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Acquiring in Personam Jurisdiction in Federal Question Cases: Procedural Frustration Under Federal Rule of Civil Procedure 4

Marilyn J. Berger*

I. INTRODUCTION

The role of federal courts as enforcers of federally created law recently has received renewed attention. Proposals to curtail diversity jurisdiction, the elimination of the monetary requirement for federal question cases and the proliferation of civil cases brought in federal courts suggest a resurgence of the idea that the primary function of federal courts is to entertain cases involving federally granted rights. The interest in having federal forums hear federal questions makes it particularly important for federal courts to acquire personal jurisdiction in such cases.

The federal court system originally was established to provide a national forum for the protection of federally granted rights.  De-

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1. Federal courts have jurisdiction over "[c]ases in Law and Equity, arising under [the United States] Constitution, the Laws of the United States, and Treaties made . . . under their Authority." U.S. CONST. art. III, § 2. Those cases are termed federal question cases.

2. During the 95th Congress, several bills were introduced to curtail federal diversity jurisdiction. The House Bill, passed on February 28, 1978, would have effectively abolished diversity jurisdiction. H.R. 9622, 95th Cong., 2d Sess., 124 CONG. REC. 1569-70 (1978). However, the Senate Bill proposing curtailment of diversity jurisdiction, S. 2094, 95th Cong., 1st Sess. (1977), Hearings Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess. 5-9 (1978), did not survive the Senate Committee, and both bills died. See Rowe, Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms, 92 HARV. L. REV. 963 (1979) (discussing proposals to abolish diversity jurisdiction).


5. See 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3561 (1975); Chadbourn & Levin, Original Jurisdiction of Federal Questions, 90 U. PA. L.
spite that initial intent, Congress did not address federal question subject matter jurisdiction in the Judiciary Act of 1789; with few exceptions, the federal courts were not vested with original federal question subject matter jurisdiction until 1875. Since granting that jurisdiction, Congress has given scant attention to federal court access for federal questions. Only when particular jurisdictional problems are brought to its attention has Congress concerned itself with personal jurisdiction in federal question cases. As a result, a myriad of federal question personal jurisdiction statutes have developed, not reflective of any uniform plan.

With the adoption of the Federal Rules of Civil Procedure in 1938, Congress finally attempted to provide a uniform standard for exercising personal jurisdiction in federal courts. Despite that attempt, there is currently no uniform method for acquiring personal jurisdiction in federal question cases. A contributing factor to the lack of uniformity is Federal Rule of Civil Procedure 4.

Rule 4 governs the assertion of personal jurisdiction in most civil actions brought in federal court. Under Rule 4, the exercise

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6. Ch. 20, 1 Stat. 73. Among other things, the Judiciary Act created inferior federal courts, removal jurisdiction, the jurisdictional amount requirement for diversity subject matter jurisdiction, the Rules of Decision Act and Supreme Court appellate jurisdiction.

7. See Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 HARV. L. REV. 49 (1923). In analyzing the debates on the 1789 Act, Warren concluded that the final form of the Act was a compromise measure to secure the votes of those who “were willing to see the experiment of a Federal Constitution” and “were insistent that the Federal courts be given minimum powers and jurisdiction.” Id. at 53. He observed that drafting the bill was a contest between those “who wished to confine federal judicial power within narrow limits . . . and those who wished to vest in the Federal Courts the full judicial power [of the constitution].” Id. at 62.

For a description of the federal questions that could be entertained by federal courts prior to 1875, see P. BATOR, P. MISCHKIN, D. SHAPIRO & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 844-47 (2d ed. 1973). Those questions were heard because of their peculiarly federal nature or political exigencies. Id. at 844.

8. With the exception of a one-year experiment that vested federal courts with original federal question subject matter jurisdiction, Act of Feb. 13, 1801, ch. 4, § 11, 2 Stat. 89, repealed by Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132, Congress did not grant federal courts such jurisdiction until 1875. Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470 (current version at 28 U.S.C. § 1331 (Supp. IV 1980)).

9. Congress' limited attention to the desirability of federal jurisdiction for federal questions parallels the attitude of the framers of the 1875 Act. Professors Chadbourn and Levin have observed that the 1875 Act, which granted federal courts original jurisdiction over federal questions, was not the result of any extended debate or discussion. Chadbourn and Levin, supra note 4, at 643-45.

10. See infra notes 159-227 and accompanying text.

11. FED. R. Civ. P. 4. For the text of Rule 4, see infra note 17.

12. Rule 1 of the Federal Rules of Civil Procedure provides: “These rules govern the procedure in the United States district courts in all suits of a civil nature whether cogniza-
of personal jurisdiction involves two primary requirements: (1) notice, which refers to the mechanics for serving process; and (2) amenability, which refers to the relationship between the defendant and the forum. Although the Rule describes the mechanics for service of process, it does not clarify the amenability basis, specifying only that process may be served pursuant to its own provisions or by compliance with applicable state or federal statutes. Neither the language of the Rule nor the Advisory Committee notes provide sufficient guidance for determining which of those three methods for serving process can and should be used as a basis for asserting jurisdiction or what the constitutional limits are.

Federal courts addressing the amenability issue have developed their own responses. In the absence of explicit jurisdictional statutes for many federal questions, federal courts rely on state statutes. Applying state jurisdictional principles, some federal courts have used the due process test developed by the United States Supreme Court in *International Shoe v. Washington.* Others, recognizing that federal and state forums differ, have suggested that a federal due process test is more appropriate. Still others have indicated that use of the federal transfer of venue statute is a logical way to resolve problems of asserting personal jurisdiction in federal courts.

Contrary to its purported intent, Rule 4 is an obstacle to uniformity in acquiring personal jurisdiction in federal question cases. Current solutions posed by Congress and the federal courts have not resolved the problems created by the lack of consistency.

This article calls for a uniform personal jurisdiction standard in federal question cases. In so doing, it examines the three ways to acquire personal jurisdiction under Rule 4 and evaluates the adequacy of each method. Because some federal courts rely on the personal jurisdiction analysis developed for state courts, this article explores the recent United States Supreme Court cases in that area. Finally, it explains the principles of due process developed by federal courts and examines their applicability to the exercise of jurisdiction in federal question cases.

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1. Throughout this article, the phrases "basis for asserting jurisdiction" and "amenability basis" are used interchangeably.
3. See infra notes 135-152 and accompanying text.
4. See infra notes 73-76, 153-154 and accompanying text.
II. Rule 4

A. Physical Presence as a Basis for Asserting Jurisdiction

Federal Rule of Civil Procedure 417 fails to enumerate explic-

17. The applicable provisions of Rule 4 are:
(d) Summons: Personal Service. The summons and complaint shall be served to-
gether. The plaintiff shall furnish the person making service with such copies as are
necessary. Service shall be made as follows:
(1) Upon an individual other than an infant or an incompetent person, by de-
ivering a copy of the summons and of the complaint to him personally or by
leaving copies thereof at his dwelling house or usual place of abode with some
person of suitable age and discretion then residing therein or by delivering a
copy of the summons and of the complaint to an agent authorized by appoint-
ment or by law to receive service of process.
(2) Upon an infant or an incompetent person, by serving the summons and
complaint in the manner prescribed by the law of the state in which the service
is made for the service of summons or other like process upon any such defen-
dant in an action brought in the courts of general jurisdiction of that state.
(3) Upon a domestic or foreign corporation or upon a partnership or other un-
incorporated association which is subject to suit under a common name, by
delivering a copy of the summons and of the complaint to an officer, a manag-
ing or general agent, or to any other agent authorized by appointment or by
law to receive service of process and, if the agent is one authorized by statute
to receive service and the statute so requires, by also mailing a copy to the
defendant.
(4) Upon the United States, by delivering a copy of the summons and of the
complaint to the United States attorney for the district in which the action is
brought or to an assistant United States attorney or clerical employee design-
ated by the United States attorney in writing filed with the clerk of the court
and by sending a copy of the summons and of the complaint by registered or
certified mail to the Attorney General of the United States at Washington,
District of Columbia, and in any action attacking the validity of an order of an
officer or agency of the United States not made a party, by also sending a copy
of the summons and of the complaint by registered or certified mail to such
officer or agency.
(5) Upon an officer or agency of the United States, by serving the United
States and by delivering a copy of the summons and of the complaint to such
officer or agency. If the agency is a corporation the copy shall be delivered as
provided in paragraph (3) of this subdivision of this rule.
(6) Upon a state or municipal corporation or other governmental organization
thereof subject to suit, by delivering a copy of the summons and of the com-
plaint to the chief executive officer thereof or by serving the summons and
complaint in the manner prescribed by the law of that state for the service of
summons or other like process upon any such defendant.
(7) Upon a defendant of any class referred to in paragraph (1) or (3) of this
subdivision of this rule, it is also sufficient if the summons and complaint are
served in the manner prescribed by any statute of the United States or in the
manner prescribed by the law of the state in which the district court is held for
the service of summons or other like process upon any such defendant in an
action brought in the courts of general jurisdiction of that state.
(e) Same: Service Upon Party Not Inhabitant of or Found Within State. Whenever a
statute of the United States or an order of court thereunder provides for service of
itly a basis for asserting personal jurisdiction. Therefore, many authorities take the position that the Rule does no more than provide methods for serving process, and many federal courts have taken a similar position.

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 in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. 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.

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


18. The overwhelming weight of authority interprets Rule 4 as describing only the mechanics for serving process. See, e.g., 4 C. WRIGHT, A. MILLER & E. COOPER, supra note 4, §§ 1063-64, 1117:

Strictly speaking Rule 4 does not deal directly with jurisdiction over the subject matter, jurisdiction over the person, or venue. The federal rules were not designed to affect jurisdiction or venue, and this is expressly stated in Rule 82 . . . .

The primary function of Rule 4 is to provide the mechanisms for bringing notice of the commencement of an action to defendant's attention and to provide a ritual that marks the court's assertion of jurisdiction over the lawsuit. Normally this is accomplished by service of a summons and complaint on defendant or the attachment of his property pursuant to the procedures set out in Rule 4.


This section explores the possibility that Rule 4 authorizes the assertion of jurisdiction on the basis of physical presence.\footnote{Exami-} basing its reasoning on three arguments: (1) federal statutes or rules of civil procedure do not expressly authorize such an interpretation; (2) interpreting Rule 4(d)(3) as providing a federal amenability basis strains the particular language of that rule; and (3) the notes of the Advisory Committee that drafted the Rule indicate that its limited purpose is to regulate the manner for service. The Arrowsmith court, however, failed to address the argument advanced three years earlier in Jaf tex Corp. v. Randolph Mills, Inc., 282 F.2d 508 (2d Cir. 1960). In Jaf tex, the majority concluded that because Rule 4(d)(3) was based in part on the 1789 Judiciary Act, which determined amenability to jurisdiction under federal standards, it should be interpreted as providing an amenability basis. 282 F.2d at 512, 516. Judge Clark, who authored the majority opinion in Jaf tex, dissented in Arrowsmith. In his dissent, Judge Clark questioned the retreat from Jaf tex and warned against the inherent confusion and limitations of applying state law. 320 F.2d at 234-42, 242 app. (Clark, J., dissenting).

Judge Clark's argument in Jaf tex might have been more persuasive had he compared the language of Rule 4 with that of the 1789 Judiciary Act because there are striking similarities. For a discussion of the language and interpretation of the 1789 Judiciary Act, see infra notes 159-186 and accompanying text. See also Petrol Shipping Corp. v. Kingdom of Greece, 360 F.2d 103, 109 (2d Cir.), cert denied, 385 U.S. 931 (1966); Stanley v. Local 926, Int'l Union of Operating Eng'rs, 354 F. Supp. 1267, 1269 (N.D. Ga. 1973). But see Coleman v. American Export Isbrandtsen Lines, 405 F.2d 250, 251-53 (2d Cir. 1968).

20. The physical presence basis received its best known publication in Pennoyer v. Neff, 95 U.S. 714 (1877). Historically, each state was considered to be a sovereign entity and only could assert jurisdiction over a defendant found and served within its geographic boundaries. The basis for jurisdiction became known as transient presence because it did not matter how transient a defendant's presence within the state was for process to be effective. Transient presence has been referred to as a common law basis for the assertion of jurisdiction. 1 J. BEALE, CONFLICT OF LAWS 339-40 (1935). But see Ehrenzweig, The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens, 65 YALE L.J. 289 (1956).

Generally, the physical presence basis operates differently for corporations than for natural persons. At the time of Pennoyer, it generally was believed that corporations only existed where they were incorporated. See Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 517 (1839). Subsequently, the doctrine of implied consent was devised to allow states to assert jurisdiction over a corporation engaged in activities outside the state of its incorporation. By doing business within a state, a corporation was deemed to have given implied consent to that state's jurisdiction. To be consistent with the physical presence doctrine for individuals, courts required appointment of a corporate agent within the state for service of process. The corporation then was deemed present and served within the state through its agent.

There were objections to the "consent" doctrine because of its fictitious nature. See Werner, Dropping the Other Shoe, Shaffer v. Heitner and the Demise of Presence-Oriented Jurisdiction, 45 BROOKLYN L. REV. 565, 575-77 (1979). Courts responded by adopting the "doing business test," which deemed the corporation "present" because of its activities within the state. See International Harvester Co. v. Kentucky, 234 U.S. 579 (1914). The "doing business" approach is considered by most commentators to be the analogue of "physical presence." See Werner, supra, at 577. That conclusion, however, fails to account for certain fundamental differences between the two bases. First, unlike physical presence, "doing business" was not generally recognized as a basis for acquiring jurisdiction at common law. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 35 comment f (1971). Second, under the doing business basis, a corporation's presence, unlike the physical presence basis for individuals, could not be of a transient nature. See Perkins v. Benque Consol. Mining Co., 342 U.S. 437, 441 (1952). Third, a corporation's presence now is measured by its activi-
nation of the Rule suggests, however, that the use of physical presence as a basis for acquiring jurisdiction is limited by geographic scope, judicial interpretation and application of due process principles.

Construing Rule 4 as providing for presence as an amenability basis requires that the language describing the methods for service of process be interpreted as also providing a basis for asserting personal jurisdiction. Under Rule 4, the method of service depends on whether or not process is served within the territorial boundaries of the state in which the district court is located. Service made within the court's geographic boundaries can be accomplished under Rule 4 or under an applicable state or federal statute. If a party physically present within the district court's territorial boundaries is served pursuant to Rule 4, subsections (d)(1)-(6) and (f) specify the manner of service.

Unless an amenability basis is provided either in a statute or by common law, jurisdiction cannot be asserted over a party.

