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Power, Convenience, and the Elimination of Personal Jurisdiction in the Federal Courts†

ROBERT HASKELL ABRAMS*

Is it not time that we stop thinking that, because for administrative purposes it is convenient to divide the United States into judicial districts, a federal court "sits within and for that district; and is bounded by its local limits," as the Supreme Court once put it? It also sits within and for the United States"

Had Congress in the exercise of its article III powers to establish "inferior courts"¹ chosen to establish only one such tribunal, there would be little doubt of the constitutional permissibility of such a choice.² That court would have been able to hear and decide all cases which Congress instructed it to adjudicate, subject only to limitation by the scope of the judicial power.³ Assuming efforts were made to inform defendants of the

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** Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 22 n.87 (1945) (citation omitted).

¹ "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1.

² P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART & WECHSLER'S, THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 309-74 (2d ed. 1973) (hereinafter cited as HART & WECHSLER).

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens

pendency of litigation sufficient to give them reasonable notice and opportunity to be heard⁴, binding in personam judgments could be entered against those defendants without constitutional infirmity. Stated differently, in this hypothetically simplified system of federal courts the only relevant constitutional restraints arise from article III and narrow fifth amendment due process interests. Concern, constitutional or otherwise, with venue or personal jurisdiction would be wholly inapposite. Not only is venue not a constitutional consideration,⁵ in the single-court hypothetical there is no choice between alternate courthouses of the same tribunal. The tribunal, as the sole general trial court of the national sovereign, would also possess personal jurisdiction in the traditional, *Pennoyer v. Neff*⁶ sense of having sufficient sovereign authority over the defendant to constitutionally command obedience to the court's judgment.

The hypothetical one-court federal judiciary demonstrates the minimal inquiry needed to conclude that a constitutionally valid binding judgment may be rendered by a federal court against a defendant who does not consent to that court's exercise of jurisdiction over his person. Present practice in the federal courts is complicated by statutorily and judicially imposed issues regarding the appropriate place of trial⁷ and methods of serving process.⁸ Even so, this added complexity does not necessarily make the constitutional role of personal jurisdiction any more useful in the existing system of federal courts than in the hypothetical one-court system.

After briefly cataloging the types of federal court cases that raise difficult conceptual issues regarding personal jurisdiction, this article will explore in detail the possible function and content of a uniquely federal concept of personal jurisdiction. After rejecting functions based on constitutional concern for litigant convenience⁹ and federalism of the *Erie*

of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such exceptions, and under such Regulations as the Congress shall make.

U.S. CONST. art. III, § 2, cl. 1-2.

⁴ Such notice is necessary to meet the fifth amendment's procedural due process requirements. *See, e.g., Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

⁵ In contrast to personal jurisdiction, venue is widely acknowledged to be wholly statutory. *See, e.g., C. WRIGHT, LAW OF THE FEDERAL COURTS* 170 (3d ed. 1976).

⁶ 95 U.S. 714 (1877).

⁷ *See, e.g., 28 U.S.C. § 1391* (1976) (venue); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947) (forum non conveniens).

⁸ *See, e.g., 28 U.S.C. § 2361* (1976); *FED. R. CIV. P. 4*.

⁹ *See, e.g., World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Kulko v. Superior Court*, 436 U.S. 84 (1978). *See also infra* text accompanying notes 94-134.

vein,¹⁰ other roles for the concept will be considered. This exploration will be expanded to consider the functions presently served by limitations on service of process and federal venue and the ability of those doctrines to subsume all useful aspects of the personal jurisdiction inquiry. A substantial departure from existing doctrine will be advocated including a uniquely federal concept of personal jurisdiction predicated on the "presence" of defendant within the United States, abandonment of most limits on service of process and original venue, and a heavy reliance on transfer of venue to protect litigant convenience and judicial efficiency. The gravest concerns regarding those changes will be seen to involve forum shopping for favorable choice of law. The ultimate genesis of these concerns resides in the structure of the American federal system, it is not attributable to the advocated changes in methodology of asserting the federal judicial power. Nevertheless, in the later stages of the article, an argument will be made in favor of a federal choice of law rule as the best means of minimizing the potential evils of forum shopping that arise under the advocated system. Taken together, these several changes provide a more effective basis for operating a unified system of federal courts in the present highly complex federal system.

I. SITUATIONS CALLING FOR AN ARTICULATED CONCEPT OF FEDERAL PERSONAL JURISDICTION

Perhaps unfairly the one-court hypothetical wholly belittles the usefulness of personal jurisdiction as a limit on federal court adjudications. There are interests currently served by personal jurisdiction, so that scrutiny of these interests and of other means of insuring their vindication is necessary prior to abandoning all inquiry into federal personal jurisdiction. As background to the major inquiry a brief discussion of terminology will minimize the hazards of unconsciously merging concerns appropriate to the state courts with those appropriate to federal courts; this also serves to clarify the terms used throughout this article. Thereafter, a series of examples will be advanced which demonstrate the existence of recurrent issues related to personal jurisdiction and the need for a total reevaluation of that concept in the federal courts.

A. *Terminological Pitfalls*: DeJames v. Magnificence Carriers, Inc.¹¹

A discussion of cases posing serious questions of personal jurisdiction requires distinguishing that concept from service of process and from long-

¹⁰ Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). See *infra* text accompanying notes 153-205.

¹¹ 654 F.2d 280 (3d Cir. 1981).

arm jurisdiction. As described in this article and elsewhere,¹² personal jurisdiction is primarily a concept of power, addressing the power of the particular judicial tribunal to bind a defendant to its judgment. Service of process refers to the formal procedure by which a defendant is notified of the pendency of litigation. The sharp distinction between concepts is blurred by three factors. First, the writ of summons, served together with the complaint, threatens the defendant with entry of an in personam judgment should the defendant fail to appear.¹³ Thus, service of process acts as a formal assertion of a claimed power of personal jurisdiction. Second, early statutes governing process authorized only intraterritorial, in-hand service.¹⁴ As a result, good service evidenced a set of factual conditions: (1) apprehension of defendant (2) by an officer of the sovereign (3) within the sovereign's territory (4) joined with an order to appear in court.¹⁵ These facts in turn form the predicate for the valid assertion of in personam jurisdiction. Only with the advent of extraterritorial service does the linkage between service of process and personal jurisdiction dissolve. Third, defendants are sometimes referred to as being "not amenable to service of process." This creates ambiguity because the phrase can either refer to technical grounds for immunity from service¹⁶ or serve as a shorthand expression of the conclusion that the court issuing the process lacks personal jurisdiction over the defendant under the circumstances. While these factors blur the issue, service and personal jurisdiction remain independent.

Long-arm statutes stand at the intersection of personal jurisdiction and service of process. Most frequently these statutes describe the circumstances under which a state will allow assertion of its courts' authority over persons and other entities not present within the state. Invocation of these statutes is an assertion of personal jurisdiction over the defendant. To facilitate invocation of the asserted personal jurisdiction, states frequently include special provisions for extraterritorial service of process as part of the long-arm statute. While this practice is common,¹⁷ it is not universal.¹⁸ The marriage of assertions of power with the methods for

¹² Viewing personal jurisdiction as a concept of power is the traditional norm. See Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 241.

¹³ See, e.g., FED. R. CIV. P. 4; *id.* at form 1.

¹⁴ See, e.g., Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73 (1789).

¹⁵ See *Pennoy v. Neff*, 95 U.S. 714 (1877); 4 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1064 (1969).

¹⁶ For example, California law provides that one who goes to California in response to a subpoena requiring his testimony at trial may not be served with civil or criminal process "in connection with matters which arose before his entrance into this State under the subpoena." CAL. PENAL CODE § 1334.4 (West 1982).

¹⁷ See, e.g., CONN. GEN. STAT. ANN. §§ 52-57a (West Supp. 1982); ILL. ANN. STAT. ch. 110, § 17 (Smith-Hurd Supp. 1982-1983); MASS. ANN. LAWS ch. 223A, §§ 3(d), 4, 6 (Michie/Law. Co-op. 1974).

¹⁸ See, e.g., CAL. CIV. PROC. CODE §§ 410.10, 415.40 (West 1973); N.Y. CIV. PRAC. LAW §§ 302, 313 (McKinney 1972); 42 PA. CONS. STAT. ANN. §§ 5322, 5323 (Purdon 1981).

service of process, however, possesses an obvious potential for commingling two distinct inquiries. Imprecise description of the dual issues involved with state long-arm statutes not only obscures decisional criteria in state court cases, it also complicates the present inquiry into a purely federal concept of personal jurisdiction. Federal courts are specifically empowered by Federal Rule of Civil Procedure 4(e) to borrow state law provisions for extraterritorial service of process.¹⁹ If issues of personal jurisdiction are erroneously intertwined with those relating to borrowed service of process methodology, standards for personal jurisdiction in the federal courts will be wedded to those of their state court counterparts. Such a practice is simply misguided since federal and state courts should not be governed by equivalent limitations on the exercise of personal jurisdiction.²⁰

A recent Third Circuit decision exemplifies the miasma which can arise from mixing assertions of power over defendants with methods prescribed for extraterritorial service of process. In *DeJames v. Magnificence Carriers, Inc.*²¹ plaintiff, a longshoreman, sought to sue a Japanese shipbuilding firm for injuries allegedly received as a result of that firm's defective installation of equipment which refitted a general cargo ship for the transport of automobiles. Federal suit was commenced in New Jersey where the injury occurred, with subject matter jurisdiction predicated upon the exclusive grant of admiralty jurisdiction to the federal courts.²² Service of process was made on the Japanese firm in Japan in a manner consistent with the multilateral convention on service abroad.²³ Defendant successfully moved to dismiss for lack of personal jurisdiction²⁴ and an appeal was taken. In affirming, the Third Circuit observed that the district court had premised dismissal on the conclusion that defendant lacked sufficient

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

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

²⁰ See *infra* notes 155-65 and text accompanying notes 114-34. But cf. *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949) (where local law establishes a right but expressly bars a remedy in state courts under certain circumstances, recovery is likewise barred under the same circumstances in a federal court sitting in diversity); *Angel v. Bullington*, 330 U.S. 183, 191 (1947) ("If North Carolina has authoritatively announced that deficiency judgments cannot be secured within its borders, it contradicts the presuppositions of diversity jurisdiction for a federal court in that state to give such a deficiency judgement.").

²¹ 654 F.2d 280 (3d Cir. 1981).

²² *Id.* at 282 (citing 28 U.S.C. § 1333 (1976)).

²³ *Id.* at 283 (citing Convention on Service Abroad of Judicial and Extrajudicial Documents, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638).

²⁴ *DeJames v. Magnificence Carriers, Inc.*, 491 F. Supp. 1276, 1284 (D.N.J. 1980).

contact with the forum state to sustain personal jurisdiction. Recognizing that contacts with the state might not be the appropriate measure of federal personal jurisdiction, the opinion explored the rationale for looking at state-specific contacts in an exclusively federal cause of action. The court then stated, "even in non-diversity cases, if service of process must be made pursuant to a state long-arm statute or rule of court, the defendant's amenability to suit in federal district court is limited by that statute or rule."²⁵ This statement is at best trivial and at worst unduly restrictive of federal judicial power. In either event, its shortcomings are directly attributable to mixing an inquiry into borrowed service of process statutes with borrowed personal jurisdiction norms.

To construe the above quoted language as merely trivial it should be read as saying that service pursuant to borrowed methods for service of process can be successful only if service complies with the terms of the borrowed state provision. That is a truism. The *DeJames* decision could rest on this ground if it were found that New Jersey does not provide for service in a foreign nation. The provisions for extraterritorial service of process are found primarily in the New Jersey Court Rules.²⁶ Although not expressly authorizing international service, the New Jersey Court Rules allow, without geographical limitation, service by certified or registered mail when the defendant is not present in New Jersey.²⁷ Thus, it is difficult to view the opinion as simply holding that there is no provision of New Jersey law allowing extraterritorial service in Japan. Further, if that was the intended objection to adjudication in New Jersey federal court, the proper motion would have attacked service, not personal jurisdiction.²⁸

It is more likely that the majority meant to limit federal litigation of federal causes of action in which service must be obtained by use of borrowed state provisions to constitutional standards of due process and minimum contacts²⁹ applicable to the states.³⁰ The dissent strongly attacks this position,³¹ as does the remainder of this article. The approach intertwines extraterritorial service, the means of asserting power over the foreign defendant, with personal jurisdiction, the limitation on constitutionally permissible exercises of sovereign power. The majority apparently reasons that Congress, in approving the Federal Rules of Civil

²⁵ *DeJames*, 654 F.2d at 283.

²⁶ N.J. Ct. R. 4:4-4.

²⁷ N.J. Ct. R. 4:4-4(e), 4:4-5(b).

²⁸ Compare FED. R. Civ. P. 12(b)(4) with FED. R. Civ. P. 12(b)(5); see also 5 C. WRIGHT & A. MILLER, *supra* note 15, §§ 1351, 1353.

²⁹ See, e.g., *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

³⁰ See *supra* text accompanying note 25. The majority then defined its inquiry into the efficacy of state law authorized service of process as turning on the "argument that Hitachi's contacts with the state of New Jersey alone were sufficient to support personal jurisdiction under that state's long-arm rule." *DeJames*, 654 F.2d at 284.

³¹ *DeJames*, 654 F.2d at 292-93 (Gibbons, J., dissenting).

Procedure as to borrowing of state methods of service process,³² also intimated that federal courts employing state service methodology must also employ state standards of personal jurisdiction.³³ Without regard to its rectitude as an interpretation of existing law, the result is surely an odd one. A federal court adjudicating a federal admiralty claim is subjected to restrictions on its power identical to those of the fourteenth amendment that are imposed on state courts. The results obtained by the majority's convoluted measurement of federal personal jurisdiction may be defensible,³⁴ but one criticism is evident: mixing the concept of service of process with that of personal jurisdiction occludes the possibility of a reasoned analysis—that is, one which is predicated upon the separable policies that underlie limitations on service of process and personal jurisdiction.

*B. Nationwide Service of Process Conjoined with Broad
Choice of Venue: Stafford v. Briggs³⁵*

A second genre of recent cases further illustrates the need for devising a coherent theory of federal personal jurisdiction. Through legislation and the adoption of rules of procedure, the ability of the federal courts to summon defendants from great distances has been increased.³⁶ Concomitant with these extensions of service have been revisions, including some expansion, of the statutes controlling venue.³⁷ Little, if any, congressional attention has been given to personal jurisdiction. Cases involving disputes over the invocation of liberalized service and venue statutes have begun to arise and are posing difficult issues for the district courts owing to the lack of carefully derived principles governing the exercise of federal personal jurisdiction.

In *Stafford v. Briggs*, as well as in its companion case, *Colby v. Driver*,³⁸

³² Cf. 28 U.S.C. § 2072 (1976) (court rules proscribed by Supreme Court do not take effect until ninety days after their transmission to Congress).

³³ *DeJames*, 654 F.2d at 286 n.6. Specifically the majority accepts wholly federal service as an assertion of personal jurisdiction and assumes *arguendo* that fifth amendment due process requirements are sufficiently different from those of the fourteenth amendment to allow aggregation of a defendant's contacts with the United States to serve as a basis for asserting personal jurisdiction.

The language of Federal Rule of Civil Procedure 4(e) allows federal service to be made "under the circumstances and in the manner" of local state law. FED. R. CIV. P. 4(e) (emphasis added). A reading in support of the *DeJames* result is that "manner" prescribes methodology and "circumstances" would not allow service if minimum contacts sufficient to satisfy the fourteenth amendment were lacking.

³⁴ The line of defense would stress delimitation of effective limits on federal service of process as indicative of congressional intent to impose an indential limitation on assertions of the judicial power.

³⁵ 444 U.S. 527 (1980).

³⁶ See, e.g., 28 U.S.C. § 2361 (1976); FED. R. CIV. P. 4(i).

³⁷ See, e.g., 28 U.S.C. §§ 1391, 1397 (1976).

³⁸ 444 U.S. 527 (1980).

the Supreme Court granted certiorari to consider issues of venue and personal jurisdiction in federal court suits against federal officials brought under the Mandamus and Venue Act.³⁹ The statute allows suits against federal officials acting under the color of office to be brought in a district where "(1) a defendant . . . resides . . . or, . . . (4) the plaintiff resides . . ." and provides for nationwide service of process.⁴⁰ Defendants were alleged to have acted both in their official and their individual capacities in violating claimed constitutional rights of the respective plaintiffs.

Consistent with the delineation of service, venue and personal jurisdiction briefly outlined above, defendants ultimately conceded the validity of the statutorily prescribed nationwide service by mail⁴¹ and attacked only venue and personal jurisdiction. The former was attacked on the narrow ground that Congress did not intend the particular venue provision in question to apply in suits alleging claims against defendants acting in their personal capacities.⁴² Personal jurisdiction was challenged as violative of due process in subjecting defendants to potential in personam judgments in a district for which the minimum contacts test of *International Shoe v. Washington*⁴³ could not be satisfied.⁴⁴

The Court's majority accepted the statutory construction argument and held that venue did not lie as to suits in individual capacity.⁴⁵ The dissenters read the statute literally and thus reached the personal jurisdiction issue as well. Speaking for himself and Justice Brennan, Justice Stewart curtly dismissed the due process attack:

The short answer to this argument is that due process requires only certain minimum contacts between the defendant and the sovereign that created the court The issue is not whether it is unfair to require a defendant to assume the burden of litigating in an inconvenient forum, but rather whether the court of the particular sovereign has power to exercise personal jurisdiction over a named defendant. The cases before us involve suits against residents of the United States in the courts of the United States. No due process problem exists.⁴⁶

The thesis of this article is in full accord with Justice Stewart's position, but the propriety of the conclusion is not as self-evident as the quoted passage would make it appear. Further, the incidence of the problem is not limited to the single context of suits against federal officials. There

³⁹ 28 U.S.C. § 1391(e) (1976).

⁴⁰ *Id.*

⁴¹ Original attacks in both *Stafford v. Briggs* and *Colby v. Driver* included insufficiency of process. *Stafford*, 444 U.S. at 531, 533.

⁴² Chief Justice Burger stated that certiorari was granted "to decide whether the venue provisions . . . apply to actions for money damages brought against federal officials in their individual capacities." *Id.* at 529-30.

⁴³ 326 U.S. 310 (1945).

⁴⁴ *Stafford*, 444 U.S. at 531-33.

⁴⁵ *Id.* at 545.

⁴⁶ *Id.* at 554 (Stewart, J., dissenting) (citations omitted).

are numerous provisions in the Judicial Code⁴⁷ and elsewhere,⁴⁸ as well as state statutes made relevant in the federal courts by Federal Rule of Civil Procedure 4(e),⁴⁹ that provide for nationwide service of process. Similarly, there are several venue provisions which do not insure that the situs of litigation will be in a federal district with which the defendant has substantial contact, purposeful or otherwise.⁵⁰ As in *Stafford v. Briggs*, when these provisions are used to claim power over a defendant with minimal contact with the forum district, the assertion of federal personal jurisdiction is not self-evidently correct.⁵¹ The potential for mischievous use of these and similar statutes remains unabated in the absence of a clear set of concepts governing federal judicial power. The Supreme Court, however, has shown little inclination to come to grips with the underlying personal jurisdiction quandary.

