under circumstances where the cause of action against the defendant *has no connection with* the defendant's contacts with the forum.<sup>47</sup>

#### 1. *General Jurisdiction*

Insofar as general jurisdiction applies where the cause of action is unrelated to the defendant's contacts with the forum, a forum in which a defendant is

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<sup>41</sup> See *Ins. Corp. of Ir.*, 456 U.S. at 702.

<sup>42</sup> See, e.g., *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 884, 903 n.10 (2011) (plurality opinion).

<sup>43</sup> 326 U.S. 310 (1945).

<sup>44</sup> See *id.* at 317–18.

<sup>45</sup> See *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984); Rhodes & Robertson, *supra* note 12, at 235 n.162. Professors Arthur von Mehren and Donald Trautman originated the terms in the 1960s. See Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136 (1966).

<sup>46</sup> *Helicopteros*, 466 U.S. at 414 n.8.

<sup>47</sup> *Id.* at 414 n.9.

subject to general jurisdiction is one where the defendant can be sued for any cause of action whatsoever. In a 1952 case, the Court made clear that a Philippine corporation could be sued in Ohio where, owing to World War II, the corporation's headquarters was effectively located in Ohio.<sup>48</sup> In a 1984 case, the Court made clear that substantial, but not overwhelmingly continuous and systematic, contacts with a forum are *not* sufficient to support general jurisdiction.<sup>49</sup> Based on these cases, lower courts uniformly concluded that corporations were subject to general jurisdiction in the place of their incorporation and in the state of their principal place of business.<sup>50</sup> Most lower courts also considered a corporation subject to general jurisdiction in a forum where it was "doing business," although the lower courts varied as to the test to be applied for whether a corporation was sufficiently "doing business" in a forum.<sup>51</sup>

The Supreme Court used two cases in the 2010s to substantially narrow the reach of general jurisdiction. In *Goodyear Dunlop Tire Operations, S.A. v. Brown*<sup>52</sup> and *Daimler AG v. Bauman*,<sup>53</sup> the Court held that a corporation is subject to general jurisdiction only in a forum where it is "at home."<sup>54</sup> The Court elucidated that a corporation is "at home" where it is incorporated and at its principal place of business,<sup>55</sup> while there may conceivably be other forums where a corporation is at home, the Court has indicated that such situations would be very rare.<sup>56</sup>

## 2. *Specific Jurisdiction*

With respect to specific jurisdiction, the Court has explained that the focus of the inquiry should be on the extent to which the defendant has "purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws,"<sup>57</sup> i.e., the extent to which "the defendant's activities manifest an intention to submit to the power of a sovereign."<sup>58</sup> The Court has developed different specific jurisdiction tests for

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<sup>48</sup> See *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 446–48 (1952).

<sup>49</sup> See *Helicopteros*, 466 U.S. at 409–18.

<sup>50</sup> See *supra* note 12 and accompanying text.

<sup>51</sup> See *Nash*, *supra* note 12, at 24–26.

<sup>52</sup> 564 U.S. 915 (2011).

<sup>53</sup> 571 U.S. 117 (2014).

<sup>54</sup> See *Daimler*, 571 U.S. at 136; *Goodyear*, 564 U.S. at 924.

<sup>55</sup> See *Daimler*, 571 U.S. at 136.

<sup>56</sup> See *id.* at 139 n.19.

<sup>57</sup> See *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

<sup>58</sup> See *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 882 (2011) (plurality opinion).

various kinds of civil actions a plaintiff might bring. In contracts cases, the relevant contacts would relate to contract formation.<sup>59</sup> In a defamation case (and perhaps generally in intentional torts cases), the relevant test for minimum contacts looks to where the behavior that led to the alleged injury, and the effects of that behavior, took place.<sup>60</sup> The Justices have had more trouble agreeing on a test for typical products liability and negligence cases,<sup>61</sup> but it seems that the relevant contacts are (i) harm experienced in the forum, (ii) the extent to which the defendant placed its product into the “stream of commerce” with the product eventually winding up in the forum, and (iii) beyond that, some modicum of “purposeful[] avail[ment]” directed toward the forum by the defendant.<sup>62</sup> Note that, under all these tests, the “forum” as to which the court is to focus is the state in which the court sits.

Last Term, in *Bristol–Myers Squibb Co. v. Superior Court of California, San Francisco County*, the Court made clear the “specific jurisdiction” requirement that the defendant’s contacts give rise to the claim against the defendant is not relaxed simply because the defendant has extensive forum contacts that are unrelated to the claim.<sup>63</sup> The Court explained that “[o]ur cases provide no support for this approach,”<sup>64</sup> which, according to the Court, “resembles a loose and spurious form of general jurisdiction.”<sup>65</sup>

### *B. The Fourteenth Amendment and Federal Court Litigation*

Fourteenth Amendment personal jurisdiction restrictions can apply as well in proceedings in federal court. Indeed, some of the Court’s seminal Fourteenth Amendment Due Process cases have arisen out of federal court litigation.<sup>66</sup> Still, the reason that the Fourteenth Amendment applies in federal court litigation differs from the reason it applies in state court litigation. The Fourteenth Amendment applies of its own accord in state court litigation. This is not

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<sup>59</sup> See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 479 (1985).

<sup>60</sup> See *Calder v. Jones*, 465 U.S. 783, 788–89 (1984).

<sup>61</sup> Compare *Asahi Metal Indus. Co. v. Superior Court of Cal., Solano Cty.*, 480 U.S. 102, 112 (1987) (plurality opinion) (noting personal jurisdiction is not created merely by “[t]he placement of a product into the stream of commerce, without more”), with *id.* at 117 (Brennan, J., concurring in part and concurring in the judgment) (disagreeing on this point); see *McIntyre*, 564 U.S. at 883 (plurality opinion) (“Justice Brennan’s [*Asahi*] concurrence, advocating a rule based on general notions of fairness and foreseeability, is inconsistent with the premises of lawful judicial power.”).

<sup>62</sup> See *Asahi*, 480 U.S. at 112; *id.* at 121 (Brennan, J., concurring in part and concurring in the judgment).

<sup>63</sup> See 137 S. Ct. 1773, 1781 (2017).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> See, e.g., *Daimler AG v. Bauman*, 571 U.S. 117, 120–21 (2014) (federal question case); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 464 (1985) (diversity case).

surprising, since the Amendment applies by its terms to states.<sup>67</sup> In federal court, by contrast, Rule 4 of the Federal Rules of Civil Procedure generally incorporates by reference the limitations under the Fourteenth Amendment.<sup>68</sup>

This said, there are situations where, under current law, the Fourteenth Amendment does not govern the personal jurisdictional reach of a federal court. Rule 4 itself authorizes some exertions of personal jurisdiction beyond the boundaries of the state in which the federal court sits.<sup>69</sup> Certain federal statutes allow for nationwide service of process in cases filed in the federal district courts.<sup>70</sup> And Congress has over the years established unitary federal trial courts—generally of limited jurisdiction—with nationwide reach.<sup>71</sup> The following Part discusses these various examples of nationwide federal personal jurisdiction.

## II. THE FIFTH AMENDMENT’S DUE PROCESS CLAUSE AND PERSONAL JURISDICTION

Does the Constitution itself pose any restrictions on the personal jurisdictional reach of the federal courts and on Congress’s ability to prescribe the personal jurisdiction of the federal courts? To whatever extent the original Constitution as ratified in 1788 did not pose any restrictions,<sup>72</sup> it seems clear that the Fifth Amendment’s Due Process Clause does.<sup>73</sup>

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<sup>67</sup> See U.S. CONST. amend. XIV (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law.” (emphasis added)).

<sup>68</sup> FED. R. CIV. P. 4(k)(1)(A); see 4 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1068.1 (4th ed. 2015); Lilly, *supra* note 20, at 134. Rule 4 also incorporates the applicable state long-arm statute. Cf. Lilly, *supra* note 20, at 135–36 (noting that some federal courts have relied upon a strong federal interest to assert personal jurisdiction consistent with the Fourteenth Amendment but even where the otherwise applicable state long-arm statute would not allow it, but also explaining that such an approach, “implemented without direct support in the [state long-arm] statute or the [federal] rules, must rest upon the uncertain ground of federal common law”).

<sup>69</sup> See *infra* notes 96–107 and accompanying text.

<sup>70</sup> See Lilly, *supra* note 20, at 130–32; *infra* notes 99–105 and accompanying text.

<sup>71</sup> See *infra* notes 111–18 and accompanying text.

<sup>72</sup> There is an argument that the ratification of the Constitution itself formalized certain principles of international law that imposed limits on personal jurisdiction. See *supra* note 35.

<sup>73</sup> See, e.g., FED. R. CIV. P. 4(k)(2) advisory committee’s note to 1993 amendment; *Mariash v. Morrill*, 496 F.2d 1138, 1143 (2d Cir. 1974); Lilly, *supra* note 20, at 122; Linda Sandstrom Simard, *Exploring the Limits of Specific Personal Jurisdiction*, 62 OHIO ST. L.J. 1619, 1643 (2001). To the extent that (as Professor Sachs has argued) the Constitution imposes no direct limits on personal jurisdiction and the Fourteenth Amendment leaves Congress free to contract or extend the personal jurisdictional reach of the state courts, the Tribunals Clause and/or the Necessary and Proper Clause similarly empower Congress to extend the personal jurisdictional reach of the federal courts. See Sachs, *supra* note 34, at 1318–19.

The question still remains—exactly what are those restraints? The Supreme Court has explicitly reserved the question of what restraints the Fifth Amendment’s Due Process Clause imposes on courts.<sup>74</sup> Still, logic allows us to develop a framework for Fifth Amendment Due Process protections. Save for the relevant sovereign, the Fourteenth Amendment’s Due Process Clause tracks the language of the Fifth’s.<sup>75</sup> Thus, to the extent that the Fourteenth Amendment imposes restrictions on the reach of personal jurisdiction, it stands to reason that the Fifth Amendment does as well. If the Fourteenth Amendment requires consideration of minimum contacts and concerns of fairness, so too does the Fifth Amendment.<sup>76</sup> This leaves the question, then, of how these two factors translate from the Fourteenth Amendment’s Due Process Clause to its Fifth Amendment counterpart. The following sections consider each factor in turn.

#### A. *Minimum Contacts*

It stands to reason and has been held that, while the Fourteenth Amendment measures contacts with the state, the Fifth Amendment considers contacts with the entire United States.<sup>77</sup> To the extent that the Due Process Clause ties jurisdiction to sovereignty, the Fifth Amendment’s Clause should extend the reach of personal jurisdiction to the sovereignty of the United States. To the extent that the Due Process Clause ties jurisdiction to defendants’ liberty interest against being called upon to defend suits in a forum with which it has no ties, the Fifth Amendment’s Clause should preclude foreign nonresident defendants with no ties *to the United States* being called upon to defend suits *in the United States*.<sup>78</sup>

Just as the Fourteenth Amendment does not restrict personal jurisdiction *within* states, so too ought the Fifth Amendment not restrict personal jurisdiction

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<sup>74</sup> See *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 885 (2011) (plurality opinion); *Omni Capital Int’l, Ltd. v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 102 n.5 (1987); *Asahi Metal Indus. Co. v. Superior Court of Cal., Solano Cty.*, 480 U.S. 102, 113 n.\* (1987) (plurality opinion).

<sup>75</sup> See U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law . . .”).

<sup>76</sup> See FED. R. CIV. P. 4 advisory committee’s note to 1993 amendment.

<sup>77</sup> See *id.*; *Adams v. Unione Mediterranea di Sicurta*, 364 F.3d 646, 650 (5th Cir. 2004); *United Rope Distribs., Inc. v. Seatrion Marine Corp.*, 930 F.2d 532 (7th Cir. 1991); *Lisak v. Mercantile Bancorp, Inc.*, 834 F.2d 668, 671 (7th Cir. 1987).

<sup>78</sup> This assumes that foreign nonresident defendants can claim the benefit of Due Process Clause limitations on personal jurisdiction. See *supra* note 37.



within the United States.<sup>79</sup> In other words, the Fifth Amendment imposes no obstacle to nationwide personal jurisdiction.<sup>80</sup>

That the Constitution does not require anything beyond contacts with the entire United States—i.e., that it does not require contacts with any particular state—can be seen from the freedom Congress enjoys to design the geographic scope of federal courts. The prevailing wisdom is that the Madisonian Compromise preserved Congress’s freedom not to create lower federal courts at all.<sup>81</sup> And the Court has explained that that freedom not to create lower courts at all includes the lesser power to create as few (or as many) lower federal courts as it wishes, with as little (or as much) jurisdiction as it wishes.<sup>82</sup> If that is true, then Congress could establish federal trial courts whose jurisdictional reach extends across state lines; indeed, it could even set up a single federal trial court with national jurisdiction.<sup>83</sup> And, in turn, if that is true, then logic would strongly suggest that the relevant minimum contact analysis should focus on connections with the nation, and not any particular state.<sup>84</sup>

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<sup>79</sup> See Lilly, *supra* note 20, at 128.

<sup>80</sup> See AM. LAW INST., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 437 (1969) [hereinafter ALI 1969 STUDY] (accompanying memorandum entitled: “The constitutionality of service of federal court process without regard to state boundaries”); Lilly, *supra* note 20, at 123; Sachs, *supra* note 25, at 1319–20; see also Casad, *supra* note 20; Note, *Alien Corporations and Aggregate Contacts: A Genuinely Federal Jurisdictional Standard*, 95 HARV. L. REV. 470, 481–82 (1981).

<sup>81</sup> See, e.g., Michael Collins & Ann Woolhandler, *Judicial Federalism Under Marshall and Taney*, 2017 SUP. CT. REV. 337, 352.

<sup>82</sup> See *United States v. Union Pac. R.R. Co.*, 98 U.S. 569, 603 (1878); *Sheldon v. Sill*, 49 U.S. 441, 448–49 (1850).

<sup>83</sup> See *Union Pac. R.R. Co.*, 98 U.S. at 602–03; Robert Haskell Abrams, *Power, Convenience, and the Elimination of Personal Jurisdiction in the Federal Courts*, 58 IND. L.J. 1, 1 (1982). Even among “mandatory vesting theories” that argue (contrary to the Supreme Court’s position) that Congress was obligated to create some lower federal courts, there is none that believes it obligatory on Congress to create at least one federal district court per state or to create districts that adhere to state lines, or that would find it problematic were Congress to create a single federal trial court. See, e.g., Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985). The *Union Pacific R.R. Co.* Court was open to the possibility that the Constitution required the creation of at least one federal district court in each state to the extent that Congress created federal crimes, but adhered to the general position that otherwise (and certainly with respect to non-criminal cases) there was no such requirement. 98 U.S. at 603. The Court noted constitutional provisions under Article 3, Section 2 providing that the “trial of all crimes . . . be held in the State where they shall have been committed,” and under the Sixth Amendment that, “in all criminal prosecutions[,] the accused shall enjoy the right to a speedy and public trial[,] by an impartial jury of the State and district wherein the crime shall have been committed . . .” *Union Pac. R.R. Co.*, 98 U.S. at 608; see also *Martin v. Hunter’s Lessee*, 14 U.S. 304, 336–37 (1816) (suggesting that federal criminal jurisdiction must be vested in the lower federal courts). The Court concluded: “These provisions, which relate solely to the place of the trial for criminal offences, do not affect the general proposition.” *Union Pac. R.R. Co.*, 98 U.S. at 603.

<sup>84</sup> *Union Pac. R.R. Co.*, 98 U.S. at 603; Abrams, *supra* note 83, at 2.

