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THE PERILS OF NATIONWIDE SERVICE OF PROCESS IN A BANKRUPTCY CONTEXT

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I. INTRODUCTION

Shortly after arriving in his office in downtown San Diego Daryl Dobson was served with a summons and a complaint. It directed him to answer a lawsuit in United States Bankruptcy Court for the District of Vermont. *Vermont?* Daryl had never been to Vermont; he was not even certain precisely where in New England it was located. Nor had he done any business with anyone in Vermont, or anyone else outside the state of California for that matter.

The plaintiff, SoCal Novelties, Inc., a California corporation, was one of his local customers, but, as far as Daryl knew, it had nothing to do with Vermont.

Daryl's inquiry revealed that SoCal Novelties, Inc. was a twenty percent subsidiary of Vermont Novelties, Inc. which had filed a bankruptcy case at its corporate headquarters in Vermont. SoCal Novelties had also filed for bankruptcy reorganization in Vermont Bankruptcy court as part of the reorganization of Vermont Novelties Inc. and its various regional subsidi-

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aries. The suit brought against Daryl was one of many cases SoCal Novelties had brought against some of its suppliers.

Daryl couldn't believe that he would have to respond to a lawsuit, brought by a local company, involving a local transaction, in such a faraway location. His lawyer, however, correctly advised Daryl that unless the Vermont bankruptcy judge could be persuaded to transfer venue of the case to a California bankruptcy court, a motion which in the interest of the efficient reorganization of the debtor, is rarely granted, Daryl would have to attempt to defend the lawsuit in Vermont. As Daryl was to learn, one of the foremost procedural advantages of filing bankruptcy is the ability to conduct any necessary litigation in a single forum before a judge familiar with the debtor's business and financial affairs.¹

Typically, the personal jurisdiction of federal courts is tied to state law,² and thus to state boundaries.³ However, the federal Bankruptcy Code⁴

1. With few exceptions, 28 U.S.C. § 1409(a) permits a proceeding arising under the Bankruptcy Code or arising in or related to a bankruptcy case to be brought in the federal judicial district in which the bankruptcy case itself is pending. 28 U.S.C. § 1409(a) (1988). See *infra* text accompanying notes 41-48.

The drafters of the Bankruptcy Reform Act sought to abandon the complicated and arcane jurisdictional distinctions under the Bankruptcy Act of 1898 in favor of a simple jurisdictional structure that would permit all bankruptcy litigation to be conducted in a single bankruptcy forum. See H.R. REP. NO. 595, 95th Cong., 1st Sess. 45-52 (1977), reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6006-6013; S. REP. NO. 989, 95th Cong., 2d Sess. 17, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5803.

For a description of jurisdiction under the Bankruptcy Act of 1898 see *infra* note 219.

2. In most cases falling within the general federal question or diversity jurisdiction of the federal district courts, the personal jurisdiction of the court depends on the jurisdictional power of the courts of the state in which the federal district court is located. FED. R. CRV. P. 4(e)-(f).

3. Much of the scholarly debate about the nature and extent of the minimum contacts doctrine in the law of personal jurisdiction since *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), has focused on the ability of a state court to exercise jurisdiction over a nonresident defendant who has few, if any, contacts with the forum state.

Among the books and articles dealing with personal jurisdiction that contain material directly relevant to the topic of this article are: R. CASAD, JURISDICTION IN CIVIL ACTIONS (1983); Whitten & Woods, *Pennoyer's Demise, Personal Jurisdiction after Shaffer and Kulko and a Modest Prediction Regarding World-Wide Volkswagen Corp. v. Woodson*, 20 ARIZ. L. REV. 861 (1978); Whitten, *The Constitutional Limitations on State Court Jurisdiction: A Historical Interpretive Reexamination of the Full Faith and Credit and Due Process Clauses* (Pts. 1 & 2), 14 CREIGHTON L. REV. 499, 735 (1981); *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909 (1960); Drobak, *The Federalism Theme in Personal Jurisdiction*, 68 IOWA L. REV. 1015 (1983); Casad, Shaffer v. Heitner: *An End to Ambivalence in Jurisdictional Theory?* 26 KAN. L. REV. 61 (1977); Silberman, Shaffer v. Heitner: *The End of an Era*, 53 N.Y.U. L. REV. 33 (1978); Nordenberg, *State Courts, Personal Jurisdiction and the Evolutionary Process*, 54 NOTRE DAME LAW. 587 (1979); Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U.L. REV. 1112 (1981); Hazard, *A General Theory of State Court Jurisdiction*, 1965 SUP. CT. REV. 241 (1965); Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts—From Pennoyer to Denckla: A Review*, 25 U. CHI. L. REV. 569 (1958); Rheinstein, *The Constitutional Bases of Jurisdiction*, 22 U. CHI. L. REV. 775 (1955).