*C. State Created Causes of Action in the Federal Courts:
From Bankruptcy to Arrowsmith⁵²*

Even if Justice Stewart's conclusion is correct in the context of federal court litigation of federal causes of action, the gamut of personal jurisdiction issues arising in the federal courts is not exhausted by that paradigm. As state substantive law becomes more important in the litigation, a greater number of problematic cases can be put forth. These cases lessen the allure of adopting a federal standard without first having considered the arguments militating for application of the personal jurisdiction

⁴⁷ See, e.g., 28 U.S.C. §§ 1655, 1659, 2361 (1976).

⁴⁸ See, e.g., 15 U.S.C. §§ 22, 25 (1976).

⁴⁹ The relevant part of this rule is quoted *supra* note 19. An example of state law authorizing such service is CAL. CIV. PROC. CODE § 415.40 (West 1973).

⁵⁰ 28 U.S.C. § 1397 presents obvious opportunities for locating litigation in a district where a defendant has no substantial contact. For example, if claimants are geographically dispersed, selection of one claimant's district is proper yet potentially inconvenient to other claimants. See also the discussion of bankruptcy litigation *infra* text accompanying notes 57-64.

⁵¹ In the securities area, for example, cases such as *Oxford First Corp. v. PNC Liquidating Corp.*, 372 F. Supp. 191, 197 (E.D. Pa. 1974), arise based both on nationwide service of process and liberal venue provisions allowing suit in any district "wherein any act or transaction constituting the violation (of the securities laws) occurred." In *Oxford*, the court erroneously cited statutory language appropriate to venue in criminal cases, but the civil provision is equally comprehensive. See 15 U.S.C. § 78aa (1970). In *Leroy v. Great Western United Corp.*, 443 U.S. 173 (1979), the Supreme Court adopted a somewhat crabbed construction of the above quoted securities-specific venue provision to avoid confrontation with the jurisdictional issue. Given the nationwide aspects of securities transactions, the potential for far-flung litigation is large, and the need for a clear and united federal doctrine is great. The obvious concern arises from the possibility that defense in a distant or inconvenient forum would infringe a due process interest of the defendant. See *infra* text accompanying notes 94-134; see also Abraham, *Constitutional Limitations Upon the Territorial Reach of Federal Process*, 8 VILL. L. REV. 520 (1963); Note, *Removing the Cloak of Personal Jurisdiction From Choice of Law Analysis: Pendent Jurisdiction and Nationwide Service of Process*, 51 FORDHAM L. REV. 127, 128 n.6 (1982).

⁵² *Arrowsmith v. United Press Int'l*, 320 F.2d 219 (2d Cir. 1963).

standard of the state in which the district court sits. The spectrum of cases includes those in which federal interest such as uniformity and efficient administration⁵³ of bankruptcy law are vindicated by reliance on federal adjudication of state law causes of action and those state law claims heard in the federal courts solely because of diversity jurisdiction.⁵⁴ It should be clear that the policy arguments favoring a wholly federal standard of personal jurisdiction appear weakest in the latter case when only state substantive interests provide the occasion for invocation of the federal judicial power.⁵⁵

While *Stafford* and analogous cases⁵⁶ involve wholly federal causes of action and application of federal law, the same cannot be said of the federal litigation spawned by the Bankruptcy Reform Act of 1978.⁵⁷ One such case is *In re Trim-Lean Meat Products, Inc.*⁵⁸ There service was effected pursuant to Bankruptcy Rule 704(f)(1) which states that all process except subpoenas "may be served anywhere within the United States."⁵⁹ Venue is proper in the district court sitting in the state of the bankrupt's incorporation without regard to the quantum of operations carried on in that state.⁶⁰ The trustee in *Trim-Lean*, marshalling the assets of the bankrupt, sued the bankrupt's debtor in a federal district with which the debtor had very few contacts.⁶¹ The underlying cause of action against the bankrupt's debtor was nonfederal in nature.⁶² Although the judge in *Trim-Lean* described the defendant's contacts with the forum as sufficient to satisfy *International Shoe's* minimum contacts standard of due process,⁶³ the opinion indicated an obvious willingness to devise federal standards for adjudicating the issue of personal jurisdiction.⁶⁴

⁵³ U.S. CONST. art. I, § 8, cl. 4.

⁵⁴ 28 U.S.C. § 1332 (1976). See also Note, *supra* note 51 (state law claims pendent to federal claims).

⁵⁵ Some of the articulated benefits of federal diversity jurisdiction include mitigation of local bias and the infusion of the ideas of federal judges into the process of state law adjudication. Frank, *For Maintaining Diversity Jurisdiction*, 73 YALE L.J. 7, 9-13 (1973). There is nothing in these (or other) justifications of diversity jurisdiction that requires the federal court to have its own standard for the exercise of personal jurisdiction. In comparison, substantive federal policies inherent in the existence of federal causes of action and the enforceability of the rights they create are affected by the scope of personal jurisdiction of the federal court system.

⁵⁶ See *supra* note 51.

⁵⁷ 11 U.S.C. (Supp. V 1981).

⁵⁸ 11 Bankr. 1010 (Bankr. D. Del. 1981).

⁵⁹ RULES BANKR. PROC. 704(f)(1).

⁶⁰ See 28 U.S.C. § 1472 (Supp. 1981); see also 28 U.S.C. § 1473 (Supp. 1981).

⁶¹ *Trim-Lean*, 11 Bankr. at 1011.

⁶² The trustee sought to recover finished goods and cash turned over to the creditor, alleging that these transfers constituted conversion of property or wrongful delivery of property. *Id.* at 1013.

⁶³ *Id.*

⁶⁴ In the court's view, "[a] resident citizen of the United States has sufficient contacts with the United States to support the fairness of the exercise of jurisdiction over him by a United States court." *Id.* (quoting *Fitzsimmons v. Barton*, 589 F.2d 330, 333 (7th Cir. 1979)).

Trim-Lean demonstrates that current bankruptcy law creates the frequent possibility of federal and state courts sitting in the same locale exercising variant standards of personal jurisdiction with respect to prosecution of a state law claim against the same out-of-state defendant. Suit brought in state court by the bankrupt-to-be would fail under *International Shoe*; suit by the trustee in federal court would be allowed to go forward in consequence of the implied congressional intent to employ a federal rule of personal jurisdiction. In the event of a bankrupt firm with multistate operations, it would not be surprising to find a number of the bankrupt's debtors, who dealt with the bankrupt from afar, so situated. Adoption of a federal standard of personal jurisdiction for state law claims adjudicated in federal bankruptcy cases stands in contrast to the Second Circuit's famous en banc decision in the *Arrowsmith* case.⁶⁵ Judge Friendly, writing the *Arrowsmith* majority opinion, held that a federal court sitting in diversity must limit its assertion of personal jurisdiction to that of the courts of the state in which it sits.⁶⁶ The principles regarding the proper accommodation of federal and state interests announced in *Arrowsmith* have survived unreviewed by the Supreme Court,⁶⁷ and are generally accepted by the judiciary⁶⁸ and commentators⁶⁹ alike.

The contrast between use of a federal standard in bankruptcy cases and use of state standards in diversity cases is explained as a consequence of the express congressional power to provide uniform laws of bankruptcy and of the lack of a parallel power regarding diversity litigation. While Congress found it expedient to provide a means to concentrate all litigation related to a single bankrupt's estate in a single locale, Congress did not attempt to provide an entire body of substantive law governing the bankrupt's dealings; state law applies in many situations. The constitutional demands of diversity jurisdiction are equally satisfied by a similar arrangement, state law as to substance and, if Congress so chooses, federal law to govern everything else.⁷⁰ As discussed at length later, even Judge Friendly admits that the *Arrowsmith* decision is one of policy preference, not constitutional compulsion.⁷¹ In view of the emergence of classes of

⁶⁵ *Arrowsmith v. United Press Int'l*, 320 F.2d 219 (2d Cir. 1963).

⁶⁶ *Id.* at 231.

⁶⁷ The Supreme Court did not review the *Arrowsmith* case, see C. WRIGHT, *supra* note 5, at 304.

⁶⁸ An extensive list of cases adopting the *Arrowsmith* view, encompassing all of the federal circuits, is compiled in Annot., 6 A.L.R.3d 1103, 1110 nn.1-9 & 20.

⁶⁹ See, e.g., C. WRIGHT, *supra* note 5, at 304; Note, *Personal Jurisdiction Over Foreign Corporations in Diversity Actions: A Tillyard for the Knights of Erie*, 31 U. CHI. L. REV. 752, 778 (1964).

⁷⁰ Cf. *Hanna v. Plumer*, 380 U.S. 460, 471-72 (1965) (Supreme Court deeming all things arguably procedural to be within federal competence pursuant to 28 U.S.C. § 2072). But see *infra* notes 155-62 and accompanying text (questioning the precise holding in *Erie*). See generally Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974).

⁷¹ *Arrowsmith*, 320 F.2d at 226.

federal cases applying state substantive law yet using federal standards of personal jurisdiction, it is not too ambitious to suggest that *Arrowsmith* ought to be reexamined to determine whether its policy choice remains correct, and if so, whether those policies are better served by a different method than borrowing state standards of personal jurisdiction. This undertaking is especially appropriate after having found that in other contexts the borrowing of state standards of personal jurisdiction is ill-conceived. Similarly, Justice Stewart's statement that "due process requires only certain minimum contacts between the defendant and the sovereign that created the court"⁷² must also be reevaluated.⁷³

II. DUE PROCESS AND CONSTITUTIONAL FAIRNESS: THE RELATIONSHIP OF *PENNOYER* TO *INTERNATIONAL SHOE*

Recent decisions of the United States Supreme Court have apparently departed from the traditional logic of *Pennoyer v. Neff*⁷⁴ in assessing the constitutional validity of state court assertions of personal jurisdiction. Whereas *Pennoyer* stressed the state's sovereign power in determining whether a state could validly bind a defendant to a judgment, and linked power to presence within the territorial limits of the state,⁷⁵ modern cases adopt a different vernacular. Starting with *International Shoe Co. v. State of Washington*,⁷⁶ and culminating in a series of four decisions in the space of three years,⁷⁷ a spoken concern for fair treatment of the defendant⁷⁸ has been a major emphasis of constitutional limitation of state court power. These cases, in the name of due process, erect a constitutional requirement that no unconsenting defendant may be bound if to do so would violate "traditional notions of fair play and substantial justice."⁷⁹ It is

⁷² *Stafford*, 444 U.S. at 554.

⁷³ See *supra* text accompanying note 46. But see *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 102 S. Ct. 2099, 2108-12 (1982) (Powell, J., concurring). Powell's view, like Friendly's, admits the possibility of congressional action to establish purely federal rules of personal jurisdiction, but insists that the present dependence of federal diversity jurisdiction on state law doctrines imports limits on sovereignty as well.

⁷⁴ 95 U.S. 714 (1877).

⁷⁵ *Id.* at 722.

⁷⁶ 326 U.S. 310 (1945).

⁷⁷ *Rush v. Savchuk*, 444 U.S. 320 (1980); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Kulko v. Superior Court*, 436 U.S. 84 (1978); *Shaffer v. Heitner*, 433 U.S. 186 (1977).

⁷⁸ *E.g.*, in *Kulko* the Court stated, "[A]n essential criterion in all cases is whether the 'quality and nature' of the defendant's activity is such that it is 'reasonable' and 'fair' to require him to conduct his defense in that State." 436 U.S. at 92. The pretense that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property was viewed in *Shaffer* as a fiction containing consequences "fundamentally unfair to the defendant." 433 U.S. at 212.

⁷⁹ *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

crucial to discover in what ways this due process requirement departs from the concept of territorial power developed in *Pennoyer*.

Several relationships between *Pennoyer* and *International Shoe* are logically possible, but the two most important are: first, that the due process inquiries of *Pennoyer* and *International Shoe* are intimately related, and *International Shoe* simply defines "presence" for the purpose of deciding whether conditions for a constitutionally valid exercise of jurisdiction are met; or, second, that satisfaction of *International Shoe* requires an independent inquiry into fair treatment of the defendant as a necessary condition for the constitutionally valid exercise of jurisdiction. The first relationship is important because if it obtains, it would render the vast majority of federal assertions of personal jurisdiction constitutional without question.⁸⁰ Any defendant found within the United States would almost invariably satisfy the *International Shoe* test of presence through contact with the United States and would thereby be subject to the constitutional reach of the federal judicial power. If, however, the latter relationship obtains, then it would appear that in order to render constitutionally valid judgments even federal courts must undertake an elaborate inquiry into convenience and other factors that affect fairness.⁸¹

A. *A Preliminary View of International Shoe as the Modern Incarnation of Pennoyer*

There is much in the logic of Chief Justice Stone's majority opinion in *International Shoe* which suggests that the genesis of the previously quoted language regarding "fair play and substantial justice" is an attempt to modernize *Pennoyer* and apply it to foreign corporations doing business within the forum state. As such, *International Shoe* becomes an exercise in the application of *Pennoyer's* concept of power rather than the fount of a new and independent constitutional restraint on the assertion of personal jurisdiction.

In the era preceding *International Shoe*, corporations, although lacking a corporeal presence akin to that of individuals, had nevertheless been found amenable to assertions of personal jurisdiction by the courts of states in which such corporations conducted business.⁸² While the resultant ability to sue corporations in states other than their state of incorporation⁸³ was unobjectionable,⁸⁴ the basis for the assertion of such authority remained rather muddled.⁸⁵ Sometimes the requisite authority was deemed

⁸⁰ See *infra* text accompanying notes 82-90.

⁸¹ See Abraham, *supra* note 51; Seeburger, *The Federal Long-Arm: The Uses of Diversity, or 'Tain't So, McGee*, 10 IND. L. REV. 480 (1977).

⁸² 4 C. WRIGHT & A. MILLER, *supra* note 15, § 1066.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 224.

to be a function of implied consent to jurisdiction.⁸⁶ Less fictive theories also appeared, the most prominent of which was a theory of corporate presence. This theory looked at a defendant corporation's activities and subjected the corporation to suit "if it [was] doing business within the State in such manner and to such extent as to warrant the inference that it is present there."⁸⁷ The two distinct lines of reasoning, implied consent and corporate presence, both relied heavily on the threshold determination that a corporation was "doing business" within a state, and that term too took on a life of its own as an independent test of personal jurisdiction over nonresident corporate defendants.⁸⁸ After tracing these developments in some detail, Professors Wright and Miller conclude that *International Shoe* was the Supreme Court's "attempt to chart a course across the morass [of personal jurisdiction over nonresident corporations] by drawing some reasonably definitive guidelines."⁸⁹ This approach to *International Shoe* supports the conclusion that the minimum contacts test, although phrased with reference to fairness to litigants, is simply an elucidation of the degree of in-state activity or presence that allows the exercise of state power under the principles laid down in *Pennoyer*.⁹⁰ As stated by Professor Moore, "The principles of *International Shoe* are grounded upon concepts of territorial limitations on the power of the respective states to subject nonresidents to the jurisdiction of their courts."⁹¹ Thus, the relationship between *Pennoyer* and *International Shoe* is that they are highly similar tests of the sovereign's authority to bind a nonconsenting defendant to the judgment of its courts. In turn, it would seem that the federal courts, as representative of a nationwide sovereign could, consistent with the Constitution, exercise personal jurisdiction over a defendant without regard to convenience if the defendant is present within the United States.⁹²

B. *The Limited Role of Fairness as an Independent Constitutional Value*

Within the last twenty years two principal events gave rise to consideration of a generalized kind of fairness to a defendant as part of the essential content of the due process guarantee in the personal jurisdiction area. First, as noted above, the language appearing in several

⁸⁶ See, e.g., *St. Clair v. Cox*, 106 U.S. 350, 356 (1882).

⁸⁷ *Philadelphia & R. Ry. Co. v. McKibbin*, 243 U.S. 264, 265 (1917).

⁸⁸ 4 C. WRIGHT & A. MILLER, *supra* note 15, at 223-34; see *Hutchinson v. Chase & Gilbert, Inc.*, 45 F.2d 139 (2d Cir. 1930).

⁸⁹ 4 C. WRIGHT & A. MILLER, *supra* note 15, at 223-24.

⁹⁰ *Pennoyer*, 95 U.S. at 724-26.

⁹¹ 2 J. MOORE, *MOORE'S FEDERAL PRACTICE* ¶ 4.25[5] (2d ed. 1982).

⁹² Cf. *id.* at 4.25[5] (as to federal question cases; no position is taken regarding diversity cases).

⁹³ See *supra* notes 76-79 and accompanying text.

Supreme Court cases lends plausibility to the idea.⁹³ Second, the broad federal judicial power urged by the American Law Institute in its 1969 study of the division of jurisdiction between state and federal courts provoked a good deal of scholarly attention to this and kindred topics.⁹⁴ For example, as early as 1963, the first tentative draft of the ALI Study took the position that there were no substantial constitutional constraints relevant to federal assertions of in personam jurisdiction.⁹⁵ Professor Abraham wrote in criticism:

There appears to be more than a similarity of verbiage between the due process clauses of the Fourteenth and Fifth Amendments. There is no clear reason why the "traditional notions of fair play and substantial justice" embodied in the Fifth Amendment should not also encompass some measure of protection against inconvenient litigation, even though the protection is not identical to that accorded by the Fourteenth Amendment.⁹⁶

Although the content of the doctrinal limit advocated by Abraham is vague, it merits exploration given the recurring language in Supreme Court opinions supportive of such an interpretation. This brief survey will show, however, that there is little independent content to "fair play and substantial justice," and that this minimal content is consistent with the thesis that such a limitation is virtually meaningless in the federal courts.

The case that is most supportive of the creation of an independent fairness inquiry of constitutional magnitude is *Shaffer v. Heitner*.⁹⁷ *Shaffer* involved the constitutionality of Delaware's exercise of quasi in rem jurisdiction predicated upon sequestration of shares of stock in a Delaware corporation. Rather than consider the claim that prejudgment sequestration of the stock deprived the defendant of property without adequate notice and opportunity to be heard,⁹⁸ Justice Marshall's six member majority⁹⁹ faced head on the conditions under which quasi in rem jurisdiction could be exercised constitutionally.

Much of Marshall's analysis appears to be at odds with the preceeding section of this article which implicitly relies on the continued validity of *Pennoyer's* concept of power as the norm for testing assertions of per-

⁹³ See, e.g., Currie, *The Federal Courts and the American Law Institute*, 36 U. CHI. L. REV. 1, 268 (1968-1969) (parts 1 and 2); Foster, *Long-Arm Jurisdiction in Federal Courts*, 1969 WIS. L. REV. 9.

⁹⁴ See AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 138 (Tent. Draft No. 1, 1963); see also Abraham, *supra* note 51, at 522.

⁹⁵ Abraham, *supra* note 51, at 536.

⁹⁶ 433 U.S. 186 (1977).

⁹⁷ *Id.* at 189.