The Court used such reasoning in the 1878 case of *United States v. Union Pacific R.R. Co.*,<sup>85</sup> decided well after the approval of the Fifth Amendment. The Court concluded:

There is, therefore, nothing in the Constitution which forbids Congress to enact that, as to a class of cases or a case of special character, a circuit court—any circuit court—in which the suit may be brought, shall, by process served anywhere in the United States, have the power to bring before it all the parties necessary to its decision.<sup>86</sup>

The Supreme Court has cited its *Union Pacific* holding favorably over the years.<sup>87</sup> Not surprisingly, lower courts have generally concluded that the Fifth Amendment minimum contacts analysis considers the contacts between the defendant and *the United States* as a whole.<sup>88</sup>

In arguing to the contrary—that Congress has understood some constitutional prohibition against federal service of process across state lines—some commentators have relied on the fact that federal district courts almost always observe state lines as support.<sup>89</sup> However, while Congress has generally created federal trial courts that observe state lines, there have been exceptions.<sup>90</sup>

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<sup>85</sup> *Union Pac. R.R. Co.*, 98 U.S. at 603–04. Professor Maryellen Fullerton discounts the *Union Pacific* Court’s reasoning, asserting that the Court addressed the issue only “in passing.” Fullerton, *supra* note 24, at 28. In fact, the Court’s holding on personal jurisdiction was not dicta (especially given the strict jurisdictional sequencing then in effect at the Court), and the Court devoted no fewer than three pages in the United States Reports. See *Union Pac. R.R. Co.*, 98 U.S. at 602–05.

<sup>86</sup> *Union Pac. R.R. Co.*, 98 U.S. at 604.

<sup>87</sup> See, e.g., *Miss. Publ’g Corp. v. Murphree*, 326 U.S. 438, 442 (1946).

<sup>88</sup> See, e.g., *Johnson Creative Arts, Inc. v. Wool Masters, Inc.*, 743 F.2d 947, 950 (1st Cir. 1984); *Mariash v. Morrill*, 496 F.2d 1138, 1143 (2d Cir. 1974) (panel including retired Justice Tom Clark). *But see* *Honeywell, Inc. v. Metz Apparatewerke*, 509 F.2d 1137, 1143 (7th Cir. 1975) (“[W]e can perceive no operative difference between the concept of due process as applied to the states and as applied to the federal government.”).

<sup>89</sup> See Fullerton, *supra* note 24, at 32, 34–35. Historically, Congress has also incorporated state boundaries as limits on some federal court service of process. See *WRIGHT ET AL.*, *supra* note 68. *But see* *Sachs*, *supra* note 25, at 1319 (“[F]ederal courts could send some of their process nationwide as early as 1793. And federal personal jurisdiction didn’t rely on state lines in particular until the Federal Rules’ adoption in 1938 . . . .” (footnote omitted)).

<sup>90</sup> The fact that Congress, and perhaps especially early Congresses, have created districts that span state boundaries reflects a congressional belief in the constitutionality of such districts. On the other hand, congressional practice in favor of creating districts that lie wholly within states is not necessarily probative of a congressional belief that the opposite practice—the creation of interstate districts—is not constitutional. Such congressional action is subconstitutional and reflects a congressional belief about the constitutionality of interstate districts only to the extent that Congress felt constitutionally obligated to *avoid* interstate districts. In general, steps by Congress that are not clearly congressionally mandated may simply reflect Congress’s subconstitutional preference. *Cf.* Fullerton, *supra* note 24, at 35–36 (arguing that subconstitutional doctrines like venue transfer and the doctrine of *forum non conveniens* are insufficient to protect constitutional interests). For example, in questioning the constitutionality of bankruptcy courts asserting nationwide personal jurisdiction over state law claims, Professor Jackie Gardina points to “support in the Bankruptcy Code itself for the proposition that not all aspects of the bankruptcy need be litigated within a single bankruptcy court forum.”

Early on, the Federalist-controlled Congress enacted the Judiciary Act of 1801,<sup>91</sup> which created a federal district court—the District of Potomac—that extended beyond state lines.<sup>92</sup> While this district was short-lived—it was dissolved in 1802<sup>93</sup>—there have been a few other examples of federal judicial districts extending beyond state lines over the history of the Republic.<sup>94</sup> Indeed, there is today one federal judicial district that extends beyond state lines: Since its creation over a century ago, the so-called United States District Court for the District of Wyoming has included the entirety of the Yellowstone National Park, including the portions of that Park that lie within the borders of Idaho and Montana.<sup>95</sup> The history, and in particular this long-standing example, thus demonstrates congressional endorsement of cross-border federal judicial districts, if under limited circumstances, and an implicit assertion of the power to assert personal jurisdiction across state borders.

Even for the standard federal district that does not traverse state boundaries, Rule 4 offers no fewer than three exceptions to its own general rule that a federal district court adhere to the Fourteenth Amendment (and long-arm statutory) restrictions that bind a court of the state in which the federal district court sits.<sup>96</sup>

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Jackie Gardina, *The Bankruptcy of Due Process: Nationwide Service of Process, Personal Jurisdiction and the Bankruptcy Rules*, 16 AM. BANKR. INST. L. REV. 37, 64 (2008). But the Bankruptcy Code is clearly unconstitutional, and the drafters may simply have had a unconstitutional preference for litigation in a single bankruptcy court forum.

<sup>91</sup> Judiciary Act of 1801, § 1, 2 Stat. 89 (1801) (repealed 1802).

<sup>92</sup> *Id.* § 21, 2 Stat. at 96.

<sup>93</sup> See Amending Act of 1802, § 4, 2 Stat. 156, 157–59 (1802); Judiciary Act of 1802, § 1, 2 Stat. 132 (1802) (current version in scattered sections of 28 U.S.C.) (repealing the 1801 Act).

<sup>94</sup> See Peter Nicolas, *American-Style Justice in No Man's Land*, 36 GA. L. REV. 895, 1003–04, 1006–10, 1012–13 (2002).

<sup>95</sup> See 28 U.S.C. § 131 (2012). The provisions creating the federal district courts for the Districts of Montana and Idaho expressly leave out the portions of those states that lie within Yellowstone National Park. *Id.* §§ 92, 106.

<sup>96</sup> See FED. R. CIV. P. 4(e)(1)–(2). Even Rule 4's general rule of state law governing personal jurisdiction in federal court has been questioned in some circumstances in the past. A prior version of Rule 4 provided:

Whenever a statute or rule of a court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule.

FED. R. CIV. P. 4(e) (1993 text, amended 2000). A minority of courts interpreted this provision to allow a federal district court to assert personal jurisdiction in federal question cases based on national minimum contacts *provided that* the requirements of the state long-arm statute were met. Put another way, these courts would have allowed application of a state long-arm statute even where its application in state court would be unconstitutional (because the Fourteenth Amendment minimum contacts test would be violated). See, e.g., *United Rope Distribs.*,

First, Rule 4 allows for the addition of third-party defendants and necessary defendants (who are not already in the case) when they are “served within a judicial district of the United States and not more than 100 miles from where the summons was issued.”<sup>97</sup>

Second, Rule 4 allows a federal court to exert personal jurisdiction over a defendant where it is “authorized by a federal statute.”<sup>98</sup> And Congress has indeed enacted statutes that authorize broader service of process. As early as 1917, Congress enacted an interpleader statute that allows for nationwide service of process.<sup>99</sup> Congress has since afforded similar treatment to certain causes of action under securities laws,<sup>100</sup> antitrust laws,<sup>101</sup> patent laws,<sup>102</sup> federal law governing pension plans,<sup>103</sup> and the Racketeering Influenced Corrupt Organizations (RICO) statute,<sup>104</sup> among others. It has also authorized nationwide service in minimal diversity cases arising out of mass accidents.<sup>105</sup>

Third, Rule 4 has a special provision that authorizes personal jurisdiction over a defendant who faces a federal cause of action and has minimum contacts

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Inc. v. Seatrion Marine Corp., 930 F.2d 532, 535–36 (7th Cir. 1991); *Handley v. Ind. & Mich. Elec. Co.*, 732 F.2d 1265, 1271 (6th Cir. 1984); see Thomas F. Green, Jr., *Federal Jurisdiction in Personam of Corporations and Due Process*, 14 VAND. L. REV. 967, 981 (1961); Note, *supra* note 80, at 474–81. The 1993 amendment of Rule 4 to include Rule 4(k)(2)—which allows for national personal jurisdiction as to a federal claim where no state court would have personal jurisdiction—seems to have mooted this issue. See *Kohler Co. v. Titon Indus., Inc.*, 948 F. Supp. 815, 819–20 (E.D. Wis. 1996). For an exploration of various courts’ reasoning under the old version of Rule 4, see Marilyn J. Berger, *Acquiring In Personam Jurisdiction in Federal Question Cases: Procedural Frustration Under Federal Rule of Civil Procedure 4*, 1982 UTAH L. REV. 285, 310–18.

<sup>97</sup> FED. R. CIV. P. 4(k)(1)(B).

<sup>98</sup> FED. R. CIV. P. 4(k)(1)(C).

<sup>99</sup> See WRIGHT ET AL., *supra* note 68, at § 3636. Today, the district courts derive subject matter jurisdiction from 28 U.S.C. § 1335. The basis for nationwide personal jurisdiction is found in 28 U.S.C. § 2361.

<sup>100</sup> See 15 U.S.C. §§ 77v(a), 78aa(b) (2012).

<sup>101</sup> See 15 U.S.C. § 22 (2012).

<sup>102</sup> See 28 U.S.C. § 1694 (2012).

<sup>103</sup> See 29 U.S.C. § 1132(e)(2) (2012).

<sup>104</sup> While the courts of appeals that have confronted the issue agree that civil RICO contemplates nationwide service of process in some circumstances, there is a circuit split as to exactly which provision of the RICO service of process statute grants that authority: subsection (b) or subsection (d) of 18 U.S.C. § 1965 (2012). Compare *Cory v. Aztec Steel Bldg., Inc.*, 468 F.3d 1226, 1231 (10th Cir. 2006) (relying on subsection (b)), and *Lisak v. Mercantile Bancorp, Inc.*, 834 F.2d 668, 671 (7th Cir. 1987) (same), and *Butcher’s Union Local No. 498 v. SDC Investment, Inc.*, 788 F.2d 535, 538 (9th Cir. 1986) (same), with *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 627 (4th Cir. 1997) (relying on subsection (d)), and *Republic of Pan. v. BCCI Holdings (Lux.) S.A.*, 119 F.3d 935, 942 (11th Cir. 1997) (same), with *PT United Can Co. v. Crown Cork & Seal Co.*, 138 F.3d 65, 71 (2d Cir. 1998) (relying on both subsections (b) and (d)).

<sup>105</sup> See 28 U.S.C. §§ 1369(a), 1697 (2012).

with the United States but not with any state.<sup>106</sup> This jurisdiction is available only if it is “consistent with the United States Constitution and laws.”<sup>107</sup>

Beyond Rule 4, federal bankruptcy courts, which are designated as “units” of the federal district courts,<sup>108</sup> have the power to effect nationwide service of process and assert personal jurisdiction across state lines. Rule 7004 of the Federal Rules of Bankruptcy Procedure expressly authorizes nationwide service of process,<sup>109</sup> and authorizes personal jurisdiction to the *federal* constitutional and statutory limit.<sup>110</sup>

Looking beyond the federal district courts, one can find examples of national federal trial courts that enjoy (by necessity) the power to assert personal jurisdiction nationally. The short-lived U.S. Commerce Court was an Article III court during the early 1910s.<sup>111</sup> While it is best known for hearing challenges to orders of the Interstate Commerce Commission,<sup>112</sup> in which case the government would have been the respondent and so personal jurisdiction would not have been an issue, the court also had jurisdiction to hear some Commission enforcement proceedings.<sup>113</sup> Although empowered to hold sessions throughout the United States, the court held its regular sessions in Washington, D.C.,<sup>114</sup> and Congress authorized nationwide service of process with respect to court proceedings.<sup>115</sup>

The U.S. Court of International Trade provides a modern-day example of a national trial court. The court, which sits predominantly in New York City, has jurisdiction over certain civil enforcement actions related to international

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<sup>106</sup> FED. R. CIV. P. 4(k)(2).

<sup>107</sup> FED. R. CIV. P. 4(k)(2)(B).

<sup>108</sup> See 28 U.S.C. § 151 (2012).

<sup>109</sup> FED. R. BANKR. P. 7004(d).

<sup>110</sup> FED. R. BANKR. P. 7004(f).

<sup>111</sup> Congress created the court in 1910 and abolished it in 1913. *E.g.*, Edward V. Di Lello, *Fighting Fire with Firefighters: A Proposal for Expert Judges at the Trial Level*, 93 COLUM. L. REV. 473, 504 (1993). For a discussion of the politics leading to the creation of the court, see Felix Frankfurter, *The Business of the Supreme Court of the United States—A Study in the Federal Judicial System*, 39 HARV. L. REV. 587, 594–603 (1926). For a brief history of the court, see WILLIAM SEAL CARPENTER, JUDICIAL TENURE IN THE UNITED STATES 78–83, 86–88, 90, 92–94 (1918); FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 153–74 (1927); Philip B. Kurland, *The Constitution and the Tenure of Judges: Some Notes from History*, 36 U. CHI. L. REV. 665, 683–86 (1969).

<sup>112</sup> See, *e.g.*, Di Lello, *supra* note 111, at 504.

<sup>113</sup> See Pub. L. No. 61-218, 36 Stat. 539, 539 (1910).

<sup>114</sup> *Id.* at 541.

<sup>115</sup> *Id.* (“[P]rocess may run, be served, and be returnable anywhere in the United States . . .”).

trade,<sup>116</sup> and also over third-party claims brought by parties before the court.<sup>117</sup> The court's rules of procedure authorize nationwide service of process and even service abroad, where the defendant would not be subject to the jurisdiction of any state's courts.<sup>118</sup>

Congressional practice and judicial understandings are thus hardly inconsistent with the notion of national personal jurisdiction.<sup>119</sup> Some who urge that the Fifth Amendment should look to contacts with the *state* (despite the history and logic to the contrary) emphasize that times have changed, and that the size of the United States today implicates concerns that simply were not present in a bygone age.<sup>120</sup> Of course, even as the country has grown, so too have technological advances made travel across the country much easier and cheaper.<sup>121</sup> Moreover, Congress continues to keep in place national trial courts without much objection,<sup>122</sup> which suggests that the historical practice remains acceptable today.

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<sup>116</sup> See 28 U.S.C. § 1582 (2012).

<sup>117</sup> See *id.* § 1583.

<sup>118</sup> See U.S. CT. INT'L TRADE R. 4(j)(2). Congress statutorily authorized the court to "prescribe rules governing the summons, pleadings, and other papers, for their amendment, service, and filing, for consolidations, severances, suspensions of cases, and for other procedural matters." 28 U.S.C. § 2633(b) (2012).

<sup>119</sup> To the extent that personal jurisdiction is required in such settings, the federal judicial architecture outside the setting of a traditional trial court further confirms the validity of national personal jurisdiction. Where civil actions with common questions of fact are pending in multiple federal districts, Congress has authorized the transfer of those actions to a single district (chosen by the "judicial panel on multidistrict litigation") for "coordinated or consolidated pretrial proceedings." See 28 U.S.C. § 1407 (2012). Lower courts have rejected the argument that the transferee court for pretrial matters must meet the Fourteenth Amendment's personal jurisdiction requirements, citing Congress's freedom to empower federal district courts with national personal jurisdiction. See *e.g.*, *Howard v. Sulzer Orthopedics, Inc.*, 382 F. App'x 436, 442 (6th Cir. 2010); see also WRIGHT ET AL., *supra* note 68, at § 1067.3 n.19 (referring to minimum contacts not applying to a transferee court under the multidistrict litigation statute). For an argument that a multidistrict litigation transferee court should require proper personal jurisdiction, see Andrew D. Bradt, *The Long Arm of Multidistrict Litigation*, 59 WM. & MARY L. REV. 1165 (2018). While an appellate court hearing an appeal from a trial court relies on the personal jurisdiction established by the trial court, it nonetheless is worth noting that almost all federal appellate courts have jurisdiction that extend beyond the bounds of a single state or territory. Setting aside the Supreme Court (which the Constitution sets as a unitary national court under Article III, Section 2), in today's federal judiciary, the jurisdiction of a typical federal court of appeals extends over a region consisting of several states (and even federal territories). The U.S. Court of Appeals for the District of Columbia hears appeals from the District of Columbia itself, but also hears cases involving administrative law on a nationwide basis. And the U.S. Court of Appeals for the Federal Circuit has nationwide jurisdiction. See Sachs, *supra* note 25, at 1319 (citing the existence of regional federal courts of appeals and a unitary national Supreme Court to bolster the constitutionality of national minimum contacts).