21. One commentator has suggested that where jurisdiction in a federal question case is predicated on a defendant's physical presence within the state in which the district court is located, "it is generally assumed that judicially-fashioned federal standards of "consent" or "presence" measure the amenability of the defendant within the state where the district court is held, and thus provide options of federal as well as state standards of amenability when service is made within the state." Foster, supra note 18, at 17 (footnote omitted).

In Donald Manter Co. v. Davis, 543 F.2d 419 (1st Cir. 1976), the defendant was personally served with process while present in the state in which the district court was located, as specified by Rule 4(d)(1). The district court held that "[i]t has long been black letter law that personal service within its geographical area establishes a court's personal jurisdiction over the defendant." Id. at 420. See also Koupetoris v. Konkar Intrepid Corp., 535 F.2d 1389, 1395 (2d Cir. 1976) (service of process pursuant to Rule 4(d)(3) resulting in amenability to personal jurisdiction). Cf. Stafford v. Briggs, 444 U.S. 527, 553 n.6 (1980) (Stewart & Brennan, JJ., dissenting on other grounds) (statute appearing only to provide for manner of serving process interpreted as detailing amenability for personal jurisdiction). In Stafford, Justices Stewart and Brennan stated that "as a general rule, service of process is the means by which a court obtains personal jurisdiction over a defendant." Id.

22. Rules 4(d)(1)-(6) and 4(f) specify how service can be made within a federal court's geographic boundaries. Rules 4(e) and (i) specify how service can be made outside the court's boundaries.


24. See id. 4(d)(2), (7) (service can be made pursuant to an applicable state statute for those persons or entities described in Rule 4(d)(1)-(3)).

25. See id. 4(d)(7), (f) (service of process pursuant to a federal statute authorized for those persons or entities described in Rules 4(d)(1) or (3)).

26. But see Rule 4(d)(2) (manner for serving process on infants and incompetents is that prescribed by state statute).

27. RESTATEMENT (SECOND) OF CONFLICT OF LAWS, supra note 20, § 79 introductory note & comment c, at 101-02; RESTATEMENT (SECOND) OF JUDGMENTS § 7 comment (Tent.
Therefore, Rule 4 should either specify an amenability basis or designate the source from which the amenability basis can be derived. The Rule, however, does neither. Because some standard of amenability is necessary and the common law physical presence basis need not be codified, it is appropriate to construe Rule 4 as including physical presence as the amenability basis where it describes the federal manner for serving process.

That interpretation of Rule 4 is supported by subsections (e) and (i). Rule 4(e), which governs service on a defendant not an inhabitant of or found within the state in which the district court is located, and Rule 4(i), which provides for service in a foreign country, declare that either applicable state or federal statutes may be followed in determining the method of service. Although neither section contains an explicit provision dealing with amenability to jurisdiction, federal courts interpreting those sections have impliedly determined that the amenability basis is provided by state or federal statutes. Under that interpretation, the amenability basis can be provided by a separate statute or by Rule 4,


28. See R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 93 (1971): “Some of the bases for jurisdiction over individuals have been recognized at common law without the need for a statute authorizing use of those bases for jurisdiction. These ‘common law’ bases are presence, consent and appearance.” Id. (footnote omitted).

Construing Rule 4 as providing for presence as the amenability basis also is consistent with the construction given to similar state statutes. See, e.g., N.Y. CIV. PRAC. LAW § 301 (McKinney 1971 & Supp. 1981): “A court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore.” That statute has been interpreted as preserving the common law bases for jurisdiction. See also CAL. CIV. PROC. CODE § 410.10 (West 1973). The California Judicial Council commented that Section 410.10 “permits California courts to exercise judicial jurisdiction on any basis not inconsistent with the state or federal Constitutions. This authorization continues the California law on jurisdiction over foreign corporations and re-establishes the prior law that once governed nonresident individuals.” Id. comment—judicial council, at 459. But see N.C. GEN. STAT. § 1-75.4(1) (Supp. 1981): “A court of this State having jurisdiction of the subject matter has jurisdiction over a person [i]n any action . . . in which a claim is asserted against a party who when service of process is made upon such party: (a) [i]s a natural person present within this State.” See also CAL. CIV. PROC. CODE §§ 415-417 (West 1973 & Supp. 1981); ILL. ANN. STAT. ch. 110, §§ 13-19 (Smith-Hurd 1968 & Supp. 1981); N.Y. CIV. PRAC. LAW §§ 307-312 (McKinney 1972 & Supp. 1981); N.C. GEN. STAT. § 1A-1, Rule 4(j) (Supp. 1981).

29. In Gkiasis v. Steamship Yiosonas, 342 F.2d 546, 548-49 (4th Cir. 1965), the court of appeals commented that because no federal statutory provision informs courts when foreign corporations are amenable to jurisdiction, the amenability basis is found within the state long-arm statute used to effect service of process. In Scott Paper Co. v. Scott’s Liquid Gold, Inc., 374 F. Supp. 184 (D. Del. 1974), the question of amenability for service under the state long-arm statute was governed by state interpretation, even though the trademark infringement action arose under federal law. The same conclusion has been reached where service of process was made pursuant to a federal statute. See Stafford v. Briggs, 444 U.S. 527 (1980); supra note 21.
which also is a federal statute. Similarly, in the case of Rule 4(d)(1)-(6) where no reference to a separate statute is made, the physical presence language for service of process can be construed as providing the amenability basis.

B. Nonuniform Treatment Under Rule 4

1. Application of State Due Process Principles—Because of the difficulties in determining an amenability basis, it is not surprising that federal courts have adopted different approaches to acquiring personal jurisdiction under Rule 4. In particular, federal courts have given diverse interpretations to subsections (d)(1)-(6) and (f). To a great extent, that lack of uniformity is a result of attempts to apply jurisdictional principles developed for state courts to questions of federal jurisdiction.

State courts analyze jurisdictional disputes by determining whether the defendant is physically within the state’s territorial boundaries.30 Where a defendant is served with process while he is within the state’s boundaries, the state can assert jurisdiction based on that presence.31 If a defendant is physically outside the state, a due process test must be met before the state may exercise jurisdiction.32

Where service of process is made pursuant to Rule 4(d)(1)-(6), some federal courts accept physical presence as the amenability basis.33 Under Rule 4(d)(1)-(6), the geographic boundaries of the

30. State statutes usually differentiate between defendants who are physically located within the state's boundaries and those outside the state. See, e.g., ILL. ANN. STAT. ch. 110, §§ 13-19 (Smith-Hurd 1968 & Supp. 1981); N.C. GEN. STAT. § 1-75.4 (Supp. 1981).


32. The due process test applied by state courts is commonly referred to as the "minimum contacts test." That test first was articulated in International Shoe Co. v. Washington, 326 U.S. 310 (1945). In International Shoe, the Court determined that to assert personal jurisdiction over a corporation not present within the state, fourteenth amendment due process standards had to be met:

But now that the capias ad respondendum has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

Id. at 316 (citation omitted) (emphasis in original).

33. Physical presence as an amenability basis was recognized in Donald Manter Co. v. Davis, 643 F.2d 419 (1st Cir. 1976), where service of process apparently was made pursuant to Rule 4(d)(1). See also Lone Star Package Car Co. v. Baltimore & Ohio R.R., 212 F.2d 147, 151-55 (5th Cir. 1954) (recognizing a federal basis for asserting personal jurisdiction
federal court are coterminous with those of the state in which the district court is located. Therefore, when a defendant is within those boundaries, the federal district court can assert jurisdiction over the defendant in the same manner as state courts.

Under Rule 4(f), the boundaries of federal district courts are extended an additional 100 miles for service of process on necessary or third parties. Where a third party defendant is served with process while within the geographic boundaries of the "100 mile bulge" area, however, only a minority of federal courts allow the assertion of personal jurisdiction based on physical presence alone. The majority of federal courts apply a due process test, which is the result of two factors: reliance on state court jurisdictional principles and a misinterpretation of the territorial boundaries of district courts.

State jurisdictional principles require a due process analysis if a defendant is outside a state's boundaries. Because its boundaries are clearly definable, a state court easily can decide whether a due process test is appropriate. Most federal courts and commen-
tators view the "100 mile bulge" area as extraterritorial. Where a defendant is served with process while physically present in the "100 mile bulge" area, those courts consider the defendant outside the federal district court's territorial boundaries and then, by referring to state court jurisdictional principles, apply a due process test. The problem with that approach is that Congress, in Rule 4(f), has redefined the territorial boundaries of district courts to extend beyond the boundaries of the state in which the federal district court is located for the purpose of serving process on necessary or third parties. The geographic extension of federal district court boundaries does not make assertion of jurisdiction within the extended area extraterritorial. Because a federal district court can assert jurisdiction over a defendant within its geographic area based on physical presence alone, a due process test should be unnecessary where personal service is made on a third party defendant within the "100 mile bulge" area.

40. E.g., Coleman v. American Export Isbrandtsen Lines, Inc., 405 F.2d 250, 261 (2d Cir. 1968); Spearing v. Manhattan Oil Transp. Corp., 375 F. Supp. 764, 771 (S.D.N.Y. 1974); McGonigle v. Penn Central Transp. Co., 49 F.R.D. 58, 61 (D. Md. 1969); Karlson v. Hanff, 278 F. Supp. 864, 865 (S.D.N.Y. 1967). But see Sprow v. Hartford Ins. Co., 594 F.2d 412 (5th Cir. 1979). In Sprow, the court believed that the 100-mile bulge provision "has effectively expanded the territorial jurisdiction of a federal district court beyond state lines." Id. at 416. Although the Sprow court recognized that Rule 4(f) "was an exercise by Congress of its lawful power to provide for service of process in any part of the United States," it nevertheless applied principles of due process. Id. The court justified that application by reasoning: [I]t is possible that a set of facts may arise where it would be fundamentally unfair to subject a party served within the bulge area to the forum's jurisdiction. The clearest example that comes to mind is that of a corporation whose only contact with the forum state or bulge area is its officer's temporary presence within the bulge at the time of service.


42. See Mississippi Publishing Corp. v. Murphree, 326 U.S. 438 (1945). In Mississippi Publishing, the court stated that "Rule 4(f) serves only to implement the jurisdiction over the subject matter which Congress has conferred, by providing a procedure by which the defendant may be brought into court at the places where Congress has declared that the suit may be maintained." Id. at 445.

43. But see Kaplan, supra note 18, at 633: "The amendment is certainly not intended to hold the corporation to judgment if the sole contact is the fact of service. Considerations of fairness to the party, viewed in the light of the animating purpose of the amendment, ought to control. . . ." Notwithstanding Professor Kaplan's concerns, a due process test is not essential to ensure fairness in asserting personal jurisdiction in federal question cases. A corporation's presence is measured by its activities. Similarly with individuals, although they are "present" if physically served with process while within the geographic area, the
2. Lack of Uniformity Within the Due Process Test—A second problem of uniformity under Rule 4(f) occurs because federal courts apply state court standards to determine whether due process has been satisfied. The due process test used by state courts is the "minimum contacts" test, which determines the sufficiency of a defendant's contacts with a particular state. Federal courts also use a minimum contacts approach to due process, examining the sufficiency of a defendant's contacts with a defined geographic area. In federal courts, however, the geographic entity with which the sufficiency of the defendant's contacts is measured varies. Federal courts examine the defendant's contacts with one of three geographic areas: (1) the forum state, (2) the bulge area (the 100 miles in which the third-party defendant may be served) or (3) the United States.

In Karlsen v. Hanff, the third-party defendant in an admiralty case was served with process, pursuant to Rule 4(f), in the bulge area. Adopting state minimum contacts analysis and territorial limitations, the Karlsen court selected the state in which the district court was located as the geographic entity with which to measure the defendant's contacts. Thus, the court found that it could not assert jurisdiction because process was served beyond the state's boundaries.

Other courts examine the sufficiency of the defendant's contacts with the bulge area. In Coleman v. American Export Is-
brandtsen Lines, Inc., also a case in admiralty, the district court rejected examination of contacts with the forum state alone and suggested that the third-party defendant must have minimum contacts with the bulge area. A majority of federal courts follow Coleman, reasoning that if the defendant's contacts were measured solely by references to a forum state's boundaries, susceptibility to jurisdiction under the "100 mile bulge" rule would not be much different than under state long-arm statutes.

Some commentators have suggested that the United States is a more appropriate geographic area with which to examine the sufficiency of a defendant's contacts than either the forum or the bulge area. Because jurisdiction relates to the power of the unit of government of which that court is a part, and not to a particular court's power, use of the United States as the geographic entity is more logical under a territorial due process test. Nevertheless, most federal courts have not adopted that approach.

The different approaches adopted by federal courts illustrate the problems inherent in applying a territorial due process test.

50. 405 F.2d 250 (2d Cir. 1969).
51. Id. at 252.
55. Geographic areas have been used consistently to measure due process. For states, that use has reflected the sovereign entity concept. The sovereign entity concept, however, does not apply to federal court use of geographic areas. In particular, the 100-mile bulge area does not correspond to a sovereign entity, such as the forum state or the state into which the bulge area extends. Where territorial considerations are used in federal question cases, it would be more relevant to require minimum contacts with the United States. See RESTATEMENT (SECOND) OF JUDGMENTS, supra note 27, §§ 8-10. But cf. National Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 330-31 (1964) (Black, J., dissenting) (arguing that state boundary lines ought to be constitutionally controlling in diversity cases even when a federal manner for serving process is used).
56. Courts have used the United States as the geographic entity, however, under nationwide service of process statutes. See, e.g., Fitzsimmons v. Barton, 859 F.2d 330, 334 (7th Cir. 1989) (sufficiency of defendant's contacts should be examined in relation to the United States because that is the sovereign entity).
Instead of creating a uniform system for asserting personal jurisdiction, federal courts' due process analyses have resulted in nonuniformity. Lack of uniformity arguably could be eliminated if physical presence were used as a basis for asserting personal jurisdiction in federal question cases.

C. Physical Presence and Due Process: Are They Antagonistic?

Uniformity could be achieved by adopting a consistent approach in interpreting Rule 4 and due process. For example, if Rule 4 implicitly provides for physical presence as an amenability basis, it is doubtful that a due process test needs to be applied in federal question cases.57 Due process notions limit the power of a court to render a valid personal judgment against a nonresident defendant to situations where the assertion of jurisdiction is consistent with principles of "fair play and substantial justice."58 Whether an assertion of jurisdiction meets those standards depends on the facts and circumstances of each case.

Physical presence as a basis for exercising jurisdiction is based on the "power theory."59 According to that theory, "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory."60 Thus, a sovereign derives the

57. Except to recognize that the concerns of federal and state courts may differ in their approaches to jurisdiction, state court's application of due process principles, where physical presence is the amenability basis, is beyond the scope of this article. For an extensive discussion of state jurisdiction and physical presence, see Ehrenzweig, supra note 20; Werner, supra note 20.