⁹⁸ Justice Marshall's opinion was joined by Justices Burger, Stewart, White, Blackmun, and Powell; Justice Stevens concurred in the judgment; Justice Brennan joined in parts I-III of Justice Marshall's opinion but dissented from part IV; Justice Rehnquist did not participate in the consideration or decision of the case.

sonal jurisdiction. In parts II and III of the *Shaffer* opinion Marshall explicitly traces and accepts the reasons for regarding *International Shoe* and not *Pennoyer* as the operative standard for measuring all assertions of state court personal jurisdiction.¹⁰⁰ Careful scrutiny, however, demonstrates that what Marshall rejects is that aspect of *Pennoyer* which mechanically measures sovereign power; he does not reject reliance on sovereign power as the delimiter of a state's asserted personal jurisdiction. What Marshall draws from *International Shoe* is not an abstract ideal of fair treatment of defendants; rather, he adopts its more flexible and realistic inquiry into when power is justifiably exercised.¹⁰¹

Context is, of course, relevant to interpretation. *Shaffer* presents the assertion of power by the State of Delaware solely on the basis of ownership of stock in a Delaware corporation.¹⁰² The claim of power is limited by the value of the property sequestered. Dicta in *Pennoyer*, read literally, would have the court inquire whether the sequestration procedure was properly invoked, and if so, conclude that the defendant can be forced to respond or risk entry of judgment for an amount up to the value of the sequestered property.¹⁰³ This limited inquiry would constitute the full scope of due process protection without regard to the relationship between the property seized and the litigation in issue, the defendant's other contacts with the forum state, or the state's connection with the particular litigants or transaction involved. Indeed, if *Pennoyer* commands such a result, it offers scant due process protection to defendants haled into court on the fortuitous basis of presence of property in the forum state. Moreover, Delaware's assertion that Delaware is the situs of intangible property like stock in a Delaware corporation compounds the hazard to potential defendants.¹⁰⁴ *Pennoyer*, however, need not be interpreted so dogmatically that a defendant's constitutional protections are virtually eliminated.

¹⁰⁰ See *infra* text accompanying note 113.

¹⁰¹ See, e.g., 2 J. MOORE, *supra* note 91.

¹⁰² *Shaffer*, 433 U.S. at 192. DEL. CODE ANN. tit. 8, § 169 (1975), makes Delaware the situs of ownership of all stock in Delaware corporations. DEL. CODE ANN. tit 10, § 366 (1975), provides for seizure of defendants' Delaware property in order to compel their appearance in court.

¹⁰³

It is in virtue of the State's jurisdiction over the property of the non-resident situated within its limits that its tribunals can inquire into that non-resident's obligations to its own citizens, and the inquiry can then be carried only to the extent necessary to control the disposition of the property.

Pennoyer v. Neff, 95 U.S. 714, 723 (1877).

¹⁰⁴

If its procedure were upheld, Delaware would, in effect, impose a duty of inquiry on every purchaser of securities in the national market. For unless the purchaser ascertains both the state of incorporation of the company whose shares he is buying, and also the idiosyncracies of its law, he may be assuming an unknown risk of litigation.

Shaffer, 433 U.S. at 219 (Stevens, J., concurring). For the basis of Delaware's assertion of jurisdiction, see *supra* note 102.

Marshall does not reject *Pennoyer's* premise that "state authority to adjudicate was based on the jurisdiction's power over either persons or property."¹⁰⁵ Instead he notes, "[T]his fundamental concept is embodied in the very vocabulary which we use to describe judgments."¹⁰⁶ In the 19th century, rote application of the test of presence of person or property performed the function of providing an easy basis on which to sanction or bar state court assertions of jurisdiction. In personam jurisdiction, for example, was easily determined on the basis of corporeal presence of the defendant within the forum state.¹⁰⁷ This mechanical means of obtaining in personam jurisdiction, standing alone, proved inadequate to meet the needs of the states to provide judicial remedies for legal disputes arising within their borders. A potential defendant could easily remove himself from the forum state and thereby avoid its jurisdiction. Marshall, in accepting this view,¹⁰⁸ found the growth of in rem and quasi in rem jurisdiction to be a response to these needs. As a matter of theory, the jurisdiction was explained as an incident of a sovereign's territorial power to control the disposition of property found within its borders.¹⁰⁹ Marshall also noted that increased interstate commerce had led to the expansion of allowable assertions of in personam jurisdiction based on contacts with the forum. This process, ultimately culminating in the adoption of the *International Shoe* standard as an allowable measure of extraterritorial reach of state in personam jurisdiction,¹¹⁰ sharply reduced the need for unthinking invocation of power over property as a sufficient basis for state court jurisdiction. Thus, the conditions were ripe for a reconsideration of jurisdiction based solely on the presence of property in the forum state.

Marshall's reading of jurisdictional history clearly indicates that *International Shoe* was first developed as a limit on extensions of *Pennoyer's* jurisdictional reach, and not as a limit upon *Pennoyer* itself. *International Shoe*, and cases like it,¹¹¹ concerned claims of in personam extraterritorial power not allowable under *Pennoyer's* rigid territorial formula. Thus, *Shaffer*, not *International Shoe*, is the watershed for convincing claims that due process fairness inquiries limit or replace the power theories of *Pennoyer*. In this respect, Marshall's central attack on *Pennoyer* is rather narrow. In personam jurisdiction based on the defendant's presence is not considered;¹¹² rather, Marshall attacks that part of *Pennoyer's* dicta pertaining to the presence of property in the forum:

¹⁰⁵ *Shaffer*, 433 U.S. at 199.

¹⁰⁶ *Id.*

¹⁰⁷ See, e.g., C. WRIGHT & A. MILLER, *supra* note 15, at 206-07.

¹⁰⁸ *Shaffer*, 433 U.S. at 210.

¹⁰⁹ *Id.* at 199-200.

¹¹⁰ *Id.* at 203-04. See also *supra* text accompanying notes 82-90.

¹¹¹ See, e.g., *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); *Hess v. Pawloski*, 274 U.S. 352 (1927); see generally 4 C. WRIGHT & A. MILLER, *supra* note 15, at 225-36.

¹¹² Marshall would not take issue with jurisdiction based on actual corporeal presence. Instead, Marshall objects to highly fictive theories that substitute for actual presence.

[A]lthough the theory that territorial power is both essential to and sufficient for jurisdiction has been undermined, we have never held that the presence of property in a State does not automatically confer jurisdiction over the owner's interest in that property. This history must be considered as supporting the proposition that jurisdiction based solely on the presence of property satisfies the demands of due process, . . . but it is not decisive. "Traditional notions of fair play and substantial justice" can be as readily offended by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures that are inconsistent with the basic values of our constitutional heritage. . . . The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justifications. Its continued acceptance would only serve to allow state court jurisdiction that is fundamentally unfair to the defendant.

We therefore conclude that all assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny.¹¹³

The logic of *Shaffer* retains force even in the case of a defendant actually present and subject to service in the forum state. There is little intuitive appeal to a state's claim that it can bind a person to the dictates of its judicial tribunals solely because that individual was fleetingly present within the territorial limits of the state.¹¹⁴ Read on this level, however, *Shaffer* challenges only *Pennoyer's* mechanistic rule that a defendant's corporeal presence in itself justifies jurisdiction. What is left unquestioned is the more general principle that sufficient presence within the forum state supports the exercise of jurisdiction. *International Shoe* and its realistic assessment of "presence" are the operative measure of when sovereign power attaches. *Pennoyer* is revised as to how it is to be applied, but its bedrock conception of territorial power is unimpaired.

Likewise, the applicability of *Shaffer's* broad language to federal courts is not self-evident. The concluding sentence of the above quoted excerpt is penned in limitation of a state's attempt to exercise *extraterritorial* authority over a defendant not present in the forum state. Its content, the *International Shoe* standard of fairness, was developed in that precise context. It is not ineluctably true that *intraterritorial* assertions of personal jurisdiction are necessarily subject to *International Shoe's* fairness scrutiny despite the presence of the word "all" in Marshall's opinion. Neither *International Shoe* nor *Shaffer* was concerned with the case of a defendant found physically within the forum, and thus their applicability to that case should be measured by the force their reasoning would

¹¹³ *Shaffer*, 433 U.S. at 211-12.

¹¹⁴ See, e.g., *Grace v. MacArthur*, 170 F. Supp. 442 (E.D. Ark. 1959). See generally Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289 (1956).

command in that context, not by the mere presence of dicta that would reach (perhaps unintentionally) the intraforum defendant.

The above analysis is corroborated by the Supreme Court's application of due process standards in *Shaffer* and subsequent cases. The *International Shoe* standard of fairness has been employed predominantly as a measuring rod for the substantiality of the defendant's presence within the forum. It has not served as a springboard for creating new types of fairness claims sufficient to prevent constitutional assertions of jurisdiction when there is more than fleeting presence in the forum. The convenience to a defendant of the forum chosen has no importance in constitutional decisionmaking.

Shaffer turns to the application of the *International Shoe* standard in part IV of the opinion. A catalog of the opinion would be tedious but the reasons offered in support of jurisdiction and Marshall's rejection of them as insufficient can be characterized as being an ad hoc determination that the defendant's contacts with Delaware were too attenuated to allow jurisdiction. For example, ownership of stock in a Delaware corporation is "not . . . sufficient to support jurisdiction."¹¹⁵ Likewise, Marshall expressly notes, "Heitner did not allege and does not now claim that appellants have ever set foot in Delaware."¹¹⁶ The most illuminating passages in the opinion reject the argument that the defendants, officers, and directors in a Delaware corporation benefitted from their Delaware association and thus should be amenable to suit in Delaware for their corporate activities. Marshall states in response that the argument "does not demonstrate that appellants have 'purposefully avail[ed themselves] of the privilege of conducting activities within the forum State,' . . . in a way that would justify bringing them before a Delaware tribunal."¹¹⁷ The purport of this language is unmistakably an analysis of whether the nonresidents have sufficient contacts to deem them "present" and thus within the scope of *Pennoyer's* power as measured by the realistic *International Shoe* standard.

Supreme Court decisions interpreting the reach of state court personal jurisdiction since *Shaffer* are likewise concerned with extraterritorial claims of power. This warrants repeating because the United States' territorial jurisdiction is, of course, not bounded by state lines. Thus, all of the Supreme Court decisions are relevant only by rough analogy when the federal courts seek to exercise personal jurisdiction over a defendant found outside the forum district but within the United States and having substantial contacts with the United States.¹¹⁸ Nevertheless, like *Shaffer's*

¹¹⁵ *Shaffer*, 433 U.S. at 213.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 216 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

¹¹⁸ The federal courts have, throughout history, been organized into districts which do not span state lines. Only once did Congress create federal fora that had territorial limits crossing state lines. See Judiciary Act of 1801, ch. 4, § 21, 2 Stat. 89. This tradition, however,

broad dicta, subsequent decisions keep alive the possibility of independent content for the concept of fairness in the exercise of judicial power.

The first post-*Shaffer* case, *Kulko v. Superior Court*,¹¹⁹ held California's claim of personal jurisdiction to enter a child support decree against a New York parent whose children were living in California with their mother violative of due process. Justice Marshall, again writing for a six member majority,¹²⁰ applied the *International Shoe* standard and found insufficient "affiliating circumstances" to satisfy the test.¹²¹ More interesting, however, is his comment on the fact that California, in defense of its assertion of power did not seek to rely on defendant's fleeting presence in California many years earlier. After noting that Kulko had passed through the state on his way to and from the Korean War, Marshall stated: "To hold such temporary visits to a State a basis for the assertion of in personam jurisdiction over unrelated actions arising in the future would make a mockery of the limitations on state jurisdiction imposed by the Fourteenth Amendment."¹²² The clear import of the passage is that a defendant's physical presence in the jurisdiction may, in some cases, fail to sustain the invocation of in personam jurisdiction.

Even more recently, the Court decided a pair of cases involving long-arm jurisdiction and jurisdiction by attachment of property. In *World-Wide Volkswagen Corp. v. Woodson*¹²³ Justice White refused to allow Oklahoma to exercise in personam jurisdiction over a retail seller and East Coast regional distributor of an allegedly defective automobile which had been driven to Oklahoma and been involved in a collision there. Although relying on a classic minimum contacts rationale as the basis for decision, White's opinion talks of due process as protective of dual interests:

[M]inimum contacts, in turn, can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts

should not be taken to belie the power of the federal government to arrange its courts on a unitary national basis.

¹¹⁹ 436 U.S. 84 (1978).

¹²⁰ Justice Marshall's opinion was joined by Chief Justice Burger and Justices Stewart, Blackmun, Rehnquist and Stevens; Justice Brennan's dissenting opinion was joined by Justices White and Powell.

¹²¹ *Kulko*, 436 U.S. at 92.

¹²² *Id.* at 93. The facts of *Kulko* are not particularly helpful for drawing lines concerning the quantum of presence in the forum that will suffice. The California presence was 13 years before the litigation commenced, for a mere total of four days and it was wholly unrelated to the cause of action being litigated. *Id.* *Kulko* can thus be viewed as supporting a broad interpretation of the *Shaffer* dictum that would have *International Shoe* be the sole modern authority to be consulted in determining consonance with due process. Similarly, there is nothing in *Kulko* which either supports or negates the possibility that fairness could be violated, even in a case of less fleeting presence.

¹²³ 444 U.S. 286 (1980).

to ensure that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.¹²⁴

In reading White's opinion it is difficult to be certain whether a defendant, on the basis of claimed inconvenience alone, is constitutionally protected from a plaintiff's choice of an inconvenient forum. Three factors account for this uncertainty. First, White specifically notes that the defendant's convenience interest is to be weighed against a number of other factors "including the forum State's interest in adjudicating the dispute, . . . the plaintiff's interest in obtaining convenient and effective relief, . . . the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering substantive social policies . . ."¹²⁵ Second, White recognizes that the guarantee against inconvenience has been "substantially relaxed over the years"¹²⁶ due to a "fundamental transformation in the American economy."¹²⁷ Third, in actually deciding that due process would be violated if World-Wide could be forced to litigate in Oklahoma, White speaks of a specialized kind of foreseeability measured in terms of whether a defendant "should reasonably anticipate being haled into court there."¹²⁸ Thus, it is difficult to ascertain what, if any, concrete constitutional significance attaches to the inconvenience criterion. Judging from White's own qualification of the idea as well as his reliance on a test that does not speak in terms of inconvenience as the basis for decision, inconvenience can be seen to limit state court assertions of personal jurisdiction in only the most attenuated way.

*Rush v. Savchuk*¹²⁹ was decided as a companion case to *World-Wide Volkswagen*. *Rush*, however, involved quasi in rem jurisdiction obtained by attaching the obligation of the defendant's insurer to defend lawsuits arising out of the operation of the insured's automobile.¹³⁰ Justice Marshall wrote the majority opinion which reiterated the teaching of *Shaffer* that all assertions of jurisdiction are to be measured by the *International Shoe* standard. Focusing on the insured's total lack of contact with the forum save the activities of his insurance company, Marshall easily concluded that *International Shoe* was not satisfied.¹³¹ Only one passage in the opinion is of note to the present inquiry. In reviewing the basis on which "*Seider*

¹²⁴ *Id.* at 291-92.

¹²⁵ *Id.* at 292.

¹²⁶ *Id.* at 293.

¹²⁷ *McGee v. International Life Ins. Co.*, 355 U.S. 220, 222-23 (1957).

¹²⁸ *World-Wide Volkswagen*, 444 U.S. at 297.

¹²⁹ 444 U.S. 320 (1980).

¹³⁰ This method of establishing quasi in rem jurisdiction is authorized in Minnesota by MINN. STAT. § 571.41, subd. 2 (1978).

¹³¹ *Rush*, 444 U.S. at 329.

type"¹³² jurisdiction had been previously sustained, Marshall stated that those opinions impermissibly "shift the focus of the inquiry from the relationship among the defendant, the forum, and the litigation to that among the plaintiff, the forum, the insurer, and the litigation."¹³³ The emphasis on the defendant may be taken to suggest that convenience is relevant, but it can hardly be construed as an explicit and absolute constitutional requirement.

Although the foregoing review of the Supreme Court's most recent treatment of due process attacks on state court jurisdiction has been somewhat tedious, it establishes that no credible convenience requirement exists as a matter of constitutional necessity. At most, a defendant's interest in a convenient forum has received some support as an interest protected by, and almost wholly subsumed by, the minimum contacts inquiry. Even in the cases most congenial to the convenience concept, a constitutional interest in a defendant's convenience has played no part in the decisional calculus and is discounted to accommodate systemic interests in administration of an interstate system of courts.¹³⁴

Even more problematic is the claim that this amorphous constitutional interest restricts the courts of a sovereign that finds a defendant currently present within its borders. All of the decided cases involve extraterritorial assertions of power; all involve one of the several states as sovereign, not the United States; all accept the fundamental aspect of *Pennoyer* which conjoins sovereign power and personal jurisdiction. What the cases discuss and resolve is the standard by which the equivalent of presence is established so that the sovereign may bind a party to the judgment of its courts. At the very most, modern due process analysis suggests that fleeting corporeal presence standing alone without other "affiliating contacts" may no longer be adequate justification for a finding of in personam jurisdiction. A defendant's convenience is not the constitutional foundation of such a limitation on *Pennoyer*'s literal claim of power in such a case.¹³⁵

¹³² *Seider v. Roth*, 17 N.Y.2d 111, 216 N.E.2d 312 (1966). The court in *Seider* held that the contractual obligation of an insurance company to its insured under a liability insurance policy is a debt subject to attachment under state law if the insurer does business in the state and that jurisdiction may be predicated on such attachment. *Id.* at 114, 216 N.E.2d at 314.

¹³³ *Rush*, 444 U.S. at 332.

¹³⁴ See, e.g., *supra* text accompanying note 124.

¹³⁵ The conclusion that due process should be measured without reference to defendant's convenience (either independently or as a strand of fairness, see *infra* text accompanying notes 136-50) may strike some readers as surprising or incorrect. A less ambitious position also justified by the analysis of this article would admit that due process imposes some concept of convenience but that interest need not be manifested as an abstract rule of "jurisdiction." Instead, individualized case-by-case decisions regarding transfer or dismissal better honor the constitutional concern. See, e.g., *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981); 28 U.S.C. § 1404 (1976).

*C. Vindication of Fairness Values Without Limiting
Personal Jurisdiction*

Apart from the claim that *International Shoe* has taken on a due process life of its own, two other assaults on the validity of *Pennoyer* were urged by Professor Ehrenzweig in an earlier era. First, that *Pennoyer* was mere ipse dixit;¹³⁶ second, and far more important for present purposes, that *Pennoyer* and its concept of territorial power leads courts to ask the wrong question and obtain the wrong result in the case of transient defendants fortuitously served while within the forum.¹³⁷ Ehrenzweig's two attacks on *Pennoyer* both stem from a concern for the convenience of the defendant; this concern bears further exploration before claiming with full confidence that personal jurisdiction has no constitutional role in assuring the protection of a defendant's inconvenience.

Ehrenzweig posits the proverbial "hard case" and defies the logic of *Pennoyer* to solve it in a jurisprudentially satisfactory manner. He opens his famous attack on *Pennoyer* picturing an about-to-be defendant seated in the lounge of a transcontinental airliner. Once the plane enters the forum state's airspace, that unfortunate soul is served with process.¹³⁸

For many years to come, to his great expense and greater annoyance, he will have to defend a law suit in a New York court three thousand miles away from his home, even though the plaintiff may be a spiteful competitor alleging a fanciful claim dating back many years to a trip abroad.¹³⁹

Also troubling to Ehrenzweig is the fact that the forum can be one "where neither plaintiff nor defendant resides and which has no connection with the cause of action."¹⁴⁰ It is not necessary to disagree that a number of evils inhere in the hypothetical tagging episode; the only inquiry that must be undertaken for the moment is ascertaining whether the due process clause of the Constitution forbids the practice because of inconvenience or unfairness to the defendant.¹⁴¹

A first line of response to the problem is to argue that tagging, however odious in this particular instance, is a legislatively struck balance between a plaintiff's need to be able to commence an action and a defendant's interest in being free from inconvenience. Such a response avoids giving

¹³⁶ Ehrenzweig, *supra* note 114, at 296.