<sup>120</sup> See Fullerton, *supra* note 24, at 32.

<sup>121</sup> See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980); *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 222–23 (1957).

<sup>122</sup> See *supra* notes 116–18 and accompanying text.

In sum, like its Fourteenth Amendment counterpart, the Fifth Amendment Due Process Clause imposes a minimum contacts requirement on the exercise of personal jurisdiction. However, the minimum contacts analysis under the Fifth Amendment looks to contacts with the United States as a whole, not any one particular state forum.

### *B. Concerns of Fairness*

Beyond minimum contacts, Fourteenth Amendment Due Process analysis requires consideration of whether the forum in question is sufficiently “fair” to the defendant otherwise properly under personal jurisdiction. How does this requirement translate to the setting of the Fifth Amendment? Case law and commentators identify three possibilities,<sup>123</sup> summarized in Table 1.

<b>Table 1: Various Interpretations of Fairness Analysis Under the Fifth Amendment’s Due Process Clause</b>			
<b>Type of Fairness Analysis</b>	<b>Definition</b>	<b>Interaction with Domestic Defendant</b>	<b>Interaction with Foreign Nonresident Defendant<sup>124</sup></b>
<i>National Fairness</i>	Fairness inquiry that examines fairness of calling upon defendant to defend within the United States (regardless of location)	No unfairness possible	Unfairness possible, but fairness does not vary depending upon the precise location of the court
<i>Location-Based Fairness</i>	Fairness inquiry that examines fairness of calling upon defendant to defend at a particular location (but without regard to state lines)	Unfairness possible depending upon location of court	Unfairness possible depending upon location of court
<i>State-Based Fairness</i>	Fairness inquiry that examines fairness of calling upon defendant to defend within the state in which the court lies	Unfairness possible depending upon the state	Unfairness possible depending upon the state

<sup>123</sup> See Casad, *supra* note 20, at 1600–02 (surveying cases to identify “four different views of what Fifth Amendment due process requires[.]” three of which resemble the three approaches this Article discusses, and the fourth of which Professor Casad dismisses as based on a misreading of prior precedent).

<sup>124</sup> This assumes that foreign nonresident defendants enjoy the protections of the Fifth Amendment’s Due Process Clause, at least with respect to personal jurisdiction. See *supra* note 37.

National fairness is the precise analog to fairness as it is understood in the Fourteenth Amendment context. Under “national fairness,” the inquiry is simply whether litigation in the United States—*regardless of the actual location of the litigation within the United States*—would promote “fair play” to a defendant.<sup>125</sup> Just as the Fourteenth Amendment inquiry has nothing to say about a state court asserting jurisdiction over a state resident (regardless of the location of the court within the state), so too is national fairness unconcerned with a federal court asserting jurisdiction over a U.S. resident (regardless of the location of the court within the United States). And, just as the Fourteenth Amendment inquiry as applied to a nonresident (not present within the borders of the state) looks at the unfairness of requiring that nonresident to defend suit in the forum state regardless of the precise location of the court within the state, so too does national fairness look at the unfairness of requiring a nonresident of the United States—including a corporation incorporated, or having its principal place of business, in the United States—to defend suit in the United States, again regardless of the precise location of the court within the United States.

The remaining two possible forms of Fifth Amendment fairness treat U.S. residents and nonresidents identically. Under “location-based fairness,” the relevant inquiry is the extent to which it is unfair to require the defendant to defend suit at the location of the court without regard to state lines.<sup>126</sup> One could imagine here it being fair to require a defendant to defend suit at one location within a state, but unfair to require it at another.

Under “state-based fairness,” the relevant inquiry is the extent to which it is unfair to require the defendant to defend suit in the state in which the court is located.<sup>127</sup> This version of fairness in effect transplants the standard Fourteenth Amendment fairness inquiry directly into the Fifth Amendment calculus.

The first interpretation—national fairness—is the approach taken by many courts.<sup>128</sup> It is surely more consistent with the logic of existing Fourteenth Amendment jurisprudence.<sup>129</sup> Nothing in that jurisprudence suggests that a defendant has standing to challenge the precise location of litigation within a forum where personal jurisdiction exists.<sup>130</sup> Bolstering this notion is the fact that, once personal jurisdiction obtains, litigation conceivably may continue to a state

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<sup>125</sup> See Lilly, *supra* note 20, at 141–42.

<sup>126</sup> See Ferriell, *supra* note 24, at 1248; *infra* notes 133–36 and accompanying text.

<sup>127</sup> See Lusardi, *supra* note 24, at 34; *infra* note 137 and accompanying text.

<sup>128</sup> See Casad, *supra* note 20, at 1601.

<sup>129</sup> See *id.* at 1606.

<sup>130</sup> See Lisak v. Mercantile Bancorp, Inc., 834 F.2d 668, 671 (7th Cir. 1987).



intermediate appellate court and the state supreme court. And litigation before those courts will take place where those courts sit, regardless of whether that litigation at those locations would prove onerous to the defendant.<sup>131</sup>

Similar logic suggests that, where minimum contacts with the United States arise, fairness concerns are not a sufficient basis to challenge the *location of the trial court within the United States*. Indeed, analogous to the setting of state court litigation, litigation that commences in a federal district court may eventually proceed to a federal court of appeals and potentially to the Supreme Court—the locations of which may be (and indeed are likely to be) more onerous than the location of the federal district court. Yet, there has never been any suggestion that any such unfairness warrants relocating the location of appellate litigation.<sup>132</sup>

Proponents of location-based fairness argue that the Supreme Court has renounced the notion that Fourteenth Amendment Due Process restrictions on personal jurisdiction arise out of concerns of state sovereignty, and instead arise entirely out of concerns of fairness.<sup>133</sup> As discussed above, however, to whatever extent this once was an accurate assessment of the Supreme Court's view, recent cases have confirmed the continuing importance of sovereignty as a driving factor behind the Fourteenth Amendment jurisprudence.<sup>134</sup>

Further refuting this position is the fact that in no Fourteenth Amendment case has the Court (or any lower court) suggested that fairness concerns render off limits litigation at a particular location within a state. Were Due Process concerned with fairness of location *within a sovereign* (where the propriety of jurisdiction is otherwise not subject to question), one would have thought that such a case would have arisen—especially in states encompassing large geographic areas, like Alaska, California, and Texas.<sup>135</sup> While courts and commentators acknowledge that decisions to site litigation in locations that would “make the offer of adjudication a mirage” might implicate fundamental fairness and violate one (or both) of the Due Process Clauses, any such violations would be independent of restrictions on personal jurisdiction.<sup>136</sup>

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<sup>131</sup> See, e.g., *Bd. of Trs., Sheet Metal Workers' Nat'l Pension Fund v. Elite Erectors, Inc.*, 212 F.3d 1031, 1036 (7th Cir. 2000).

<sup>132</sup> See, e.g., *Sachs*, *supra* note 25, at 1319.

<sup>133</sup> See Fullerton, *supra* note 24, at 22; Gardina, *supra* note 90, at 44, 46; see also Ferriell, *supra* note 24, at 1217–22 (making a similar argument, but also noting that the Supreme Court's then-recent decision in *Burnham v. Superior Court* “raises more questions about this analysis than it resolves”).

<sup>134</sup> See, e.g., *Elite Erectors, Inc.*, 212 F.3d at 1036, see *supra* note 8.

<sup>135</sup> See *Elite Erectors, Inc.*, 212 F.3d at 1036; Casad, *supra* note 20, at 1603.

<sup>136</sup> See *Elite Erectors, Inc.*, 212 F.3d at 1036; *Sachs*, *supra* note 25, at 1320.

Few courts have endorsed the last option<sup>137</sup>—state-based fairness—and for good reason. It would be very odd indeed if (as strongly seems to be the case) state boundaries were irrelevant for Fifth Amendment minimum contacts purposes, yet somehow relevant for the Fifth Amendment fairness calculus.

Location-based and state-based fairness found a proponent in then-District Judge Edward Becker, who in 1974 developed a multifactor analysis for Fifth Amendment fairness that focused on where the judicial forum (i.e., the state or federal judicial district) was located and the state of incorporation of the defendant.<sup>138</sup> Some later cases cite Judge Becker’s test favorably,<sup>139</sup> but the test has also been criticized for conflating constitutional fairness with propriety of venue.<sup>140</sup> Moreover, even cases that cite favorably to Judge Becker’s test emphasize that the test should be interpreted narrowly such that unfairness is found very rarely.<sup>141</sup>

Similar to arguments raised in the minimum contacts context,<sup>142</sup> supporters of location-based and state-based fairness argue that the Fifth Amendment fairness calculus, owing to the size of the country, ought to take into account the location of the trial court within the United States.<sup>143</sup> In fact, existing Supreme Court precedent suggests that the Fifth Amendment’s concern with fair access to justice is limited.<sup>144</sup> Moreover, the arguments based on unfairness of location seem overblown. The heightened fairness concerns that result from great distances are countered by new technologies that make traversing those distances much easier and cheaper than traversing far shorter distances was in

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<sup>137</sup> See *Republic of Pan. v. BCCI Holdings (Lux.) S.A.*, 119 F.3d 935, 947 (11th Cir. 1997).

<sup>138</sup> See *Oxford First Corp. v. PNC Liquidating Corp.*, 372 F. Supp. 191, 203–04 (E.D. Pa. 1974).

<sup>139</sup> See, e.g., *Peay v. BellSouth Med. Assistance Plan*, 205 F.3d 1206, 1212 (10th Cir. 2000); see also FED. R. CIV. P. 4(k)(2) advisory committee’s notes to 1993 amendment (noting that, beyond minimum contacts with the United States, “[t]here also may be a further Fifth Amendment constraint in that a plaintiff’s forum selection might be so inconvenient to a defendant that it would be a denial of ‘fair play and substantial justice’ required by the due process clause”).

<sup>140</sup> See, e.g., *Fitzsimmons v. Barton*, 589 F.2d 330, 334 (7th Cir. 1979); see also Gerald Abraham, *Constitutional Limitations upon the Territorial Reach of Federal Process*, 8 VILL. L. REV. 520, 535 (1963) (“Even if the Fifth Amendment places restrictions of fairness upon the territorial reach of federal process, the outer limits of fairness do not necessarily run along state borderlines.”).

<sup>141</sup> See, e.g., *Peay*, 205 F.3d at 1212–13.

<sup>142</sup> See *supra* notes 119–22 and accompanying text.

<sup>143</sup> See Fullerton, *supra* note 24, at 44–49 (discussing the state as the relevant geographical unit for fairness analysis in this regard); *id.* at 49–52 (discussing the federal judicial district as the relevant geographical unit for fairness analysis in this regard).

<sup>144</sup> See Casad, *supra* note 20, at 1605 (describing the Court’s decision in *Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991), as an “indication that the Supreme Court majority places small importance on fairness in forum selection”); *United States v. Kras*, 409 U.S. 434, 446–49 (1973) (constitutional to require indigent to pay filing fee before gaining the benefits of declaring bankruptcy).

the past.<sup>145</sup> At least with respect to federal court litigation, concerns over being forced to litigate in a distant court are mitigated by the virtual uniformity of the federal courts across the country.<sup>146</sup>

None of this is to say that concerns of fairness relating to the location of litigation within the sovereign's borders should be irrelevant in deciding where a defendant should have to litigate a case, or how a judicial system is designed.<sup>147</sup> The point simply is that such concerns are not *constitutionally* required.

### III. IN WHAT COURTS, AND KINDS OF CAUSES OF ACTION, MAY COURTS APPLY NATIONAL PERSONAL JURISDICTION?

To the extent that national personal jurisdiction is constitutional at all, courts and commentators agree that it is acceptable in the context of federal question claims<sup>148</sup> pending in federal court.<sup>149</sup> But the language many of these courts and commentators use to endorse the possibility of national personal jurisdiction in this context suggests that this setting may be the *only* one where national personal jurisdiction is possible.<sup>150</sup> This Part considers the constitutional propriety of national personal jurisdiction across various types of claims and courts.

#### A. Federal Courts

There is a strong argument that personal jurisdiction is an aspect of judicial power, and since the Constitution vests in Congress the authority to extend the “federal judicial power” to the lower federal courts, Congress ought to be able

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<sup>145</sup> See *supra* notes 120–21 and accompanying text.

<sup>146</sup> See Fullerton, *supra* note 24, at 15 n.60 (acknowledging that fairness concerns faced by a defendant having to litigate away from its home are ameliorated where the defendant can litigate in federal court, given the generally uniform nature of the federal court system).

<sup>147</sup> See *United States v. Union Pac. R.R. Co.*, 98 U.S. 569, 604 (1878); Lilly, *supra* note 20, at 148, 148 n.240; Sachs, *supra* note 25, at 1325, 1333–40.

<sup>148</sup> Article III of the Constitution authorizes Congress to confer upon the federal courts subject matter jurisdiction over “all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority . . . .” U.S. CONST. art. III. In turn, Congress has conferred statutory federal question jurisdiction upon the federal district courts. See 28 U.S.C. § 1331 (2012). State courts enjoy concurrent jurisdiction over most claims that fall under federal question jurisdiction. See *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 823 (1990).

<sup>149</sup> See, e.g., Casad, *supra* note 20, at 1606.

<sup>150</sup> See, e.g., *United Rope Distribs., Inc. v. Seatrion Marine Corp.*, 930 F.2d 532 (7th Cir. 1991) (“When a national court applies national law, the [D]ue [P]rocess [C]ause requires only that the defendant possess sufficient contacts with the United States.” (emphases added)); *Lisak v. Mercantile Bancorp, Inc.*, 834 F.2d 668, 671 (7th Cir. 1987) (“[T]here is no constitutional obstacle to nationwide service of process in the federal courts in federal-question cases.” (emphasis added)).

to grant the full extent of personal jurisdictional authority—that is, national personal jurisdiction—with respect to any case that falls within the ambit of Article III.<sup>151</sup> Indeed, that is this Article’s ultimate conclusion with respect to all types of Article III subject matter jurisdiction cases. However, both because of statements suggesting that congressional power is limited to (or greater in) federal question cases<sup>152</sup> and because the counterarguments one encounters are different in respect of the various types of subject matter jurisdiction, this Article addresses each type of Article III subject matter jurisdiction separately in turn.

### 1. *Causes of Action Under Federal Question Jurisdiction*

The ability of Congress to endow the federal courts with national personal jurisdiction with respect to federal question jurisdiction is relatively free from controversy.<sup>153</sup> Rule 4 currently allows for national personal jurisdiction under certain circumstances in federal question cases.<sup>154</sup> While it never came to pass, the Rules Advisory Committee in the late 1980s contemplated making national personal jurisdiction the rule rather than the exception in federal question cases.<sup>155</sup> An earlier American Law Institute (ALI) proposal was to similar

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<sup>151</sup> Assuming *arguendo* insofar as national personal jurisdiction would be unattainable had Congress opted not to create any lower federal courts, the desire to keep open the option of national personal jurisdiction is another reason for Congress to have created, and maintained, lower federal courts. The author is grateful to Professor Robert Schapiro for this point.

<sup>152</sup> See *supra* note 150.