59. See McDonald v. Mabee, 243 U.S. 90, 91 (1917) ("The foundation of jurisdiction is physical power") (dictum). See generally RESTATEMENT (SECOND) OF JUDGMENTS, supra note 27, §§ 8-11.

60. Pennoyer v. Neff, 95 U.S. 714, 722 (1877). The territorial power theory of jurisdiction rests on two jurisdictional principles, which were set forth in Pennoyer:

The several States of the Union are not, it is true, in every respect independent, many of the rights and powers which originally belonged to them being now vested in the government created by the Constitution. But, except as restrained and limited by that instrument, they possess and exercise the authority of independent States, and the principles of public law to which we have referred are applicable to them. One of these principles is, that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. As a consequence, every State has the power to determine for itself the civil status and capacities of its inhabitants . . . . The other principle of public law referred to follows from the one mentioned; that is, that no State can exercise direct jurisdiction and authority over persons or property without its territory . . . . The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one State have no operation outside of its territory, except so far as is allowed by comity; and that no
power to exercise personal jurisdiction from the defendant's presence within the sovereign's territory.\(^{61}\)

The presence basis often is criticized on the ground that the power theory is contrary to fundamental principles of fairness.\(^{62}\) Some commentators have vociferously urged that jurisdiction should be asserted against a defendant only if the exercise is fair\(^{63}\) and that the presence amenability basis should be replaced entirely by a due process analysis.\(^{64}\) The United States Supreme Court, however, has reconciled the power theory and due process principles. In *World-Wide Volkswagen v. Woodson*,\(^{65}\) the Court found that the fourteenth amendment due process test performs two related but distinct functions: (1) preserving the sovereignty of each state's judicial system from encroachment by other states;\(^{66}\) and (2) protecting defendants from the burden of litigating in a

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tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions.

*Id.* (emphasis in original).


64. See *id.,* note 63, at 658-59; Von Mehren & Trautman, *supra* note 63, at 1164-79. *But cf.* Ehrenzweig, *supra* note 20, at 312-14 (concern for fairness to a defendant should not be the sole inquiry, instead, the most appropriate forum should be selected and state courts should develop interstate venue to seek a "forum conveniens"). *Id.* at 312-14. See also Currie, *The Federal Courts and the American Law Institute*, 36 U. CHI. L. REV. 288, 298-307 (1969); Barrett, *Venue and Service of Process in the Federal Courts—Suggestions for Reform*, 17 VAND. L. REV. 608 (1954) (suggesting that functions and requirements of personal jurisdiction and venue should be united).


66. In *World-Wide Volkswagen*, the Court stated that the due process concept of minimum contacts "[a]cts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as co-equal sovereigns in a federal system." *Id.* at 292. Accordingly, the Constitution upholds each state's sovereign right to try cases in its own courts. *Id.* at 293-94. *But see* Insurance Corp. of Ireland v. Campagnie des Bauxites de Guinea, 102 S. Ct. 2099 (1982). In that case the court attempted to clarify the interstate federalism concept enunciated in *World-Wide Volkswagen*:

It is true that we have stated that the requirement of personal jurisdiction, as applied to state courts, reflects an element of federalism and the character of state sovereignty vis-a-vis other states. . . . The restriction on state sovereign power described in *World-Wide Volkswagen Corp.*, however, must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That clause is the only source of the personal jurisdiction requirement and the clause itself makes no mention of federalism concerns. . . . Individual actions cannot change the powers of sovereignty, although the individual can subject himself to powers from which he may otherwise be protected.

*Id.* at 2104 n.10. (citations omitted).
distant or inconvenient forum.\textsuperscript{67}

The first function, preservation of state sovereignty, is a consideration shared by the power theory. In contrast to state courts, however, federal courts do not need to be protected from encroachment by other federal courts. District courts are not sovereign entities; they are part of one national court system.\textsuperscript{68} Under the national system, no district court has a superior right to entertain a particular federal question. Therefore, an individual district court does not encroach on another district's sovereignty by asserting presence-based jurisdiction. Furthermore, because federal courts may entertain only claims with an allowable subject matter,\textsuperscript{69} assertion of presence-based jurisdiction is restrained.\textsuperscript{70} Where subject matter jurisdiction is based on a federal question, that question limits the scope of the litigation.\textsuperscript{71} Thus, even though a defendant is present, the court may not assert presence-based jurisdiction unless the claim falls within the range of federal question subject matter.

The second function, protection from litigation in an inconvenient forum, is typically described as the fairness part of the due process examination. Although not included in the power theory,

\textsuperscript{67} Id. at 291-92.

\textsuperscript{68} For a detailed discussion of the division of the federal courts, see 1 J. Goebel, History of the Supreme Court of the United States 471-73 (1971). Goebel notes that "[f]or the purposes of judicial administration . . . a species of artificial federal entities was to come into existence." Id. at 471. Article III of the United States Constitution and the 1789 Judiciary Act created inferior federal courts. U.S. Const. art. III, § 1; Judiciary Act of 1789, ch. 20, 1 Stat. 73. The original national judicial system had two sets of inferior courts. Each state had a district court, and there were three circuit courts. Final appellate review was vested in the supreme Court. For a detailed history of the federal court system, see F. Frankfurter & J. Landis, The Business of the Supreme Court (1928); P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, supra note 7, at 1-63; Warren, supra note 6, at 72-73.

\textsuperscript{69} See supra notes 1, 4, 6, 8 and accompanying text.

\textsuperscript{70} Von Mehren & Trautman have classified jurisdiction as "[1] unlimited general jurisdiction, the ensuing judgment speaking without restriction to any of the judgment debtor's assets; and [2] the judgment affecting only a specified fund or assets." Von Mehren & Trautman, supra note 63, at 1136. Those terms also have been applied to the ability to acquire jurisdiction. Thus, "the appropriate test for 'limited jurisdiction' focuses on the nexus between the cause of action at issue and [a] defendant's activities within the forum." Cornelison v. Chaney, 16 Cal. 3d 143, 153, 545 P.2d 264, 270, 127 Cal. Rptr. 352, 358 (1976) (Clark, J., dissenting).

\textsuperscript{71} Federal courts entertaining federal question cases usually are limited to deciding claims that arise out of the United States Constitution or federal statutes. However, under the doctrine of pendent jurisdiction, federal courts may acquire jurisdiction over an entire case and decide claims that have a substantial relationship to the federal question, thereby allowing the joinder of state claims. See United Mine Workers v. Gibbs, 383 U.S. 715 (1966). A similar doctrine, ancillary jurisdiction, exists for diversity cases. See Owen Equip. & Erection Co. v. Kroger, 434 U.S. 1008 (1978).
the fairness consideration is harmonious with that theory in federal question cases. Unlike the circumstances in state courts, two safeguards, independent of the due process clause, ensure that defendants will not be forced to litigate in an inconvenient federal forum.

First, protection against inconvenience caused by factors such as distance, witness availability and costs of litigation can be achieved by using federal venue and transfer of venue provisions. Although personal jurisdiction concerns the power to adjudicate and venue is concerned with providing a convenient forum, both ultimately attempt to prevent inconvenience. Thus, the ability to

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72. In federal question cases, the defendant has a sufficient nexus with the federal court by his involvement in a case arising under federal law. See infra note 77 and accompanying text.

73. Venue for federal questions is governed by section 1391 which provides, in part: (b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law. (c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes. 28 U.S.C. §§ 1391(b), (c) (1979). Many federal statutes, however, provide for special venue. See infra notes 187-227 and accompanying text.

Transfer of venue for federal courts is governed by section 1404(a): "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a) (1976). Many courts view the venue and transfer of venue provisions as a last measure to protect a defendant from having to defend a case at an inconvenient location. See First Flight Co. v. National Carloading Corp., 209 F. Supp. 730, 740 (E.D. Tenn. 1962). Some federal courts have combined their venue and amenability analysis to determine issues of inconvenience. In large part, that approach rests on the assumption that the minimum contacts due process test incorporates inconvenience criteria. See Kilpatrick v. Texas & P. Ry., 166 F.2d 788, 790-91 (2d Cir.), cert. denied, 335 U.S. 814 (1948). In Kilpatrick, a case which arose under the Federal Employer's Liability Act, the court held that the criteria used in forum non conveniens were inseparable from the criteria used to determine amenability to personal jurisdiction. Id. at 791. For a discussion of forum non conveniens, see infra note 75.

74. See Time, Inc. v. Manning, 366 F.2d 690 (5th Cir. 1966): Jurisdiction and venue, while comprising many of the same considerations, are not the same . . . . Both are designed to test the fairness to the defendant and the degree of inconvenience caused him by requiring him to litigate in a particular court . . . . But jurisdiction is relatively more concerned with fairness and venue more with inconvenience. Id. at 696 (citations omitted). See also United States v. Scophony Corp., 333 U.S. 795, 809 (1948); Ford v. Valmac Indus., 494 F.2d 330, 331 (10th Cir. 1974); C. Wright, A. Miller & E. Cooper, supra note 14, § 3801.

75. Compare World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) (due process analysis focusing on concern for protecting defendant from the burden of distant litigation) with Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947) (forum non conveniens). In World-Wide Volkswagen, the factors the Court considered included: the plaintiff's interests
transfer a case to a more convenient federal court can alleviate the
need to assess convenience factors under a personal jurisdiction
due process analysis. 76

Second, federal question subject matter jurisdiction ensures
that sufficient nexus exists among the defendant, the federal forum
and the litigation. 77 The subject matter in federal question cases is
created by the United States Constitution or federal statutes.
Thus, the question litigated has a direct connection with the fed-
eral forum. Because federal questions are an expression of the gov-
ernment’s concern for federally created rights, the defendant es-
tablishes a connection with the federal government, and thus with
the federal forum, by seeking to take advantage of those rights.

Because there is a sufficient nexus among the defendant, the
federal forum and the litigation, the federal court system as the
interpreter and enforcer of federal law should have jurisdiction
over a defendant in cases concerned with federally created rights.
The application of state due process principles in federal courts is
objectionable both because it is an irrelevant exercise and because
it negates the federal court’s otherwise valid right to assert
jurisdiction.

D. Inherent Limitations in Asserting Jurisdiction Under Rule 4

The difficulty with using Rule 4 to acquire jurisdiction does
not emanate entirely from the application of due process prin-
ciples. Problems also occur because of the limited power delegated to
federal district courts.

Historically, the reach of district courts was limited to protect

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76. See, e.g., Champion Spark Plug Co. v. Karchmar, 180 F. Supp. 727, 731-32
(S.D.N.Y. 1960) (noting that criteria for determining amenability to personal jurisdiction
were equally applicable where determining forum non conveniens). Some commentators
have suggested combining venue and jurisdiction provisions. See Barrett, supra note 64, at
629-35; Seidelson, Jurisdiction of Federal Courts Hearing Federal Cases: An Examination
of the Propriety of the Limitations Imposed by Venue Restrictions, 37 Geo. Wash. L. Rev.
82, 100 (1968).

defendants from the inconvenience of travel and to protect states from the encroaching powers of federal courts. Those concerns, however, can be viewed as relics from the past. Venue and transfer of venue rules serve to protect a defendant from inconvenience, and it is well established that Congress has the power to determine how jurisdiction can be asserted within the geographic territory of the United States. In Rule 4, Congress gave district courts power to exercise jurisdiction within limited geographic areas. Under sections 4(d)(1)-(6), district courts can assert jurisdiction only within the state in which the district court is located. Under section 4(f), they can extend their jurisdictional powers into the 100-mile bulge area for necessary and third-party defendants. The problems with Rule 4, then, stem not from physical presence as a basis of amenability but from the limited geographic area in which that basis can be used.

III. State Long-Arm Statutes

State long-arm statutes provide an alternative basis under Rule 4 for the assertion of personal jurisdiction in federal court. Most federal courts rely on those statutes to obtain jurisdiction over parties outside the district court’s geographic area. However, whether jurisdiction can be asserted in a particular federal court depends on the applicable state statute. Because state long-arm statutes vary in content and are interpreted differently, they often are major hurdles to acquiring personal jurisdiction in federal court.

78. "[R]ecognizing the sentiment relative to the dragging of persons from their homes long distances to the District Courts, the Senate, in Section 3, increased the number of places at which such Courts should be held." Warren, supra note 6, at 72 (footnote omitted).
79. Id. at 53, 62, 65-71.
80. See Mississippi Publishing Corp. v. Murphree, 326 U.S. 438, 442 (1946); United States v. Union Pac. R.R., 98 U.S. 569, 604 (1878); Toland v. Sprague, 37 U.S. (12 Pet.) 300, 328 (1838); Picquet v. Swan, 19 Fed. Cas. 609, 611 (No. 11,134) (C.C.D. Mass. 1828). Although the above cases frequently are cited for the proposition that Congress has the power to provide nationwide service of process, all rely on sovereignty as the basis for that authority. See also A.L.I. Study of the Division of Jurisdiction Between State and Federal Courts § 2374(a) commentary-memorandum b (1969) [hereinafter cited as A.L.I. Study].
81. For the text of Rule 4, see supra note 17.
82. Fed. R. Civ. P. 4(d)(2), (7), (e), (f), (i).
83. Rules 4(e), (f) and (i) authorize the use of a state statute where service is made on a party who is not an inhabitant of or found within the state where the district court is located. Id. 4(e), (f), (i). If personal service is made within the state where the district court is located, Rule 4(d)(2) authorizes the use of a state statute for serving process on an infant or incompetent. Id. 4(d)(2). Rule 4(d)(7) authorizes the use of a state statute where serving process on either an individual, see id. 4(d)(1), or a corporation, see id. 4(d)(3). Id. 4(d)(7).
This section examines the impact of state long-arm statutes on personal jurisdiction in federal question cases. The differing content and interpretation of long-arm statutes are discussed in the context of how those differences create a lack of uniformity in the federal court system and often preclude federal courts from hearing federal question cases. The varying constitutional limitations federal courts have placed on state long-arm statutes then are explored.

A. State Long-Arm Statutes: Difference in Type and Interpretation

Long-arm statutes were enacted to enable individual states to acquire jurisdiction over parties who were not physically present in, a resident of, or domiciled within the state. There are two general categories of long-arm statutes. "Single act" statutes list the types of acts that give a court jurisdiction over a nonresident.

84. Justices Black and Douglas, objecting to adoption of the amendment to Rule 4(e), which provided for the use of state long-arm statutes to obtain personal jurisdiction in federal court, observed: "We also see no reason why the extent of a Federal District Court's personal jurisdiction should depend on the existence or nonexistence of a state 'long-arm' statute." Amendments to Rules of Civil Procedure for the United States District Courts, 374 U.S. 863, 869 (1963).