¹³⁷ *Id.* at 289-90.

¹³⁸ *Id.* at 289. See *Grace v. MacArthur*, 170 F. Supp. 442 (E.D. Ark. 1959).

¹³⁹ Ehrenzweig, *supra* note 114, at 289.

¹⁴⁰ *Id.*

¹⁴¹ It is possible to argue persuasively that "tagging" violates due process or other constitutional guarantees because fleeting presence is insufficient to allow the sovereign's power to attach. A finding of unconstitutionality on a lack of presence theory, however, is theoretically distinct from a similar finding predicated on an inconvenience theory.

a direct answer to whether the interest of inconvenience is constitutionally relevant by suggesting that even if it is, it stands in equipoise to the plaintiff's equal and opposite due process interest in being able to invoke the judicial system to adjudicate a dispute.¹⁴² The legislative choice preferring plaintiffs may be imperfect, but it is hardly susceptible to substantive invalidation¹⁴³ in the post-*Lochner*¹⁴⁴ era. Further, to the extent that the magnitude of the burden on would-be defendants is relevant in determining whether the Constitution forbids the practice¹⁴⁵ other ameliorative devices are available.¹⁴⁶

Although this treatment of Ehrenzweig's hypothetical is rather cursory, the conclusion is sound. While the hypothetical chronicles a substantial abuse of the coercive power of a judicial system, the proper remedy is not a denial of jurisdiction on the basis of constitutional theories which are demonstrably difficult to adjudicate. Ehrenzweig would probably agree that his objections to jurisdiction are nonconstitutional in origin.¹⁴⁷ Instead, he finds their basis in international law precedents¹⁴⁸ and in the inexact analogy between the several states and independent nations.¹⁴⁹ He views

¹⁴² Cf. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1383-84 (1952-1953) (suggesting a possible constitutional imperative commanding grant of jurisdiction to vindicate plaintiff's vested rights).

¹⁴³ In the modern era, such legislative choices need only demonstrate a real or substantial relation to the objective of the law in order to be upheld. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 8-7, at 450-51 (1978).

¹⁴⁴ *Lochner v. New York*, 198 U.S. 45 (1905), was the origin of the doctrine that due process authorized courts to hold laws unconstitutional when they believed the legislature had acted unwisely. This doctrine has been subsequently disavowed by the Court on many occasions. See generally Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 937-39 (1973).

¹⁴⁵ It may not be relevant. Cf. *Carlson v. Green*, 446 U.S. 14, 18-19 (1980) (Justice Brennan's majority opinion indicates that a judicially created remedy for violation of a federal constitutional right can be eclipsed if "congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the constitution and viewed as equally effective") (emphasis in the original). Analogously the legislature, by opting for tagging and providing the amelioratives outlined *infra* note 146 could arguably pretermit consideration of burdens on defendant as a constitutionally required inquiry.

¹⁴⁶ In the federal courts, Ehrenzweig's unlucky transient could forfend protracted litigation of a spurious suit through a motion to dismiss for failure to state a claim or through a motion for summary judgment. FED. R. CIV. P. 12(b)(6) and 56. He could engage in effective discovery by methods not requiring him to leave his west coast abode, e.g., *id.* 30(b)(7) (oral deposition by telephone), 31 (deposition upon written questions), 33 (interrogatories), and 36 (request for admission), while simultaneously enjoying protection against harassment in discovery, see *id.* 26(c), and possibly obtaining costs and attorney's fees for some of the work involved, *id.* 37(a)(4), (b)-(d). A state court may invoke the forum non conveniens doctrine and dismiss, see generally F. JAMES & G. HAZARD, *CIVIL PROCEDURE* 631 (2d ed. 1977), while in the federal system a change of venue may be possible, see, e.g., 28 U.S.C. § 1404 (1976); see also *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981) (federal use of forum non conveniens). Finally, it is no longer patent that transcontinental travel is so inherently burdensome as to be constitutionally proscribed in a situation such as that befalling Ehrenzweig's unfortunate traveler.

¹⁴⁷ Ehrenzweig, *supra* note 114, at 292-93.

¹⁴⁸ *Id.* at 289 n.3, 302-03.

¹⁴⁹ *Id.* at 308-12.

the fundamental error of *Pennoyer* to be the conclusion that mere transient presence was, in the 19th century, a wholly sufficient condition for the exercise of jurisdiction over the person. Further, his objection is limited to the case of transients only temporarily found within the forum. Thus, even if one grants force to all aspects of his argument, it is a surprisingly narrow inroad on the modern uses of *Pennoyer*. The jurisdiction that Ehrenzweig would deny is precisely that which is most questionable after the decisions in *Shaffer*, *Kulko*, *World-Wide* and *Rush*, all of which concern assertions of power where presence is either fictive or de minimus.¹⁵⁰ Thus, as was the case before, the argument does little to establish due process guarantees against inconvenient litigation. It raises important policy concerns, but they are lessened by the available panoply of ameliorative procedural devices which reduce the burden on defendants in such suits. In all, the best course appears to be that of leaving remedies for inconvenience on a nonconstitutional plane.¹⁵¹

III. *ERIE* AS A CONSTITUTIONAL CHECK ON PERSONAL JURISDICTION IN A COMPLEX SYSTEM OF FEDERAL AND STATE COURTS

Thus far concern was focused on due process based constraints surrounding the assertion of personal jurisdiction. The precedents studied have been cases involving state courts, but the conclusions have been drawn with an eye toward how the federal courts should ascertain the constitutional limits of their power to bind unconsenting defendants. The standard which has emerged is that the federal courts are, in reliance on a revised view of *Pennoyer v. Neff*'s¹⁵² theory of sovereign power, constitutionally free to claim personal jurisdiction over any defendant found within the United States.

The standard was developed without reference to *Arrowsmith v. United Press International*¹⁵³ which demonstrated the centrality of federalism concerns to a complete theory of federal personal jurisdiction. Specifically, the possible applicability of the dictates of *Erie Railroad v. Tompkins*¹⁵⁴

¹⁵⁰ See generally *supra* notes 97-133 and accompanying text. The presence in Delaware of the *Shaffer* defendants was certainly fictive. As the Court noted, "Heitner did not allege and does not now claim that appellants have ever set foot in Delaware. Nor does he identify any act related to his cause of action as having taken place in Delaware." *Shaffer*, 433 U.S. at 213. The "presence" in Delaware of the stock by which Heitner sought to force the defendants to appear in court was supported by a statutory fiction. See *supra* note 102. In *Kulko*, defendant's presence in the forum state was only marginally greater. See *supra* text accompanying notes 119-22.

¹⁵¹ The issue of tagging and its implications is extensively treated in Posnak, *A Uniform Approach to Judicial Jurisdiction After World-Wide and the Abolition of the "Gotcha" Theory*, 30 EMORY L.J. 729 (1981). A rich and diverse pre-existing literature is cited by Professor Posnak. *Id.* at 731 nn.10 & 11.

¹⁵² 95 U.S. 714 (1877).

¹⁵³ 320 F.2d 219 (2d Cir. 1963).

¹⁵⁴ 304 U.S. 64 (1938).

must be considered. There Justice Brandeis suggested that a federal court's application of state law is constitutionally required with respect to some issues in diversity cases. If personal jurisdiction is within the constitutional shadow of *Erie*, the standard advocated in this article cannot be applied in diversity cases. Alternatively, if personal jurisdiction is distinguishable from the constitutional aspect of *Erie*, the discussion may provide guidance about the extent to which a nonconstitutional limitation on federal court jurisdiction is advisable.

A. *The Constitutional Content of the Erie Decision*

The decision in *Erie* is a bit of an oddity as a benchmark of constitutional adjudication. Justice Brandeis expressly claimed it to be a constitutional decision, yet there is virtually no citation of the applicable constitutional provisions or of any case law deriving those identifying provisions.¹⁵⁵ Scholars have explicated the analysis omitted by Brandeis, finding its essence to be the absence of a grant of constitutional authority to the federal government to provide the rule of decision in a diversity case.¹⁵⁶ This argument is spawned by the tenth amendment¹⁵⁷ and the lack of express federal power to displace state regulation of the type involved in *Erie*.¹⁵⁸ The grant to Congress of authority to vest diversity jurisdiction in the federal courts¹⁵⁹ is found to be an insufficient constitutional predicate to support federal regulation of the underlying events that gave rise to the state law created cause of action.¹⁶⁰ Likewise, neither the abundantly broad commerce clause¹⁶¹ nor the necessary and proper clause¹⁶² allow federal fixing of the rule of decision in a situation like *Erie* where the sole federal connection with the case is its fortuitous presence in federal court as a result of the citizenship of the parties.

The concept of personal jurisdiction, however, is not readily equated with the application of a general federal common law to diversity cases.

¹⁵⁵ *Id.* at 78-79, 80.

¹⁵⁶ See, e.g., Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 702-05 (1974).

¹⁵⁷ "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

¹⁵⁸ In *Erie*, this involved the rule of decision in a tort case as to whether a person on a longitudinal path beside a railroad is a trespasser or a licensee. *Erie*, 304 U.S. at 70.

¹⁵⁹ "The judicial Power shall extend . . . to Controversies . . . between Citizens of different States . . ." U.S. CONST. art. III, § 2, para. 1.

¹⁶⁰ "Congress has no power to declare substantive rules of common law applicable in a state . . ." *Erie*, 304 U.S. at 78.

¹⁶¹ "The Congress shall have Power . . . To regulate Commerce . . . among the several States . . ." U.S. CONST. art. I, § 8, cl. 3.

¹⁶² "The Congress shall have Power . . . to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this constitution in the Government of the United States, or any Department or Officer thereof." U.S. CONST. art. I, § 8 cl. 18.

Congress enjoys express article III power to create federal courts and vest subject matter jurisdiction for deciding diversity cases.¹⁶³ If the power to authorize application of federal standards of personal jurisdiction is not an inherent element of this express power, it is surely an incident of the necessary and proper powers granted to effectuate express powers.¹⁶⁴ Even decisions like *Arrowsmith*, which adopt a state standard of personal jurisdiction in federal diversity actions, readily concede that the reason for using a state standard is nonconstitutional. Judge Friendly's language stating this position is clear: "[W]e fully concede that the constitutional doctrine announced in [*Erie*] would not prevent the 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."¹⁶⁵ Thus, constitutionally, the federal courts may apply a federal personal jurisdiction standard in diversity cases.

B. Federalism and Choice of Law

Erie's constitutional theory is not, however, its sole contribution to instruction regarding the proper role of the federal courts in a judicial system that includes parallel state and federal enforcement of state created causes of action. The far more accessible portion of Brandeis' opinion described the evils of shopping for the forum providing the most favorable substantive law governing the dispute. In his criticism of *Swift v. Tyson*'s¹⁶⁶ acceptance of general federal common law, Brandeis recalled the infamous *Taxicab* case¹⁶⁷ in which an anticompetitive contract was made enforceable by altering the place of the plaintiff's incorporation to achieve diversity. Indeed, the subsequent history of *Erie* in the Supreme Court seems most concerned with prevention of forum shopping for "outcome determinative"¹⁶⁸ choice of laws.¹⁶⁹

Personal jurisdiction is outcome determinative only in the sense that a suit which would otherwise be dismissed might be allowed to proceed to consideration on the merits. Thus, if the federal standard for personal jurisdiction can be satisfied when the state standard cannot, a plaintiff

¹⁶³ See *supra* notes 1 & 159.

¹⁶⁴ See *supra* note 162.

¹⁶⁵ *Arrowsmith*, 320 F.2d at 226 (*Erie* citation omitted).

¹⁶⁶ 41 U.S. (16 Pet.) 1 (1842).

¹⁶⁷ *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1928).

¹⁶⁸ See, e.g., *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949); *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949); *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945). But see *Hanna v. Plumer*, 380 U.S. 460 (1965) (outcome determinative test is not sole criterion in *Erie* cases).

¹⁶⁹ See, e.g., *Van Dusen v. Barrack*, 376 U.S. 612 (1964); *Griffin v. McCoach*, 313 U.S. 498 (1941); *Klaxon Co. v. Stentor Elec. Co.*, 313 U.S. 487 (1941).

would be able to obtain litigation on the merits in federal court but would suffer dismissal without prejudice to the merits in state court. While this is obviously of substantial benefit to a plaintiff, resort to federal court in this context does not appear to possess exactly the same evils as the *Taxicab* case. Plaintiff gains a hearing on the merits but not application of federal substantive law different (and more favorable to him) than state law.¹⁷⁰ Thus, little readily apparent concern attaches to the use of a federal standard of personal jurisdiction.¹⁷¹

This benign conclusion ignores the full panoply of choice of law considerations that might be involved in selecting a federal forum in a state whose courts could not obtain personal jurisdiction over the defendant. The foremost practical application of *Erie* is that the federal diversity court pretends to be a court of the state in which it sits. Thus, for example, if the federal court in Minnesota can obtain personal jurisdiction over a defendant when the state courts of Minnesota cannot, a substantive law would be chosen on the basis of Minnesota's choice of law principles.¹⁷² The potential importance of this practice is not insubstantial, as is demonstrated by reconsidering the facts presented by *Rush v. Savchuk*.¹⁷³

In *Rush*, the underlying controversy involved an attempted recovery by a motor vehicle passenger against the allegedly negligent driver.¹⁷⁴ The injury was sustained in Indiana while both driver and passenger were Indiana residents with no ostensible connection with Minnesota. Plaintiff Savchuk moved to Minnesota some time after the accident, for purposes unrelated to obtaining diversity jurisdiction.¹⁷⁵ The United States Supreme Court effectively held that defendant lacked sufficient contacts with Minnesota to allow the state courts to assert personal jurisdiction.¹⁷⁶ It is clear, however, that defendant Rush had sufficient contacts with the United States so that it would not be unconstitutional for a federal court to enter an in personam judgment against him. Minnesota would be a proper venue for a diversity action between him and Savchuk.¹⁷⁷ If it is

¹⁷⁰ The federal court would still apply state law in accordance with *Erie*. The state law applied could be different from the state law that would be applied in other state courts which are able to obtain personal jurisdiction over the defendants.

This possibility of forum shopping has not inhibited the federal courts from entertaining state court suits when the sister state court lacks jurisdiction. Even the Second Circuit, which authored *Arrowsmith*, has adopted a theory of pendant personal jurisdiction, see *International Controls Corp. v. Vesco*, 593 F.2d 166, 175 n.5 (2d Cir. 1979), cert. denied, 442 U.S. 941 (1979), and allowed joinder of claims that are not within the reach of a state's long-arm statute to claims that are within the statute. See *Hargrave v. Oki Nursery, Inc.*, 646 F.2d 716 (2d Cir. 1981).

¹⁷¹ But see *infra* text accompanying notes 173-80 & 292-348.

¹⁷² See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

¹⁷³ 444 U.S. 320 (1980).

¹⁷⁴ *Savchuk v. Rush*, 311 Minn. 480, 482, 245 N.W.2d 624, 626 (1976).

¹⁷⁵ *Rush*, 444 U.S. at 322.

¹⁷⁶ *Id.* at 332-33.

¹⁷⁷ See 28 U.S.C. § 1391(a) (1976).

assumed that service of process can be obtained on Rush,¹⁷⁸ there is no obstacle to federal litigation on the merits. Minnesota choice of law rules would govern, and, as was found in the actual litigation, Minnesota would refuse to defer to Indiana's guest passenger statute in adjudicating the case.¹⁷⁹ Assuming *arguendo* that Savchuk could prove that ordinary negligence, but not gross negligence, caused the injury, the availability of a federal forum would result in a predictable victory for plaintiff in a case which would fail on the merits if tried in a constitutionally acceptable state forum such as Indiana.¹⁸⁰ The end result of the application of a federal standard of personal jurisdiction is precisely the kind of result-oriented forum shopping that *Erie* and its progeny so clearly disapprove.

In defending the use of the federal standard, some comfort may be sought in questioning whether service on Rush can, in reality, be obtained.¹⁸¹ It is true that no federal law would provide authorization for extraterritorial service on facts like those set forth in *Rush*. Rule 4(e) of the Federal Rules of Civil Procedure, however, would allow extraterritorial service of process in accordance with state law. Since many states routinely allow extraterritorial service of process,¹⁸² no consistent margin of protection against this form of forum shopping can be assured by the difficulty of obtaining service. It is worth recalling that prior discussion of rule 4(e) explicitly rejected the idea that federal borrowing of state service of process provisions also borrows constitutional limitations on personal jurisdiction.¹⁸³ Thus, at least sporadic episodes will occur in which resort to the advocated federal standard of personal jurisdiction will result in using diversity jurisdiction as a means of forum shopping for more favorable governing law. That the choice is between the laws of two states rather than between state and federal law does not eliminate the unseemliness of the practice.

¹⁷⁸ Minnesota provides for extraterritorial service in 48 MINN. STAT. ANN., R. C. P. 4.04 (West 1979). This provision may be borrowed by the federal court sitting in diversity under FED. R. CIV. P. 4(e).

¹⁷⁹ *Rush*, 311 Minn. at 496, 245 N.W.2d at 633 (Otis, J., dissenting).

¹⁸⁰ Indiana would be a constitutionally acceptable forum and Indiana would apply its automobile guest statute, IND. CODE § 9-3-3-1 (1982), thereby requiring proof of "wanton or willful misconduct" which by hypothesis was not possible on these facts. The possibility exists that there are other states with which Rush has sufficient contacts to allow them to exercise in personam jurisdiction over claims lodged against him. Any of those states may opt to apply a choice of law rule that ignores Indiana's guest passenger law. In such a case, state choice of law rules would provide the same windfall to Savchuk as would a purely federal concept of personal jurisdiction conjoined with the *Erie-Klaxon* doctrine. There is some possibility that the forum state might be unable to apply its own law owing the lack of affiliation with the subject matter of the litigation. See *infra* text accompanying note 191. The possibility remains that the non-affiliated forum could choose Minnesota's law to govern. The key point, however, is that in most instances the availability of a markedly more favorable choice of state law will be directly attributable to a federal personal jurisdiction rule and the *Erie-Klaxon* choice of law rule.

¹⁸¹ See *supra* note 178.

¹⁸² See *supra* notes 17 & 18.

¹⁸³ See *supra* text accompanying notes 114-34.