<sup>153</sup> See Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT’L & COMP. L. 1, 39 (1987); von Mehren & Trautman, *supra* note 45, at 1124 n.6; *supra* note 150. Professor Wendy Perdue argues that, where a federal court asserts federal question jurisdiction, Fifth Amendment Due Process Clause “constraints should be very modest and should not include the requirement of ‘purposeful availment.’” Perdue, *supra* note 31, at 461. This argument—about whether nationwide contacts are appropriate, but rather the precise way that existing tests for minimum contacts should be applied—lies beyond the scope of this Article.

<sup>154</sup> See *supra* notes 106–07 and accompanying text.

<sup>155</sup> Under the 1989 proposal, Rule 4(e) would have allowed for “service upon an individual . . . in any judicial district of the United States.” Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure and the Federal Rules of Civil Procedure, 127 F.R.D. 237, 273–74 (1989) (emphasis added) [hereinafter 1989 Preliminary Draft]. Rule 4(f) would have provided for service upon an individual in a foreign country. See *id.* at 274. Rule 4(h) would have offered similar treatment for defendant corporations and associations. See *id.* at 276–77. Finally, Rule 4(l)(2) would have broadly authorized national personal jurisdiction: “Unless a statute of the United States otherwise provides, or the Constitution in a specific application otherwise requires, service of a summons or filing of a waiver of service is also effective to establish jurisdiction over the person of any defendant against whom is asserted a claim arising under federal law.” *Id.* at 280–81. The proposal also suggested a statutory change to the federal question state:

If th[e] addition [of Rule 4(l)(2) is not] disapproved by the Congress, it is recommended that an amendment should be made to 28 U.S.C. § 1331, adding words as follows: “The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States and, unless the Constitution in a specific application otherwise requires, jurisdiction over the person of defendants in such actions.”

effect.<sup>156</sup> Clearly neither the Advisory Committee nor the ALI saw the Constitution as an obstacle to ubiquitous national personal jurisdiction as to federal question claims.

## 2. *Causes of Action Under Supplemental Jurisdiction*

To appreciate the niceties of whether national supplemental jurisdiction can be constitutionally valid, it is analytically helpful to consider how supplemental national personal jurisdiction might come into play in the first place.<sup>157</sup> Consider an attempt by a Georgia plaintiff to sue an Alaska defendant (or, equally, a Russian defendant) without minimum contacts with Georgia, in Georgia federal court on a state law claim. That attempt would ordinarily fail absent a valid extension of national personal jurisdiction. But now consider the setting in which that state law claim arises out of the same common nucleus of operative fact as a federal law claim with respect to which Congress has authorized national personal jurisdiction. May the federal district court, in asserting proper national

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*Id.* at 266. With respect to proposed Rule 4(l)(2), the Advisory Committee notes explained:

Paragraph (l)(2) is an important addition authorizing the exercise of territorial jurisdiction over the person of any defendant against whom is made a claim arising under federal law. This addition is a companion to the amendments made in revised subdivisions (e) and (f) that provide for service of a summons and complaint anywhere in the world . . . . This subdivision measures the effectiveness of the service to establish jurisdiction over persons, and this paragraph (l)(2) operates as a federal long-arm provision for claims arising under federal law. It extends the federal reach in cases arising under federal law to the full extent allowed by the Fifth Amendment and any applicable Congressional enactment.

*Id.* at 294–95. For a discussion of this proposed (but ultimately failed) amendment, see Casad, *supra* note 20, at 1598. See generally Howard M. Erichson, *Nationwide Personal Jurisdiction in All Federal Question Cases: A New Rule 4*, 64 N.Y.U. L. REV. 1117 (1989).

<sup>156</sup> The ALI's 1969 proposal to revamp federal court jurisdiction included a suggested provision that stated: "In civil actions in which jurisdiction is founded on [general federal question jurisdiction], service of process upon any defendant may be made in any district." ALI 1969 STUDY, *supra* note 80, at 31. The provision would have been used to secure personal jurisdiction when another suggested provision would have made venue proper in a federal question case in a district where "any defendant may be found, if there is no district within the United States in which the action may otherwise be brought under this subsection." *Id.* at 30; see *id.* at 32 (explanatory note); Casad, *supra* note 20, at 1597. In a memorandum accompanying the proposal (entitled: "The constitutionality of service of federal court process without regard to state boundaries"), the ALI emphasized the clear propriety of national personal jurisdiction: "We may put aside any question as to the validity of nationwide service in cases involving the enforcement of federal law; indeed, it is difficult even to conceive of any reason why Congress should not have this power in such cases." ALI 1969 STUDY, *supra* note 80, at 437.

<sup>157</sup> Many sources refer to the doctrine of supplemental personal jurisdiction instead as pendent personal jurisdiction. See, e.g., Simard, *supra* note 73, at 1621–27. Indeed, the Federal Practice and Procedure treatise notes that its choice of the "pendent personal jurisdiction" moniker is a deliberate one: "[T]his section will refer to 'pendent personal jurisdiction' rather than 'supplemental personal jurisdiction' to highlight the fact that Section 1367 should not be read to subsume personal as well as subject matter jurisdiction." WRIGHT ET AL., *supra* note 68, at § 1069.7. For a history of supplemental personal jurisdiction, see Simard, *supra* note 73, at 1632–42.

personal jurisdiction over the defendant with respect to the federal law claim, assert supplemental personal jurisdiction over the same defendant as to the state law claim?<sup>158</sup>

Where a federal court has proper subject matter jurisdiction over a cause of action (an “anchor claim”), the Constitution empowers Congress to authorize the federal court to take jurisdiction over an entire constitutional “case or controversy”—that is, in addition to the cause of action that properly falls under federal jurisdiction, other causes of action that arise out of the same “common nucleus of operative fact.”<sup>159</sup> The Supreme Court has interpreted some statutes conferring other forms of Article III jurisdiction on the federal district courts to include grants of some quantum of supplemental jurisdiction.<sup>160</sup> After the Supreme Court questioned Congress’s ability to grant supplemental jurisdiction as to causes of action involving parties not already parties to the anchor claim<sup>161</sup>—so-called supplemental party jurisdiction—Congress in 1990 enacted 28 U.S.C. § 1367.<sup>162</sup> Section 1367 grants federal district courts (subject to some exceptions) “supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.”<sup>163</sup> Statutory supplemental jurisdiction today explicitly extends to “claims that involve the joinder or intervention of additional parties.”<sup>164</sup>

Courts and commentators have debated whether as a policy matter there *ought* to be supplemental national personal jurisdiction,<sup>165</sup> and also whether—to

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<sup>158</sup> See WRIGHT ET AL., *supra* note 68, at § 1069.7.

<sup>159</sup> See *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966).

<sup>160</sup> See *id.*

<sup>161</sup> See *Finley v. United States*, 490 U.S. 545, 549–56 (1989).

<sup>162</sup> Pub. L. No. 101-650, 104 Stat. 5089, 5113 (codified at 28 U.S.C. § 1367 (2012)).

<sup>163</sup> 28 U.S.C. § 1367(a).

<sup>164</sup> *Id.*

<sup>165</sup> As discussed above, a 1989 version of a proposal by the Advisory Committee (which was not adopted as written) would have generally authorized national personal jurisdiction in the federal district courts “over the person of any defendant against whom is asserted a claim arising under federal law.” 1989 Preliminary Draft, 127 F.R.D. 237, 281 (1989) (draft of Rule 4(l)(2)). Examination of the record underlying this proposal reveals a belief that such supplemental national personal jurisdiction should be limited, but for the most part for policy, not constitutional, reasons. A 1988 version of the amendment would have made clear that, “[w]ith respect to [nonfederal] claims, service of a summons shall not be effective to establish jurisdiction over the person or property of a defendant who is not subject to the jurisdiction of a court of general jurisdiction in the state in which the district court is held.” Jon Heller, Note, *Pendent Personal Jurisdiction and Nationwide Service of Process*, 64 N.Y.U. L. REV. 113, 117 n.36 (1989) (quoting Reporter’s Draft, FED. R. CIV. P. 4, Oct. 1, 1988). A comment to the amendment further elucidated:

It is . . . not desirable to apply the principle [of pendent personal jurisdiction] to bring into the federal court a related state claim which not only could not be separately litigated in a federal

the extent there *is* supplemental national personal jurisdiction—that jurisdiction is provided for by § 1367 or by federal common law,<sup>166</sup> a point to which this Article returns to below.<sup>167</sup> For present purposes, it suffices to note that *both* sides of *both* of these debates accept the constitutionality of supplemental pendent personal jurisdiction. Those who believe that supplemental national personal jurisdiction is inadvisable from a policy standpoint do not question its constitutional validity. Rather, the consensus position is that supplemental national personal jurisdiction *is* currently available,<sup>168</sup> at least with respect to claims that do not involve additional defendants as to whom personal jurisdiction has not been established under an anchor claim.<sup>169</sup> Current

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court, but which also could not be asserted in the state court of general jurisdiction in the state in which the federal court sits. To facilitate such double application of the doctrine of pendent jurisdiction would provide an unwelcome incentive to plaintiffs to employ the revised rule to secure jurisdiction in an inappropriate federal forum.

*Id.* The final 1989 proposal did not include the explicit carveout that appeared in the 1988 version, but the Notes accompanying the proposal explained that the proposal was not intended to extend supplemental *party* national personal jurisdiction:

The extension of the federal reach under this rule is . . . applicable only to defendants against whom a federal claim is made, and does not apply to a defendant who is joined in the action only by reason of that defendant's possible liability for a state law claim that is pendent to a federal claim.

1989 Preliminary Draft, 127 F.R.D. at 297. The Advisory Committee notes also echoed the position of the notes that accompanied the 1988 version as to possible issues that may arise where pendent personal jurisdiction was used to bring before the federal court a claim that could not be brought in that court or in the court of the state in which the federal court sits. *Id.* at 298. It is only here that the Advisory Committee so much as alluded to any constitutional issue with the exercise of supplemental national personal jurisdiction, and even then the Committee was hardly committal that any constitutional problem necessarily existed:

The doctrine of pendent jurisdiction is, however, something less than a “general, all-encompassing . . . rule”; it is a flexible tool of judicial administration. Additional caution should be exercised in its use to bring into a federal court a state-law or foreign-law claim that could not be otherwise presented either to a federal court or to a state court in the district in which the federal court sits. There is a problem of fairness in the exercise of such “double-pendent” jurisdiction.

*Id.* (citation omitted) (quoting *Aldinger v. Howard*, 427 U.S. 1, 13 (1976)). In short, the Advisory Committee's decision to recommend only limited supplemental national personal jurisdiction seems to have rested mostly on policy considerations.

<sup>166</sup> See WRIGHT ET AL., *supra* note 68, at § 1069.7. Compare *Iron Workers Local Union No. 17 Ins. Fund v. Philip Morris Inc.*, 23 F. Supp. 2d 796, 804 (N.D. Ohio 1998) (noting that supplemental national personal jurisdiction originates in § 1367), with *United States v. Botefuhr*, 309 F.3d 1263, 1273 (10th Cir. 2002) (noting that supplemental national personal jurisdiction is a common law doctrine), and WRIGHT ET AL., *supra* note 68, at § 1069.7 (noting the same).

<sup>167</sup> See *infra* notes 306–09 and accompanying text.

<sup>168</sup> See WRIGHT ET AL., *supra* note 68, at § 1069.7.

<sup>169</sup> The doctrine of supplemental party personal jurisdiction is potentially problematic to the extent that supplemental party jurisdiction is indeed a common law doctrine, given the Supreme Court's treatment of the analogous pre-§ 1367 common law doctrine of pendent party subject matter jurisdiction. Even while it has

understanding and practices, then, are entirely consistent with the constitutionality of supplemental national personal jurisdiction.<sup>170</sup>

### 3. *Causes of Action Under Diversity Jurisdiction*

Despite statements suggesting that national personal jurisdiction is available only in federal question cases,<sup>171</sup> the fact is that national personal jurisdiction is currently available in federal diversity cases. The federal interpleader statute and the minimal diversity tort statute both rest on Article III's diversity clause,<sup>172</sup> and both statutes authorize nationwide service of process.<sup>173</sup> Indeed, Rule 4(k)(1)(C) of the Federal Rules of Civil Procedure (unlike Rule 4(k)(2))—which authorizes federal courts to apply national personal jurisdiction “when authorized by a federal statute”<sup>174</sup>—by its plain language is not restricted to claims arising under federal law,<sup>175</sup> and courts have applied it in the context of federal statutes grounded on the Article III diversity grant.<sup>176</sup> Thus, while courts often state summarily that the reach of a federal district court's personal jurisdiction extends only as far as does the reach of a court of the state in which the federal court sits, opinions that truly address the issue—and that lie at the start of a string of cases that then state the conclusion unreflectingly—make clear that it is only Rule 4(k)(1)(A)'s general rule, and not the Constitution, that obligates federal district courts to mimic state courts in terms of personal

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accepted the common law doctrine of pendent claim subject matter jurisdiction, the Supreme Court found a presumption against a common law doctrine of pendent party subject matter jurisdiction. *See* *Finley v. United States*, 490 U.S. 545, 549–56 (1989); *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966). Indeed, it was the *Finley* decision that prompted Congress to codify supplemental jurisdiction in § 1367. *See* Richard D. Freer, *Compounding Confusion and Hampering Diversity: Life After Finley and the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 445, 446 (1991). Analogously, then, a common law doctrine of supplemental party personal jurisdiction might similarly be presumptively invalid. By contrast, if § 1367 confers personal, as well as subject matter, jurisdiction, then it presumably confers supplemental party personal, as well as supplemental party subject matter, jurisdiction. Of course, even if federal district courts currently lack the ability to invoke supplemental party personal jurisdiction—because it is unavailable as a common law doctrine, and § 1367 does not confer it—that is simply because Congress has to date failed to confer it, not because the Constitution precludes it.

<sup>170</sup> *See* Simard, *supra* note 73, at 1642–45.

<sup>171</sup> *See supra* note 150; *see also* *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530–31 (1967) (finding that, consistent with Article III, the federal interpleader statute requires only minimal diversity between parties). *But see* von Mehren & Trautman, *supra* note 45, at 1123 n.6 (suggesting that “federal standards” well might govern personal jurisdiction in federal court “even in diversity litigation”).

<sup>172</sup> *See* U.S. CONST. art. III, § 2.

<sup>173</sup> *See supra* notes 99, 104.

<sup>174</sup> FED. R. CIV. P. 4(k)(1)(C).

<sup>175</sup> *See id.*; *cf.* FED. R. CIV. P. 4(k)(2) (confining its scope to “a claim that arises under federal law”).

<sup>176</sup> *See* WRIGHT ET AL., *supra* note 68, at § 1068.1 n.75. So too is Rule 4(k)(1)'s provision for a 100-mile bulge for service of additional parties not restricted to federal question cases. *See* FED. R. CIV. P. 4(k)(1)(B).



jurisdiction.<sup>177</sup> Indeed, the 1969 ALI proposal to revamp federal jurisdiction, while recognizing that some might find the proposition of nationwide personal jurisdiction more questionable in diversity than federal question cases, also suggested that the propriety of national jurisdiction in diversity cases might in the end be free from doubt.<sup>178</sup>

The biggest obstacle to the invocation of national personal jurisdiction to diversity claims is the possible application of *Erie R.R. Co. v. Tompkins*<sup>179</sup> and its progeny.<sup>180</sup> That line of cases holds that, in order to avoid the “twin evils” of inequitable administration of the laws and forum shopping,<sup>181</sup> a federal diversity court should apply the substantive law of the state in which it sits.<sup>182</sup> There are two arguments that shield national personal jurisdiction from *Erie*’s assault. First, to the extent that *Erie*’s holding is simply a matter of how to interpret the federal Rules of Decision Act properly,<sup>183</sup> the *Erie* line poses no constitutional obstacle to the introduction of national personal jurisdiction in diversity cases. Second, notwithstanding *Erie*’s constitutional ramifications, national personal

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<sup>177</sup> For example, the Seventh Circuit in *Deluxe Ice Cream Co. v. R.C.H. Tool Corp.* cursorily asserted: “It is established in this circuit that a federal district court has personal jurisdiction over a party in a diversity case only if a court of the state in which the district court is sitting would have such jurisdiction.” 726 F.2d 1209, 1212 (7th Cir. 1984). But for that proposition, the *Deluxe Ice Cream Co.* court cited *Lakeside Bridge & Steel Co. v. Mountain State Construction Co.*, 597 F.2d 596, 598 (7th Cir. 1979), and the court in that case made clear that Congress could extend nationwide personal jurisdiction in diversity cases. 726 F.2d at 1212.