85. See Mishkin, The Federal "Question" in the District Courts, 53 COLUM. L. REV. 157, 158-59, 171-72, 196 (1953). Professor Mishkin suggests a number of reasons why federal question cases should be heard in federal court: to protect federal legislative programs, to set federal policy, to provide a uniform interpretation of federal law, and to promote the existence of an alternative forum that stimulates state courts to be more attentive to claims of federal rights. Id. at 195-96. See also Wechsler, Federal Jurisdiction and the Revision of the Judicial Code, 13 LAW & CONTEMP. PROBS. 216, 218, 225-26 (1948); A.L.I. Study, supra note 80, at 4, 162-68. The A.L.I. Study concluded that federal question jurisdiction should be expanded because it is "necessary to preserve uniformity in federal law and to protect litigants relying on federal law from the danger that state courts will not properly apply that law, either through misunderstanding or lack of sympathy." Id. at 4. See, e.g., Bartels v. International Commodities Corp., 435 F. Supp. 865, 868 (D. Conn. 1977) (action under the 1974 Commodity Act, jurisdiction denied because no applicable federal statute and state long-arm requirements not met); Bernard v. Richter's Jewelry Co., 53 F.R.D. 606, 608 (S.D.N.Y. 1971) (truth-in-lending action, jurisdiction denied because no applicable federal jurisdiction statute and state long-arm statute requirement not met).

86. See Currie, supra note 64, at 300; D. LOUISELL & G. HAZARD, CASES AND MATERIALS ON PLEADING AND PROCEDURE, STATE AND FEDERAL 14-16 (4th ed. 1979).

87. Jurisdiction under a single act statute is predicated on a nonresident engaging in one of the acts specified by the statute. Those acts usually involve aspects of contract, tort, or real property law. The Illinois statute is a typical "single act" state statute:

(1) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits such person, and, if an individual, his personal representative, to the jurisdiction of the
"Due process" statutes provide simply that any action by a nonresident that satisfies fourteenth amendment constitutional due process requirements gives a court personal jurisdiction. Where state courts apply "single act" statutes, they use a two-part test to determine whether personal jurisdiction may be asserted. The courts first examine compliance with the specific language of the courts of this State as to any cause of action arising from the doing of any of such acts:

(a) The transaction of any business within this State;
(b) The commission of a tortious act within this State;
(c) The ownership, use, or possession of any real estate situated in this State;
(d) Contracting to insure any person, property or risk located within this State at the time of contracting;
(e) With respect to actions of dissolution of marriage and legal separation, the maintenance in this state of a matrimonial domicile.

(2) Service of process on any person who is subject to the jurisdiction of the courts of this State, as provided in this Section, may be made by personally serving the summons on the defendant outside this State, as provided in this Act, with the same force and effect as though summons had been personally served within this State.

(3) Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based on this Section.

(4) Nothing herein contained limits or affects the right to serve any process in any other manner now or hereafter provided by law.


Most single act statutes have been patterned after the Illinois statute, including the Uniform Interstate and International Procedure Act, 13 U.L.A. 459-507 (master ed. 1980).

88. The California long-arm statute is one example of a due process statute: "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." CAL. CIV. PROC. CODE § 410.10 (West 1973). The Rhode Island statute is another example of a due process statute:

Every foreign corporation, every individual not a resident of this state or his executor or administrator, and every partnership or association, composed of any person or persons, not such residents, that shall have the necessary minimum contacts with the State of Rhode Island, shall be subject to the jurisdiction of the State of Rhode Island, and the courts of this state shall hold such foreign corporations and such nonresident individuals or their executors or administrators, and such partnerships or associations amenable to suit in Rhode Island in every case not contrary to the provisions of the Constitution or laws of the United States.


89. In Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406 (9th Cir. 1977), the Ninth Circuit stated: “[N]ot only must the requirements of due process be met before a court can properly assert in personam jurisdiction, but the exercise of jurisdiction must also be affirmatively authorized by the legislature." Id. at 416. See also World-Wide Volkswagen v. Woodson, 444 U.S. 286, 290-91 (1980); Lone Star Package Car Co. v. Baltimore & Ohio R.R., 212 F.2d 147, 153 (5th Cir. 1954); Pulson v. American Rolling Mill Co., 170 F.2d 193, 194 (1st Cir. 1948). See generally 2 J. MOORE, FEDERAL PRACTICE, supra note 18, ¶ 4.41-1[1], at 4-421-22; RESTATEMENT OF CONFLICT OF LAWS, supra note 20, §§ 46 comment f, 73 comment a; RESTATEMENT (SECOND) OF JUDGMENTS, supra note 27, § 7 comment a. However, where a state interprets its statute as conferring jurisdiction to the limits permitted by the United States Constitution, the court can dispense with the statutory test. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 290 (1980).
statute. Next, they determine whether due process requirements have been met. Due process statutes only require a determination of whether the defendant's contacts with the forum state satisfy due process.

A federal court, relying on a state statute to assert personal jurisdiction, follows the same process. Thus, where a state "single-act" statute is relied on for asserting personal jurisdiction, the federal question must conform to the statutory language. Because federal question cases concern unique federal rights, it is difficult to classify them as one of the common law acts specified in the state statutes. For example, federal courts have original subject matter jurisdiction in trademark infringement cases. Personal jurisdiction and venue can be acquired under federal statute in cases that involve foreign or multiple adverse parties residing in different states or where the action is brought in the District of Columbia. Where an action involves a single adverse party and is

90. See Honeywell, Inc. v. Metz Apparatewerke, 509 F.2d 1137, 1141-42 (7th Cir. 1975); Gkiafas v. Steamship Yiosonas, 342 F.2d 546 (4th Cir. 1965); Fed. R. Civ. P. 81(e). See also supra note 17.

91. See Elefteriou v. Tanker Archontissa, 443 F.2d 185 (4th Cir. 1971). Elefteriou involved a merchant seaman's suit to recover damages for personal injury, maintenance and wages under federal maritime law. Because the defendant was located outside the territorial boundaries of the state in which the district court was located, Rule 4(e) allowed process to be served under federal or state statute. Id. at 187-88. Because there was no applicable federal statute, process was served pursuant to the Virginia long-arm statute, which is similar to the Illinois provision. See supra note 87. The district court held that the plaintiff's claims did not fit within the enumerated acts of the Virginia statute and dismissed the case for lack of personal jurisdiction. The court of appeals ruled that the wage claim, basically a contractual relationship, could give rise to a cause of action sounding in contract within the meaning of the statute. 443 F.2d at 187-88. Cf. Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 416 (9th Cir. 1977) (use of state long-arm statutes in diversity cases does not present problems of classifying acts because subject matter does not differ from that which could be brought in state courts).

92. 28 U.S.C. § 1338(a) (1976). That statute provides: The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trade-marks. Such jurisdiction shall be exclusive of the courts of the states in patent, plant variety protection and copyright cases.

93. See 15 U.S.C. §§ 1071(b)(1), (4) (Supp. IV 1980): (b)(1) Whenever a person authorized by subsection (a) of this section to appeal to the United States Court of Customs and Patent Appeals is dissatisfied with the decision of the Commissioner or Trademark Trial and Appeal Board, said person may, unless appeal has been taken to said Court of Customs and Patent Appeals, have remedy by a civil action . . . .

(4) Where there is an adverse party, such suit may be instituted against the party in interest as shown by the records of the Patent and Trademark Office at the time of
brought outside the District of Columbia, personal jurisdiction is dependent on state long-arm statutes. In *Besuner v. Faberge, Inc.*, the defendant was located outside the territorial limits of the federal district court, and personal jurisdiction was sought under the Ohio long-arm statute. The court denied jurisdiction even though the defendant had general business activities within the state, holding that the trademark infringement had no relationship to Ohio and jurisdiction could not be asserted under any of the specified acts in the Ohio statute.

Even where a federal question satisfies one of the specific acts in a state long-arm statute, reliance on those statutes creates ad-
ditional problems. One problem is that state long-arm statutes may use different language to describe the acts that provide an amenability basis for asserting jurisdiction. As a result of those language differences, federal rights heard in one district court may not be heard in another.

That inconsistency can be illustrated best by considering a hypothetical case based on two single-act statutes that include the commission of a tort as one of the enumerated acts. Plaintiff, a resident of Illinois, sues defendant, a citizen and resident of Denmark, in the United States District Court for the District of Illinois for patent infringement. Defendant manufactures a product in Denmark that is almost identical to the one on which plaintiff holds a patent. Defendant's product is manufactured and sold in a number of states but is not sold or manufactured in Illinois. Defendant does not maintain an office, employ personnel, contract to sell goods or real property and is not qualified to do business in Illinois. Patent infringement can be a tort.

The Illinois single-act statute provides for jurisdiction if a nonresident commits "a tortious act within the state." Because the patent infringement did not occur within Illinois, jurisdiction may not be available under that statute.

If the district court applied a long-arm statute like New York's, which allows jurisdiction to be asserted over a nonresident who commits "a tortious act without the state causing injury to person or property within the state . . . if he expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce," the result probably would be different. Because the plaintiff held the patent in Illinois and suffered the infringement in that state, the defendant should have reasonably expected the infringement to have consequences within Illinois. Additionally, the defendant derives a substantial revenue from those sales, which involve both interstate and international commerce. Thus, the defendant probably would be amenable to jurisdiction.

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99. Compare FLA. STAT. ANN. § 48-193(1)(a) (West Supp. 1981) ("Operates, conducts, engages in, or carries on a business or business venture in this state or has an office or agency in this state") with COLO. REV. STAT. § 13-1-124(1)(a) (1974) ("The transaction of any business within this state").
101. ILL. ANN. STAT. ch. 110, § 17(1) (b) (Smith-Hurd Supp. 1981).
In addition to problems resulting from language differences, court interpretations of state long-arm statutes also create a lack of uniformity.\textsuperscript{103} Even though statutes are similar, courts interpret them differently. For example, in applying similar long-arm statutes in the patent infringement area, federal courts have differed in their interpretation of whether a patent infringement can be classified as one of the enumerated statutory acts.\textsuperscript{104}

Additionally, state courts differ in how broadly they construe the statutory language of their long-arm statutes. Although some single-act statutes apparently provide a narrow basis for asserting jurisdiction, some state courts ignore the specific language and allow jurisdiction to be asserted to the full extent due process permits.\textsuperscript{105} Other state statutes, which appear to provide a broad basis for asserting jurisdiction, have been interpreted strictly.\textsuperscript{106}

As an illustration, the Illinois long-arm statute\textsuperscript{107} allows jurisdiction to be asserted if a tort is committed within the state; Illi-

\textsuperscript{103} Compare Jack O'Donnell Chevrolet, Inc. v. Shankles, 276 F. Supp. 998 (N.D. Ill. 1967) (jurisdiction sustained under Illinois long-arm statute because defendant should have been aware that its acts could cause injury in Illinois) with American Eutectic Welding Alloys Sales Co. v. Dytron Alloys Corp., 439 F.2d 428 (2d Cir. 1971) (jurisdiction denied under New York long-arm statute because merely causing an injury within the state did not satisfy statutory requirement).


\textsuperscript{105} See, e.g., Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961). Federal courts have relied on state long-arm statutes but have ignored the specific statutory language. See, e.g., Cryomedics, Inc. v. Spembly, Ltd., 397 F. Supp. 287 (D. Conn. 1975). For a general discussion of state long-arm statutes, see 2 J. Moore, FEDERAL PRACTICE, supra note 18, ¶ 4.41-1[3], at 4-475-502. It is not essential that each state interpret its long-arm statute to permit the exercise of in personam jurisdiction to the full extent permitted by the due process clause. See Perkins v. Benquet Consol. Mining Co., 342 U.S. 437 (1952).

\textsuperscript{106} Both the New York and Florida long-arm statutes are similar to the Illinois long-arm statute. Illinois state courts have interpreted their statute as complying with due process if the defendant commits a single statutory act. Nelson v. Miller, 11 Ill. 2d 378, 143 N.E.2d 673 (1957). The New York and Florida long-arm statutes, however, are more strictly construed; to meet due process standards, the defendant must have more contact with the forum than engaging in a single act. See Masonite Corp. v. Hellenic Lines, Ltd., 412 F. Supp. 434, 438 (S.D.N.Y. 1976) (interpretation based on due process concerns); Escambia Treating Co. v. Otto Candies, Inc., 405 F. Supp. 1235, 1236 (N.D. Fla. 1975) (interpretation based on legislative intent).

nois courts have gone beyond the specific statutory language to conclude that a tort occurs where the injury results. In contrast, New York courts have rejected a literal interpretation of that state's long-arm statute, which appears to allow the exercise of jurisdiction if the injury occurs within the state, and requires the actual tort, sale or manufacturing to have occurred within the state.

Because federal courts rely on a state court's interpretation where a long-arm statute is used to assert federal jurisdiction, differences in interpretation have resulted in disparate jurisdictional limitations in federal question cases. Instead of determining jurisdiction throughout the federal system in a uniform manner, each federal district court acts autonomously.