It is likewise unhelpful to suggest that the real evil is overly liberal state choice of law rules rather than forum shopping engendered by the advocated federal personal jurisdiction standard. The point is valid to the extent it links forum shopping to Minnesota's disregard of Indiana's guest passenger statute,¹⁸⁴ but restrictions on state choice of law as a solution to the problem will not be forthcoming.¹⁸⁵ The Supreme Court has shown little inclination to restrict a state's choice of law on constitutional grounds.¹⁸⁶ Very recently, the Court in *Allstate Insurance Co. v. Hague*¹⁸⁷ allowed Minnesota to apply its own rule regarding stacking of liability insurance policies in a case with a marked preponderance of Wisconsin contacts.¹⁸⁸ While the case involved no questionable assertion of personal jurisdiction, Minnesota had little interest in the underlying transaction until after the beneficiary of the policies moved to Minnesota and brought suit against the insurer.¹⁸⁹ Justice Brennan's plurality opinion, as well as that of the dissenters, stressed the narrow scope of federal constitutional review of state choice of law decisions.¹⁹⁰ Brennan noted, and the dissenters agreed, that both full faith and credit and due process merge into a single inquiry, requiring the state whose law is to be applied to have "significant contacts" with the litigation.¹⁹¹

There is an unmistakable linguistic similarity in the standard protecting defendants against unfair choice of law through ingenious forum shopping and *International Shoe's* protection against unconstitutional assertions of personal jurisdiction.¹⁹² Examination of the precedents, however, suggests that the minimum contacts of *International Shoe* are more demanding than the significant contacts that will justify application of a particular state's law.¹⁹³ The reason for the relative laxity of Supreme Court review of choice of law is perhaps best explained by Justice Stevens' concurrence in *Hague*.

¹⁸⁴ See *supra* text accompanying note 179.

¹⁸⁵ The textual statement and argument presume an absence of state self-restraint as a remedy for the problem of conflicts of law.

¹⁸⁶ See, e.g., Sedler, *Constitutional Limitations on Choice of Law: The Perspective of Constitutional Generalism*, 10 HOFSTRA L. REV. 59 (1982); Martin, *Personal Jurisdiction and Choice of Law*, 78 MICH. L. REV. 872 (1980).

¹⁸⁷ 449 U.S. 302 (1981).

¹⁸⁸ *Id.* at 305.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 312-13 (opinion of Brennan, J.); *id.* at 332 (Powell, J., dissenting). Justices White, Marshall, and Blackmun joined in Justice Brennan's opinion. Justice Stevens concurred in the judgment. Justice Powell's dissent was joined by Chief Justice Burger and Justice Rehnquist. Justice Stewart did not participate.

¹⁹¹ *Id.* at 312-13 (opinion of Brennan, J.); *id.* at 332 (Powell, J., dissenting).

¹⁹² Compare *Hague*, 449 U.S. at 312-13 with *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

¹⁹³ Compare *Watson v. Employers Liab. Assurance Corp.*, 348 U.S. 66 (1973); *Clay v. Sun Ins. Office, Ltd.*, 337 U.S. 179 (1964); *Cardillo v. Liberty Mut. Ins. Co.*, 330 U.S. 469 (1947); and *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532 (1935) with *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) and *Kulko v. Superior Court*, 436 U.S. 84 (1978).

Unlike the majority and most commentators,¹⁹⁴ Stevens asserts that full faith and credit and due process serve separable functions relating to "transform[ing] the several States from independent sovereigns into a single, unified Nation,"¹⁹⁵ and fairness,¹⁹⁶ respectively. Stevens notes that almost invariably a forum state may, consistent with full faith and credit's federalism commands, choose to advance the policies served by its own laws in preference to those of another state.¹⁹⁷ Likewise, Stevens postulates that due process violations arising from total arbitrariness would be rare in cases where the forum chooses its own law because it is patently rational for judges to wish to deal with a body of law with which they are already familiar.¹⁹⁸ Thus, for Stevens, the only operative ground for invalidation in choice of law cases is the fairness prong of due process.

Stevens argues that the crux of decided cases invalidating a forum's choice of its own law "can be explained as attempts to prevent a State with minimal contact with the litigation from materially enlarging the contractual obligations of one of the parties where that party had no reason to anticipate the possibility of such enlargement."¹⁹⁹ If Justice Stevens' analysis is correct, the operative inquiry is really one aimed at preventing frustration of justifiable expectations about governing law. Contacts with the forum which will render application of its law permissible need not be contacts of the defendant. In *Hague*, for example, the due process inquiry is ended for Stevens by noting that Allstate had no firm assurance that a "no stacking" rule would apply. Allstate did not try to specify the governing law in its policies; it did not limit coverage to occurrences in non-stacking states; it "presumably was aware that Minnesota law, as well as the law of most states, permitted 'stacking'."²⁰⁰ In short, no unfair frustration of legitimate, expressly bargained for, governing principles occurred.

The brief comparison²⁰¹ of the protection offered against unconstitutionally unfair choice of law and unconstitutionally unfair assertions of personal jurisdiction appears to indicate that the Supreme Court will monitor more closely state assertions of jurisdiction than state choice of

¹⁹⁴ See, e.g., B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS, 188-89 (1963); Martin, *supra* note 186; Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587 (1978). For support of Justice Stevens' view, see Kirgis, *The Roles of Due Process and Full Faith and Credit in Choice of Law*, 62 CORNELL L. REV. 94 (1976).

¹⁹⁵ *Hague*, 449 U.S. at 322.

¹⁹⁶ *Id.* at 326.

¹⁹⁷ *Id.* at 323 & 323 n.9.

¹⁹⁸ *Id.* at 326.

¹⁹⁹ *Id.* at 327 n.16.

²⁰⁰ *Id.* at 330.

²⁰¹ For a more detailed comparison, see Martin, *supra* note 186. See also sources cited *id.* at 877 n.32; Symposium, *Choice of Law Theory After Allstate Insurance Co. v. Hague*, 10 HOFSTRA L. REV. 1 (1981).

laws.²⁰² Consequently, a dilemma remains for federal diversity courts concerned with protecting defendants from "unfair" but constitutional state choice of law rules. The federal courts, out of comity,²⁰³ could choose to borrow state standards of personal jurisdiction as its own. This would eliminate the potential forum shopping, but at the expense of unnecessarily limiting congressionally authorized jurisdiction that can be exercised without constitutional impediment.²⁰⁴ Absent any congressional expression of intent to entertain this limitation, it seems ill-advised.²⁰⁵

Thus, the dilemma remains and must be solved either by congressional action regarding altered federal standards for personal jurisdiction, service of process, or venue, or by confronting the choice of laws question in search of a rule for federal courts that avoids unfairness. The final two sections consider each of these approaches in more detail.

IV. CONGRESSIONAL DEFINITION OF THE LIMITS OF DEFENDANT AMENABILITY TO FEDERAL COURT AUTHORITY: A MORE RADICAL PROPOSAL

Thus far this article has focused primarily on measuring the constitutional limitations that constrain the federal courts in asserting personal jurisdiction. A working model of an appropriate federal standard was drawn from extending *Pennoyer v. Neff*'s²⁰⁶ concept of state sovereignty to the United States as sovereign. This standard was subsequently found to be constitutionally permissible. The role and function of concepts such as venue and service of process were touched upon only insofar as their use and application related to the constitutionality of the advocated federal standard. This section will consider in more detail a plan for congressional modification of personal jurisdiction, service, and venue as a means of more fully articulating and rationalizing federal assertions of judicial power. This inquiry is undertaken against a background of congressional reluctance to enter the field, as evidenced by the failure of the ALI proposals²⁰⁷ to achieve enactment within more than a decade after their development.²⁰⁸ Nevertheless, the extent to which modification of federal

²⁰² Compare *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981) with *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

²⁰³ The role of comity in the federal system is sometimes prominent. See, e.g., *Younger v. Harris*, 401 U.S. 37 (1971). In the instant context situations may arise in which the forum state's policies would in part be undermined by federal adjudication. See *Woods v. Interstate Realty Co.*, 337 U.S. 585 (1949).

²⁰⁴ See *supra* text accompanying notes 90-135.

²⁰⁵ Cf. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821) (judiciary has no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given).

²⁰⁶ 95 U.S. 714 (1877).

²⁰⁷ See *supra* note 95 and accompanying text.

²⁰⁸ The final draft of the ALI proposal was published in 1969.

service and venue provisions effectuates the rational exercise of the federal judicial power to bind defendants remains pertinent.

*A. Total Elimination of the Personal Jurisdiction
Inquiry in the Federal Courts*

The baseline content of federal personal jurisdiction is insistence on the defendant having contacts with the United States. These contacts must be such that it is not unreasonable for the United States as a sovereign to force the defendant to respond to the summons of its judicial system.²⁰⁹ For suits involving defendants who are either United States citizens or residents, the requirement seems to be met without need for reflection upon the details of the case at hand.²¹⁰ Accordingly, the doctrine of personal jurisdiction will have relevance, if at all, only in the case of nonresident foreign individuals or entities sued in the federal courts. Here, as with diversity, article III provides adequate constitutional authorization for Congress to act in commanding appearance.²¹¹ In contrast to intraterritorial assertions of judicial power, however, principles of international law, possibly in conjunction with *International Shoe's* limits on extraterritoriality, would seem to govern the ability of the United States to exercise jurisdiction in these cases.²¹²

International law standards of amenability to personal jurisdiction are quite amorphous,²¹³ stressing the need for the forum nation to have sufficient contact with the litigation to have an interest in providing a forum. Undoubtedly there is some measurable content to this standard,²¹⁴ but there will be relatively little occasions for its exercise. For example, Professor Ehrenzweig, in his careful study of the genesis of *Pennoyer's* misbegotten concept of "transient jurisdiction,"²¹⁵ traces the international law roots of extraterritorial assertions of power. In so doing, he points out that in the pre-*Pennoyer* 19th century practice in both this country and England the courts were not hesitant to enter judgments against persons not present within their territory on the theory that a sovereign

²⁰⁹ The Supreme Court has recently held that even a defendant who has not yet been proved to have any contacts with the United States is still subject to the power of the district courts to compel discovery on that issue, and defendant by refusing to comply is thereby subject to the court's personal jurisdiction. See *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 102 S. Ct. 2099 (1982).

²¹⁰ It is hard to imagine a United States citizen or resident making a credible claim that there is a lack of sufficient contacts to justify the exercise of personal jurisdiction by a federal court. Citizenship or residency is a sufficient contact for the exercise of jurisdiction.

²¹¹ U.S. CONST. art. III, § 2, cl. 2.

²¹² See Ehrenzweig, *supra* note 114, at 305.

²¹³ See 2 H. READ, *RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS* 125-34 (1938).

²¹⁴ See Rheinstein, *The Constitutional Bases of Jurisdiction*, 22 U. CHI. L. REV. 775, 797 (1955).

²¹⁵ Ehrenzweig, *supra* note 114, at 303-09.

had a right to protect its citizens through the operation of its judicial system.²¹⁶ This view is widely shared by other scholars.²¹⁷

Even if international law checks on federal court power are rather minimal, the assertion of extraterritorial power by the United States as sovereign would be constitutionally subject to *International Shoe's* standards for measuring presence. In light of the earlier analysis which viewed *International Shoe* as the modern divining rod for exercising sovereign power based on the presence of the defendant this conclusion seems logically impelled by the fifth amendment.²¹⁸ The due process analogy, however, is inexact. The several states are, as a direct result of the constitutional plan, no longer unlimited sovereigns. Implicit concessions were made concerning the treatment that states might give to nonlocal defendants either in deference to national unity within the United States,²¹⁹ or with respect to the need of the United States as a nation to chart a uniform course in its dealings with foreigners.²²⁰ Thus constitutional limitations on state judicial power over defendants are potentially more restrictive than those limiting federal power. Far more important, however is the fact that as to foreign affairs (which can be viewed to include judicial jurisdiction over foreigners and foreign legal claims²²¹) there are acknowledged "differences between the powers of the federal government in respect of foreign or external affairs and those in respect of domestic or internal affairs."²²² Although those famous words of Justice Sutherland were penned in a quite different context,²²³ the subsequent conclusion that "[a]s a member of the family of nations, the right and power of the United States in that field are equal to the right and power of other members of the international family"²²⁴ is appropriate in regard to the international reach of federal court authority.

Placing the United States on an equal footing in the company of other nations does not consign to oblivion due process concerns about federal court suits against foreign individuals and entities. It does, however, em-

²¹⁶ *Id.* at 303-04.

²¹⁷ *See id.* at 303-04 nn.106-08. Further, Ehrenzweig noted declension of jurisdiction over suits involving foreigners as a matter of discretion, not compulsion. *Id.* at 305 & n.121.

²¹⁸ *See supra* text accompanying notes 82-134.

²¹⁹ *Cf.* F. JAMES & G. HAZARD, *supra* note 146, at 631 (commerce clause limitations on states' ability to exclude foreign business from operating within their boundaries).

²²⁰ *See, e.g.,* U.S. CONST. art. I, § 8, cl. 3 (granting power to Congress to regulate commerce with foreign nations); *see also id.* art. III, § 2 (granting and vesting in the Supreme Court the bulk of jurisdiction in "Cases affecting Ambassadors, other public Ministers and Counsuls . . .").

²²¹ *Id.* art. III, § 2.

²²² *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315 (1936).

²²³ The issue in *Curtiss-Wright* was whether a joint resolution of Congress, authorizing the President to embargo arms sales to warring South American countries, if he should determine that such an embargo would "contribute to the reestablishment of peace," and providing criminal penalties for violation of any such embargo, was an unconstitutional delegation of legislative powers.

²²⁴ *Curtiss-Wright*, 299 U.S. at 318.

phasize the importance of balancing concern for defendants with concern for the interests of local plaintiffs seeking enforcement of legal claims against foreign parties.²²⁵ In this context Professors Hazard and James noted that it is widely held that the United States as sovereign is empowered to protect its citizens through its judicial process without regard to the locus of the transaction involved in the litigation.²²⁶

In a recent diversity suit the Supreme Court offered a degree of insight into the extent of due process concern that is offered to foreign defendants sued in the courts of the United States. The Court held that an appropriate sanction for nonproduction of material requested through discovery that might help to establish personal jurisdiction is the unverified assumption that the defendants have sufficient contacts to sustain personal jurisdiction.²²⁷ In support of its decision in *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*,²²⁸ the Court explained that personal jurisdiction "represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty."²²⁹ In a supporting footnote the majority opinion continued, "[I]ndividual actions cannot change the powers of sovereignty, although the individual can subject himself to powers from which he may otherwise be protected."²³⁰ At bedrock, while espousing the existence of personal jurisdiction as a constitutional limitation on judicial power, the nature of the limitation is modest with respect to a defendant's claim of total immunity from litigating any issues in a distant and inconvenient forum. By its holding, the Court found that the due process interest in individual liberty is not offended by the sovereign's insistence that its claim of sovereign power be subject to determination in its own courts. Thus, the due process protection granted is not a guarantee against distant and inconvenient litigation; it is merely a limitation of issues litigable at the outset.²³¹

²²⁵ Compare *supra* notes 142-46 and accompanying text (allowing tagging of transient defendant defensible as legislatively struck balance) with *supra* text accompanying notes 215-17 (international law recognized right of sovereigns to protect their citizens in suits against absent foreigners).

²²⁶ F. JAMES & G. HAZARD, *supra* note 146, at 620.

²²⁷ *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 102 S. Ct. 2099 (1982). The sanction was imposed pursuant to FED. R. CIV. P. 37(b)(2)(A).

²²⁸ 102 S. Ct. 2099.

²²⁹ *Id.* at 2104.

²³⁰ *Id.* at 2105 n.10.

²³¹ This point is critically important for the elimination of personal jurisdiction inquiries in federal courts as advocated in this article. The sovereign power to command a hearing on the sovereign's interest in adjudicating a dispute is not restricted by due process. Accordingly the ambit of the individual liberty interest that has heretofore been served by finding a lack of federal personal jurisdiction can, consistent with the Constitution, be vindicated by other means, such as a transfer of venue or the granting of a forum non conveniens dismissal. See *infra* text accompanying notes 265-305. Moreover, the complexity involved in some personal jurisdiction determinations might lead one to conclude that a distant hearing on a simpler issue might be far fairer to a defendant. Compare *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 102 S. Ct. 2099, 2102-23 (1982) (issue

Granting the propriety of constitutional authority to protect United States citizens or judicial authority, the potential for unconstitutional jurisdictional overreaching is minimal. The problem arises only in suits wholly between foreigners who have engaged in a transaction that has not led them to have sufficient contact with the United States to be deemed present under the contacts standard of *International Shoe*. Assuming that the federal courts look to traditional international law policies regarding the declension of jurisdiction and to self-interest in averting overcrowded dockets, jurisdiction is unlikely to be extended. Moreover, given the status of both parties as foreigners, and a transaction packing substantial relation to the United States, seldom a suitable basis for subject matter jurisdiction exists.²³² It therefore seems safe to conclude that federal courts will either lack subject matter jurisdiction over the case or invariably decline to exercise that jurisdiction in cases that might present personal jurisdiction questions of constitutional dimension, all without resort to express doctrines of federal personal jurisdiction. Given that there is no constitutional role to be played by federal personal jurisdiction in international or domestic cases,²³³ its total elimination by congressional action is appropriate.

As will be explored in detail in the next section, the bulk of the work as to both convenience and fairness that might be served by an elaborated concept of federal personal jurisdiction can better be addressed by manipulation of service, venue, and occasional use of the doctrine of forum non conveniens. Before personal jurisdiction is consigned to oblivion, because its role in protecting litigant convenience is better served by alternative doctrines, it is important to be sure that the doctrine does not also perform less visible but important functions. The label jurisdiction is talismanic in one respect. For example, lack of personal jurisdiction has been a basis for collateral attack.²³⁴ In fact, it is assumed that

of minimum contacts to sustain jurisdiction difficult to determine and alleged to involve extensive sifting of documentary materials) with *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981) (identifying and applying with relative ease factors involved in considering motion for forum non conveniens dismissal).

²³² The cases would not fall in diversity jurisdiction, lacking the necessary party structure: no party would be a citizen of the United States. Likewise, it is somewhat unlikely that the cases would arise under federal law so as to fall within general federal question jurisdiction. 28 U.S.C. § 1330 (1976), the Foreign Service Immunities Act of 1976 does allow subject matter jurisdiction in suits by a foreign plaintiff against a foreign government. *See*, *Verlinden B.V. v. Central Bank of Nigeria*, 51 U.S.L.W. 4567 (U.S. May 23, 1983). The constitutional mooring for such a justification is the "Arising Under" clause of article III. *Id.* at 4570-72. Each § 1370 case requires consideration of whether it falls into an exception to the statutory general rule that federal jurisdiction will exist. *Id.* at 4572. Cases brought in the federal courts under this head of subject matter jurisdiction but lacking any significant contact with the United States could be dismissed as a matter of international comity or on the basis of forum non conveniens. *Id.* at 4570 n.15.

²³³ *Cf.* *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981) (forum non conveniens dismissal when foreign plaintiffs were real parties in interest in suit involving foreign plane crash).

²³⁴ *See, e.g.*, 1B J. MOORE, *supra* note 91, ¶ 0.405[4-1].

default judgments are open to collateral attack only on the basis of lack of jurisdiction.²³⁵ While Professor Currie points out that there is no compulsion to limit the grounds of collateral attack to jurisdictional defects alone,²³⁶ it is appropriate to consider whether abolition of federal personal jurisdiction requirements should be accompanied by broadened grounds for collateral attack.