<sup>178</sup> See ALI 1969 STUDY, *supra* note 80, at 437 (“Limiting our inquiry to service of original process in cases under the diversity of citizenship jurisdiction presents the most arguable question—if indeed any is—for in those cases where the applicable substantive law is that of the states, the justification for process across state boundaries may be less apparent.”).

<sup>179</sup> 304 U.S. 64 (1938).

<sup>180</sup> In a lone dissenting opinion in *National Equipment Rental, Ltd. v. Szukhent*, Justice Black relied on *Erie* to argue that

[n]either the Federal Constitution nor any federal statute requires that a person who could not constitutionally be compelled to submit himself to a state court’s jurisdiction forfeits that constitutional right because he is sued in a Federal District Court acting for a state court solely by reason of the happenstance of diversity jurisdiction.

375 U.S. 311, 331 (1964) (Black, J., dissenting). But in its memorandum on “[t]he constitutionality of service of federal court process without regard to state boundaries” included in its 1969 proposal to revamp federal court jurisdiction, the ALI Reporters—Professor Richard Field, Chief Reporter, Professor Paul Mishkin, Reporter until 1965, Professor Charles Alan Wright, Reporter since 1963, and Professor David Shapiro, Assistant Reporter—stated that they “d[id] not agree with the premise, seemingly implicit in Mr. Justice Black’s opinion, that in diversity cases, the federal courts exercise *only* the judicial power of the several states, serving merely as alternative impartial state tribunals.” ALI 1969 STUDY, *supra* note 80, at 439.

<sup>181</sup> *E.g.*, *Hanna v. Plumer*, 380 U.S. 460, 467 (1965); *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941); *Erie*, 304 U.S. at 75.

<sup>182</sup> See *Erie*, 304 U.S. at 78–80.

<sup>183</sup> Judiciary Act of 1789, 1 Stat. 73, 92 (codified as amended at 28 U.S.C. § 1652).

jurisdiction is viable if it is satisfactorily a matter of procedural, not substantive, law.

The *Erie* Court itself insisted that the holding was of a constitutional nature.<sup>184</sup> Commentators, however, have questioned the precise nature of the constitutional holding, and indeed whether the holding has any constitutional foundation at all.<sup>185</sup> There is at least one aspect of the *Erie* line that might have clear implications for the application of national personal jurisdiction: the notion that a federal diversity court should apply the law of the state in which it sits.<sup>186</sup> But, to the extent that Congress is constitutionally free to design federal trial courts that extend across state lines and even simply to propound a single national federal trial court,<sup>187</sup> it surely cannot be a constitutional requirement that a federal diversity court must apply the substantive law of the state in which it sits.<sup>188</sup> That said, there yet might be a constitutional strand of *Erie* that requires

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<sup>184</sup> See *Erie*, 304 U.S. at 77–78.

<sup>185</sup> See, e.g., Alexander Volokh, *Judicial Non-Delegation, the Inherent-Powers Corollary, and Federal Common Law*, 66 EMORY L.J. 1391, 1421 (2017); cf. *Semtek Int'l, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 504 (2001) (referring to *Erie* not as a decision of constitutional federalism, but rather as having established a “federalism principle”). See generally Alfred Hill, *The Erie Doctrine and the Constitution*, 53 NW. U. L. REV. 427, 437–48 (1958) (discussing possible constitutional and nonconstitutional holdings of *Erie*); Adam N. Steinman, *What Is the Erie Doctrine? (and What Does It Mean for the Contemporary Politics of Judicial Federalism?)*, 84 NOTRE DAME L. REV. 245, 316 (2008) (identifying *Erie*’s “constitutional principle that Justice Brandeis invoked but failed to articulate” as the notion that “federal judicial lawmaking cannot override substantive rights where such lawmaking has only an *adjudicative* rationale”).

<sup>186</sup> See, e.g., *Klaxon*, 313 U.S. at 496.

<sup>187</sup> See *supra* notes 82–88, 111–18 and accompanying text.

<sup>188</sup> See Abraham, *supra* note 140, at 528; see also Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1502 (2008); Nicolas, *supra* note 94, at 1006–07 (detailing problems that ensue if the holding in *Klaxon* applies to cases pending within the portion of Yellowstone National Park outside the state of Wyoming but nonetheless within the federal District of Wyoming); Linda Silberman, *The Role of Choice of Law in National Class Actions*, 156 U. PA. L. REV. 2001, 2027 (2008). In a memorandum entitled “[t]he constitutionality of authorizing independent federal determination of choice of law in diversity of citizenship cases” accompanying its 1969 proposal to revamp federal jurisdiction, the ALI explained:

It . . . seems clear . . . that Congress may authorize service of federal court process across state lines. If, then, Congress may bring in defendants from states other than that in which the federal court sits—or if it may provide for transfer of an action from a district in one state where the parties were all served to a district court in another state—there can hardly be reason of constitutional dimension for requiring the federal court to follow the choice-of-law rule of the state in which it happens to be located. The point may perhaps be reinforced by noting that it is in fact possible for Congress to locate the lawsuit in a federal court in a state that has no substantive contact with the controversy . . . . If this is the case, there would seem no reason of constitutional dimension why the judicial power of the United States should be less potent to determine the choice of law than the judicial power of the state. And it would be especially difficult to see why Congress would have power to bring to bear choice-of-law rules of states having no substantive interest in the suit and yet not have power to authorize such federal rules.

federal diversity courts to apply the substantive law of *some state*. And that could pose an issue for national personal jurisdiction if that falls within the ambit of a state's substantive law for *Erie* purposes.

Assuming, then, there is some constitutional weight to *Erie*'s command, does *Erie* analysis require federal diversity courts to adhere to state restrictions on personal jurisdiction? The better answer to this question is that it does not.<sup>189</sup> For one thing, as Professor Robert Abrams has argued, Article III can be read to authorize congressional control over personal jurisdiction in diversity cases.<sup>190</sup>

Even applying traditional *Erie* analysis, it seems that personal jurisdiction falls within the "procedural bucket" over which state law does not encroach. To be sure, the extent of personal jurisdiction is in some sense outcome determinative.<sup>191</sup> After all, whether a defendant is subject to personal jurisdiction as to a claim can be the difference between a victory for the plaintiff and a dismissal of the plaintiff's claim.<sup>192</sup> Still, the resulting invitation to plaintiffs to choose a forum for litigation accordingly does not seem to be of the type with which *Erie* and its progeny were concerned. Somewhat analogously, a plaintiff who pursues a claim that falls within exclusive federal jurisdiction will have that claim dismissed if she brings it in state court, without any complaint of inequitable administration of the laws.

Moreover, there is a strong argument that, outcome determination notwithstanding, the scope of personal jurisdiction is very much a matter of procedural, not substantive, law.<sup>193</sup> Lawyers and legal academics have long understood service of process and jurisdiction to lie within the procedural realm.

Further confirming the procedural nature of personal jurisdiction is the fact that it is a subject covered by the Federal Rules of Civil Procedure. That means that, in enacting Rule 4, the Advisory Committee, the Supreme Court, and Congress all made a "prima facie judgment" that Rule 4 "transgresses neither

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ALI 1969 STUDY, *supra* note 80, at 448.

<sup>189</sup> The seminal statement on this point is found in *Arrowsmith v. United Press International*: "[T]he constitutional doctrine announced in *Erie R.R. v. Tompkins* would not prevent Congress or its rule-making delegate from authorizing a district court to assume jurisdiction over a foreign corporation in an ordinary diversity case although the state court would not . . ." 320 F.2d 219, 226 (2d Cir. 1963) (citation omitted); *see also Lilly*, *supra* note 20, at 141–42 ("[I]f the [alien] defendant's national contacts were constitutionally sufficient [under the Fifth Amendment], it seems consistent with 'traditional notions of fair play' to allow a federal diversity court to exercise jurisdiction.").

<sup>190</sup> *See Abrams*, *supra* note 83, at 27.

<sup>191</sup> *See Guar. Tr. Co. of N.Y. v. York*, 326 U.S. 99, 109 (1945).

<sup>192</sup> *See Abraham*, *supra* note 140, at 528.

<sup>193</sup> *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

the terms of the Enabling Act nor constitutional restrictions.”<sup>194</sup> It also means, as the Court explained in *Hanna v. Plumer*,<sup>195</sup> that the ordinary *Erie* analysis does not apply.<sup>196</sup> Rather, a court should only strike the Rule in the unlikely event that it concludes that the prima facie judgment of the Advisory Committee, the Supreme Court, and Congress about the Rule’s validity was erroneous.<sup>197</sup> Only rarely have courts even seriously questioned the validity of a Rule of Civil Procedure as improperly promulgated—let alone held that some portion of a Rule is displaced by state law<sup>198</sup>—and it is perhaps especially instructive that the Rule at issue in, and upheld in, *Hanna* was a part of Rule 4 itself—a provision governing the method by which process can be served.<sup>199</sup>

None of this is to say that it would be wise *from a policy perspective* for Congress (or its delegate) to extend national personal jurisdiction to diversity cases.<sup>200</sup> Indeed, when the Advisory Committee in 1989 proposed such treatment for federal question cases,<sup>201</sup> it explicitly declined to do so for diversity cases.<sup>202</sup> But the policy reasons that may mitigate against an action do not create a constitutional barrier.

### B. State Courts

Some question the common wisdom that congressional power to introduce national personal jurisdiction is restricted to cases pending in the federal courts.<sup>203</sup> This section proceeds serially through the different kinds of claims that might be pending in a state court as to which one might think Congress might have the power to introduce national personal jurisdiction: federal

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<sup>194</sup> *Hanna v. Plumer*, 380 U.S. 460, 471 (1965).

<sup>195</sup> 380 U.S. 460.

<sup>196</sup> *See id.* at 469–70.

<sup>197</sup> *See id.* at 471.

<sup>198</sup> *See* WRIGHT ET AL., *supra* note 68, at § 4508.

<sup>199</sup> *See Hanna*, 380 U.S. at 461.

<sup>200</sup> *See, e.g.,* *United Rope Distribrs., Inc. v. Seatrump Marine Corp.*, 930 F.2d 532, 535 (7th Cir. 1991); *Casad, supra* note 20.

<sup>201</sup> *See BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1555–58 (2017) (concluding that federal statute did not grant state courts nationwide personal jurisdiction, thus averting the need to confront the constitutional issue); *supra* note 153.

<sup>202</sup> *See* 1989 Preliminary Draft, 127 F.R.D. 237, 297 (1989) (“The extension of the federal reach [to national limits] is inapplicable to cases in which federal jurisdiction rests on the diversity of citizenship of the parties. This is *perhaps* a necessary application of the principle of *Erie* . . . .” (emphasis added)); *Casad, supra* note 20, at 1598.

<sup>203</sup> *See supra* note 150. *But see* Borchers, *supra* note 31 (“If Congress were to impose nationwide uniform standards on state and federal courts any challenge to the constitutionality of these standards would implicate the [F]ifth [A]mendment’s [D]ue [P]rocess [C]lause, not the [F]ourteenth [A]mendment’s [D]ue [P]rocess [C]lause, the current source of state court jurisdictional restrictions.” (emphasis added)).

question cases, state law claims falling within the federal diversity jurisdiction, and cases brought against foreign nonresident defendants. To the extent that congressional power to extend national personal jurisdictional authority upon the state courts, this section then considers the possibility of Congress instead augmenting the federal courts' subject matter jurisdiction. Since Congress has greater power to extend national personal jurisdiction to the federal courts, extending the federal courts' subject matter jurisdiction provides Congress with an end run around limits on the state courts' freedom to exert national personal jurisdiction.

### *1. Federal Question Cases*

The Supreme Court has explained that unless Congress divests state courts of jurisdiction, the state courts enjoy concurrent jurisdiction with the federal courts over federal questions claims.<sup>204</sup> If Congress has the option of extending national personal jurisdiction as to federal question claims pending in the federal courts, does it have similar power as to federal question claims pending in the state courts?

In fact, judging by the plain language of some statutes, Congress may have done—though perhaps without intent—just that. Consider that the state courts enjoy concurrent jurisdiction over claims under the federal securities laws, and Congress has established national personal jurisdiction—without apparent regard to whether a claim is brought in federal or state court—as to such claims.<sup>205</sup> Over the years, only three state courts appeared to have confronted the issue at all. Two of them afforded the question little if any analytic attention, and they reached opposite conclusions.<sup>206</sup> The third confronted the question directly and ultimately rejected the propriety of national personal jurisdiction, but on the basis of statutory interpretation, not constitutional command.<sup>207</sup>

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<sup>204</sup> See *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 823 (1990).

<sup>205</sup> See *supra* note 100.

<sup>206</sup> Compare *Negin v. Cico Oil & Gas Co.*, 46 Misc. 2d 367, 368 (N.Y. Sup. Ct. 1965) (rejecting nationwide personal jurisdiction in a federal securities law case pending in state court even where personal jurisdiction would have been proper were the case pending in federal court since, “[w]hile the [governing] statute confers concurrent jurisdiction, yet jurisdiction in the State court is a State issue which is not overridden by Federal venue”), with *Lakewood Bank & Tr. Co. v. Superior Court of Cal., Cty. of San Mateo*, 180 Cal. Rptr. 914, 917–18 (Cal. Ct. App. 1982) (implicitly finding appropriate national personal jurisdiction under securities laws in state court, focusing instead on propriety of court’s subject matter jurisdiction).

<sup>207</sup> See *Kelly v. McKesson HBOC, Inc.*, No. Civ.A 99C-09-265WCC, 2002 WL 88939, at \*18–19 (Del. Super. Ct. Jan. 17, 2002) (finding nationwide personal jurisdiction under the securities laws unavailable in state court, but as a matter of statutory construction, not constitutional analysis).

There are several reasons to doubt Congress's authority to augment the personal jurisdictional reach of the state courts beyond the reach of the Fourteenth Amendment, even in federal question cases. "[P]ersonal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis."<sup>208</sup> Thus, as Justice Kennedy's plurality opinion in *J. McIntyre Machinery, Ltd. v. Nicastro* explains, the distinction between the state courts and the federal courts is critical in determining the availability of national personal jurisdiction: "Because the United States is a distinct sovereign, a defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State."<sup>209</sup>

Such an approach squares with the logic that personal jurisdictional restrictions originate with notions of sovereignty arising out of public international law that were adopted by the Constitution,<sup>210</sup> and then were refined by the Due Process Clauses in the Fifth and Fourteenth Amendments. Each state is an individual sovereign, and the personal jurisdictional reach of its judiciary depends upon the sovereignty of its home state. The United States is sovereign over its own territory coextensively with the several states, and its judiciary enjoys a reach based on that national sovereignty.

This logic notwithstanding, judges and commentators have advanced several arguments in favor of congressional power to augment the reach of state courts to the limits of the Fifth Amendment. These arguments are ultimately unpersuasive. First, in a dissenting Third Circuit opinion, Judge John Gibbons opined that, "were a state court adjudicating a federal claim, the relevant due process should remain the [F]ifth [A]mendment" since "[t]he nature of the claim, not the identity of the court, should determine the appropriate due process test."<sup>211</sup> But Judge Gibbons' suggestion that "the nature of the claim, not the identity of the court, should determine the appropriate due process test" is refuted by Justice Kennedy's explanation that personal jurisdiction requires a "sovereign-by-sovereign, analysis."<sup>212</sup> This logic also rebuffs Professor Graham Lilly's suggestion that *International Shoe* "purports only to invoke the due process provision of the [F]ourteenth [A]mendment to delimit the in personam power that a state sovereign may confer upon its courts,"<sup>213</sup> and "does not, other

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<sup>208</sup> *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 884 (2011) (plurality opinion).