4. 11 U.S.C. §§ 101-1330 (1988).

and Rules⁵ are not tethered to state law. The Bankruptcy Rules, like a number of other federal statutes,⁶ purport to authorize service of process

5. FED. R. BANKR. P. 1001.

For a brief history of the development of the Federal Rules of Bankruptcy Procedure see *infra* note 46.

6. Congress has permitted service of process in only a few situations. See 45 U.S.C. § 362 (1988) (Railroad Unemployment Insurance Act); 42 U.S.C. § 9613 (1988) (CERCLA); 33 U.S.C. § 921 (1988) (Longshoreman's Workers' Compensation Act); 29 U.S.C. § 1451(d) (1988) (ERISA); 18 U.S.C. § 1965 (1988) (RICO); 15 U.S.C. § 5 (1988) (Sherman Act); 15 U.S.C. § 22 (1988) (Clayton Act); 28 U.S.C. §§ 1335, 1397, 2361 (1988) (Statutory Interpleader); 28 U.S.C. § 1655 (1988) (actions to assert property rights when defendant cannot be served within forum state); 28 U.S.C. § 1692 (1988) (actions involving real estate located in more than one judicial district); 28 U.S.C. § 1695 (1988) (shareholder derivative actions); 28 U.S.C. § 1391(e) (1988) (The Mandamus and Venue Act of 1962); 15 U.S.C. § 77v (1988) (Securities Act of 1933); 15 U.S.C. § 78aa (1988) (Securities Act of 1934); 15 U.S.C. § 77vvv (1988) (Trust Indenture Act of 1939); 15 U.S.C. § 79y (Public Utility Holding Act of 1939); 15 U.S.C. § 80a-43 (1988) (Investment Companies Act of 1940); 15 U.S.C. § 80b-14 (1988) (Investment Advisors Act of 1940); 28 U.S.C. § 1608 (1988) (Foreign Sovereign Immunity Act of 1976); 9 U.S.C. § 9 (1988) (Federal Arbitration Act).

The scope of some of these statutory nationwide service of process provisions is further limited by internal constraints on the application of many of them. See, e.g., Sherman Act, 15 U.S.C. § 5 (1988) (stating that nationwide service of process provision applies only if court finds 'that the ends of justice require that other parties should be brought before the court'); Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1965 (1988) (stating that nationwide service of process provision applies only if 'the ends of justice require that other parties residing in any other district be brought before the court'); Goldsmith & Rinne, *Civil RICO, Foreign Defendants and "ET"*, 73 MINN. L. REV. 1023, 1053 n.101 (1989). Bankruptcy Rule 7004(d) contains no such limitation. See generally Lieb, *Jurisdiction and Venue in Bankruptcy Litigation*, 1982 ANN. SURV. BANKR. L. 69, 85-89; Fullerton, *Constitutional Limits on Nationwide Personal Jurisdiction in the Federal Courts*, 79 NW. U. L. REV. 1 (1984); Stephens, *The Deferral Court Across the Street: Constitutional Limits on Federal Court Assertions of Personal Jurisdiction*, 18 U. RICH. L. REV. 297 (1984); Abraham, *Constitutional Limitations Upon the Territorial Reach of Federal Process*, 8 VILL. L. REV. 520, 533-34 (1963); Lusardi, *Nationwide Service of Process: Due Process Limitations on the Power of the Sovereign*, 33 VILL. L. REV. 1 (1988); Note, *Fifth Amendment Due Process Limitations on Nationwide Federal Jurisdiction*, 61 B.U.L. REV. 403 (1981) [hereinafter Note, *Fifth Amendment Limitations*]; Note, *Bankruptcy and the Limits of Federal Jurisdiction*, 95 HARV. L. REV. 703 (1982); Note, *Nationwide Personal Jurisdiction in All Federal Question Cases: A New Rule 4*, 64 N.Y.U. L. REV. 1117 (1989) [hereinafter Note, *Nationwide Personal Jurisdiction*]; Note, *Pendent Personal Jurisdiction and Nationwide Service of Process*, 64 N.Y.U. L. REV. 113 (1989) [hereinafter Note, *Pendent Personal Jurisdiction*].