B. Due Process Under State Long-Arm Statutes

Because both types of state long-arm statutes incorporate a due process test, federal courts using those statutes also apply a due process analysis. The application of due process principles to state statutes creates problems of uniformity because federal courts have developed three different ways to assess whether due process has been satisfied. Some federal courts duplicate the state court fourteenth amendment due process analysis. Others pur-
port to apply a fifth amendment due process test, while in reality applying fourteenth amendment standards.\textsuperscript{116} Still others apply a fifth amendment test, examining the sufficiency of the defendant's contacts with the United States.\textsuperscript{117} Although federal courts all espouse one of those three approaches, several courts actually rely on federal venue or transfer of venue statutes to ensure fairness to a defendant.\textsuperscript{118}

Federal courts that duplicate state courts' fourteenth amendment due process analysis by examining defendants' contacts with the state have offered several reasons for adopting that approach. In \emph{Stanley v. Local 926, International Union of Operating Engineers},\textsuperscript{119} a civil rights case in which the Georgia long-arm statute was applied, the court suggested that the federal court should use the same analysis implemented by the state court.\textsuperscript{120} The \emph{Stanley} court reasoned that because Rule 4(e) required that the method of serving process and the basis for jurisdiction be effected under state statute, the fourteenth amendment minimum contacts test must be followed in accordance with established state precedent.\textsuperscript{121}

\begin{itemize}
\item \textsuperscript{117} See, e.g., Bar's Leaks Western, Inc. v. Pollock, 148 F. Supp. 710 (N.D. Cal. 1957) (copyright, trademark infringement and unfair competition). Rather than dismissing the case for lack of personal jurisdiction or transferring the case to a more convenient forum, the \emph{Bar's Leaks} court dismissed the action for improper venue. \textit{Id.} at 713-14.
\item \textsuperscript{118} In Holt v. Klosters Rederi A/S, 355 F. Supp. 354 (W.D. Mich. 1973), the court asserted personal jurisdiction over the defendant under the Michigan long-arm statute but admitted that the only connection with the forum state was the plaintiff's residence. The \emph{Holt} court then transferred the case to the Southern District of Florida. \textit{Id.} at 359.
\item \textsuperscript{119} 354 F. Supp. 1267 (N.D. Ga. 1973).
\item \textsuperscript{120} \textit{Id.} at 1270. In Stanley Works Corp. v. Globemaster, Inc., 400 F. Supp. 1325, 1337 (D. Mass. 1975), the district court summarized the relationship of Rule 4 to state long-arm statutes by stating that where a state long-arm statute is used in a federal question case pursuant to Rule 4(d)(7), both the manner of service in 4(d)(7) and the circumstances of service in 4(e) must be satisfied. \textit{Id.} at 1337.
\item \textsuperscript{121} 354 F. Supp. at 1270. Rather than apply a fourteenth amendment due process test in a federal forum, the court, in \emph{Gkiafis v. Steamship Yioumas}, 342 F.2d 546 (4th Cir. 1965), found that the state's exercise of jurisdictional power was coterminous with the permissive limits of due process. \textit{Id.} at 549. Accord \emph{Amburn v. Harold Forster Indus., Ltd.}, 423 F. Supp. 1302, 1304-05 (E.D. Mich. 1976) (patent infringement case, process based on Michigan long-arm statute); Goldberg v. Mutual Readers League, Inc., 195 F. Supp. 778, 782-83 (E.D. Pa. 1961) (Federal Employer's Liability Act, service based on Rule 4(d)(3)). \textit{But see} \emph{Scott v. Middle East Airlines Co.}, 240 F. Supp. 1 (S.D.N.Y. 1965) (admiralty proceeding under \textemdash{Death on the High Seas Act}). The \emph{Scott} court stated that both a federal and state standard may be required to determine amenability to suit. \textit{Id.} at 5. It reasoned that state
A majority of federal courts recognize the anomaly created by applying the fourteenth amendment in federal court, and instead apply a fifth amendment analysis.\textsuperscript{122} Even where federal courts apply the fifth amendment, however, they have not devised a uniform test. One approach has been to rely on a fifth amendment rationale to examine a defendant's contacts with the forum state, thus effectively applying a fourteenth amendment due process test. That was the approach adopted by the Seventh Circuit in Honeywell, Inc. v. Metz Apparatewerke.\textsuperscript{123} The Honeywell court justified the use of a "fifth-fourteenth amendment" test by finding no operative difference between the concept of due process as applied to the states and as applied to the federal government.\textsuperscript{124}

\begin{quote}
A law should be applied because of precedent, and that a federal standard should be applied because the right created is purely federal. \textit{Id.}
\end{quote}

\textsuperscript{122} See, e.g., Honeywell, Inc. v. Metz Apparatewerke, 509 F.2d 1137, 1143 (7th Cir. 1975); Lone Star Package Car Co. v. Baltimore & Ohio R.R., 212 F.2d 147, 153 (5th Cir. 1954); Goldberg v. Mutual Readers League, Inc., 195 F. Supp. 778, 781-83 (E.D. Pa. 1961). Some commentators have suggested that the due process clause of the fifth amendment is applicable. See, e.g., Foster, supra note 18, at 31; Green, supra note 116, at 973. Professor Abraham found that "[t]here 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 afforded by the fourteenth amendment." Abraham, \textit{Constitutional Limitations Upon the Territorial Reach of Federal Process}, 8 \textit{Utah L. Rev.} 520, 536 (1963). See also \textit{Restatement (Second) of Judgments}, supra note 27, § 7 comment f. In discussing the constitutional and legislative determinants of territorial jurisdiction, the reporters commented:

At least within the territorial limits of the United States, the territorial jurisdiction of the federal courts is restricted only because the constitutional restrictions on state court jurisdiction have been incorporated by reference in the legislation governing the federal courts. It has been asserted that the Due Process Clause of the Fifth Amendment may embody a constraint on the range of process issuing from a federal court. If legislation were adopted that permitted process to issue from a federal court in a location completely unconnected with an action, thereby compelling a defendant to journey a grossly inconvenient distance to such a forum, the contention could be made that the legislation is incompatible with the Fifth Amendment's requirements of fairness. Such a situation has not yet arisen.

\textit{Id.} at 57.

\textsuperscript{123} 509 F.2d 1137 (7th Cir. 1975).

\textsuperscript{124} The court stated:

[\begin{quote}
[A] federally created right is at issue, and due process is properly a matter for examination in light of the Fifth Amendment rather than the Fourteenth Amendment.
\end{quote}]

That is not to say, however, that the \textit{International Shoe} line of cases is irrelevant to our inquiry here. The Due Process Clause of the Fifth Amendment is essentially a recognition of the principles of justice and fundamental fairness in a given set of circumstances. \ldots [\begin{quote}
[W]e can perceive no operative difference between the concept of due process as applied to the states and as applied to the federal government. This and other courts have reached this result, explicitly or tacitly, and have applied the "minimum contacts" standard to federal question cases in which \textit{in personam} juris-
A second and more cogent reason for applying a "fifth-fourteenth amendment" test was expressed by the court in *Ag-Tronic, Inc. v. Frank Paviour, Ltd.* There, the court found that the application of a state statute necessitates incorporating that state's due process analysis. Thus, the court concluded that where service is made pursuant to a state long-arm statute as permitted by Rule 4, there must be compliance with both the language of the statute and the due process requirements that govern it.

Because the fourteenth amendment serves only as a limitation on state action, the "fifth-fourteenth amendment" analysis is flawed. Whether a defendant has sufficient contacts with the state forum is irrelevant in determining whether the defendant has an adequate nexus with the federal forum. Because federal due process is primarily concerned with factors other than convenience, the fourteenth amendment due process test is operatively different than federal notions of due process. Furthermore, although Rules 4(d)(7) and 4(e) dictate that a federal court must comply with state long-arm provisions for service and amenability to jurisdiction, those provisions do not mandate that a federal court adopt state due process tests in federal question cases.

diction was at issue, and we deem it appropriate to do so here. *Id.* at 1143 (citations omitted). But see *Goldberg v. Mutual Readers League, Inc.*, 195 F. Supp. 778 (E.D. Pa. 1961). In a case applying the Pennsylvania long-arm statute, the *Goldberg* court observed that the formula of *International Shoe* had no effect on questions of federal jurisdiction and was of "doubtful applicability," stating:
The Fifth Amendment contains a Due Process Clause, but its limitation on the jurisdiction of the Federal District Courts over foreign corporations has never been clearly stated. The result is that we are left at best with an anomalous body of "Federal law" from which to discern the principles applicable to this case. *Id.* at 782.


128. See supra notes 68-77 and accompanying text.

129. See supra note 17 for the text of Rule 4.

130. The court in *Lone Star Package Car Co. v. Baltimore & Ohio R.R.*, 212 F.2d 147, 153-54 (5th Cir. 1954), correctly reasoned that federal courts are to interpret state long-arm statutes in federal question cases in accordance with state law but that compliance with due process requires compliance with a federal standard. See also *First Flight Co. v. National Carloading Corp.*, 209 F. Supp. 730, 737-38 (E.D. Tenn. 1962). *First Flight* is frequently cited for the proposition that compliance with due process in federal question cases is a federal matter. Service of process in *First Flight*, however, was effected under Rule 4(d)(3) rather than the state long-arm statute because the defendant was present and served with
The belief that adoption of a state's due process analysis is required where its statute is applied is part of the uncertainty over whether state or federal law should govern in federal court.\textsuperscript{131} Where a state statute is used by federal courts to assert jurisdiction, the state court's interpretation of the statutory language may be applied because compliance with the statute raises questions of state law. However, adoption of a state's interpretation of its long-arm statute does not require the federal court to embrace the state's constitutional due process test.\textsuperscript{132} The constitutional due process issue should be a question of federal law.\textsuperscript{133}

One federal district court fashioned an imaginative response to state due process analysis by creating a fifth amendment approach,\textsuperscript{134} which subsequent cases have called the "aggregated contacts within the state."

\textsuperscript{131} Applying a federal or state standard raises different questions in federal question cases than in diversity cases. In Arrowsmith v. United Press Int'l, 320 F.2d 219 (2d Cir. 1963), the court stated: "We express no opinion whether a 'federal standard' may govern jurisdiction over foreign corporations in federal question litigation. . . . Suffice it to say that the considerations favoring the overriding of state policy would be far more persuasive than in an ordinary diversity suit." Id. at 228 n.9. However, the court in Scott v. Middle East Airlines Co., 240 F. Supp. 1 (S.D.N.Y. 1965), extended the dicta in \textit{Arrowsmith} and concluded that federal courts ought to presume that, in a federal question case, federal law governs unless some overriding reason requires otherwise. Id. at 5. \textit{See also} 2 J. Moore, \textit{Federal Practice, supra} note 18, \textit{\textsuperscript{t} 4.25[7], at 279-92.}


\textsuperscript{133} Lone Star Package Car Co. v. Baltimore & Ohio R.R., 212 F.2d 147, 153 (5th Cir. 1954).

\textsuperscript{134} Edward J. Moriarty & Co. v. General Tire & Rubber, 289 F. Supp. 381 (S.D. Ohio 1967). Although responsible for fashioning the aggregated contacts test, the \textit{Moriarty} court did not apply it. Instead, the court applied the \textit{International Shoe} minimum contacts test and examined whether the defendant had sufficient contacts with the state. In so doing, the \textit{Moriarty} court stated:

Unfortunately, this course has not been left open to us by the federal rules or statutes. That is, neither Congress nor the Supreme Court has provided statute or rule whereby substituted service may be made upon an alien corporation having certain minimal contacts with the United States. And when substituted service is made pursuant to a state long-arm statute, as it was in this case, then the rules provide that service be made "under the circumstances and in the manner prescribed in the statute. . . ." Rule 4(e)(2), FED. R. CIV. P. (emphasis added).

We take the italicized portion to mean that when service is made pursuant to a state long-arm statute, it is only proper when the corporation served meets the qualifications for service set out in that statute.

2. It should be noted that, in those cases set out on this page and other cases researched by the Court, whenever the "federal" test of jurisdiction is applied, the Court invariably winds up looking at the contacts of the foreign corporation \textit{with the state}, rather than with the United States. While we believe this to be a misconception of the "federal" test as we have applied it, the lack of means to pursue the proper
contacts test. That test adopts the framework of the minimum contacts test established in International Shoe Co. v. Washington. Instead of examining whether a defendant's contacts with the state are sufficient, however, the court examines the sufficiency of a defendant's contacts with the United States. The rationale for that approach is that a defendant's contacts with the state are irrelevant where a federally created cause of action is involved. Because the federal district court is part of a national court system, personal jurisdiction is valid where a party's contacts with the United States are sufficient.

The aggregation test purportedly was adopted by three district courts in Holt v. Klosters Rederi A/S, Engineered Sports Products v. Brunswick Co. and Cryomedics, Inc. v. Spembly, Ltd. An examination of those cases reveals, however, that only Holt actually applied the aggregation test. The Holt court examined the course leaves room for no other result.

Id. at 390 & n.2 (emphasis in original). Other courts agree that federal court jurisdiction should not be dependent on state due process limitations but also have felt stymied by lack of legislative authority to apply an aggregated contacts approach. See, e.g., Ag-Tronic, Inc. v. Frank Paviour, Ltd., 70 F.R.D. 333, 400-01 (D. Neb. 1976). The Ag-Tronic court refused to follow a case from its district, Cryomedics, Inc. v. Spembly, Ltd., 397 F. Supp. 287 (D. Conn. 1975), which the Ag-Tronic court believed had applied an aggregated contacts test. See also First Flight Co. v. National Carloading Corp., 209 F. Supp. 730, 737-38 (E.D. Tenn. 1962).

135. See, e.g., Honeywell, Inc. v. Metz Apparatwerke, 509 F.2d 1137, 1143 (7th Cir. 1975).
137. In Edward J. Moriarty & Co. v. General Tire & Rubber Co., 289 F. Supp. 381 (S.D. Ohio 1967), the court examined an alien defendant's contacts with Ohio because jurisdiction was asserted under that state's long-arm statute. The Moriarty court suggested, however, that an examination of the defendant's contacts with the United States would be a more logical approach for a fifth amendment due process test in federal question cases.
138. Id. The Moriarty court found that:

[T]he judicial jurisdiction over the person of the defendant does not relate to the geographical power of the particular court which is hearing the controversy, but to the power of the unit of government of which that court is a part. . . . [T]he constitutional test of personal jurisdiction involves a determination as to whether the defendant has certain minimal contacts with the forum state. . . .

[T]he appropriate inquiry to be made in a federal court where suit is based upon a federally created right is whether the defendant has certain minimal contacts with the United States, so as to satisfy due process requirements under the Fifth Amendment.

Id. at 390.
142. Holt was instituted by a Michigan citizen against a Norwegian corporation under the Death on the High Seas Act, 46 U.S.C. §§ 761-768 (1964). Personal jurisdiction was
defendant’s activities throughout the United States, after noting that the defendant’s activities in Michigan alone were insufficient to justify the exercise of personal jurisdiction.\textsuperscript{143}

The district court in \textit{Engineered Sport}, although professing to examine the aggregate of the defendant’s contacts, did not do so. Instead, the court examined the extent to which the defendant could foresee that engaging in certain worldwide activity would cause injury in the forum.\textsuperscript{144} Rather than an aggregation test, the court applied a “foreseeability” analysis\textsuperscript{145} similar to that used for fourteenth amendment due process inquiries.\textsuperscript{146} Similarly, the Cry-

sought under the Michigan long-arm statute. The defendant had its main office in Oslo, Norway and operated a fleet of tourist ships that embarked from Miami, Florida, touring principally in the Caribbean Sea. The corporation maintained offices in New York, Chicago, Cleveland, Dallas and Los Angeles and solicited business through travel agencies that issued tickets in Chicago, Miami and New York. The defendant also owned a laundry business, a corporation that had real estate holdings in Florida, a car leasing company, a freight company and a cattle farm. None of those contacts, however, involved Michigan. The court observed:

Taken as a whole, defendant’s contacts with the United States, both qualitatively and quantitatively, are constitutionally sufficient to enable this court to render a binding judgment against it. Defendant has elected to enter the territorial domain of the United States for its economic gain. It has established itself in an identifiable geographic location to effectuate and maximize its business dealings. It has promoted its product on a national scale through advertising and other market networks. Clearly, defendant’s contacts with the United States exceed any constitutional minimum for a limited \textit{in personam} jurisdiction.

\textit{Id.} at 358.