In a system that has replaced the personal jurisdiction requirement with designated limitations on service and venue, it would seem logical to allow collateral attack of default judgments on the grounds of improper service or venue. The efficacy of a judgment is, however, undermined if collateral attack becomes more widely available. Many cases raising service or venue issues will not be in the category of cases where those concepts have replaced personal jurisdiction as a protection of a defendant. For example, a challenge to the competency of the process server or the manner of delivery of service should not become available as a basis of collateral attack.²³⁷ Likewise, interpretive issues concerning language in venue statutes such as, "where the claim arose,"²³⁸ should not be litigated collaterally. On the other side of the balance, there are evils involved in refusing collateral attack on the grounds of service or venue after these concepts have taken on a life as protectors of interests that were formerly protected by personal jurisdiction. Refusal to expand the grounds of collateral attack would force defendants sued in a district court that lacks personal jurisdiction—as measured by existing standards—to appear and contest service or venue, rather than allowing a default to be entered in reliance on the availability of a more convenient forum for collateral attack.

Although the inconvenience may occasionally be substantial,²³⁹ it is difficult to view potential defendants as having lost much if collateral attack of federal court judgments remains limited to attacks on subject matter jurisdiction. Even the most restrictive of current federal conceptions of personal jurisdiction, *Arrowsmith v. United Press International*,²⁴⁰ which borrows state standards, offers defendants few sure victories on collateral attack. One need only compare the relatively narrow gap that separates the Supreme Court majority and the dissent in their evalua-

²³⁵ See Currie, *supra* note 94, at 303-04 & n.430 (part 2).

²³⁶ *Id.*

²³⁷ These are issues typically raised on motions to dismiss for improper service. See, e.g., *Hanna v. Plumer*, 380 U.S. 460 (1965); see also 4 C. WRIGHT & A. MILLER, *supra* note 15, § 1092; 5 C. WRIGHT & A. MILLER, *supra* note 15, § 1353.

²³⁸ The language appears in a number of venue provisions. See, e.g., 28 U.S.C. §§ 1391(a), (b), (c) (1976). Attacks on venue frequently raise issues regarding where the claim arose. See, e.g., *Leroy v. Great Western United Corp.*, 443 U.S. 173 (1979).

²³⁹ One can construct the hypothetical of a Maine resident being summoned to the United States District Court in Guam and losing the opportunity to stay home, default, and collaterally attack.

²⁴⁰ 320 F.2d 219, 230-31 (2d Cir. 1963).

tion of sufficiency of forum contacts in a case like *World-Wide Volkswagen v. Woodson*²⁴¹ to eschew reliance on collateral attack in a case where there is genuine doubt about the outcome on the merits.²⁴² Stated differently, even when collateral attack is available, few defendants with viable cases on the merits are likely to place all of their hopes on collateral litigation of an issue as problematic as absence of personal jurisdiction. It is far more prudent to appear in the inconvenient forum and enjoy the ability to litigate fully both the threshold issue and the merits.²⁴³ Only defendants willing to forego the merits under existing doctrines of collateral attack would be adversely affected by refusal to expand opportunities for collateral attack to the issues of service and venue. It is submitted that this is a small group indeed.²⁴⁴ Thus, on balance, it seems preferable to continue to limit collateral attack to jurisdictional issues, even after funneling policy concerns relating to convenience into the realms of service and venue.

*B. Adapting Federal Service of Process,
Venue, and Forum Non Conveniens to a Broader Role*

Although personal jurisdiction has been a concept of low visibility in the federal courts, its elimination forces greater reliance on service of process and venue limitations as the methods of assuring fair treatment of defendants. Protection against inconvenient litigation can be offered either through restricting the locations to which a district court's summons may run²⁴⁵ or by limiting the plaintiff's choices of venue to those

²⁴¹ 444 U.S. 286 (1980). Compare the majority opinion, 444 U.S. at 297-98 (Defendant's conduct and connection with forum state must be such that he could reasonably anticipate being haled into court there. Had defendant intended his sales activity directly or indirectly to serve the market in other states, one of those states could properly exercise jurisdiction.) with Justice Brennan's dissent, *id.* at 306-07, 311 (One who sells automobiles can hardly claim ignorance of their mobility or pretend they stay put where sold. There is no difference between a case where goods reach a distant state through the distribution chain and a case involving the same goods reaching the same state because the consumer used goods as dealer knew he would. There is nothing unreasonable about expecting one involved in marketing such goods to anticipate being haled into a distant state's courts.). Similar language may be found *id.* at 314-16 (Marshall, J., dissenting) and *id.* 318-19 (Blackmun, J., dissenting).

²⁴² It should be recalled that on collateral attack only the jurisdictional issue is open. No defense on the merits will be allowed. Thus, a defendant who relies upon collateral attack foregoes any opportunity to contest the merits should the jurisdictional attack fail.

²⁴³ The Federal Rules of Civil Procedure allow raising the jurisdictional issue at a preliminary stage for possible determination prior to proceeding on the merits. See FED. R. CIV. P. 12(b)(2), (g), (h). Thus, a speedy preliminary determination of the jurisdictional issue is available without prejudice to subsequent attacks on the merits. Appellate review of the jurisdictional issue would have to await a final decision. This too is no penalty. To obtain immediate appellate review defendant may, as with collateral attack, opt to forego the merits, thereby allowing an appealable final judgment to be entered.

²⁴⁴ See *supra* note 242 and accompanying text.

²⁴⁵ The operation of the limitation is obvious: if a court's summons can only run a short distance, only those people found a short distance from the court can be summoned. In

which are protective of defendant's convenience. Historically, Congress has chosen an admixture of the two methods. Since 1789, effective service has been subject to general intraterritorial limitation.²⁴⁶ Venue has recently taken on prominence as such a limitation, with the principal provisions of the Judicial Code laying venue at the residence of the litigants, or in the district where the claim arose.²⁴⁷ The existing system of statutes and court rules displays little consistency in protecting defendants from inconvenient and burdensome litigation. For example, venue in diversity cases can properly be laid in the plaintiff's district without regard to the defendant's interests, while the same venue is unavailable in federal question suits between the same parties.²⁴⁸ The remainder of this section will offer suggestions for a systematic revision of the rules governing these areas consistent with the thesis that the federal doctrine of personal jurisdiction should be eliminated.

1. Service of Process: The Wrong Cutting Edge

Congress could, if it chose to do so, severely limit the territorial reach of federal court service of process. In fact, throughout the bulk of this country's history Congress has done just that.²⁴⁹ Defendants under this regimen are well protected against inconvenient federal litigation. Because a court can only issue process within a geographically circumscribed area, only defendants found and served within that area can be compelled to litigate in that forum. Disregarding the previously discussed problems of tagging transients, the protection of defendant convenience is self-evident. To avoid unfairness to transients, further restrictions could be placed on service of process, such as a requirement that service be made only at a defendant's residence or place of continuing employment.²⁵⁰

Were Congress to restrict service of process too severely, however, a number of competing interests would be eclipsed. The major failing of a strict territorial limitation on service of process is the problem of suits

most cases, this limitation will insure a convenient forum for defendants so served. *But cf.* Ehrenzweig, *supra* note 114 (transients may be found and served in a forum which is not only inconvenient to the defendant but also has virtually no interest in the litigation).

²⁴⁶ The original limitation provision may be found in the Judiciary Act of 1789, § 11, 1 Stat. 73, 79. The present general territorial limitation is FED. R. CIV. P. 4(f).

²⁴⁷ 28 U.S.C. §§ 1391-1408 (1976 & Supp. V 1981) (section 1408, limiting appeals from bankruptcy courts to only judicial district where bankruptcy court is located, is to be effective in 1984).

²⁴⁸ Compare 28 U.S.C. § 1391(a) (1976) with 28 U.S.C. § 1391(b) (1976).

²⁴⁹ See *supra* note 246. The general provision as stated by FED. R. CIV. P. 4(f) is that "[a]ll process . . . may be served anywhere within the territorial limits of the state in which the district court is held"

²⁵⁰ Courts routinely inquire as to whether the place of service was the defendant's residence. See, e.g., FED. R. CIV. P. 4(d)(1) (service at the usual place of abode). There are, of course, drawbacks in forcing an ad hoc inquiry into whether the place of service is the usual abode. See, e.g., 4 C. WRIGHT & A. MILLER, *supra* note 15, § 1069 nn.68-90.

involving multiple defendants who cannot all be found within the territorially prescribed area. No suit could be successfully maintained against two uncooperative,²⁵¹ geographically dispersed defendants, because a district able to obtain service on one such defendant would be territorially disabled from serving the other. The twin goals of judicial efficiency and consistency of decision²⁵² are frustrated by forcing a plaintiff to litigate against dispersed defendants separately.²⁵³

Another, more general, difficulty with narrow limitation of service of process within intradistrict boundaries is that evasion of service of process becomes easier. Potential defendants could absent themselves from the territory in an effort to evade service of process. Even devices such as service at home or work could be defeated by moving frequently and maintaining no regular employment. The adverse consequences of these activities can be minimized by allowing alternative methods of service upon a showing by the plaintiff of inability to serve consistent with the limitations.²⁵⁴ To allow such modifications, however, wholly undermines the value of the original limitation. By permitting service by publication, or any form of extraterritorial personal service, the exceptions to the general rule of narrowly circumscribed service would vitiate protections of defendants that are necessarily dependent on strict adherence to the rule.

Having concluded that territorially limited service offers benefits that are at best problematic, the alternative must be considered. Should Congress opt to dispense with all territorial limitation of service, issues of both power and prudence would arise. As to power, the discussion can be fairly brief: Congress has the power, and the Supreme Court has confirmed that fact. Although the leading cases on the subject, *Robertson v. Railway Labor Board*²⁵⁵ and *Mississippi Publishing Co. v. Murphree*²⁵⁶ address the question in dicta, the Court leaves the propriety of Congress' power almost wholly unquestioned.²⁵⁷ The ALI summarizes the relevant materials in the following manner: "[M]ost existing authority . . . declares

²⁵¹ It should be remembered that receiving proper service is considered to be an individual privilege of the defendant and may be waived. Cf. FED. R. CIV. P. 12(b)(5) (motion to dismiss for insufficiency of service of process), 12(g), 12(h) (provisions for waiver when 12(b) motions are not timely made); *National Equip. Rental v. Szukhent*, 375 U.S. 311 (1964) (defendant may contractually agree to appointment of a local agent to receive process in lieu of personal service).

²⁵² See, e.g., F. JAMES & G. HAZARD, *supra* note 146, at 2-3.

²⁵³ Efficiency is disserved because the two suits must plow much of the same ground. Consistency of decision is put in jeopardy should the two courts decide differently on essentially similar evidence.

²⁵⁴ See, e.g., J. HONIGMAN & C. HAWKINS, MICHIGAN COURT RULES ANNOTATED 112-13 (1962) (noting purpose of MICH. GEN. CT. R. 105.8, which allows court discretion to adopt special modes of service, as including cases where service is "intentionally avoided").

²⁵⁵ 268 U.S. 619 (1925).

²⁵⁶ 326 U.S. 438 (1946).

²⁵⁷ "Congress could provide for service of process anywhere in the United States." *Id.*

with absolute certainty that Congress has general power to make the process of a federal court run throughout the nation."²⁵⁸ The underlying premise of such power is the same recognition of national sovereignty that supported creation of a federal standard of personal jurisdiction uninhibited by limitations relevant to the states.²⁵⁹

Granting congressional power to authorize nationwide and even worldwide service of process²⁶⁰ does not eliminate all doubts about the wisdom of its use. Summoning a Maine resident to Guam, for example, evokes an immediate negative reaction, especially if that defendant can no longer rely on default and collateral attack in a case of improper forum selection. Nevertheless, the difficulties of administering doctrines of territorially limited yet adequate service of process do weigh against such limitation. The appeal of unlimited service of process grows upon noting that, apart from defendants' convenience, it is difficult to identify any other interests protected by territorial limitations on federal service of process.²⁶¹ Thus, if the interest of defendants' convenience can be guarded by other doctrines, limitation on federal service of process should be abandoned.

It is the position of this article that limitation of original venue and liberal transfer of venue can protect defendants against inconvenience more fully and more efficiently than restrictions upon service of process. Accordingly, Congress should authorize territorially unlimited federal service in all cases falling within the allotted subject matter jurisdiction of the federal courts. Apart from the benefit to those seeking to initiate federal suits, judicial efficiency will benefit by reducing threshold litigation involving two federal service of process issues: whether there has been compliance with the prescribed method of service and the inquiry into whether the prescribed method provides a defendant with sufficient notice and opportunity to be heard.²⁶² Assuming congressional adoption of familiar and reliable methods, such as in-hand service²⁶³ or service by

at 442. "Congress has power . . . to provide that the process of every district court shall run into every part of the United States." *Id.* at 622.

²⁵⁸ AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS Supp. Memo B, 192 (Part I 1965) [hereinafter cited as ALI STUDY].

²⁵⁹ See *supra* text accompanying notes 82-134.

²⁶⁰ See *Leasco Data Processing Equip. v. Maxwell*, 468 F.2d 1326, 1340 (2d Cir. 1972); see also 4 C. WRIGHT & A. MILLER, *supra* note 15, §§ 1133-1134; Hacker & Rotunda, *The Extraterritorial Regulation of Foreign Business Under the U.S. Securities Laws*, 59 N.C.L. REV. 643, 666-69 (1981).

²⁶¹ But cf. *supra* text accompanying notes 47-51 (acknowledging arguments favoring limitations parallel to those of state courts of the state in which a district court sits).

²⁶² See, e.g., *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) (notice by publication insufficient under the fourteenth amendment when it is not impracticable to attempt notice by mail of known persons whose substantial property rights might be impaired).

²⁶³ In *Mullane*, the Court stated that personal service is always adequate to give notice. *Id.* at 313.

registered mail,²⁶⁴ seldom, if ever, will federal courts experience litigation over the threshold issue of service of process.

2. Federal Venue: Choosing a Convenient Situs for Trial

Reflection upon a defendant's interest in convenience leads to the conclusion that the primary protection which he must be afforded is protection against an inconvenient situs of trial. A number of factors, considered in detail below, combine to make this so. A further conclusion follows from this recognition: original venue is not crucial as long as convenience-sensitive transfer of venue provisions are available, and as long as adequate protection is provided against forum shopping motivated by a plaintiff's desire to obtain more favorable substantive law.²⁶⁵

Pursuing a policy of broad original venue, Congress could, for example, establish venue in any district in which any party resides, or any district that is the situs of events related to the litigation. Assuming, *arguendo*, that very liberal, convenience-sensitive transfer provisions are also in force, even this broad formulation of original venue will seldom result in substantial hardship to a defendant. Current law already subjects defendants to some defensive burdens with regard to suits filed in the wrong district. It is not considered unduly unfair, for instance, that a defendant confronted with an outrageously inconvenient venue cannot simply default and collaterally attack attempts to enforce that default judgment on the basis of patently improper venue.²⁶⁶ The court in which the suit is filed is not obligated to initiate its own inquiry into venue.²⁶⁷ A defendant is obliged to appear, most likely through the offices of local counsel, and move either for dismissal on the ground of improper venue²⁶⁸ or for transfer of venue in accordance with the governing statutes.²⁶⁹ Obviously some burden is imposed in requiring such an appearance, but it is seldom criticized as involving substantial hardship or being unfairly inconvenient. Rather, it is an assumed cost shared by all living under a governing system that provides for compelled settlement of legal disputes. All citizens are burdened by the threatened inconvenience, but all are likewise benefitted should they become plaintiffs seeking to invoke the judicial system. Accordingly, adoption of broad original venue

²⁶⁴ See *Greene v. Lindsey*, 102 S. Ct. 1874, 1880-81 (1982) (advocating the efficacy of mailed service); see also 4 C. WRIGHT & A. MILLER, *supra* note 15, § 1074 n.97. Congress has recently made service by mail far more widely available. See Pub. L. No. 97-462, 96 Stat. 2527 (1983) (amending FED. R. Civ. P. 4(c)(2)(C)(ii)).

²⁶⁵ See *infra* text accompanying notes 292-348.

²⁶⁶ See *Currie*, *supra* note 94, at 303-04; *id.* cases cited at 304 n.430.

²⁶⁷ Compare FED. R. Civ. P. 12(h)(3) with *id.* 12(h)(1). Likewise, the low place of venue in the hierarchy of defendant protections is also indicated by the fact that it is waivable as a defect. See *id.* 12(h)(1).

²⁶⁸ *Id.* 12(b)(3).

²⁶⁹ See 28 U.S.C. §§ 1404(a), 1406(a) (1976).

provisions is not, standing alone, an unfair imposition on defendants.

Combining broad original venue with worldwide service of process and abolition of inquiry into federal personal jurisdiction is only marginally more burdensome to defendants than the existing system. The only relevant difficulty arises when it can be asserted with confidence that the forum district, in addition to being an inconvenient or improper venue, is also clearly without personal jurisdiction as measured by existing federal standards. These cases are not common.²⁷⁰ Further, all that the defendant loses by the advocated change is the previously mentioned privilege of defaulting in reliance on collateral attack in a more convenient forum. Liberal transfer of venue directed toward promoting convenience of litigation will allow the case to be transferred to a preferable venue in advance of trial. Moreover, even the alleged inconvenience of trial in a distant forum is more aptly viewed as mere annoyance, not a substantial impairment of legal rights.²⁷¹

Modern legal practice, aided by enhanced long-distance communication and travel, is easily carried on by attorneys and clients separated by substantial distances. A defendant's lack of physical presence in the forum district is seldom an impediment to full litigation of the case. For example, if a distant defendant's deposition could not be taken without substantial inconvenience to him it is notable that the Federal Rules of Civil Procedure expressly contemplate protective orders limiting use of discovery procedures.²⁷² The rules could be invoked to require that the defendant's deposition, if requested, be taken in a location convenient to the defendant. Virtually all other pretrial maneuvering can be easily undertaken without the physical presence of the defendant.²⁷³ Even trial in an inconvenient district entails few significant burdens. Deposition testimony can be used in lieu of live appearance of witnesses,²⁷⁴ and the defendant's personal presence, although desirable,²⁷⁵ is not an absolute necessity.

²⁷⁰ See *supra* text accompanying notes 239-44. Not only are personal jurisdiction determinations often difficult to predict, venue is in many cases limited to districts that seem very likely to have personal jurisdiction. See, e.g., 28 U.S.C. § 1391(b) (1976). But see 28 U.S.C. § 1391(a) (1976) (allowing plaintiff's district as a proper venue in diversity).

²⁷¹ For example, objections to venue will be waived unless defendant acts promptly to assert the interest. See FED. R. CIV. P. 12(b)(3), (h). Moreover, under 28 U.S.C. § 1391(a) (1976), Congress has allowed plaintiff's residence as a proper venue in diversity cases. Necessarily, defendant will be compelled to travel outside of his home state.

²⁷² See FED. R. CIV. P. 26(c); cf. *id.* 37(b)(2)(D) (violation of court order may be treated as contempt). Note also that the court may assess costs for violation of its orders. *Id.* 37(b)(2).

²⁷³ Cf. *id.* 30(b)(7) (allowing telephone deposition).

²⁷⁴ See *id.* 32(a)(3)(B)-(E); 8 C. WRIGHT & A. MILLER, *supra* note 15, § 2147; *id.* cases cited at nn.61-71.

²⁷⁵ The fact that a trial can be conducted without the defendant's physical presence does not indicate that having the defendant present would not be preferable. First, defendant may be able to confer with counsel about matters that transpire during the presentation of evidence in court. Second, defendant's absence may be detrimental if it results in influencing the trier of fact in assessment of the case.