<sup>209</sup> *Id.*

<sup>210</sup> *See supra* note 35.

<sup>211</sup> *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280, 292 (3d Cir. 1981) (Gibbons, J., dissenting).

<sup>212</sup> *McIntyre*, 564 U.S. at 884.

<sup>213</sup> Lilly, *supra* note 20, at 148.

than by possible implication, restrict Congress's power to enlarge a state court's personal jurisdiction."<sup>214</sup>

Professor Robert Casad points to examples of Congress announcing federal standards for the reach of courts—both state and federal—that do not go as far as state long-arm statutes,<sup>215</sup> and then argues that, “if Congress can narrow the range of state court jurisdiction in federal question cases, it surely can enlarge it as well.”<sup>216</sup> This syllogism is faulty: A decision by Congress to reduce the reach of a state court's personal jurisdiction is a decision in effect to divest the court of jurisdiction over certain claims, and that is a decision that clearly lies within congressional power.<sup>217</sup> But the decision to extend a state court's jurisdiction is quite different and lies, it seems, beyond congressional power.<sup>218</sup>

Some commentators invoke the Supreme Court's holding in *Testa v. Katt*<sup>219</sup>—that the Supremacy Clause obligates state courts to hear federal claims to the extent that they hear analogous claims under state law<sup>220</sup>—to argue that state courts would be bound by—indeed, required to execute—a congressional decision to enlarge their personal jurisdictional reach to the extent of the Fifth Amendment.<sup>221</sup> This argument, while facially appealing, is ultimately unavailing.

*Testa* dealt with an attempt by a state court system to frustrate Congress's effort to vest the state courts with subject matter jurisdiction over a federal law cause of action.<sup>222</sup> Thus, *Testa* and its progeny teach that action by Congress to vest in the state courts concurrent jurisdiction over federal claims is *not* an enlargement of the state courts' jurisdiction; rather, the attempt by a state court to decline to hear a federal claim when it readily hears similar state claims is an effort by the state court improperly to *constrain* its jurisdiction. In contrast, an effort by Congress to expand state courts' personal jurisdiction to the extent of the Fifth Amendment would effectively *expand* the set of claims that state courts could hear. *Testa* offers no support for such an expansion.

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<sup>214</sup> *Id.*

<sup>215</sup> See Casad, *supra* note 20, at 1616.

<sup>216</sup> *Id.*; see also Adams, *supra* note 29, at 85–89 (making a similar argument).

<sup>217</sup> See, e.g., Sparks v. Caldwell, 723 P.2d 244, 245 (N.M. 1986) (holding that a long-arm statute under federal Uniformed Services Former Spouses' Protection Act validly preempts state long-arm statute).

<sup>218</sup> *Mondou v. N.Y., New Haven & Hartford R.R. Co.*, 223 U.S. 1, 56 (1912) (questioning the power of Congress “to enlarge or regulate the jurisdiction of state courts”).

<sup>219</sup> 330 U.S. 386 (1947).

<sup>220</sup> *Id.* at 394.

<sup>221</sup> See Casad, *supra* note 20, at 1616; Lilly, *supra* note 20, at 148; Packel, *supra* note 29, at 925–26; Carlebach, Note, *supra* note 29, at 245.

<sup>222</sup> *Testa*, 330 U.S. at 387–88.

Even more problematically, were *Testa* read to recognize congressional power to authorize (or even require) states to exercise national personal jurisdiction, then *Testa* would effectively empower Congress to authorize states to violate the Constitution. But no provision of the Constitution—including the Supremacy Clause, on which *Testa* rests—conveys such authority on the federal government.

An attempt by Congress to expand state court personal jurisdiction to the Fifth Amendment limits is well analyzed under the so-called “reverse-*Erie*” rubric.<sup>223</sup> In an *Erie* setting, a federal court is called upon to apply state substantive law; in a reverse-*Erie* setting, a state court is called upon to apply federal substantive law. However, the limit on personal jurisdiction is better categorized as procedural rather than substantive.<sup>224</sup> And, just as under *Erie* a federal court should apply federal procedural law, so too as a general matter should a state court under reverse-*Erie* apply state procedural law.

To be sure, the federal judiciary enjoys a power advantage over the state judiciaries,<sup>225</sup> such that federal procedural law may intrude more into state court litigation under reverse-*Erie* than state procedural law intrudes into federal court litigation under *Erie*. For example, while the Supreme Court has held that a federal diversity court should ignore a state law requirement of a bench trial and instead administer a jury trial<sup>226</sup> under *Erie* and not because of the Seventh Amendment’s command,<sup>227</sup> the Court reached the opposite result in the reverse-*Erie* setting. In *Dice v. Akron, Canton & Youngstown R.R. Co.*,<sup>228</sup> the Supreme Court ruled that the federal requirement of a jury trial applied when a state court heard a federal claim; even though the Seventh Amendment was itself inapplicable, strong federal policy favored exporting the jury trial requirement to state court.<sup>229</sup> It seems unlikely, by contrast, that the federal policy behind expanding personal jurisdiction is entitled to similar weight.

Finally, one might think perhaps that Congress has power under Section 5 of the Fourteenth Amendment to alter the application of *International Shoe* to

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<sup>223</sup> See generally Kevin M. Clermont, *Reverse-Erie*, 82 NOTRE DAME L. REV. 1 (2006) (explaining *inter alia* the process of “reverse-*Erie*” analysis).

<sup>224</sup> See *supra* notes 191–99 and accompanying text.

<sup>225</sup> See Jonathan Remy Nash, *The Uneasy Case for Transjurisdictional Adjudication*, 94 VA. L. REV. 1869, 1904 (2008).

<sup>226</sup> See *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 537–38 (1958).

<sup>227</sup> *Id.* at 537 n.10.

<sup>228</sup> 342 U.S. 359 (1952).

<sup>229</sup> *Id.* at 363.



the state courts.<sup>230</sup> This argument suffers from two defects. First, the Court has required evidence of historic state discrimination violative of the Fourteenth Amendment before validating congressional enforcement legislation;<sup>231</sup> there seems to be no such evidence here. Second, enabling state courts to exercise national personal jurisdiction would *increase* state power and *decrease* individual liberty interests—quite the opposite of what one would expect of a typical exercise by Congress of its Fourteenth Amendment enforcement power.

## 2. Cases that Fall Within the Federal Diversity Jurisdiction

Surely if Congress lacks power to extend the personal jurisdictional reach of state courts as to federal claims,<sup>232</sup> it must *a fortiori* lack such power as to state law claims. The federal interest in having state courts hear state law claims is far less than the corresponding federal interest for federal law claims.<sup>233</sup>

Even assuming Congress *does* have the power to expand the reach of state court personal jurisdiction to the limits of the Fifth Amendment with respect to *federal law* claims, does it have the same power with respect to *state law* claims that fall within the federal diversity grant?<sup>234</sup> Professor Lilly has argued that, just as “control over interstate and international commerce” and “authority in the foreign relations field” provide Congress a basis for introducing national personal jurisdiction in the state courts as to federal claims,<sup>235</sup> Congress in doing the same with respect to state law claims that fall under the diversity grant “would simply be granting, as ‘necessary and proper’ to its conferral of expanded personal jurisdiction upon a federal court, coordinate in personam jurisdiction to a state court.”<sup>236</sup> Professor Lilly concludes: “If this grant did not obligate, but only empowered, the courts of a state to expand their in personam reach, the resulting scheme would not compromise state sovereignty, and should fall within the outer limits of congressional power.”<sup>237</sup>

This argument is unconvincing. Even if the logic of *Testa* somehow extends to give Congress the power to grant (indeed, require) state courts to apply Fifth Amendment-based personal jurisdictional limits in *federal question* cases, *Testa*

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<sup>230</sup> See Borchers, *supra* note 31, at 154–55; Casad, *supra* note 20, at 1620.

<sup>231</sup> See Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 645–46 (1999).

<sup>232</sup> See *supra* Section III.B.1.

<sup>233</sup> See, e.g., Lisak v. Mercantile Bancorp, Inc., 834 F.2d 668, 671 (7th Cir. 1987).

<sup>234</sup> It seems clear that Congress lacks power as to claims pending in state court that fall within neither the federal question grant nor the diversity grant.

<sup>235</sup> Lilly, *supra* note 20, at 148.

<sup>236</sup> *Id.* at 149.

<sup>237</sup> *Id.*

and its progeny have never come close to suggesting that Congress has the power to impart to state courts the power to exercise a federal procedural standard in *state law* cases. Professor Lilly's invocation of the Necessary and Proper Clause in the abstract seems manifestly insufficient to compensate for the lack of constitutional authorization.

Finally, the policies underlying the relevant constitutional provisions confirm the logic of restricting national personal jurisdiction to those diversity and alienage cases pending in federal court. A primary motive behind federal diversity and alienage subject matter jurisdiction is to *protect the interests of defendants* by providing them an opportunity to have their cases heard in a federal forum. On the other hand, the motive behind national personal jurisdiction is to *protect the interests of plaintiffs* by providing them with an opportunity to sue defendants notwithstanding possible ramifications for foreign relations in cases involving foreign defendants, and possible ramifications for interstate relations in cases involving domestic defendants. In particular, the introduction of expansive national personal jurisdiction runs the risk of straining U.S. foreign relations. On balance, then, it makes sense to restrict the exercise of national personal jurisdiction to diversity and alienage cases pending in the federal courts.<sup>238</sup>

### 3. *Cases Brought Against Foreign Nonresident Defendants*

While numerous commentators have argued over the years that Congress for various reasons can extend national personal jurisdiction as to claims brought against foreign nonresident defendants *in the federal courts*,<sup>239</sup> two pairs of commentators—Professor Ronan Degnan and Dean Mary Kay Kane and, recently, Professors William Dodge and Scott Dodson—have argued that Congress has that same power even as to claims brought *in the state courts* and thus regardless of the type of claim.<sup>240</sup> They argue in essence that, as to foreign nonresident defendants, the Fourteenth Amendment protects liberty interests only on the basis of national contacts.<sup>241</sup>

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<sup>238</sup> This author is grateful to Robert Schapiro for this point.

<sup>239</sup> See *supra* note 150.

<sup>240</sup> See Degnan & Kane, *supra* note 32; Dodge & Dodson, *supra* note 32. Professor Gary Born advances the more muted position that, while the Constitution allows federal courts to exercise nationwide minimum contacts as to foreign nonresident defendants, it allows state courts more leeway in exercising personal jurisdiction but does not permit state courts to exercise full-blown nationwide minimum contacts. See Born, *supra* note 153, at 42.

<sup>241</sup> See Degnan & Kane, *supra* note 32, at 813–14.

While carefully crafted and thought-provoking, the argument is unconvincing for at least three reasons. First, the notion that the Fourteenth Amendment extends less minimum contacts protection to aliens finds no support in existing precedent. To be sure, as Professor Degnan and Dean Kane, and Professors Dodge and Dodson, note,<sup>242</sup> the Court has indicated that the Fourteenth Amendment calculus might differ when applied to foreign, as opposed to domestic, defendants. But the fact is that the Court has only relied upon such a distinction (i) to provide *greater* protection for foreign defendants,<sup>243</sup> not to *narrow* foreign defendants' due process protections, as applying a national standard would do, and (ii) in the context of the more discretionary fairness prong rather than the minimum contacts prong that functions more as an "on-off" switch for personal jurisdiction. In *Asahi Metal Industries Co. v. Superior Court of California, Solano County*,<sup>244</sup> the Court was unable to agree on the proper stream of commerce analysis for minimum contacts purposes,<sup>245</sup> but did agree that fairness concerns weighed heavily against personal jurisdiction where the only parties remaining in the case—the

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<sup>242</sup> See *id.* at 809–11 (discussing *Asahi's* emphasis on the importance of the alien status of the defendant/third-party plaintiff and third-party defendant); Dodge & Dodson, *supra* note 32, at 1215.

<sup>243</sup> See *Daimler AG v. Bauman*, 571 U.S. 117, 141 (2014) (reasoning, based on the fact that other nations balk at an "uninhibited approach" to general jurisdiction, that a broad approach to general jurisdiction runs afoul of "the 'fair play and substantial justice' due process demands" and thus "reinforce[d]" the Court's conclusion—based primarily on traditional minimum contacts analysis—that the foreign corporation was not subject to general jurisdiction in California); *Asahi Metal Indus. Co. v. Superior Court of Cal., Solano Cty.*, 480 U.S. 102, 114 (1987) (plurality opinion) (finding absence of personal jurisdiction where "[a]ll that remain[ed]" in the case was "a claim for indemnification asserted by . . . a Taiwanese corporation" against a Japanese corporation). For a critical assessment, see Parrish, *supra* note 37, at 33 ("Aliens abroad with no connection to the United States have no constitutional rights but, under current personal jurisdictional law, paradoxically have the strongest claim that the Due Process Clause prohibits a U.S. court from asserting jurisdiction over them."). Outside of governing Supreme Court opinions, there is some endorsement of the notion that the Constitution should somehow afford less protection to foreign nonresident defendants. In her dissenting opinion in *McIntyre*, Justice Ginsburg argued that "[t]he Court's judgment . . . puts United States plaintiffs at a disadvantage in comparison to similarly situated complainants elsewhere in the world." 564 U.S. 873, 909 (2011) (Ginsburg, J., dissenting). That opinion attracted only two of her colleagues. *Id.* at 893. And Professor Perdue has argued that the "purposeful availment" should not apply to restrict jurisdiction when suit is brought in federal court under federal law against a foreign nonresident defendant. See *supra* note 153; cf. Parrish, *supra* note 37 (arguing that foreign nonresident defendants should be able to invoke sovereignty-based, but not liberty-based, aspects of Fourteenth Amendment personal jurisdiction limitations, but also that the result of heightened responses to sovereignty-based objections would be that "courts would exercise jurisdiction in fewer instances, even when minimum contacts are met").

<sup>244</sup> 480 U.S. 102.

<sup>245</sup> Compare *id.* at 108–13 (arguing in favor of more stringent standard for stream of commerce), with *id.* at 116–21 (Brennan, J., concurring in part and concurring in the judgment) (arguing in favor of a laxer standard), and *id.* at 121–22 (Stevens, J., concurring in part and concurring in the judgment) (arguing that the precise contours of stream of commerce standard could await another day and that in any event the plurality misapplied its own standard).

third-party plaintiff and the third-party defendant—were both foreign.<sup>246</sup> And, in *Daimler AG v. Bauman*,<sup>247</sup> the Court recited that the fact that other nations balk at an “uninhibited approach” to general jurisdiction made a broad approach to general jurisdiction run afoul of “the ‘fair play and substantial justice’ due process demands.”<sup>248</sup> This conclusion about fairness, the Court said, “reinforce[d]” the Court’s conclusion—based primarily on minimum contacts—that the foreign corporation was not subject to general jurisdiction in California.<sup>249</sup> In both these cases, then, the Court found that litigants’ status as aliens served to *narrow* the reach of personal jurisdiction; and in neither of these cases did the Court suggest that alien status would affect the minimum contacts portion of the Fourteenth Amendment analysis.<sup>250</sup>

Professors Dodge and Dodson argue that, “[w]ith respect to the proper forum for assessing minimum contacts, the [J]ustices in *McIntyre* appeared willing to recognize the unique influences of a defendant’s alienage status,” although “no position commanded a majority.”<sup>251</sup> Professors Dodson and Dodge correctly note that the dissent explicitly “would have taken the defendant’s alienage status into account in determining whether its conduct had met the minimum-contacts test.”<sup>252</sup> But they mischaracterize the positions of the plurality and concurring Justices. Professors Dodson and Dodge accurately quote Justice Kennedy’s plurality opinion statement that a foreign defendant “may have the requisite relationship with the United States Government but not with the government of any individual State[.]”<sup>253</sup> but their argument ignores the fact that this statement comes in the context of a discussion of the personal jurisdictional reach of the federal, as opposed to the state, courts.<sup>254</sup> Finally, while the two concurring Justices were perhaps open to looking at contacts with the entire United States for *some* foreign defendants, they were—as Professors Dodson and Dodge

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<sup>246</sup> See *id.* at 113–16 (plurality opinion).