\textsuperscript{143} The court stated:

[The defendant] had several sporadic contacts with the State of Michigan. It contacted local travel agencies in an effort to drum up business. It also advertised occasionally in Detroit newspapers. However, all these contacts, assuming this were a diversity case, would be insufficient to meet the “minimum contacts” of \textit{International Shoe} or the Michigan jurisdictional statutes.

\textit{Id.} at n.5 (citations omitted).

\textsuperscript{144} 362 F. Supp. at 725-28.

\textsuperscript{145} \textit{Engineered Sports} involved a patent infringement claim against an alien defendant. Personal jurisdiction was based on the Utah long-arm statute. The court examined the nature of the defendant’s business and concluded that only one-fiftieth involved Utah consumers. The court held that even though the defendant did not have extensive direct contacts with the forum state, the sale of its product to domestic distributors could lead to resale in the United States and ultimately the forum. Thus, the defendant should have foreseen that injury could result in Utah and was, therefore, amenable to jurisdiction. \textit{Id.}

\textsuperscript{146} \textit{See, e.g.}, Honeywell, Inc. v. Metz Apparatewerke, 509 F.2d 1137 (7th Cir. 1975); Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961). The \textit{Honeywell} court stated:

Direct contact with the forum state is not essential to the exercise of personal jurisdiction. Metz may not have physically entered the state of Illinois, but it placed its flash devices in the stream of commerce under such circumstances that it should reasonably have anticipated that injury through infringement would occur there.

509 F.2d at 1144.
omedics court, although discussing the federal test, did not aggregate the alien defendant's contacts. The court relied instead on another district court's finding that the defendant was subject to personal jurisdiction in similar litigation.\textsuperscript{147} The court reasoned that the particular state asserting personal jurisdiction makes little difference to an alien defendant because any United States forum is inconvenient.\textsuperscript{148}

Although agreeing in principle that the aggregated contacts test may be justified, the Ninth Circuit, in \textit{Wells Fargo & Co. v. Wells Fargo Express Co.},\textsuperscript{149} criticized the test and its application.\textsuperscript{150} Declining to apply the aggregation test,\textsuperscript{151} the \textit{Wells Fargo} court criticized it as an adoption of nationwide service of process by judicial fiat. According to the Ninth Circuit, such a novel approach should be adopted by the legislature rather than the courts.\textsuperscript{152}

A close look at federal courts' application of state long-arm statutes suggests that, in addition to applying due process principles, federal venue and transfer of venue statutes are used to restrict the exercise of personal jurisdiction.\textsuperscript{153} Federal courts have

\textsuperscript{147} 397 F. Supp. at 292. The court commented:

Although Spembly is involved now in multiple litigation in the United States, some of it apparently of its own initiation, the proper remedy for that problem is a motion to stay one or more proceedings; Cryomedics has alleged substantial contacts with the United States, and at oral argument Spembly conceded that it could not successfully resist personal jurisdiction in the action pending against it in the Eastern District of Pennsylvania.

\textit{Id.}

\textsuperscript{148} \textit{Id.}

\textsuperscript{149} 556 F.2d 406 (9th Cir. 1977).

\textsuperscript{150} \textit{Id.} at 416-19.

\textsuperscript{151} The court first distinguished Cryomedics, Inc. v. Spembly, Ltd., 397 F. Supp. 287 (D. Conn. 1975), and \textit{Engineered Sports Products v. Brunswick Co.}, 362 F. Supp. 722 (D. Utah 1973), by observing that in both those cases, the aggregate of the defendants' contacts contravened specific language of the state statutes. 556 F.2d at 416-18. The court observed that in \textit{Engineered Sports}, the Utah long-arm statute provided for jurisdiction over a "defendant who caused 'any injury within the state.'" \textit{Id.} at 417. The \textit{Wells Fargo} court explained that, unlike the Utah statute, the Nevada statute did not contain a similar provision and that "only causes of action 'arising from' enumerated 'acts' which took place 'within' Nevada may be reached." \textit{Id.}

\textsuperscript{152} \textit{Id.} at 418. Other courts have taken a similar position. \textit{See}, e.g., \textit{Ag-Tronic, Inc. v. Frank Paviour, Ltd.}, 70 F.R.D. 393 (D. Neb. 1976):

[U]nless Congress has provided for nationwide service of process, when the defendant is a foreign corporation it must have an agent within the territorial limits of the State in which the court sits, unless substituted service or extrastate service can be made pursuant to Rule 4(d)(7) when a state statute so authorizes.

\textit{Id.} at 400.

\textsuperscript{153} \textit{See} \textit{Bar's Leaks Western, Inc. v. Pollock}, 148 F. Supp. 710, 713-14 (N.D. Cal.}
recognized that those statutes serve to restrict personal jurisdiction even though they are based on fairness considerations that are distinct from due process.\textsuperscript{154} Nevertheless, they have hastened to embrace venue principles as a substitute for a due process assessment.

Federal court restrictions on state long-arm statutes are a direct consequence of federal court adherence to state implementation of these statutes. Because state courts include an assessment of due process, federal courts, lacking legislative guidance to the contrary, also have adopted some type of due process analysis. The result has been a lack of uniformity in how federal courts determine whether to assert personal jurisdiction under state long-arm statutes.

IV. Federal Statutes

Where a defendant is not present within the geographic boundaries of the federal court, Rule 4 provides that federal statutes may be used as an alternative basis for serving process and determining amenability to personal jurisdiction.\textsuperscript{155} Historically, Congress has taken two statutory approaches to personal jurisdiction in federal court: (1) general statutes that do not specify a particular subject area as a basis for asserting jurisdiction;\textsuperscript{156} and (2) specific federal statutes, which apply to designated federal subject areas.\textsuperscript{157}


\textsuperscript{155} See Fed. R. Civ. P. 4(e), (f). For the text of Rule 4, see supra note 17.

\textsuperscript{156} See, e.g., Judiciary Act of 1789, ch. 20, 1 Stat. 73.

Although federal jurisdictional statutes specifically grant personal jurisdiction in federal question cases, their approach to acquiring jurisdiction is not uniform. Instead, they reflect haphazard approaches, which have been prompted by specific political concerns or pressures. Exacerbating the piecemeal congressional approach are the nonuniform constitutional limitations imposed by federal courts.

Federal Rule of Civil Procedure 4 and the special federal jurisdictional statutes contain similar language to that of the 1789 Judiciary Act. By examining the original Act and its amendments, insight into Congressional concerns about federal personal jurisdiction can be gained. This section examines Congress' legislative approach by discussing the 1789 Judiciary Act, several special federal jurisdictional statutes and the problems encountered with each. In addition, the federal judiciary's imposition of constitutional limits on the exercise of jurisdiction under those federal statutes is explored.

A. Personal Jurisdiction Under the 1789 Judiciary Act

In 1789, the first United States Congress enacted a statute governing general jurisdiction and venue for federal courts. Although the Judiciary Act provided for service of process and
venue, it did not specifically describe an amenability basis for personal jurisdiction. Service of process was proper in two places: (1) in a district where the defendant resided and (2) in any district where the defendant could be found at the time of service. Venue was proper in any district where process was effectively served. Because process could follow a defendant and no provisions set forth a basis for asserting personal jurisdiction, the process and venue language suggest that the amenability basis under the Act was physical presence. Using presence as the amenability basis, federal district courts could assert jurisdiction over any person found within their boundaries. Therefore, the Act, in practice,

159. The Act provides:
But no person shall be arrested in one district for trial in another, in any civil action before a circuit or district court . . . . And no civil suit shall be brought before either of said courts against an inhabitant of the United States, by any original process in any other district other than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ.

Id. § 11, 1 Stat. 79 (emphasis added).

160. Id.

161. See United States v. Union Pac. R.R., 98 U.S. 569 (1878). In discussing the 1789 Judiciary Act, the Court commented:

It is true that Congress has enacted that no person shall be sued in a circuit court of the United States who does not reside within the district for which the court is established, or who is not found there. But a citizen residing in Oregon may be sued in Maine, if found there, so that process can be served on him.

Id. at 604.

Under the Act, courts could not reach beyond the artificial lines defining their territory. See Ex parte Graham, 10 F. Cas. 911 (C.C.E.D. Pa. 1818) (No. 5,657). In Graham, the petitioner was served with process in Pennsylvania pursuant to a writ of attachment issued by the Rhode Island circuit court. The Pennsylvania court held that the Judiciary Act did not allow the United States circuit and district courts to send their process into another district except where specifically authorized. In discussing those limitations, the court stated:

The manifest policy of the judicial system of the United States, was to render the administration of Justice as little oppressive to suitors and others as possible; and it corresponds entirely with that construction, which confines the process of the courts within the limits of the district in which the court sits, and from which it issued.

Id. at 913. See also Toland v. Sprague, 37 U.S. (12 Pet.) 300 (1838). The Toland Court commented on the purpose of the process language in the 1789 Judiciary Act:

Nothing can be more unjust, than that a person should have his rights passed upon, and finally decided by a tribunal, without some process being served upon him, by which he will have notice, which will enable him to appear and defend himself . . . .

We find, that the process of capias is in terms limited to the district within which it is issued.

Id. at 328.

Frequently, the district court boundaries encompassed a smaller geographic area than the state where the district courts were located. See, e.g., Picquet v. Swan, 19 F. Cas. 609, 612 (C.C. Mass. 1828); Ex parte Graham, 10 F. Cas. 911, 912 (C.C. E.D. Pa. 1818) (No. 5,657). The Picquet court remarked that the United States was divided into judicial districts and that jurisdiction over persons and property was available only within the limits of the district: “This results from the general principle that a court created within and for a
allowed nationwide personal jurisdiction.

Congress restricted the potentially sweeping jurisdiction of the 1789 venue and process language by amending the Judiciary Act in 1878.\textsuperscript{162} The amendment deleted the language allowing service of process on the defendant anywhere he was found and limited service of process to the district where a defendant resided.\textsuperscript{163} The legislative history of the amendment suggests that it was prompted, in part, by convenience concerns.\textsuperscript{164} By focusing on protecting citizens from litigation in distant forums, however, Congress did not consider the amendment's effect on personal jurisdiction in federal courts. In addition, the drafters failed to address the impact that curtailed personal jurisdiction would have on federal adjudication of federal question cases.\textsuperscript{165}

Predictably, after the 1878 amendment, federal courts exper-
ienced difficulty acquiring personal jurisdiction in federal question cases. The problem was particularly acute where a case arising under federal law involved multiple defendants located in different districts. Rather than fashioning a comprehensive legislative response to that problem, Congress reacted to specific crises, either by amending the Judiciary Act on a piecemeal, short-term basis or by enacting special jurisdictional statutes.

The 1922 revisions of the general venue and service of process sections of the Judiciary Code illustrate Congress' ad hoc response to the problems of jurisdiction in federal question cases. At the end of World War I, Congress directed the Department of Justice to sue contractors that had defrauded the government on wartime contracts. The Attorney General reported that, although many war fraud cases involved multiple defendants who lived in different districts, jurisdictional statutes permitted federal suit only in the district where all defendants resided. In response to that problem, Congress adopted the Attorney General's proposal, which permitted the United States to sue in a district where

166. It was difficult for federal courts to acquire jurisdiction because jurisdiction could only be asserted where a defendant resided. See supra note 163 and accompanying text.


A less charitable and equally accurate view is that Congressional reaction to issues of federal jurisdiction has always been fitful and that the fits are usually induced by strong pressures imposed by particular events or by powerful constituencies that seek to influence results in particular causes that concern them. Congress has rarely undertaken a comprehensive re-examination of federal jurisdiction. Indeed, it has not made the attempt for almost 100 years.

Id. at 842-43 (footnote omitted).


169. Congress directed the Attorney General to investigate, indict and prosecute criminal conduct and to institute civil suits for the recovery of overpayments on war contracts for building ships, airplanes, and cantonments, and for purchasing munitions and war supplies. A staff of 25 lawyers conducted 500 investigations, and the government recovered $8,500,000. That obscure episode in American history is discussed in M. Sullivan, Our Times: The United States 1900-1925 at 203-07 (1937).

170. See S. REP. No. 868, 67th Cong., 2d Sess. 2 (1922): "[I]t seems rather anomalous that the right of the Government to enforce its just claims against its own citizens should be defeated by narrow restrictions upon the jurisdiction of the Federal courts."

171. Piecemeal legislation was not limited to the war frauds nationwide service of process statute. Another example of congressional action induced by political pressures is the federal jurisdictional statute prompted by the Credit Mobilier scandal. The Credit Mobilier scandal involved prominent politicians who had accepted stock in a corporation organized to divert profits from the Union Pacific Railroad. As a result of the scandal, the House of Representatives censured two congressmen. Days after the censure vote, a nationwide service of process provision, known as the Credit Mobilier Act, was tacked onto an appropriations bill. See ch. 226, § 4, 17 Stat. 485, 509 (1873) (current version at 45 U.S.C. § 88 (1976)).
any one defendant was an inhabitant or where any part of the cause of action arose.172 The House, however, imposed a three-year time limit on the new jurisdictional power.173

The Credit Mobilier Act allowed the Attorney General to bring an equity suit against the Union Pacific Railroad Company and other persons to compel payment for stock, collection and payment of monies, and restoration of property to the railroad or to the states. The venue and process provision of the Act 4 provided:

Said suit may be brought in the circuit court in any circuit and all said parties may be made defendants in one suit. . . . The court where said cause is pending may make such orders . . . and issue such process as it shall deem necessary to bring in new parties or the representatives of parties deceased, or to carry into effect the purposes of this act . . . . Writ [of subpoenas] shall run into any district, and shall be served, as other like process, by the marshal . . . .


[An]y civil suit, action, or proceeding brought by or on behalf of the United States, or by or on behalf of any officer of the United States authorized by law to sue, may be brought in any district whereof the defendant is an inhabitant, or where there be more than one defendant in any district whereof any one of the defendants, being a necessary party, or being jointly, or jointly and severally, liable, is an inhabitant, or in any district wherein the cause of action or any part thereof arose; and in any such suit, action, or proceeding process, summons, or subpoena against any defendant issued from the district court of the district wherein such suit is brought shall run in any other district, and service thereof upon any defendant may be made in any district within the United States or the territorial or insular possessions thereof in which any such defendant may be found with the same force and effect as if the same had been served within the district in which said suit, action, or proceeding is brought.