Furthermore, because the minimum contacts doctrine has been based since its inception on now outmoded and anachronistic notions of territorial sovereignty, there has been little scholarly or judicial doubt about the constitutional validity of the few nationwide service of process statutes Congress has enacted. *But see* Fullerton, *supra* (contending that unrestricted nationwide service of process statutes may be legitimately challenged on Fifth Amendment due process grounds); Lusardi, *supra* (arguing that while Congress has authority to enact nationwide service of process statutes, this authority should be limited by due process requirements). If a court could constitutionally exercise personal jurisdiction over anyone within the territorial boundaries of the sovereign whose judicial power was exercised by that court, it seemed that the personal jurisdiction of a federally constituted court could extend to the territorial boundaries of the entire United States. See *Nationwide Personal Jurisdiction, supra*, at 1123

anywhere in the United States.⁷ Further, section 1409 of the Federal Judicial Code permits most litigation connected to a bankruptcy case to be conducted in the forum in which the debtor's bankruptcy petition was filed,⁸ regardless of the location of the defendant or the defendant's lack of contacts with the debtor in the litigation forum. Moreover, section 1408 permits corporate debtors to file a bankruptcy proceeding in any district in which an affiliated entity has also filed.⁹ Daryl's dilemma is thus a particular problem in bankruptcy reorganization cases involving geographically diverse conglomerate enterprises such as SoCal and Vermont Novelties.¹⁰

There are, of course, important policy considerations in support of these provisions. Bankruptcy Rule 7004(d), when combined with sections 1408 and 1409, permits a bankruptcy trustee¹¹ or debtor in posses-

n.30.

Finally, even where Congress has acted to permit a federal court to exercise nationwide personal jurisdiction, venue restrictions limited the circumstances where an unwilling defendant lacked substantial contacts with the state in which the court was situated. *See* 28 U.S.C. § 1391 (1988).

The general federal venue provision permits a diversity action to be brought in the federal judicial district where all the plaintiffs or all the defendants reside, or in which the claim arose. *Id.* § 1391(a). Other actions brought in federal court may be brought only in the district in which all the defendants reside or in which the claim arose. *Id.* § 1391(b). Thus, diversity actions can be venued in a district where the defendants have no contact only if all of the plaintiffs all reside in that district. Otherwise the defendant will have contacts with the district in which its case is properly venued because of the defendant's residence in the district or because of the defendant's contacts in the district which gave rise to the cause of action.

Recently, the Judicial Conference's Standing Committee on Rules and the Advisory Committee on Civil Rules, which promulgate changes to the Federal Rules of Civil Procedure under the Rules Enabling Act of 1934, 28 U.S.C. § 2072 (1988), have proposed an amendment to Federal Rule of Civil Procedure 4 that would permit nationwide service of process in all federal question cases brought in federal district court. *See* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE AND THE FEDERAL RULES OF CIVIL PROCEDURE, FEDERAL RULE OF CIVIL PROCEDURE 4(L), at 15-16 (Sept. 1989); *Nationwide Personal Jurisdiction, supra*, at 1117-18.

7. Federal Rule of Bankruptcy Procedure 7004(d) provides: "The summons and complaint and all other process except a subpoena may be served anywhere in the United States."