Finally, it should be recalled that this entire discussion is premised upon the adoption of liberal, convenience-sensitive, transfer of venue provisions. The availability of transfer eliminates all claims of under inconvenience, except for those claims stemming from the need to appear in an inconvenient forum to request the transfer.

The specific design of an original venue provision that allows the federal courts to operate with maximal efficiency requires further refinement. A broad, clear provision is desirable, not only as a boon to plaintiffs, but also to prevent litigation to determine whether the venue chosen by plaintiff is proper. Extended threshold litigation will be avoided if the statutory tests for measuring the propriety of a particular venue are easily applied. By these criteria, the venue standard suggested above, allowing suit at the residence of any party or at the situs of events related to the litigation, seems apt.²⁷⁶ The standard should be narrowed only if doing so would achieve benefits without sacrificing either judicial efficiency or the system's ability to insure that the trial is held in a convenient district.

It is possible to criticize the suggested factors as being too liberal. Even the ALI only suggests that a defendant's residence or the place where a "substantial part" of the events took place should be proper original venues.²⁷⁷ The additional breadth of the standard discussed above would accommodate the situation where the plaintiff's residence is the optimum place for trial (due to the presence of witnesses or evidence there), yet that district is not a place where a substantial part of the events related to the litigation occurred. Seldom, however, will plaintiff's residence be a convenient place of trial while failing to be the situs of events significantly related to the litigation. Thus, contraction of the original venue provision to a formulation more closely in line with the ALI proposal would not often prevent attainment of an optimal place for trial. Further, if the convenience-sensitive transfer of venue provision may be invoked by plaintiffs as well as defendants, the possibility of precluding litigation in the most convenient forum is totally avoided.²⁷⁸ Other benefits related to prevention of forum shopping for favorable choice of law may inhere in

²⁷⁶ The language, "situs of events related to the litigation," is intended to be a more permissive standard than, for example, "where the claim arose." See 28 U.S.C. § 1391 (1976).

²⁷⁷ ALI STUDY, *supra* note 258, § 1303.

²⁷⁸ The trade-off here is evident: plaintiff must file in a district that is designed to offer some protection to defendant's convenience interest. Plaintiff's convenience interest is slightly burdened by having to make a motion for transfer to a more convenient district when that district is the residence of the plaintiff and not the situs of substantial events connected with the litigation. This seems to be an unusual case, but not unthinkable. *Cf. Product Promotions, Inc. v. Cousteau*, 495 F.2d 483 (5th Cir. 1974) (foreign corporation entering into contract with Texas corporation to test product was amenable to suit in Texas even though it had no place of business there and performed no physical act of any sort in Texas). It should be noted that unlike the standard of the major existing transfer of venue provision, 28 U.S.C. § 1404 (1976), transfer as proposed would include transfer to venues that were not proper originally. See *infra* text accompanying notes 282-83.

eliminating the plaintiff's residence as a possible original venue.²⁷⁹ Finally, and most compelling, this modest limitation on venue pretermits many opportunities for selecting a district located in a state that could not obtain personal jurisdiction over defendant.²⁸⁰ Denial of the plaintiff's residence as a proper original venue may also reduce the efficacy of "nuisance suits" brought with hopes of obtaining a settlement offer rather than a victory on the merits. Plaintiffs may forego such suits in an unfamiliar jurisdiction, while defendants may be somewhat less likely to settle if they can pursue summary disposition with minimal effort.

Having settled on a general original venue formulation that lays venue in any district in which a defendant resides, or a district having a significant relationship to the litigation,²⁸¹ it remains to develop an appropriate transfer provision. The goal of transfer of venue in the advocated system is solely to allow trial in the most convenient location. Accordingly, the provision should invariably allow transfer to any district that satisfies that criterion. Unlike current practice, transfer need not be restricted to venues that would be available as proper original venues.²⁸² Moreover, maximum flexibility in attaining the desired trial venue is enhanced by allowing any party, not merely defendants, to seek transfer.²⁸³

Statutory enactment of a provision allowing for such transfers seems rife with possibilities for extended threshold battles over transfer motions. In practical terms, postponement of appellate review until after entry of a final judgment²⁸⁴ will leave no effective remedy for district court errors except the grant of a new trial in a more convenient forum. Alternatively,

²⁷⁹ See *infra* text accompanying notes 292-333. As will be seen, this becomes particularly important if the federal courts, sitting in diversity, are viewed as being required to adopt the choice of law rule of the state courts of the states in which they sit.

²⁸⁰ Personal jurisdiction, particularly in cases like *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) and *Rush v. Savchuk*, 444 U.S. 320 (1980), seems to turn on defendant's relationship to the forum. See *World-Wide*, 444 U.S. at 291-92; *Rush*, 444 U.S. at 329. Accordingly, elimination of plaintiff's residence as a venue choice seems to limit proper original venues to districts that will be more likely to have a sufficient relation to the defendant to command appearance and answer.

²⁸¹ The formulation chosen is similar to the ALI proposal in adopting a defendant or contacts with the litigation standard, but is more liberal in regard to the formulation of the standard, both as to requiring only the presence of any defendant and as to the degree of contact necessary between the litigation and the forum. Cf. ALI STUDY, *supra* note 241, § 1303 (all defendants, substantial part of the events giving rise to the litigation). When the defendant is not a resident of the United States, however, the ALI formulation is more liberal: suit may be instituted in any district. *Id.* When jurisdiction is based on a federal question, the ALI formulation is very similar. See *id.* § 1314. The differences relate to cases in which no district satisfies either of the primary criteria mentioned above.

²⁸² See 28 U.S.C. § 1404(a) (1976).

²⁸³ There appears to be no limitation on plaintiffs bringing transfer of venue motions under current practice. See 28 U.S.C. § 1404(a), (b) (1976). See also C. WRIGHT, *supra* note 5, § 44, at 187 & n.31.

²⁸⁴ The general rule in the federal courts is to review only final judgments. See 28 U.S.C. § 1291 (1976). It is doubtful whether the statutory exceptions to the rule would be adequate to allow interlocutory review of transfer motions. See 28 U.S.C. § 1292 (1976).

to allow interlocutory review of decisions of transfer motions invites expenditure of energy and money on an issue other than the merits. To avoid the horns of this dilemma, it is possible to make the rulings on transfer motions unreviewable by the appellate courts as has been done with orders to remand to state courts cases previously removed to federal court.²⁸⁵ Little benefit is likely to accrue from appellate review of these decisions. In ruling on a motion for transfer, the district judge is involved in weighing factors which determine the ease of trial in a particular location. The assessment requires consideration of rather uncomplicated factual matters²⁸⁶ and the drawing of an ad hoc conclusion which would have no precedential value.²⁸⁷ Assuming good faith on the part of the trial court, there is no reason to suspect that appellate review will reach a superior determination of the best place for trial.

If one fears that trial judges will transfer cases for reasons unrelated to convenience of litigation, then Congress could enumerate the allowable factors for trial court consideration²⁸⁸ and the appellate courts could police adherence through mandamus,²⁸⁹ even in the face of statutes denying appellate review.²⁹⁰ Finally, some provision should be made for the making of a second transfer motion, even if the initial motion was granted. New evidence about convenience, not discoverable through the exercise of due diligence at the time of the initial motion, should be allowed a role in the determination of the best place for trial. To prevent abuse of this additional device, however, either the standard for its granting should be more rigorous, requiring, for example, a showing of substantially enhanced convenience, or sanctions should be imposed for misuse of the motion.²⁹¹

²⁸⁵ See 28 U.S.C. § 1447(d) (1976).

²⁸⁶ Little complication should be expected from matters such as where witnesses reside, where parties are located, and the relative difficulty of traveling to that forum for litigation. These seem to be relatively objective determinations, likely to be of little controversy as to their substance.

²⁸⁷ The conclusion to be drawn from the facts is, of course, a highly subjective balancing of many factors. It seems unlikely that appellate review offers, *a priori*, any likelihood of a more informed choice than that of the district judge. Likewise, the conclusion reached could not be seen as binding on any future courts in balancing a different set of facts.

²⁸⁸ This is similar to the enunciation of factors relevant to forum non conveniens dismissals. See the discussion of the standards in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), *infra* note 303.

²⁸⁹ 28 U.S.C. § 1651 (1976).

²⁹⁰ See 28 U.S.C. § 1447(c) (1976), construed in *Thermtron Prod., Inc. v. Hermansdorfer*, 423 U.S. 336 (1976) (limited review of unreviewable remand order to insure that remand was based on factors properly to be considered by the district court).

²⁹¹ Federal Rule of Civil Procedure 37(a)(4), which generally allows for imposition of sanctions for improper party behavior in discovery matters, might serve as an example for a sanctions provision. Congress has resorted to some rule-specific sanctions more narrowly tailored to the situation. See Pub. L. No. 97-462, 96 Stat. 2527 (1983) (amending Fed. R. Civ. P. 4 and inserting subsections (c)(2)(C) and (D) which provide for award of actual costs of personal service if party properly served by mail does not acknowledge receipt of process). This latter approach seems preferable.

3. Forum Non Conveniens: Convenience and Foreign Disputes

Previous discussion has indicated that there exists a class of cases so little affiliated with the United States that they should not be heard in the federal court system. Under the advocated system of worldwide service of process, liberal venue, and no limitation of personal jurisdiction, these cases can find their way to federal court if some basis for subject matter jurisdiction can be found.²⁹² To prevent this, the existing doctrine of federal forum non conveniens should continue to operate as it has for at least one-third of this century.²⁹³ Current practice allows forum non conveniens dismissals in suits involving domestic²⁹⁴ as well as foreign litigants.²⁹⁵ Conveniently, current practice also allows consideration of forum non conveniens motions prior to the court's determination of jurisdiction. As Chief Judge Weinstein of the Eastern District of New York has noted: "While it is true that the question of authority to exercise jurisdiction is logically prior to the decision to exercise it, an early decision on forum non conveniens cannot prejudice a plaintiff as might a premature decision on the merits."²⁹⁶

Not surprisingly, the decisional process involved in these dismissals operates in much the same way as would convenience-sensitive transfers among the federal courts, except that the remedy must necessarily be limited to dismissal owing to the inability to transfer a case to a foreign court. Under present law, the remedy of dismissal and refiling in a more appropriate forum, as opposed to interdistrict federal transfer of venue, carries choice of law consequence.²⁹⁷ Under the advocated proposals, this important difference between convenience-sensitive federal transfer of venue and forum non conveniens dismissal would continue. A subsequent proposal²⁹⁸ would require all federal courts, transferor or transferee, to make the same choice of law. Of course, after a forum non convenience dismissal, the subsequent foreign nonfederal forum would be free to make its own choice of law.²⁹⁹

²⁹² See *supra* text accompanying note 232.

²⁹³ See, e.g., *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947); *Koster v. Lumberman's Mut. Casualty Co.*, 330 U.S. 518 (1947).

²⁹⁴ See, e.g., *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981) (California administratrix suing American domestic corporations).

²⁹⁵ See, e.g., *Murty v. Aga Khan*, 92 F.R.D. 478 (E.D.N.Y. 1981) (United States citizen suing French citizen).

²⁹⁶ *Id.* at 482.

²⁹⁷ Compare *Van Dusen v. Barrack*, 376 U.S. 612 (1964) (requiring transferee district to apply the law that would have been applied by transferor district) with *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 247-55 (1981) (specifically rejecting the relevancy of the comparative choice of substantive law as a factor in deciding forum non conveniens motions).

²⁹⁸ See *infra* text accompanying notes 334-48.

²⁹⁹ This dichotomy conforms precisely with the concept of a unitary system of United States courts. Within the United States, results will be uniform and the exercise of jurisdiction will be limited by constitutional concerns regarding subject matter jurisdiction and

Concern might arise that the forum non conveniens inquiry, because of its choice of law consequences, will expand and confound the federal courts, thereby nullifying the efficiency gained by eliminating all inquiry into personal jurisdiction.³⁰⁰ The substitution of one cutting edge for another is in this instance, however, a significant advantage. The forum non conveniens inquiry isolates convenience as the value to be protected, untrammelled by nebulous concepts such as minimum contacts. The most probative facts are relatively easy to assemble: the identity and location of parties and witnesses, and the situs of tangible evidence that will be needed at trial.³⁰¹ There is no concern with the subjective expectations of parties to the suit or complicated facts regarding the operations of an enterprise over a period of time as is the case in modern personal jurisdiction litigation.³⁰² Further, the legal rules governing forum non conveniens discourage protracted litigation. The Supreme Court has adumbrated a series of factors, both of public and private interest, that are relevant to deciding the motion,³⁰³ and it has expressly limited the scope of appellate review:

practical concerns about the optimum place for trial. If trial in a foreign nation is called for, the jurisdiction of the United States will be declined.

³⁰⁰ Foreign courts would not necessarily make the same choice of law as would the United States federal courts. Foreign and domestic litigants in cases having substantial international aspects who find the federal court choice of law to their disadvantage would predictably file motions seeking forum non conveniens dismissals. Two caveats are necessary in evaluating how many cases are involved. First, good faith belief in the merits of the motion is required. *See* FED. R. CIV. P. 11 and 7(b)(2) (signature of attorney is affidavit that pleading or motion is not interposed for delay or without belief in its merit). Second, most federal cases involve only domestic litigants and domestic issues not implicating forum non conveniens principles.

³⁰¹ *Cf. supra* text accompanying notes 284-90 (discussion of efficacy of committing such inquiries to district courts).

³⁰² *See, e.g.,* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) (whether defendant "should reasonably anticipate being haled into court there"); *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) (speaking of defendant's "purposeful availment" of the forum state); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) (analyzing at length the defendant's *modus operandi*).

³⁰³ The private interest factors include:

the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained.

Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947). The Third Circuit in *Reyno v. Piper Aircraft Co.*, 630 F.2d 149, 160 (1980) (footnotes omitted) further described the *Gilbert* test:

Also relevant is the inability to implead other parties directly involved in the controversy. These various ingredients are weighed to determine the "relative advantages and obstacles to fair trial."

Among the public interest factors are a) problems of creating court congestion and imposing jury duty in litigation centers that are removed from the origin of the controversy, and b) benefits of holding the trial in a place accessible to the witnesses to the accident and of having the trial in a forum where the court is familiar with the law governing the case rather than having a court elsewhere untangle foreign law.

The *forum non conveniens* determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion; where the court has considered all relevant public and private public interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference.³⁰⁴

Thus, while *forum non conveniens* motions may be more hotly contested than interdistrict transfer of venue motions because of the potential choice of law consequences,³⁰⁵ there is no reason to fear that the difficulty attending personal jurisdiction litigation will be reintroduced under a different banner.

V. MODIFYING FEDERAL CHOICE OF LAW: THE CONCOMITANT OF REVISED JURISDICTIONAL DOCTRINES

Thus far this article has developed a model of federal courts unencumbered by doctrines restricting personal jurisdiction, territorial limits on service of process, or narrowly circumscribed choice of venue. Assembly of the model was preceeded by a thorough examination that demonstrated the extremely narrow ambit of constitutional restraints upon Congress in shaping these aspects of the federal judicial system. In a similar manner, it is apparent that Congress or the federal judiciary could fashion a federal rule of choice of law for all cases heard in federal courts without regard to the type of cause of action involved. The only possible constitutional constraint derives from that part of *Erie Railroad v. Tompkins*³⁰⁶ that commands that state law must govern in diversity actions, but which does not specify which state's law must govern in case of conflicts.³⁰⁷ Wholly apart from the constitutional teaching of *Erie*, there is also an important federalism interest in preventing litigants from using the availability of concurrent federal diversity jurisdiction to obtain a more favorable choice of substantive law.³⁰⁸ This section will explore possible choice of law rules that will minimize federal forum shopping for more favorable governing law.³⁰⁹

Choice of law concerns are somewhat more pressing under the advocated federal system than they are under existing law. This situation results from the current federal diversity practice of trying to act

³⁰⁴ Piper Aircraft Co. v. Reyno, 454 U.S. 235, 257 (1981).

³⁰⁵ The court in considering the motion is *not* to concern itself with what the choice of law impacts will be. *Id.* at 265.

³⁰⁶ 304 U.S. 64 (1938).

³⁰⁷ See *infra* notes 319-46 and accompanying text. *But cf.* Klaxon Co. v. Stentor Elec. Mfg., 313 U.S. 487, 496-97 (1941) (general considerations of our federal system require diversity court application of forum district state's choice of law rule).

³⁰⁸ Cf. Guaranty Trust Co. v. York, 326 U.S. 99 (1945) (outcome of litigation should be substantially the same, so far as legal rules determine the outcome, whether brought in state or federal court).

³⁰⁹ See *infra* text accompanying notes 314-48.

like the courts of the state in which the district court is located.³¹⁰ Liberalization of service and venue, when coupled with abandonment of all inquiry into personal jurisdiction, results in a somewhat wider choice of originally available federal fora. Liberal transfer of venue does not reduce the problem, for existing precedents require that the transferee forum apply substantive law as though it were the transferor forum.³¹¹ Thus, whenever the proposed standards allow a suit to be commenced in a district court located in a state whose courts would be unable to hear the action,³¹² the potential for choice of law mischief is present if one adheres to current federal policies governing choice of law in diversity actions.

A careful exegesis will show that there are four distinct types of choice of law problems that are potentially affected by liberalized federal assertions of power over defendants. Diversity cases account for only two of the four. The feature that distinguishes the two types of diversity cases is the availability of a state court able to summon and obtain jurisdiction of all the parties to the case. The classic diversity case, pitting a single plaintiff against a single defendant, typifies the first type,³¹³ while cases involving more complicated dispersed party structure will occasionally result in the other.³¹⁴ Alteration of the threshold doctrines regarding personal jurisdiction, service, and venue also creates an impetus to forum shop in federal question cases. This created impetus may seem anomalous in view of the supposed national uniformity of federal law, but there are two distinct situations in which a choice between districts may also involve a choice of governing federal law. First, federal law occasionally borrows state law as an express element of federal law. Longshoremen's injury claims in admiralty are an example of this type of borrowing.³¹⁵ Second, federal law, although ultimately capable of unification through the appellate process, is not always in that unified state. Conflicts among circuits on important points of federal law are not uncommon,³¹⁶ which creates the possibility that a plaintiff might seek to initiate suit in a district bound

³¹⁰ See *supra* notes 307-08.

³¹¹ *Van Dusen v. Barrack*, 376 U.S. 612 (1964).

³¹² The potential is limited to cases where the law that would be applied by the state which would otherwise be unavailable is different from, and more favorable to, the plaintiff than the law that would be applied by the states whose courts could hear the litigation. See *infra* text accompanying notes 318-48.

³¹³ Clearly, if there is only one defendant, the courts of the state in which that defendant resides could obtain personal jurisdiction, thereby creating an available state forum for the litigation.

³¹⁴ For example, in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), if the driver of the vehicle that rear-ended plaintiffs could not be sued in a state in which all of the defendants involved in manufacturing and marketing plaintiff's vehicle could also be sued, no state could assemble all of the defendants.

³¹⁵ See, e.g., *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280 (3d Cir. 1981).