Act of Sept. 19, 1922, ch. 345, 42 Stat. 849, 849. The new statute was criticized by some legislators as being too broad. See 62 Cong. Rec. 12373 (1922) (statement by Rep. Jones that language was "just as broad as the earth"). At least one court construed the broad "cause of action" language as applying only to suits where there were multiple defendants. In United States v. Alaska Packers' Ass'n, 30 F.2d 564 (D.C. Cir. 1929), an action brought by the United States in the District of Columbia, the Court of Appeals for the District of Columbia quashed service of process made on a single defendant in California. Although the 1922 amendment addressed service of process, the "confessed general purpose of the bill [was] to locate proceedings in the District of Columbia." 62 Cong. Rec. 12369 (1922) (remarks of Rep. Moore). The companion act, Act of Sept. 19, 1922, ch. 344, 42 Stat. 848, provided nationwide service of subpoena for witnesses "upon proper application and cause shown." 42 Stat. at 849.

173. See 62 Cong. Rec. 12368-73 (1922). In recommending the limitation, one Representative stated:

I suggest that this be limited to one or two or three years and that it be provided for the Government's use alone in these war fraud cases. I accept the conditions, that the Attorney General says the only way that he can do anything is in this way. I agree to give him that temporary power, although it is violative of the very spirit of our institutions.

Id. at 12372 (remarks of Rep. Wingo). The House also expressed concern over "the great deal of prejudice against the power to take a man out of his state an unconscionable distance to be kept until the trial is over." Id. at 12368 (remarks of Rep. Parker). In the debate
Like the war fraud amendment, the 1936 amendment to the Judiciary Act dealing with stockholders' derivative actions\(^\text{174}\) was a response to a particular problem.\(^\text{175}\) Although the amendment expanded jurisdiction and venue in diversity actions, it again illustrates the lack of a uniform scheme for acquiring personal jurisdiction in federal court. The 1936 amendment was prompted by the need to assert nationwide jurisdiction in stockholders' actions brought to enforce rights of the subsidiary against the parent corporation.\(^\text{176}\) Although the subsidiary and the parent corporations were indispensable parties to such an action, both could not be brought into federal court under the then-existing venue and jurisdiction provisions of the Judicial Code because a corporation was considered a resident only of the state of its incorporation,\(^\text{177}\) and the Judiciary Act permitted diversity suits only in the district where the plaintiff or the defendant resided.\(^\text{178}\) State courts also were precluded from entertaining those cases because it was presumed under the Pennoyer edict that state courts were powerless to assert jurisdiction over nonresidents beyond their own boundaries.\(^\text{179}\) Because Congress believed it crucial that federal courts have the ability to assert personal jurisdiction over corporate defendants,\(^\text{180}\) it amended the Judiciary Act.\(^\text{181}\) The amendment pro-

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on the amendment to enlarge the *in personam* jurisdiction of federal courts, nationwide service of subpoenas on witnesses also was challenged. Representative Parker expressed fears that courts would abuse that power: "It will be used in ordinary small civil cases. It is one of the most dangerous powers in the world to allow a judge who wants to make a reputation to summon all the big bankers of New York to attend his court." \(^\text{Id.}\)

In 1925, the Department of Justice sought a three-year extension of the nationwide service of process and venue provisions. 66 Cong. Rec. 3910 (1925) (letter of Jerome Michael, Director, War Transactions Section). Congress agreed to extend it for one year. Act of Mar. 4, 1925, ch. 526, § 1, 43 Stat. 1264. Nationwide service of subpoenas, however, was extended for three years. \(^\text{Id.}\) § 2, 43 Stat. at 1265.


179. \(^\text{See supra}\) notes 59-60 and accompanying text.

180. Congress cautioned that its legislative discretion to provide for nationwide process was "based upon considerations of convenience to litigants, expense and promotion of
vided for process in any district "wherein such corporation resides or may be found," which was interpreted to encompass anywhere the corporation did business. Thus, the amendment allowed nationwide jurisdiction in stockholders' derivative actions.

The 1922 and 1936 amendments to the Judiciary Act reveal that Congress considered two factors before providing for nationwide jurisdiction: (1) the right of federal courts to entertain cases that deal with important federally created rights and remedies, and (2) the need for federal jurisdiction where state adjudication is unavailable. The reluctance to extend nationwide jurisdiction further evidences congressional concern with the inconvenience of distant litigation. Where Congress suspected that a defendant would be adversely affected, jurisdiction was curtailed even though its need was evident.


The power of the Federal courts to maintain a suit cognizable under the judicial power of the United States in any district and to issue process for service anywhere in the United States is a matter of legislative discretion, controlled by Acts of Congress based upon considerations of convenience to litigants, expense, and promotion of justice.

Id.


182. Id.


In 1948, the Act was amended again. Act of June 25, 1948, ch. 646, 62 Stat. 945. The words "resides or is found" were replaced by the phrase "is organized or licensed to do business or is doing business." The changes were made so that the language of the statute would be "more specific." H.R. Rep. No. 308, 80th Cong., 1st Sess. app. A147 (1947).


B. Special Federal Jurisdiction Statutes

In addition to the general provisions of the Judiciary Act, Congress has enacted a number of statutes that provide for federal jurisdiction over particular subject areas.\textsuperscript{187} Rule 4 defers to those statutes for determining the manner of serving process and amenability to jurisdiction.\textsuperscript{188} Federal jurisdiction statutes do not present the same uncertainty in determining amenability that Rule 4 and state long-arm statutes do.\textsuperscript{189} Nevertheless, problems of uniformity

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was a codification of the process provisions of the 1789 Judiciary Act, as amended. Judge Clark, in Jaffex Corp. v. Randolph Mills, Inc., 282 F.2d 508 (2d Cir. 1960), and in Arrowsmith v. United Press Int'l, 320 F.2d 219, 234 (2d Cir. 1963) (Clark, J., dissenting) (overruling \textit{Jaffex}), also suggested that the present statute is a codification of the process and venue provisions of the Judiciary Act. See supra note 19. Contra Note, \textit{Personal Jurisdiction Over Foreign Corporations in Diversity Actions: A Tiltyard for the Knights of Erie}, 31 U. Cin. L. Rev. 752, 759-60 (1964) (concluding that this provision is anachronistic). The most recent case discussing the process and venue issues did not reach the defendant's contention that section 1693 prohibited service of process on him. SEC v. Naftalin, 460 F.2d 471, 474-75 (8th Cir. 1972).

Section 1695, 28 U.S.C. § 1695 (1976) (originally enacted as Act of June 25, 1948, ch. 646, § 1695, 62 Stat. 945), provides for process in stockholders' derivative actions. The language of section 1695, permitting process on a corporation in any district "where it is organized or licensed to do business or is doing business," does not change the meaning of the 1936 amendment to the Judiciary Act, Act of Apr. 16, 1936, ch. 230, § 5, 49 Stat. 1213, 1214, providing that process may be served "in any district wherein such corporation resides or may be found," but merely reflects the construction given to "or may be found." Id. (emphasis added). See United States v. Scophony Corp., 333 U.S. 795, 807-08 (1948); Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 373 (1927) ("or may be found" equated with the concept of doing or carrying on business).

Sections 1391(a) and (b), 28 U.S.C. §§ 1391(a),(b) (1976) (originally enacted as Act of June 25, 1948, ch. 646, 42 Stat. 945), set forth general venue provisions in diversity and federal question cases. The 1948 revision substituted the synonym "reside" for "whereof he is an inhabitant" only for clarity. Those sections were further amended in 1966, Act of Nov. 2, 1966, Pub. L. No. 89-714, 80 Stat. 1111, authorizing venue in a civil action in the district where the claim arose. Special venue is often included as part of federal statutes. See supra note 73.

187. See supra note 157.


189. Although some of the statutes only define the method for serving process, they are interpreted as permitting jurisdiction based on physical presence. See, e.g., Driver v. Helms, 577 F.2d 147 (1st Cir. 1978), rev'd sub nom. on other grounds, Colby v. Driver, 444 U.S. 527 (1980). But see Kipperman v. McCone, 422 F. Supp. 860, 871 (N.D. Cal. 1976). The Kipperman court interpreted section 1391(e), 28 U.S.C. § 1391(e) (1976), as describing the mechanics of effective extra-territorial service of process but not as providing an amenability basis for personal jurisdiction. Id. Section 1391(e) provides:

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

Special jurisdiction statutes are included as part of legislation that sets forth both substantive federal law as well as provisions for service of process, venue and amenability to jurisdiction for those particular areas of law. Although such statutes vary in substance, the language describing jurisdiction is similar. The Securities Exchange Commission Act of 1934 contains a typical jurisdiction provision:

The district courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found . . . .

Like most special jurisdiction statutes, that statute intertwines service of process, venue and the amenability basis. Process can be served anywhere the defendant resides or is found and venue is

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

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


The Kipperman court's interpretation was rejected in United States v. McAninch, 435 F. Supp. 240 (E.D.N.Y. 1977). The McAninch court held that "if the defendants have the requisite 'minimum contacts' with the United States, there is jurisdiction over them in this district." Id. at 244 (emphasis in original). See also Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1340 (2d Cir. 1972). In Leasco, the court held that Congress intended section 27 of the Securities & Exchange Act to extend personal jurisdiction to the full reach permitted by the due process clause. Therefore, the court found it unnecessary to discuss the application of the state statute. The Leasco court based its conclusion, in part, on its interpretation of the word "found" in the 1934 Securities Exchange Commission statute. Id. at 1340.

proper anywhere process can be effected. Amenability to jurisdiction is based on two factors: (1) whether the defendant's activity falls within the substantive parts of the statute, and (2) whether the conditions for process are satisfied. Because process follows a defendant, physical presence is part of the amenability basis. Federal courts have construed the service of process language as providing nationwide jurisdiction. That construction accords with the interpretation given to the identical language in the Judiciary Act of 1789. Unlike the original Judiciary Act, however, Congress' intent in the special jurisdictional statutes is to provide for nationwide jurisdiction. Recognizing possible problems of fairness, those statutes provide nationwide jurisdiction only where a defendant has committed an act which violates the substantive part of the statute. That requirement restricts the assertion of nationwide jurisdiction to the particular federal question defined in the statute.

Three factors may have persuaded Congress to grant nationwide jurisdiction for select substantive federal questions. First, Congress may have been influenced by the importance of having federal courts entertain cases involving federally created rights. A second factor may have been Congress' desire to give federal agencies jurisdiction over federal law that they are investigating.


192. See supra notes 159-61 and accompanying text.


194. See Mariash v. Morrill, 496 F.2d 1138 (2d Cir. 1974): It is simply too late in the day to argue that Section 27 of the Securities and Exchange Act of 1934 does not authorize nationwide service of process on any individual named in the complaint, provided, of course, the complaint states a claim under the 1934 Act. Id. at 1142.

195. That factor can be inferred from the subject matter covered in the statutes. They include: (1) agricultural pest control, 7 U.S.C. § 150dd(b) (1976); (2) Antitrust regulations, 15 U.S.C. §§ 5, 22, 25 1213(d) (1976); (3) investment regulations, 15 U.S.C. §§ 77v(a), 77vv(b), 78aa, 79y, 80a-43, 80b-14 (1976); and (4) actions against state officers, 28 U.S.C. § 1391(e) (1976).
and enforcing.\textsuperscript{196} A third factor may have been the need to resolve federal disputes involving parties dispersed throughout the nation.

Although those factors may have influenced Congress to grant nationwide jurisdiction for particular federal questions, they have not been applied uniformly. Many federal statutes encompassing important federal rights and remedies do not include jurisdiction provisions.\textsuperscript{197} Similarly, federal agencies with as much responsibility for the enforcement of federal law as those granted nationwide service have not been provided equal jurisdiction.\textsuperscript{198} Finally, al-

\begin{footnotesize}


In \textit{FTC v. Browning}, 435 F.2d 96 (D.C. Cir. 1970), a proceeding was brought to enforce a Federal Trade Commission subpoena. The defendant, served by mail in Pennsylvania, argued that the District of Columbia court lacked personal jurisdiction on the ground that section 9 of the Federal Trade Commission Act was merely a venue statute. The court, in rejecting the defendant's argument, stated:

\begin{quote}
Such a construction would be contrary to the congressional purpose to endow the Commission with broad powers of investigation and the authority to compel "attendance and testimony of witnesses and the production of . . . documentary evidence relating to any matter under investigation . . . from any place in the United States at any designated place of hearing."
\end{quote}

\textit{Id.} at 99 (footnote omitted).

\textsuperscript{197} Nationwide service of process is not available in actions involving the following federal rights: (1) civil rights, \textit{see} Safeguard Mut. Ins. Co. v. Maxwell, 53 F.R.D. 116 (E.D. Pa. 1971) (no implied grant of nationwide service under Civil Rights Act); (2) trademark infringement, \textit{see} Besuner v. Faberge, Inc., 379 F. Supp. 278 (N.D. Ohio 1974) (extra-territorial service of process not authorized by the Lanham Trademark Act); AAMCO Automatic Transmissions, Inc. v. Taylor, 368 F. Supp. 1283 (E.D. Pa. 1973) (Lanham Trademark Act contains no express or implied provision for extraterritorial service of process); (3) copyright, \textit{see} Volk Corp. v. Art-Pak Clip Art Serv., 432 F. Supp. 1179, 1180-81 n.2 (S.D.N.Y. 1977) (service must conform to New York long-arm statute because no nationwide service in copyright cases); and (4) labor relations, \textit{see} Central Operating Co. v. Utility Workers of Am., 491 F.2d 245, 250 (4th Cir. 1974) (despite policy to provide federal forum for suits against unions, \textit{Labor Management Relations Act} does not authorize nationwide service).

\textsuperscript{198} \textit{See} Robertson v. Railroad Labor Bd., 268 U.S. 619 (1925) (refusing to permit nationwide service of a subpoena in an enforcement proceeding under the \textit{Transportation Act of 1920}):

\begin{quote}
[N]o reason is suggested why Congress should have wished to compel every person summoned either to obey the Board's administrative order without question, or to litigate his right to refuse to do so in such district, however remote from his home or temporary residence, as the Board might select. The Interstate Commerce Commission which, throughout thirty-eight years, has dealt in many different ways with most of the railroads of the United States, has never exercised, or asserted, or sought to secure for itself, such broad powers.
\end{quote}

\end{footnotesize}
though it is equally difficult to assert jurisdiction over dispersed parties in private antitrust litigation, nationwide jurisdiction is available only where the United States is the moving party.\footnote{199}

Recognizing the need for a uniform system, federal courts have attempted to establish criteria for asserting personal jurisdiction in federal question cases. Despite their efforts, they too have been unsuccessful. The federal courts, hoping to protect defendants from unfairness, either have restrictively construed the nationwide service of process statutes\footnote{200} or have limited their scope by applying due process principles. However, in cases involving both federal and state claims, a majority of federal courts now extend nationwide jurisdiction to pendent state claims, even though the federal statute is not directly applicable to the state claims.\footnote{201} Their reasoning in doing so is that judicial economy outweighs the lack of specific congressional authority to extend nationwide jurisdiction.\footnote{202}

\footnote{Id. at 666.}


200. By refusing to allow nationwide jurisdiction unless specifically set forth by statute, the courts claim to further the intent of Congress. In Schlanger v. Seaman, 401 U.S. 487 (1971), the United States Supreme Court refused to imply that nationwide process under section 1391(e), 28 U.S.C. § 1391(e) (1976), applies to habeas corpus actions. The Court reasoned that “the legislative history of that section is barren of any indication that congress extended habeas corpus jurisdiction. That section was enacted to broaden the venue of civil actions which could previously have been brought only in the District of Columbia. \textit{See} H.R. \textit{Rep.} No. 536, 87th Cong., 1st Sess. 1 [1961]; S.\textit{Rep.} No. 1992, 87th Cong., 2d Sess. 2 [1962].” \textit{Id.} at 490 n.4.