8. 28 U.S.C. § 1409 (1988).

9. 28 U.S.C. § 1408 (1988).

10. *Cf. LoPucki & Whitford, Bargaining Over Equity's Share in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 139 U. PA. L. REV. 125 (1990) (reporting some results of empirical study of reorganization of such enterprises).

11. A trustee is appointed in a Chapter 7 case "[p]romptly after the order for relief . . ." 11 U.S.C. § 701 (1988). In cases under Chapters 12 and 13 of the United States trustee is permitted to appoint a standing trustee who will serve as the trustee in any case filed in the district under Chapters 12 or 13. *See* 28 U.S.C. § 586(b) (1988); 11 U.S.C. §§ 1202 & 1302 (1988). In Chapter 11 cases a trustee is appointed only upon court order for cause shown. 11 U.S.C. § 1104 (1988).

Although a trustee's duties vary somewhat depending on the chapter under which the case is proceeding, a trustee is normally required to perform a variety of functions related to the collection of estate assets and the processing of claims against the estate. *See* 11 U.S.C. §§ 704, 1106, 1202(b) & 1302(b) (1988).

sion¹² to consolidate all of the debtor's assets, and all litigation concerning those assets, in one place.¹³

Furthermore, there is considerable authority, extending as far back as *Pennoyer v. Neff*,¹⁴ supporting the view that a court's power to assert personal jurisdiction is limited only by the sovereign power of the state whose court system is involved. Because Congress has, for the most part, chosen to exercise only the sovereign power of the state in which the courts sit, the salient sovereign unit is the government of the state. The jurisdictional issue is whether the defendant is located in or has sufficient minimum contacts with the state government to warrant that state court's exercise of sovereign power over the defendant.

In federal bankruptcy court, however, Congress has not chosen to so limit the power of federal courts. Instead, through the nationwide service provision of Rule 7004(d), the salient sovereign entity is the United States of America.¹⁵ Thus, a defendant with minimum contacts with the United States, or any part of it, can be made subject to the sovereign judicial power of the United States. As will be seen, there is nearly overwhelming authority for this position in the bankruptcy and other lower federal courts.

Lately, however, the Supreme Court has arguably backed away from "territorial sovereignty" as the basis for its minimum contacts decisions and has stated a separate limitation on personal jurisdiction.¹⁶ This new limitation has focused on fundamental fairness instead of territorial sovereignty.¹⁷ As will be discussed, the Court's most recent decisions are unclear regarding the proper role of these conflicting doctrines. However, it is the thesis of this article that protecting the defendant from the unanticipated and unfair burden of litigating in a distant and unfamiliar forum is an important constitutional limitation on personal jurisdiction that has serious implications for nationwide service provisions like Bankruptcy Rule 7004(d).

The second part of this article will begin by describing the circumstances in which the liberal venue rules in bankruptcy cases, combined with the possibility of nationwide service of process, might result in a defendant

12. In a Chapter 11 case a trustee is appointed only "for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management . . ." or "if such appointment is in the interests of creditors . . ." 11 U.S.C. § 1104(a) (1988). Otherwise, a debtor in possession of the estate has "all the rights, . . . powers, . . . functions and duties . . . of a trustee . . ." 11 U.S.C. § 1107(a) (1988). Normally no trustee is appointed in a Chapter 11 case and the debtor remains in control of the estate acting as debtor in possession pursuant to § 1107(a). 5 COLLIER ON BANKRUPTCY ¶ 1104.01[7][b] (L. King 15th ed. 1990).

13. See *infra* text accompanying notes 215-43.

14. 95 U.S. 714 (1877).

15. See U.S. CONST. art. III, § 1.

16. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982).

17. See *infra* text accompanying notes 94-112.

being called upon to answer in a forum with which the defendant has no discernable contact. The first part of Section III will analyze recent decisions by the Supreme Court, particularly *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*¹⁸ and *Burger King Corp. v. Rudzewicz*¹⁹ in which state sovereignty, as the basis of the minimum contacts doctrine, has been questioned and arguably supplanted. This analysis will provide the foundation for a constitutionally based argument that some version of the minimum contacts doctrine must serve as a limitation on the existing nationwide service of process rule applicable in bankruptcy cases.