<sup>247</sup> 571 U.S. 117.

<sup>248</sup> *Id.* at 142 (quoting *International Shoe*, 326 U.S. 310, 316 (1945)).

<sup>249</sup> *Id.*

<sup>250</sup> It does seem that alien status determined the outcome in *Asahi*, but that is because there remained in the case *no* domestic litigant. See 480 U.S. at 113–16. The broad use of the case to argue that the presence of an alien affects the personal jurisdiction analysis is thus dubious.

<sup>251</sup> Dodge & Dodson, *supra* note 32, at 1216.

<sup>252</sup> *Id.*; see *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 899 (Ginsburg, J., dissenting) (“[N]o issue of the fair and reasonable allocation of adjudicatory authority among States of the United States is present in this case. New Jersey’s exercise of personal jurisdiction over a foreign manufacturer whose dangerous product caused a workplace injury in New Jersey does not tread on the domain, or diminish the sovereignty, of any sister State.”).

<sup>253</sup> Dodge & Dodson, *supra* note 32, at 1216 (quoting *McIntyre*, 564 U.S. at 884 (plurality opinion)).

<sup>254</sup> See *McIntyre*, 564 U.S. at 884–85.

concede<sup>255</sup>—explicitly *unwilling* to adopt a broad rule to that effect for *all* foreign defendants.<sup>256</sup> In short, despite Professors Dodson and Dodge’s claim,<sup>257</sup> a majority of the Justices in *McIntyre* seem to have rejected a broad rule that the relevant contacts for foreign defendants are contacts with the whole United States.

A second flaw with the argument in favor of considering minimum contacts with the whole United States for foreign defendants is that such a rule is consistent with neither of the two justifications for Fourteenth Amendment personal jurisdiction jurisprudence. Professors Dodson and Dodge argue, to the contrary, that fairness and federalism both are consistent with national contacts in the Fourteenth Amendment context. In the context of fairness, they argue that, for alien defendants, “the particular state forum is largely irrelevant.”<sup>258</sup> But their support for this contention is overinclusive. They explain that (i) “[w]hatever interstate differences exist among U.S. courts is of little concern to alien defendants in light of the stark differences between litigation”,<sup>259</sup> (ii) “for the most part, aliens are far more concerned about the travel costs and burdens of litigating in America generally than in a particular state”,<sup>260</sup> and (iii) “many aliens engaged in commercial enterprises treat the United States as a single market rather than a state-specific market.”<sup>261</sup> But these points are not universally true for foreign defendants, as indeed Professors Dodge and Dodson concede for points two and three.<sup>262</sup> A small business based in Ciudad Juarez doing business across the Rio Grande in Texas might be well-versed in Texas law as compared to the law of other states (and the gulf between legal systems would be considerably smaller for a small business in Windsor, Ontario doing business across the Detroit River from Detroit). Both these small businesses would likely disagree vehemently with the notion that they were indifferent as to burdens of litigating in various U.S. states, and likely would not treat the U.S.

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<sup>255</sup> See Dodge & Dodson, *supra* note 32, at 1217 (“[T]he concurrence expressed general concern with the difficulty of crafting a general rule in light of the uncertainties of specific applications.”).

<sup>256</sup> See *McIntyre*, 564 U.S. at 887 (Breyer, J., concurring).

<sup>257</sup> See Dodge & Dodson, *supra* note 32, at 1217 (“The end result of *McIntyre* is that whether and how the alienage status of a defendant affects the minimum-contacts prong of specific jurisdiction remains unsettled.”).

<sup>258</sup> *Id.* at 1224. While Professors Dodge and Dodson argue that foreign nonresident defendants are simply unconcerned with the choice of state forum, Dean Parrish argues that considerations of foreign nonresident defendants’ liberty interests (even if they have such preferences) should be per se irrelevant to the Due Process analysis. See Parrish, *supra* note 37, at 54.

<sup>259</sup> Dodge & Dodson, *supra* note 32, at 1224.

<sup>260</sup> *Id.* at 1224.

<sup>261</sup> *Id.* at 1224–25.

<sup>262</sup> See Born, *supra* note 153, at 41 (“[W]hile foreign defendants will have a comparatively weak interest in litigating in one United States forum rather than another, in certain cases they may have *some* such preferences.” (footnote omitted)).

as a single market.<sup>263</sup> Professors Dodge and Dodson’s argument seems to generalize on the assumption that all foreign defendants are multinational corporations. But just as the features of U.S. national corporations do not generate a fair one-size-fits-all jurisdictional test for domestic defendants, neither do the features of transnational corporations generate a fair one-size-fits-all jurisdictional test for foreign defendants.<sup>264</sup>

With respect to federalism, Professors Dodge and Dodson assert that the interstate federalism concerns that motivate, in part, Fourteenth Amendment jurisprudence “arise only if the defendant is subject to general jurisdiction in a U.S. state.”<sup>265</sup> While they acknowledge that “a national-contacts approach does enlarge the number of courts that could assert personal jurisdiction over an alien defendant,”<sup>266</sup> they assert that, “unlike a domestic defendant, an alien defendant is not ‘at home’ in any U.S. state, and thus a state’s assertion of specific jurisdiction over the alien cannot intrude on any home state’s authority.”<sup>267</sup> But “enlarg[ing] the number of courts that could assert personal jurisdiction over an alien defendant”<sup>268</sup> likely will result (by increasing forum shopping) in a reduction in the number of cases over which courts in states with specific jurisdiction under a state-based minimum-contacts approach will preside. Professors Dodge and Dodson discount this point, arguing that a state with no relevant connection to a dispute (i) “would be constitutionally prohibited from applying [its own] substantive law;”<sup>269</sup> (ii) would “almost certainly” apply the

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<sup>263</sup> Cf. *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 892 (2011) (Breyer, J., concurring in the judgment) (“[M]anufacturers come in many shapes and sizes. It may be fundamentally unfair to require a small Egyptian shirt maker, a Brazilian manufacturing cooperative, or a Kenyan coffee farmer, selling its products through international distributors, to respond to products-liability tort suits in virtually every State in the United States, even those in respect to which the foreign firm has no connection at all but the sale of a single (allegedly defective) good.”).

<sup>264</sup> Professors Dodge and Dodson further argue that it is acceptable not to factor in the burdens to foreign defendants of litigating in particular U.S. forums since “the reasonableness component of personal-jurisdiction doctrine already accounts for these burdens on alien defendants.” Dodge & Dodson, *supra* note 32, at 1227. It is a strange argument indeed that, essentially, the vast *increase* in personal jurisdiction that a move to a national minimum contacts standard for foreign defendants under the Fourteenth Amendment would in effect be somewhat offset by the increased protection—i.e., the *decrease* in jurisdiction reach—afforded to aliens under the fairness portion of the Fourteenth Amendment analysis.

<sup>265</sup> *Id.* at 1230; accord Born, *supra* note 153, at 41; Toran, *supra* note 20, at 772. *But see* Recent Case, *Civil Procedure—Personal Jurisdiction—Second Circuit Reverses Anti-Terrorism Act Judgment for Foreign Terror Attack*.—Waldman v. Palestine Liberation Organization, 835 F.3d 317 (2d Cir. 2016), 130 HARV. L. REV. 1488, 1493 (2017) (“[F]ederalism justifications do not apply to cases governed by the Fifth Amendment, where federal law applies uniformly and it is the authority of the United States government itself that matters.” (emphasis added)).

<sup>266</sup> Dodge & Dodson, *supra* note 32, at 1231.

<sup>267</sup> *Id.* at 1230.

<sup>268</sup> *Id.* at 1231.

<sup>269</sup> *Id.*

law of the state where the dispute arose (i.e., the law of the state that would, under a state-specific minimum-contacts approach, have specific jurisdiction);<sup>270</sup> and (iii) “would almost certainly not adjudicate the dispute in the end but would instead dismiss the suit under [the] doctrine of forum non conveniens.”<sup>271</sup> The problem is that the latter two points are girded in subconstitutional legal doctrine: Professors Dodge and Dodson ground the second proposition on the (logical but subconstitutional) assumption that the state has adopted the Restatement (Second) of Conflicts of Laws,<sup>272</sup> while the third assumption rests on the subconstitutional doctrine of forum non conveniens. Thus, a state could *constitutionally* decline to invoke the doctrine of forum non conveniens and, even if it could not constitutionally apply its own law, could *constitutionally* apply the law of a state other than the one where the dispute arose. The interests of the state where the dispute arose are thus protected only subconstitutionally, and subconstitutional protections are insufficient to vindicate constitutionally protected interests.

A third, overarching problem with the argument in favor of applying minimum contacts with the whole United States for foreign defendants is that—even to the extent that Professor Degnan and Dean Kane, and Professors Dodge and Dodson, are correct that the Fourteenth Amendment may under some circumstances afford foreign defendants *less* protection than their domestic counterparts—it nevertheless is incongruous that whatever protection the Fourteenth Amendment *does provide* should be wholly detached from *state* sovereignty. Professor Degnan and Dean Kane assert that “[q]uite obviously neither Germany nor Germans can claim any benefits that are accorded to the State of New York or to persons because they are in or are from New York.”<sup>273</sup> Yet the Fourteenth Amendment’s Due Process Clause is clearly addressed to the “states,”<sup>274</sup> and, to the extent that sovereignty limits originate in international law principles that the Constitution incorporated, those limits apply to the *states* as sovereign entities. In short, it is hard to understand exactly how *state* sovereignty—which remains a fundamental basis for Fourteenth Amendment Due Process personal jurisdiction jurisprudence<sup>275</sup>—can be vindicated when the relevant contacts are with the entire United States. If indeed foreign defendants

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<sup>270</sup> *Id.*

<sup>271</sup> *Id.* at 1232. Forum non conveniens is a common law doctrine under which a court “may dismiss an action on the ground that a court abroad is the more appropriate and convenient forum for adjudicating the controversy.” *Sinochem Int’l Co. v. Malay. Int’l Shipping Corp.*, 549 U.S. 422, 425 (2007).

<sup>272</sup> See Dodge & Dodson, *supra* note 32, at 1231 n.169.

<sup>273</sup> Degnan & Kane, *supra* note 32, at 814.

<sup>274</sup> U.S. CONST. amend. XIV, § 1; see Sachs, *supra* note 25, at 1318.

<sup>275</sup> See *supra* note 8.

qualify as “persons” for Fourteenth Amendment purposes—a point that Supreme Court precedent clearly endorses, and a point with which neither Professor Degnan and Dean Kane, nor Professors Dodge and Dodson, take issue<sup>276</sup>—then foreign defendants ought to enjoy some measure of protection based upon the sovereignty of the states, not just the federal government.

#### 4. *The Option of Expanding Federal Court Original Jurisdiction*

If Congress lacks power to authorize state courts to exercise Fifth Amendment-based personal jurisdictional limits, it *does* have the power to expand the original subject matter jurisdiction of the federal courts to the constitutional limit<sup>277</sup> so that as many plaintiffs as constitutionally possible have the option of filing suit in federal court, where national personal jurisdiction can be made readily available.<sup>278</sup> For federal question jurisdiction, Congress has largely done this already: The current grant of statutory federal question jurisdiction has no amount in controversy requirement.<sup>279</sup> Congress could also eliminate or limit the well-pleaded complaint rule,<sup>280</sup> although that would admit cases to federal court based on defenses that the defendant might not in the end plead.<sup>281</sup>

With respect to diversity jurisdiction, Congress has the option of reducing or removing the amount in controversy requirement and/or requiring only minimal diversity. To avoid opening the federal litigation floodgates too wide, it could do this only with respect to cases where national personal jurisdiction is appropriate. Indeed, that is precisely what Congress already has done in its extension of jurisdiction in minimal diversity cases arising out of mass accidents.<sup>282</sup>

Congress would have to be more inventive about extending federal court jurisdiction with respect to run-of-the-mill state law cases that do not fall under

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<sup>276</sup> See Degnan & Kane, *supra* note 32, at 813; Dodge & Dodson, *supra* note 32, at 1221–22.

<sup>277</sup> Congress has analogous power with respect to the federal district courts’ removal jurisdiction, but the expansion of removal jurisdiction would not be helpful in this context. A plaintiff who knew that she could only obtain personal jurisdiction over a defendant in federal court needs original jurisdiction to sue there in the first place. And, if a plaintiff erred and sued a defendant in state court where there was no jurisdiction, removal (if it were available) would be counter to the defendant’s interests.

<sup>278</sup> See *supra* Section III.A.

<sup>279</sup> See 28 U.S.C. § 1331 (2012).

<sup>280</sup> See, e.g., *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152–53 (1908).

<sup>281</sup> See Jonathan Remy Nash, *On the Efficient Deployment of Rules and Standards to Define Federal Jurisdiction*, 65 VAND. L. REV. 509, 546 n.129 (2012) (discussing federal defense removal and similar possibilities).

<sup>282</sup> See *supra* note 105 and accompanying text.



Article III's diversity grant. One possibility—at least for contracts cases that implicate interstate commerce (e.g., contracts cases involving merchants)—could be for Congress to advert to protective jurisdiction.<sup>283</sup> The logic underlying protective jurisdiction is that, if Congress has the constitutional authority to regulate a field, it surely has the lesser power simply to extend federal jurisdiction to claims in that field, leaving state law to supply the rules of decision.<sup>284</sup> As applied here, one can argue that, though it has never exercised it, Congress has the power to enact a federal contracts law at least with respect to contracts that implicate interstate commerce. If that is so, then Congress could, under the logic of protective jurisdiction, (i) open the federal courthouse doors to claims arising out of such contracts, (ii) grant the federal courts national personal jurisdiction in such cases (or a subset of such cases), and (iii) leave state law as the substantive law governing such cases. The viability of such a strategy is unclear, insofar as the Court has never approved of the protective jurisdiction.<sup>285</sup> Congress might be on safer constitutional ground but end up more at risk of offending state legislatures and judiciaries ordinarily used to regulating the law of contracts by simply converting these claims into ones arising under federal law by enacting a federal version of the Uniform Commercial Code.

A final strategy would be for Congress to enact a statute that, in return for permission to “do business” within the United States, extracts from foreign corporations “consent” to national personal jurisdiction, i.e., jurisdiction in any court of the United States. Some states have analogously endeavored to obtain consent to jurisdiction in state courts,<sup>286</sup> but commentators have observed that such state efforts may be constitutionally suspect—under the Due Process Clause, the dormant Commerce Clause, and the doctrine of foreign affairs preemption<sup>287</sup>—and courts have viewed such efforts with suspicion, especially in the wake of *Goodyear* and *Daimler*.<sup>288</sup> Whatever the merits of these concerns,

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<sup>283</sup> See Casad, *supra* note 20, at 1620 (noting the potential promise of “the uncharted waters of ‘protective jurisdiction’” in this regard, but with Professor Casad concluding that “[he was] not prepared to embark on that voyage at [that] time”).

<sup>284</sup> See, e.g., 20 CHARLES ALAN WRIGHT & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 21 (2d ed. 2011).

<sup>285</sup> See *id.*

<sup>286</sup> See Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 CARDOZO L. REV. 1343, 1363–71 (2015); Gwynne L. Skinner, *Expanding General Personal Jurisdiction over Transnational Corporations for Federal Causes of Action*, 121 PENN. ST. L. REV. 617, 673–74 (2017).