Although federal courts have interpreted nationwide jurisdiction statutes to reflect constitutional principles of fairness, their definitions differ from those used by Congress. Congressional definitions of fairness require that defendants be protected from unreasonable burdens of litigation imposed by nationwide jurisdiction. Although those concerns are understandable, inconvenience in terms of physical distance traveled has not been traditionally protected by the Constitution.

Federal courts have defined fairness by examining the defendant's relationship with the forum. In examining that relationship, they have adopted three constitutional approaches to acquiring personal jurisdiction in federal question cases. Some federal courts apply a territorial due process test, examining the sufficiency of the defendants' contacts with the United States. Other courts determine whether a defendant has a sufficient nexus with the forum state. To determine whether that nexus exists, some federal courts apply state courts' territorial due process tests.


204. See supra notes 163-164 and accompanying text.

205. See Hanson v. Denckla, 357 U.S. 235, 254 (1958) ("[The State] does not acquire that jurisdiction by being the 'center of gravity' of the controversy, or the most convenient location for litigation"); Fitzsimmons v. Barton, 589 F.2d 330, 333 (7th Cir. 1979) ("It is clear, therefore, that the 'fairness' standard imposed by Shaffer relates to the fairness of the exercise of power by a particular sovereign, not the fairness of imposing the burdens of litigating in a distant forum").


208. In United States v. McAninch, 435 F. Supp. 240 (E.D.N.Y. 1977), the court reasoned that a sufficient nexus was present with the United States because the defendants were United States citizens employed by the United States. Id. at 244. In Alco Standard Corp. v. Benelal, 345 F. Supp. 14 (E.D. Pa. 1972), the court examined the acts committed in the United States because the court viewed the Securities Acts as national in scope. Id. at 24-25.

209. That analysis parallels the approach state courts are directed to take in determining personal jurisdiction. See International Shoe Co. v. Washington, 326 U.S. 310 (1945); supra note 32.

For example, in *Kipperman v. McConne*, personal jurisdiction was based on a federal nationwide service of process statute and a state long-arm statute. Although the statutory requirements for personal jurisdiction under the federal statute were met, the district court denied jurisdiction because the defendant had insufficient contacts with the state. The court found that the plaintiff's claim of jurisdiction was based on:

only the most tenuous connection with the State of California. Certainly none of the defendants had the commercial or professional relationship with the forum which typifies most of the relevant case law. Moreover, the conduct of which [the plaintiff] complains, while of paramount concern to all United States citizens, is primarily the subject of federal law. The offending agencies are organized under federal law, the alleged participants were federal employees, and the rights allegedly invaded were primarily constitutional rights.

The only aspect of the case which is peculiarly forum-related is that plaintiff experienced the emotional effect of the alleged activity in California.

The *Kipperman* court's due process analysis of the defendants' relationship to the forum treated the federal jurisdiction statute the same as a state statute, contrary to the intent of Congress. In so

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211. 422 F. Supp. 860 (N.D. Cal. 1976) (suit against federal officials for illegally opening plaintiff's mail).
214. 422 F. Supp. at 870-75.
215. Id. at 875 (emphasis added).
216. See Driver v. Helms, 577 F.2d 147, 152 n.16 (1st Cir. 1978), rev'd sub nom. on other grounds, Colby v. Driver, 444 U.S. 527 (1980). In Driver, the court of appeals refuted the defendant's argument that section 1391(e), 28 U.S.C. § 1391(e) (1976), concerned only the mechanics for serving process and not amenability to personal jurisdiction. Relying on authenticated, but unpublished, transcripts of the House Report, H.R. Rep. No. 1008, 86th Cong., 2d Sess. 2-4 (1960), the court established that section 1391(e) was intended to provide broader coverage than that allowed under Rule 4:

There are statutes which do, like the Antitrust Laws, the Sherman Antitrust Act, under which you can bring a suit against defendants and serve them anywhere in the United States, and of course under the Bankruptcy Act you can serve persons anywhere in the United States.

Now what you would have to do here it seems to me would be to provide for the service that we discussed, namely, service upon the U.S. Attorney, service by mail upon the Attorney General, and also service by mail anywhere in the United States upon the officer or agent being sued.

That would take care of it because all that is necessary is for Congress to authorize service to be made outside of the District, and it is perfectly valid to do so. *Id.* at 156 (citing Hearings on H.R. 10039 Before the Comm. on the Judiciary, 86th Cong., 2d Sess. 2-4 (1960) (statement of Judge Maris)). *Cf.* Stern v. Gobeloff, 332 F. Supp. 909 (D. Md. 1971). The *Stern* court rejected the argument that the nationwide process provisions of
doing, the court failed to recognize that federal statutes provide federal jurisdiction independent of state rules or statutes.

Other federal courts have taken an entirely different approach by abandoning a due process test where a defendant is physically present and served with process within the United States. In *Mariash v. Morrill*, the court, holding the due process requirements inapplicable, stated:

It is not the State of New York, but the United States, "which would exercise its jurisdiction over them [the defendants]." And plainly, where, as here, the defendants reside within the territorial boundaries of the United States, the "minimum contacts" required to justify the federal government's exercise of power over them, are present. Indeed, the minimum contacts principle does not, in our view, seem particularly relevant in evaluating the constitutionality of in personam jurisdiction based on nationwide, but not extraterritorial service of process. It is only the latter, quite simply, which even raises a question of the forum's power to assert control over the defendant.

In *Stafford v. Briggs*, dissenting Justices Stewart and Bren-

the Security Act of 1933 and the Securities Exchange Act of 1934 were subject to the same due process assessment as state long-arm statutes:

Although defendants cite many cases supporting the "minimum contacts" theory, the mistake in their approach lies in equating due process requirements as applied to jurisdiction in a state court based on the state's long-arm statute, with jurisdiction in a federal court pursuant to a federal statute which explicitly sets out the extent of venue and jurisdiction the court may exert in a given case.

*Id.* at 912.

217. 496 F.2d 1138 (2d Cir. 1974). In *Mariash*, the action was based on violations of the Security Act of 1933 and the Securities Exchange Act of 1934. The individual defendants were served with process in Massachusetts, their state of residency, pursuant to the nationwide process provisions of the 1934 Act, 15 U.S.C. § 78aa (1976). The *Mariash* court relied on the decision in *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972), where the alien defendants were served in England pursuant to Rule 4(i), and personal jurisdiction was predicated on section 27 of the Securities Exchange Act of 1934. Upholding the defendants' amenability to jurisdiction, the *Leasco* court stated:

While Congress was doubtless thinking mainly in terms of exercising its power "to provide that the process of every District Court shall run into every part of the United States," use of the word "wherever", rather than "where" or "in which", demonstrates an intention to authorize service on a defendant who can be "found" only in a foreign country, and although the section does not deal specifically with *in personam* jurisdiction, it is reasonable to infer that Congress meant to assert personal jurisdiction over foreigners not present in the United States to [sic], but, of course, not beyond the bounds permitted by the due process clause of the fifth amendment.

*Id.* at 1340 (citations omitted).

218. 496 F.2d at 1143 (citations omitted) (emphasis in original).

219. 444 U.S. 527, 545 (1980) (Stewart & Brennan, JJ., dissenting). In *Stafford*, the majority refused to recognize the assertion of jurisdiction over federal officers served with
nan expressed a similar view, stating:

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 a 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. 220

The distinction federal courts make between defendants within the United States and defendants outside those boundaries suggests that they have misunderstood the relationship between federal jurisdictional statutes and due process. Both Rule 4 and the 1789 Judiciary Act provide for general jurisdiction based on a defendant's physical presence. Unlike rule 4 and the Judiciary Act, however, the subject matter of federal jurisdictional statutes has a direct connection with the forum. Therefore, a due process test is unnecessary even if the defendant is physically served with process while outside the United States. 221

One imaginative federal court constructed a five-factor "fairness" test. 222 That test combines elements used to evaluate the burdens on the defendant under jurisdiction with those used under venue standards. The purpose of the fairness test is to ensure a convenient federal forum. Some federal courts have declined to follow that test, criticizing its failure to relate the central concerns of fairness to the power theory of jurisdiction and viewing it as an

process within the United States pursuant to a nationwide jurisdiction provisions of section 1391(e), 28 U.S.C. § 1391(e) (1976).

220. 444 U.S. at 554.

221. See A.L.I. Study, supra note 80. In discussing a federal statute that proposed worldwide process for dispersed parties in diversity of citizenship cases, see 28 U.S.C. § 2374(a) (1976), the authors of that study stated:

Process under this section is authorized to run wherever the authority of the United States may lawfully reach. There is no good reason why process should be limited to the territorial boundaries of the United States and immunize persons outside the country who may properly be subjected personally to the jurisdiction of the United States Courts.

A.L.I. Study, supra note 80, at 401. The A.L.I. Study only considered "the general power of Congress to authorize service of process across state lines, not with possible limits on the use of such power dictated by considerations of fairness embodied in the due process clause of the fifth amendment." Id. at 437 n.1.

222. Oxford First Corp. v. PNC Liquidating Corp., 372 F. Supp. 191 (E.D. Pa. 1974). The five factors are: (1) the extent of the defendant's contacts with the place the action is brought; (2) the inconvenience to the defendant; (3) judicial economy; (4) the probable situs of the discovery proceedings; and (5) the impact of the activity in question beyond the borders of the defendant's residence or business. Id. at 203-04.
Some federal courts, recognizing that a due process analysis is unnecessary, but being concerned with the burdens of litigation, have suggested that the criteria used for venue or transfer of venue provisions may be more appropriate.\(^{224}\) The difficulty with that approach, however, is that venue not only restricts the exercise of nationwide jurisdiction but may prevent federal courts from hearing a federal question case.\(^{225}\)

Attempts by both Congress and federal courts to ensure that federal jurisdictional statutes are fair has resulted in a lack of uniformity in acquiring personal jurisdiction in federal question cases. Responsibility now lies with Congress to enact a well-planned federal jurisdiction scheme that is fair to defendants while meeting the needs of the federal system. Such a scheme would combine process and venue standards for all federal question jurisdiction.\(^{226}\)

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223. See Fitzsimmons v. Barton, 589 F.2d 330 (7th Cir. 1979). In rejecting the five-factor fairness test, the Fitzsimmons court stated:

We decline, however, to adopt these [fairness] factors as a test of whether an instance of personal jurisdiction under Section 27 complies with the Due Process Clause. The "fairness" measured by these factors does not relate to the fairness of the exercise of power by a particular sovereign—the central concern of Shaffer and its predecessors—but instead to the fairness of imposing the burdens of litigation in a particular forum. As such, these factors are more appropriately used in applying 28 U.S.C. § 1404(a), which embodies the nonjurisdictional doctrine of forum non conveniens, and we therefore decline to import them into a determination of the constitutionality of exercises of personal jurisdiction.

Id. at 334 (footnote omitted).

224. See Warren v. Bokum Resources Corp., 433 F. Supp. 1360 (D.N.M. 1977) (SEC action). In Warren, the court stated:

Given the extra-territorial service of process provision in § 27, it is evident that so long as venue is properly laid in the forum district for claims brought under the 1934 Act, it is not necessary that each defendant have personally engaged in acts or transactions within the forum in order to sustain personal jurisdiction over him.

Id. at 1364. See also Thompson v. Battle, 54 F.R.D. 222 (N.D. Ill. 1971).

Using venue criteria as a means of limiting federal jurisdiction reflects Congress’ prior attempt to rely-on venue as a restriction on jurisdiction. See Judiciary Act of 1789, ch. 20, 1 Stat. 73; supra notes 159-161 and accompanying text. Most federal jurisdiction statutes also provide for special venue. See statutes cited supra note 157.

225. Recently, the United States Supreme Court held that in exceptional cases, venue could be examined prior to personal jurisdiction to avoid a constitutional question. Leroy v. Great Western United Corp., 443 U.S. 173 (1980). In Leroy, where jurisdiction and venue were predicated on section 27 of the 1934 Securities Exchange Act, the United States Supreme Court stated that "when there is a sound prudential justification for doing so, we conclude that act may reverse the normal order of considering personal jurisdiction and venue." Id. at 180. The Court avoided a possible constitutional issue by finding that venue was improper and dismissing the case. Id. at 181-82.

226. See A.L.I. Study, supra note 80. The A.L.I. Study stressed the necessary relationship of nationwide process to proposed venue change for federal question subject matter
Federal procedure then would provide a uniform source of personal jurisdiction in federal question cases that would be coextensive with the grant of federal question subject matter.

If Congress were to provide such legislation, it would be unnecessary to apply a due process test in federal question cases. Because a defendant's actions would fall within the federal subject matter area, a relationship among the defendant, the litigation and the court would be established. Thus, a sufficient nexus would exist by virtue of the statutory grant of subject matter jurisdiction. Any inconveniences caused by litigation in a particular forum could be resolved under the federal transfer of venue statute. Transfer of venue considerations would not interfere with federal courts' rights to acquire or sustain jurisdiction because that analysis compares the convenience of available alternative forums. 227

V. Conclusion

Exploration of the methods for acquiring personal jurisdiction under Rule 4 demonstrates a lack of uniformity in the federal courts. Those diverse methods ignore the policies inherent in acquiring personal jurisdiction in federal question cases and have resulted in confusion, unreliability and nonuniformity. The present personal jurisdiction framework is contrary to the intent of provid-

ing uniform federal procedures and often forecloses a federal forum from hearing federal question cases. Neither Congress nor the federal courts have solved the problems arising under Rule 4. By failing to enact legislation that encompasses all federal questions, Congress has left the field open to state statutory schemes. Federal courts also have added to the uncertainty about personal jurisdiction in federal question cases because of their disagreement on whether and how state due process limits should be imposed.

Restrictions on personal jurisdiction should not prevent federal courts from hearing cases based on federally created law. In developing personal jurisdiction standards, Congress should expressly provide that due process concerns have been satisfied once subject matter jurisdiction is found.