³¹⁶ Cf. *Weiner, Federal Regional Courts: A Solution to the Certiorari Dilemma*, 49 A.B.A. J. 1169 (1963) (suggesting regional courts of appeals to resolve intercircuit conflicts).

to apply the more favorable precedent.³¹⁷ To the extent that a broader choice of original federal forum is created by the previously advocated provisions, increased danger of forum shopping is encountered. Thus, while diversity cases present more acute problems of forum shopping, federal choice of law rules for all cases can be devised which are more responsive to the needs of a federal system than is the existing federal practice.

The most controversial of the four classes of potential forum shopping cases would arise in those instances in which there is some state court that could provide an adequate hearing of the suit.³¹⁸ Adequacy in this context refers to the ability of a state to summon and bind all of the parties to the suit. The current choice of law rule in diversity cases is that a federal court applies the law that would be applied by a court of the state in which it sits.³¹⁹ If the previously advocated revisions in federal practice allow the suit to be initiated in a federal court in a state that cannot assemble all of the parties, and that state's choice of law is substantially more favorable to the plaintiff than the law chosen by the available state court, the notorious evil of the *Taxicab* case would appear to be resurrected.³²⁰ The fortuitous availability of diversity of citizenship will grant a windfall to plaintiffs. The ultimate *Erie* embarrassment of obtaining different results in federal and state courts located around the corner from one another³²¹ will not be present, but the availability of a federal forum may substantially affect the outcome of the litigation.³²²

The alternative of doing nothing to ameliorate this situation and suffering occasional choice of law consequences that favor plaintiffs is not wholly unattractive. Recalling that the advocated choice of original venue provision was limited to the residence of any defendant or to a district where events related to the litigation occurred,³²³ it is evident that frequently cases can be litigated in the state courts of these districts. In part this is a result of the extensive growth of state statutes asserting personal jurisdiction and providing for extraterritorial service of process;³²⁴ in part it is due to the fact that residence of the defendant, or occurrence of events related to the litigation, are likely to provide the constitutionally

³¹⁷ The hierarchical structure of the federal courts require district courts to follow the precedent of their own circuits. See, e.g., 1B J. MOORE, *supra* note 91, § 0.402[1], at 61 & n.29.

³¹⁸ This case is most controversial because it is the only case where the plaintiff obtains a windfall choice of law by opting for federal suit when an adequate state forum is nevertheless available.

³¹⁹ See *Klaxon v. Stentor Elec. Mfg.*, 313 U.S. 487 (1941).

³²⁰ See *supra* note 167. The evil is, of course, allowing the fortuity of diversity and the consequent invocation of federal jurisdiction, to obtain a more favorable choice of law. In this case the more favorable law chosen is state law rather than general federal common law.

³²¹ See, e.g., *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945).

³²² See *infra* text accompanying notes 323-26.

³²³ See *supra* text accompanying note 276.

³²⁴ The long-arm and associated extraterritorial service provisions of California are not atypical of the current crop of statutes. See *supra* notes 17-18.

required degree of presence or contact that will allow a state to exercise judicial power over the defendant.³²⁵ Nonetheless, the new venue provision is not a guarantee that a state court of the state in which the district court sits could obtain personal jurisdiction of all defendants. The advocated venue provision looks to the residence of any defendant, not that of all defendants.³²⁶ Second, as illustrated by Justice White's logic in *World-Wide Volkswagen v. Woodson*,³²⁷ districts having a relation to the litigation are not always districts with which the defendants will have sufficient contact to justify the assertion of personal jurisdiction. Thus, if no changes are made in federal choice of law rules while new views on personal jurisdiction, service, and venue are adopted, the result will provide choice of law shopping opportunities to plaintiffs.

Two amelioratives are available. The existing federal rule which requires a federal court to pretend, for diversity choice of law purposes, to be a state court of the state in which it sits³²⁸ could be abandoned, either totally or only in cases where the courts of the state in which it sits are unavailable. It is possible to make a strong case against both possible ameliorative choice of law rules. To create a new, unique, and universally applicable federal choice of law rule might generate occurrences of a federal district court and the courts of its host state applying different law. If, for example, the federal rule is a *lex loci* rule, every diversity case tried in the federal courts located in a non-*lex loci* state³²⁹ involving events that took place outside of the state will present possible state-federal forum shopping opportunities for more favorable governing law. If those state courts are able to entertain the litigation, adopting a federal choice of law rule exacerbates, rather than solves, the forum shopping problem. The presence of diversity will result in potentially varied results between a district court and the state court of the state in which it sits.³³⁰ Further, the resulting system also encounters embarrassment in removed cases when the federal choice of law rule would favor the defendant.³³¹

³²⁵ See *supra* text accompanying notes 82-90.

³²⁶ See *supra* text accompanying notes 276-83.

³²⁷ 444 U.S. 286, 292, 294-95. In *World-Wide*, the automobile accident occurred in the forum state, a most significant contact.

³²⁸ See *supra* note 319 and accompanying text.

³²⁹ See, e.g., *Rush v. Savchuk*, 444 U.S. 320 (1980); *Ingersoll v. Klein*, 46 Ill. 2d 42, 262 N.E.2d 593 (1970); *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

³³⁰ This is thought to be the ultimate evil. See, e.g., *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945): "The nub of the policy that underlies *Erie R.R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in federal court instead of in a State court a block away would not lead to a substantially different result." See also *id.* at 111: "The main foundation for the criticism of *Swift v. Tyson* was that a litigant in cases where federal jurisdiction is based only on diverse citizenship may obtain a more favorable decision by suing in the United States courts." (quoting *York v. Guaranty Trust Co.*, 143 F.2d 503, 532 (1944) (Hand, J., dissenting)).

³³¹ It is presumed that upon removal the choice of law rule would remain the same, thereby

The other ameliorative, adopting a special choice of law rule only for cases where the state courts of the forum district are unavailable, recreates much of the burdensome dependence on irrelevant state limitations that militated for the adoption of a distinct set of federal amenability standards. To be sure, a federal court suit may now be brought in a location that was previously unavailable, but the efficiency gains of pretermittting almost all threshold litigation about service and personal jurisdiction are lost.³³² Those numerous state-law questions would simply become part of the determination of whether the federal court would be required to follow the choice of law rules of the state in which it sits. If the federal court finds its state's courts would be able to entertain the lawsuit, then the host state's choice of law rule is employed. If, however, those courts would be unavailable, invocation of a federal choice of law rule does not end the threat of forum shopping. It remains possible that the law chosen by a federal rule would be different from the law chosen by *any* available forum state. The logic that abhors substantively important choice of law differences based on the fortuity of diverse citizenship is again offended. To remedy this defect and insure that the choice of law rule is that of an available state requires further inquiry into the availability of other states. If more than one such state proves to be available, and if there would be a discrepancy in their choice of law determinations, the federal court would then have to fashion a means by which to choose among those competing choice of law rules. Thus, protracted litigation over otherwise irrelevant issues of state court power would plague a narrowly applicable federal choice of law rule.

Having chronicled major weaknesses of the choice of law possibilities, it remains to select the one having the least offensive consequences. The advocated changes regarding federal personal jurisdiction, service, and venue will require abandonment if no choice of law rule can prevent consequences so harmful as to outweigh the benefits of placing federal judicial power on a clear and easily applied federal basis. Although some may think doing nothing to change present practice is preferable,³³³ adoption of a federal choice of law rule applicable in all cases is not so unattractive

benefiting the defendant should the federal choice of law rule pick the law of a state that is more favorable to the defendant. This need not be true. That is, the benefits of forum shopping can be reserved to plaintiffs by limiting the applicability of the federal choice of law rule to cases of original federal jurisdiction, treating removed cases as though they are cases in the state courts of the state in which the federal court sits. This seems unfair and somewhat contradictory, given the policy arguments that follow. See *infra* text accompanying notes 334-48.

³³² To know whether to apply the choice of law rule, the federal court would be required to measure both the possibility of achieving good service and that of obtaining personal jurisdiction in the state court.

³³³ See ALI STUDY, *supra* note 58, app. A, at 166-67 (describing as "unsound" the congressional creation of a federal choice of law rule to replace the doctrine of *Klaxon Co. v. Stentor Elec. Mfg.*, 313 U.S. 487 (1941)).

as to scuttle the whole enterprise of altering federal assertions of judicial power.

To put matters in perspective, assume that either Congress³³⁴ or the Supreme Court³³⁵ adopts a federal choice of law rule applicable in all federal court litigation. Assume further that the chosen rule is in the nature of a most significant relationship test.³³⁶ Although the precise application of this standard will become clear only after some experience in using it, it does not seem to be outrageously mutable. Speaking abstractly, having but one federal standard is laudable in terms of both efficiency and internal consistency within the nationwide system of federal courts. No effort will be spent searching unfamiliar bodies of choice of law rules, and any particular case will have the same law chosen as governing without regard to the location of trial, or the laying of proper original venue. These efficiency benefits will obtain in both types of diversity cases and in both types of federal question cases described above as posing problems of forum shopping. With all federal courts applying the same choice of law rule, the choice between courts within the federal system will be a matter of indifference as to substance. The federal rule will tend to have a leveling effect, especially if it is applied in both original jurisdiction and removed cases. If either plaintiff or defendant could benefit from a federal forum, and either plaintiff or defendant could elect a federal forum, one would expect that a federal forum would be chosen in all cases where federal choice of law diverges markedly from state choice of law.³³⁷ The dichotomy in forum shopping will be limited to choosing between the federal choice of law rule and the state choice of law rule.

Adoption of a purely federal choice of law rule creates the potential embarrassment of occasionally divergent results, depending on whether a case is tried in federal court on the basis of diversity jurisdiction or in the state court "one block away."³³⁸ Albeit embarrassing, the likelihood

³³⁴ Congress could enact legislation pursuant to the necessary and proper power in relation to its authority in creating and governing the federal courts. *See supra* note 162.

³³⁵ The Supreme Court could adopt this rule as a matter of federal common law governing litigation in the federal courts. *Cf. Monaghan, Constitutional Common Law*, 89 HARV. L. REV. 1, 38-39 (1975).

³³⁶ *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(1) (1971).

³³⁷ If one shares the view that relatively liberal choice of law rules, such as Minnesota's, should be disfavored in a federal system, this leveling effect is not disquieting. *But cf. Sedler, supra* note 186 (advocating liberal "interest analysis" choice of law rules in cases such as *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981)). Even if one agrees with Professor Sedler that the states should not be subject to intrusive constitutional limitations on choice of law, it is still possible to favor a federal court system making its choice of law decisions without reference to the parochial concerns of an individual state.

It is not clear that the "leveling effect" will indeed occur. The experience of an earlier era in the wake of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), points toward continued state adherence to divergent rules of law. *But cf. Frank, For Maintaining Diversity Jurisdiction*, 73 YALE L.J. 7, 9-13 (1963) (discussing the positive effects of continued federal diversity jurisdiction on state court decisional processes).

³³⁸ *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945).

of providing a true windfall to plaintiffs is not great. If an alternate forum could be found that applies the same law that would be chosen by a purely federal choice of law rule, plaintiff has gained very little. It must be assumed that a plaintiff sophisticated enough to select the benefit of a federal choice of law rule is also sophisticated enough to initiate suit in a state that would apply more favorable law, if that was the only means of obtaining the choice of law benefit. Frequently, the state having the most significant relationship to the litigated events, the state's whose law will be chosen by the advocated federal choice of law rule, will be an available forum. The acts which provide that state with a substantial relationship to the legal dispute are, for the most part, acts of parties occurring within that state. The occurrence of acts in the state are the same sort of indicia that accompany a finding of presence in the due process context.³³⁹ If the state is not a constitutionally impermissible choice of forum under the circumstance, most frequently such a state will be available to hear the litigation.³⁴⁰ As a result, the cases in which diversity jurisdiction provides the only lever that allows plaintiffs to obtain an otherwise unavailable and more favorable governing law are relatively rare. They should not, therefore, be seen as significant enough to outweigh the benefits of a unified and streamlined system of federal personal jurisdiction, service of process, and venue.

In the multiparty diversity setting, where there is, by definition,³⁴¹ no state that could serve as a forum for the litigation, the advantages of a uniform federal rule regarding choice of law are more readily apparent. If federal suit can be brought under current practice,³⁴² one can confidently predict that plaintiffs will be doing a good deal of forum shopping, and will seek to commence suit in a state offering the most favorable choice of law.³⁴³ That choice of law would be applied, in turn, by the district court sitting in that state. Cases of this sort are not invariably cast out of the federal courts under prevailing federal practice despite the fact that no state court could hear the case. Congress has permitted the federal courts to hear certain of these cases, in some instances precisely because

³³⁹ See, e.g., *Buckeye Boiler Co. v. Superior Court*, 71 Cal. 2d 893, 898-99, 458 P.2d 57, 61-62, 80 Cal. Rptr. 113, 117-18 (1969) (en banc).

³⁴⁰ A state that could constitutionally assert personal jurisdiction might be an unavailable forum for one of three reasons: (1) it may not have an adequate method of extraterritorial service to successfully summon a defendant; (2) it may not have a comprehensive long-arm statute which asserts jurisdiction over the particular type of dispute or circumstances involved; or (3) the state may limit the availability of its courts via so-called "door closing" statutes that bar litigation of certain claims.

³⁴¹ See *supra* text accompanying notes 313-14.

³⁴² There are some instances in which Congress has expressly created the possibility of a federal forum in the absence of any available state forum. See, e.g., 28 U.S.C. §§ 1335, 1397 (1976; 28 U.S.C. § 2361 (1978)).

³⁴³ See *infra* text accompanying notes 345-46.

³⁴⁴ Cf. ALI STUDY, *supra* note 258, at 120-31 (urging multiparty, multistate diversity jurisdiction).

of the potential unavailability of a state forum.³⁴⁴ For example, frequently there will be no state court capable of assembling all the needed parties to an interpleader action. Federal courts, pursuant to minimal diversity jurisdiction³⁴⁵ combined with special service and venue provisions³⁴⁶ routinely hear these cases and thereby provide a valuable national judicial service. To argue that these cases reflect either a special congressional interest in the subject, or a unique federal court role in a federal system populated principally by territorially limited state sovereigns simply strengthens the position advocated in this article: federal courts should not, without good reason, be cast in a mold fitted for courts of a different and less powerful sovereign just because they are exercising diversity jurisdiction.

When adjudicating a federal question lawsuit, there can be no reason to doubt the propriety of having a federal court apply a federal choice of law standard if an issue arises requiring that a choice be made. The integrity of a unified system of federal courts is best maintained by having the same law applied to a suit without regard to the situs of filing or trial.³⁴⁷ Once again the proffered standard of most significant relationship would serve to avoid variance when federal question cases present questions of governing law. This is true in both types of federal choice of law situations described above.

When state law is to be borrowed to form an element of federal law, the circumstances that prompt either Congress or the Supreme Court to borrow state law³⁴⁸ are usually related to the highly localized nature of the activity being regulated thereby allowing easy and consistent application of the most significant relationship rule. Many borrowings involve personal injury situations in which the law of the place of injury will be the only law which can plausibly be described as having the most significant relationship to the event sued upon. This is especially likely when it is recognized that the United States as sovereign, unlike the states, has no interest in promoting the policies of any one of the several states in preference to that of another. Forum shopping for choice of law

³⁴⁵ See 28 U.S.C. § 1335 (1976). Minimal diversity simply requires that any plaintiff's state citizenship be diverse from any defendant's. Complete diversity is the general rule for diversity, established by *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806).

³⁴⁶ 28 U.S.C. §§ 1397, 2361 (1976).

³⁴⁷ Forum shopping within the federal system will be totally eliminated by such a rule working in conjunction with a convenience-sensitive transfer of venue provision. There is simply nothing to be gained by seeking a different district for filing of a case. This compares favorably with current practice, where a great deal may be gained by original filing in a district offering a more favorable choice of law.

³⁴⁸ Either the court or Congress may adopt a borrowing rule. See, e.g., *United States v. Kimbell Foods*, 440 U.S. 715 (1979) (court borrowed state law); *Reconstruction Fin. Corp. v. Beaver County*, 328 U.S. 204 (1946) (construing § 10 of the Reconstruction Finance Corporation Act as amended, 47 Stat. 5, 9, 55 Stat. 248, as a congressional borrowing of state definitions of real property).

is avoided, yet the ease of bringing suit and convenience to litigants are promoted by the advocated changes in federal law.

In the case of conflicts between the circuits as to the meaning of federal law, application of a choice of laws analysis is novel, but beneficial. Forcing all of the district courts in which a particular federal question lawsuit may be brought to attempt to apply the same choice of then conflicting federal law helps to unify the federal court system. It will prevent some windfall benefits from accruing to plaintiffs as a result of conflicts between the circuits. Thus, results in the federal court system will be less arbitrary, and the possibility exists that the added awareness of conflicts and potential conflicts may result in greater cohesiveness among the circuits.

VI. CONCLUSION

Having embarked on a study of personal jurisdiction in the federal courts, the compass has swung past service of process to venue and to choice of law. Perhaps this is not surprising, given the inherent redundancy of the first three concepts when applied to the United States as sovereign. Modern methods of travel and communication and the often complex nationwide nature of legal controversies have rekindled the need for federal action to nationalize and unify the behavior of the lower federal courts. The power of a national sovereign to command appearance in its courts in any case having a meaningful relationship with its territory or its citizens is not novel, and self-restraint in exercising the power is no longer necessitated by the physical realities of an earlier era. Convenience of litigation is still a valuable concern, but due process cannot be viewed as requiring stringent limitations on forum availability especially in light of modern procedures that facilitate conducting litigation at great distances from one's home. Instead, convenience is now an end in itself, best served by procedural devices that directly operate to promote it.

Restructuring the federal court system in recognition of the lack of constitutional constraints on congressional choices in this area allows pursuit of a more unified federal system. The threshold barriers to invoking the federal judicial power can be vastly simplified, allowing litigants opting for a federal forum to proceed with a minimum of wasteful procedural litigation. Both the personal jurisdiction inquiry and territorial limitations on federal service of process can be wholly eliminated. Original venue can then be laid in all districts in which a defendant resides or in districts having a significant relationship to the litigation. Transfer of venue should be readily available to ensure convenience of litigation.

The price of this more efficient system of federal courts is the knowledge that in a few cases federal courts adjudicating a lawsuit will reach a different result than would state courts. The disparity of results will occasionally lead to some forum shopping between the state and federal courts to secure a more favorable choice of law. While this is true, the possible

occurrences are limited in number by the establishment of a universally applicable federal choice of law rule which applies the law of the state having the most significant relationship to the litigation. In mediating disputes presenting a potentially significant choice of law, it is difficult to call this choice unfair to litigants who have engaged in multistate activities. Moreover, in most cases a plaintiff would be able to select a nonfederal forum applying this law. Thus, application of the federal choice of law rule will seldom grant litigants the unseemly benefit of a victory rather than a defeat through the selection of a federal rather than a state tribunal. Even when choice of law is critical, the result is not born of federal imposition of federal law as governing. Rather, the conflict of law to be mediated arose from federalism's attempt to rely on the several states as sovereign expositors of their own laws regulating primary conduct. Federal oversight of interstate disputes is necessary, and the adoption of a universal choice of law rule for the federal courts is no more contemptible than the wooden application of the local state's rule. On balance, one must conclude that the myriad interests of a unitary federal system are best served by freeing the federal courts to develop unique rules governing assertions of power over unconsenting defendants. Neither sound jurisdictional policy nor due process commands otherwise.