<sup>287</sup> See Monestier, *supra* note 286, at 1372–1413.

<sup>288</sup> See *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 633–41 (2d Cir. 2016) (finding a Connecticut statute ambiguous and interpreting it to obtain consent for jurisdiction as to claims arising out of a corporation's contacts with the state (i.e., specific jurisdiction), not general jurisdiction, in order to avoid constitutional concerns).

an effort by *Congress* to extract consent would certainly, as Professor Gwynne Skinner argues, quell concerns of violating the dormant Commerce Clause and of running afoul of foreign affairs preemption,<sup>289</sup> leaving only the concern of whether the “consent” thus obtained is sufficiently voluntary to satisfy the Due Process Clause. In any event, it is unclear whether Congress would opt to require consent to nationwide jurisdiction, or instead exercise the lesser power of requiring consent to suit merely in some particular state, especially a state of the foreign corporation’s choosing.<sup>290</sup>

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In sum, Congress likely has authority to confer on the federal courts national personal jurisdiction as to claims brought under federal question, supplemental, and diversity jurisdiction. In contrast, Congress likely lacks such authority with respect to claims brought in the state courts.

#### IV. WHAT STEPS (IF ANY) MUST CONGRESS TAKE TO EFFECT NATIONAL PERSONAL JURISDICTION?

If there is no constitutional impediment to the introduction of national personal jurisdiction in at least some forums and with respect to at least some categories of cases, what steps must Congress take to introduce it? The instances of national personal jurisdiction we have seen to this point highlight two ways for it to arise. First, Congress itself has enacted a few statutes that authorize it.<sup>291</sup> Second, congressional delegates have exercised their rulemaking power<sup>292</sup> to authorize it.<sup>293</sup>

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<sup>289</sup> See Skinner, *supra* note 286, at 674.

<sup>290</sup> To the extent that conditions attach to the government’s efforts to coerce waiver of a foreign defendant corporation’s personal jurisdictional due process rights, *cf.* Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801, 806–07 (2003) (describing the unconstitutional conditions doctrine, under which the government is limited in its ability to coerce an individual to waive his or her constitutional rights in exchange for some government benefit), one could imagine a court invalidating the statutory extraction of consent for nationwide jurisdiction on the ground that it was not narrowly tailored to the goal of ensuring that domestic plaintiffs have a U.S. forum in which they can sue a defendant foreign corporation. After all, consent merely to general jurisdiction in some particular state (even of the corporation’s choosing) should suffice to address the problem of domestic plaintiffs potentially not having a domestic forum in which to sue the corporation.

<sup>291</sup> See *supra* notes 99–105 and accompanying text.

<sup>292</sup> See 28 U.S.C. § 2072 (2012).

<sup>293</sup> See, e.g., FED. R. CIV. P. 4(k)(2). Some commentators argue that the nondelegation doctrine—the notion that the power of Congress to delegate legislative power on an Executive Branch actor absent some “intelligible principle” to guide the Executive’s discretion—applies to delegations to the judiciary. See Whitman v. Am. Trucking Ass’ns, 531 U.S. 457, 472 (2001); Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 421–60 (2008); Aaron Nielson, *Erie as Nondelegation*, 72 OHIO ST. L.J. 239, 266–70 (2011); Andrew S. Oldham, *Sherman’s March (in)to the*

But must Congress take any step at all, or can the federal courts themselves authorize national personal jurisdiction? In other words, is common law action sufficient to render applicable national minimum contacts?

Before proceeding, it is well to take note of two distinct types of federal common law. The first—so-called “interstitial federal common law”—arises when a federal court announces law to fill in gaps in existing federal statutes or rules. The second—to which we might refer as “pure federal common law”—arises when a federal court, much as would a state court, simply announces law, with no particular basis in existing federal statutes or rules. The latter is seen potentially to run afoul of *Erie*’s directive that “[t]here is no federal general common law,”<sup>294</sup> while the former is quite acceptable.<sup>295</sup>

Many courts and commentators invoke the Supreme Court’s opinion in *Omni Capital International, Ltd. v. Rudolf Wolff & Co., Ltd.*<sup>296</sup> to conclude that common law cannot be a basis for personal jurisdiction—and in particular for national personal jurisdiction.<sup>297</sup> However, despite courts and commentators’ reliance on *Omni*, and though the *Omni* Court expressed great skepticism about the federal courts’ common law power to generate personal jurisdiction standards, that case does not slam the door on the possibility of common law-

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*Sea*, 74 TENN. L. REV. 319, 371–75 (2007); Volokh, *supra* note 185, at 1410–14. Professor Alexander Volokh has further argued that the doctrine incorporates the “Inherent Powers Corollary,” that is, the notion that the nondelegation doctrine’s requirement of an “intelligible principle” does not apply where Congress delegates in an area that lies within (or is “interlinked” with) powers that the delegate already has. *Id.* at 1405–06. To the extent that developing limits on personal jurisdiction seems properly to lie within the judicial role, such a delegation would seem beyond reproach. *But see* *Omni Capital Int’l, Ltd. v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 108 (1987) (“At common law, a court lacked authority to issue process outside its district . . .”).

A separate question is whether the delegation of authority to extend national personal jurisdiction is consistent with the Rules Enabling Act as currently drafted. The general wisdom is that it is, with Rule 4(k)(2) being one such example. *See* Paul D. Carrington, *Continuing Work on the Civil Rules: The Summons*, 63 NOTRE DAME L. REV. 733, 744 (1988) (noting the issue, while suggesting it likely had been resolved). Still, the issue is not free from doubt. *See* Leslie M. Kelleher, *Amenability to Jurisdiction as a “Substantive Right”: The Invalidity of Rule 4(k) Under the Rules Enabling Act*, 75 IND. L.J. 1191, 1223–28 (2000) (arguing that such delegations impermissibly alter substantive rights in violation of the Rules Enabling Act); *see also* ADVISORY COMMITTEE ON CIVIL RULES, MEETING OF THE ADVISORY COMMITTEE ON CIVIL RULES 339 (2018), <http://www.uscourts.gov/sites/default/files/2018-04-civil-rules-agenda-book.pdf> (“[P]ast Committees have concluded that the Enabling Act authorizes rules that expand personal jurisdiction by providing for service of process outside the court’s district or state. . . . The question, however, deserves careful attention.”).

<sup>294</sup> *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

<sup>295</sup> *See* WRIGHT ET AL., *supra* note 68, at § 4514.

<sup>296</sup> 484 U.S. 97.

<sup>297</sup> *See, e.g.*, *United Rope Distribrs., Inc. v. Seatriumph Marine Corp.*, 930 F.2d 532, 534–35 (7th Cir. 1991); WRIGHT ET AL., *supra* note 68; Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L.J. 929 (1996); Casad, *supra* note 20, at 1594–95; Degnan & Kane, *supra* note 32, at 806 n.31.

based personal jurisdiction standards.<sup>298</sup> First, the Court cited a 1925 case—*Robertson v. R.R. Labor Board*<sup>299</sup>—in which it had noted that pre-constitutional common law did not grant courts power over personal jurisdiction, and that the first Judiciary Act continued that tradition.<sup>300</sup> But the Court allowed for the possibility that “the bases for the rule in *Robertson* are no longer valid.”<sup>301</sup>

Beyond this, the Court observed that, in order to conclude that it had common law authority, it would have to decide that the existing provisions of Rule 4, “in authorizing service in certain circumstances, were not intended to prohibit service in all other circumstances.”<sup>302</sup> Were this the case, this would be a subconstitutional impediment to common lawmaking authority; it would mean that common law personal jurisdiction as requested by the plaintiff in the case at bar would be inconsistent with the existing rule-based architecture,<sup>303</sup> not that courts would in all cases lack common lawmaking power. The Court also noted a final prerequisite to proceeding via common law: “We would also have to find adequate authority for common-law rulemaking.”<sup>304</sup>

In the end, however, the *Omni* Court concluded that *it need not rule on these ancillary issues*, “since [it] would not fashion a rule for service *in this litigation* even if [it] had the power to do so.”<sup>305</sup> Thus, the Court never held that the Constitution precludes federal courts from promulgating common law-based standards for personal jurisdiction.

Indeed, there is currently a form of common law national personal jurisdiction according to many courts and commentators. Consider the doctrine of supplemental national personal jurisdiction. There is an argument that § 1367 today confers on federal courts supplemental national personal jurisdiction, at least where a statutory scheme that confers original jurisdiction also conveys

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<sup>298</sup> See Lusardi, *supra* note 24, at 2 n.5, 5 n.17; Michael E. Solimine, *Enforcement and Interpretation of Settlements of Federal Civil Rights Actions*, 19 RUTGERS L.J. 295, 317 (1988); see also *Vazquez-Robles v. CommoLoCo, Inc.*, 757 F.3d 1, 8 (1st Cir. 2014) (noting that the Court’s decision in *Omni* did not preclude the possibility of a common law rule, but merely “strongly reinforces our reluctance to recognize a method of service of process not described in any Puerto Rico statute or procedural rule”).

<sup>299</sup> 268 U.S. 619 (1925).

<sup>300</sup> *Omni*, 484 U.S. at 108–09 (citing *Robertson*, 268 U.S. at 622–23).

<sup>301</sup> *Id.* at 109, 109 n.10; see Allan R. Stein, *Erie and Court Access*, 100 YALE L.J. 1935, 1987 n.248 (1991).

<sup>302</sup> *Omni*, 484 U.S. at 109.

<sup>303</sup> See Kelleher, *supra* note 293, at 1199; Elizabeth T. Lear, *Congress, the Federal Courts, and Forum Non Conveniens: Friction on the Frontier of the Inherent Power*, 91 IOWA L. REV. 1147, 1203 n.384 (2006); Solimine, *supra* note 298.

<sup>304</sup> *Omni*, 484 U.S. at 109.

<sup>305</sup> *Id.* (emphasis added).

national personal jurisdiction over anchor claims.<sup>306</sup> But many commentators vehemently contest this notion, arguing that § 1367 confers only subject matter, not personal, jurisdictional power.<sup>307</sup> Moreover, even if it is the case that § 1367 today confers on the federal courts supplemental national personal jurisdiction, supplemental national personal jurisdiction predates § 1367.<sup>308</sup> Presumably, then, in the years before § 1367's enactment, supplemental national personal jurisdiction existed—and possibly exists today as well—based upon federal courts' interstitial reading of statutes conferring national personal jurisdiction over particular claims.<sup>309</sup>

Where does this leave us with respect to the broad notion of common law-based supplemental national personal jurisdiction? One possibility is that only narrow, interstitial common law rulemaking is possible. On this account, supplemental national personal jurisdiction may represent the full extent of possible common law forms of national personal jurisdiction.<sup>310</sup>

Another possibility is that broader federal court common law rulemaking authority might be possible, but only consistent with the existing federal court

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<sup>306</sup> § 1367(a) confers on the federal district courts, “in any civil action of which the district courts have original jurisdiction, . . . supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.” 28 U.S.C. § 1367(a) (2012). One can take the position that, by extending power to the constitutional limit, Congress granted supplemental national personal jurisdiction related closely enough to anchor claims as to which Congress has conveyed explicit national personal jurisdiction. As noted above, while the Court once expressed the view that personal jurisdiction originates in the Constitution's Due Process Clauses, in fact the Court elsewhere has recognized that it originates in international law principles that predate the Constitution. *See Iron Workers Local Union No. 17 Ins. Fund v. Philip Morris Inc.*, 23 F. Supp. 2d 796, 804 (N.D. Ohio 1998); *supra* note 35.

<sup>307</sup> *See supra* note 166. The Federal Practice and Procedure treatise argues:

Neither the plain meaning of [Section 1367], which shows it to be a subject matter jurisdiction provision, nor its legislative history supports the conclusion that Congress intended Section 1367 to include personal jurisdiction, and only a few opinions since Section 1367 was enacted have found that it should be read “broadly” to include personal jurisdiction . . . . Thus, if pendent personal jurisdiction exists, it must be properly understood to be a federal common law doctrine.

WRIGHT ET AL., *supra* note 68, at § 1069.7 (footnote omitted). But the fact that neither the plain language nor the legislative history of § 1367 contemplates personal jurisdiction hardly seems conclusive. Time has proven § 1367 to have numerous unexpected and unintended consequences. *See generally* Thomas C. Arthur & Richard D. Freer, *Grasping at Burnt Straws: The Disaster of the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 963 (1991); Freer, *supra* note 169.

<sup>308</sup> *See supra* notes 159–64 and accompanying text.

<sup>309</sup> *See Berger, supra* note 96, at 330; Simard, *supra* note 73, at 1650–52; James S. Cochran, Note, *Personal Jurisdiction and the Joinder of Claims in the Federal Courts*, 64 TEX. L. REV. 1463, 1475–79 (1986).

<sup>310</sup> *See Lilly, supra* note 20, at 142 (“Although [federal court] opinions vary somewhat in their reasons for rejecting a national contacts doctrine [in diversity cases], the most convincing rationale is the absence of an express federal provision containing a federal standard of amenability.”).

architecture that Congress and its delegates have put in place.<sup>311</sup> This would mean that common law authority to generate national personal jurisdiction could only exist if the background of the federal judicial system was consistent with that notion. For example, perhaps if Congress had indeed created a unitary, national federal trial court but not specified the basis for its personal jurisdiction authority, the court could conclude as a matter of common law that it enjoyed national personal jurisdictional power. But of course, that is not the case: Congress has long ensconced subnational districts, and indeed districts largely confined to areas within states.<sup>312</sup> Thus, the congressional design for the federal judiciary is inconsistent with a common law form of national personal jurisdiction. Putting matters slightly differently, even if there is some common law power in the federal courts to come up with jurisdictional standards, the *measure* of that common law<sup>313</sup> cannot, given the backdrop of the current federal judicial architecture, be—absent true interstitial common lawmaking—national personal jurisdiction.<sup>314</sup>

### CONCLUSION

This Article elucidates the viability of national personal jurisdiction. The Fifth Amendment’s Due Process Clause requires only minimum contacts with the United States as a whole. That Clause also considers the fairness only of requiring a defendant to litigate within the territory of the United States. That said, Congress can, and should, introduce greater fairness protections subconstitutionally.<sup>315</sup>

Congress has the power to introduce national personal jurisdiction to all claims that fall within or could fall within federal court jurisdiction. In contrast,

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<sup>311</sup> *See id.* at 134 (“The general plan of [R]ule 4 is thus to adopt by reference the extraterritorial amenability provisions of federal and state statutes.”); *supra* text accompanying note 306. *But see* von Mehren & Trautman, *supra* note 45, at 1123 n.6 (“Arguably, federal courts do not require enabling legislation to assume adjudicatory jurisdiction under federal standards . . .”).

<sup>312</sup> *See supra* note 89 and accompanying text.

<sup>313</sup> *See, e.g.,* United States v. Kimbell Foods, Inc., 440 U.S. 715, 727 (1979) (concluding that federal common law was appropriate in the case at bar, but then turning to the question of what the *content* of that federal common law should be).

<sup>314</sup> *See supra* notes 186–88 and accompanying text (noting that the rule of *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487, 496 (1941), is logical only in light of the congressional decision to establish federal district courts in every state); *cf. Semtek Int’l, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001) (after finding that federal common law governed the res judicata effects of a federal diversity court judgment, concluding—implicitly in light of the existing federal judicial architecture—that this was “a classic case for adopting, as the federally prescribed rule of decision, the law that would be applied by state courts in the State in which the federal diversity court sits”).

<sup>315</sup> *See supra* note 147 and accompanying text.

the Fourteenth Amendment prevents state courts from exercising national personal jurisdiction. Congress does have the power, however, if it chooses, to expand federal court jurisdiction and thus allow more cases to fall under the national personal jurisdiction umbrella. Finally, common law-based national personal jurisdiction, if it is possible at all, is limited to interstitial lawmaking, and perhaps also to lawmaking against a backdrop of existing statutory national personal jurisdiction.