The second half of Section III will describe how modern courts have responded to the argument that nationwide service of process is limited by the fairness concern of the Fifth Amendment. Section IV explains how the values and policies associated with Bankruptcy Rule 7004(d) might be reconciled with the Fifth Amendment's restrictions on nationwide service of process. Section IV will conclude by proposing that state boundaries, within the United States, should be used to establish presumptive limitations on a federal court's personal jurisdictional authority in bankruptcy cases.²⁰

II. MODERN CORPORATE STRUCTURE, PERSONAL JURISDICTION, AND VENUE IN BANKRUPTCY LITIGATION

In the last few years there has been an explosion of bankruptcy filings by large, publicly held, conglomerate corporate debtors.²¹ When such companies file a bankruptcy case they not infrequently cause petitions to be filed on behalf of their subsidiaries.²² Such large, and even smaller bankruptcy cases spawn a considerable amount of related litigation between the principal debtor or its subsidiaries and those who have dealt with the various corporate debtors in such cases.

18. 456 U.S. 694 (1982).

19. 471 U.S. 462 (1985).

20. The model suggested by this article is consistent with, although not identical to the "Mutual Inconvenience Paradigm" of personal jurisdiction described in Kogan, *A Neo-Federalist Tale of Personal Jurisdiction*, 63 S. CAL. L. REV. 257 (1990). Under this paradigm the issue of personal jurisdiction is primarily one of the administration of justice and cost-effective adjudication. *Id.* at 368. The difference between the model of analysis suggested here and the Mutual Inconvenience Paradigm explained by Prof. Kogan is that in this model the plaintiff's interests are explained in terms of the federal government's interest in achieving a cost efficient administration of bankruptcy estate assets. See *infra* text accompanying notes 215-43. Further, where a party has minimum contacts with any part of the United States there is no possibility of a problem with the territorial sovereignty of a federal court over that party. See *infra* text accompanying note 301.

21. See generally LoPucki & Whitford, *supra* note 10, at 134.

22. See Lopucki & Whitford, *Venue Choice and Forum Shopping in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 1991 WIS. L. REV. 11, 21. On Jan. 15, 1990 Campeau Inc. caused voluntary petitions to be filed for Federated Department Stores, Inc., Allied Stores Corp., and approximately 64 affiliated companies. See, e.g., *In re Federated Department Stores, Inc.*, No. 1-90-00130 (S.D. Ohio, Jan. 15, 1990) (voluntary petition); *In re Allied Stores, Corp.*, No. 1-90-00131 (Bankr. S.D. Ohio, Jan. 15, 1990) (voluntary petition); petitions in 64 separate but affiliated cases on file at Capital University Law School.

A. Personal Jurisdiction and Service of Process in Bankruptcy Litigation

Rule 7004(d) of the Federal Rules of Bankruptcy Procedure provides for the service of "the summons and complaint [in an adversary proceeding] . . . anywhere in the United States."²³ Rule 7004(d), however, like Rule 4(e) of the Federal Rules of Civil Procedure, governs only the actual service of process, not the defendant's amenability to that process under the Due Process Clause of the Fifth Amendment.²⁴

Most cases considering the impact of the Fifth Amendment on federal nationwide service of process rules like Rule 7004(d) have concluded that the Fifth Amendment is satisfied as long as the defendant has minimum contacts with the United States or any part of it.²⁵

While this result may be acceptable in other situations where Congress has provided for nationwide service of process, the peculiarities of bankruptcy litigation make this result potentially unfair. This is particularly true in a bankruptcy reorganization case involving a corporate debtor whose geographically distant subsidiaries may have been permitted to file for protection under the bankruptcy laws in the same venue as their parent despite the subsidiary's lack of other connections with the forum state. A brief explanation of the jurisdiction and venue rules governing bankruptcy cases and adversary bankruptcy litigation will be helpful in understanding the problem that nationwide service of process can create in such a context.

B. Venue of Bankruptcy Cases

A bankruptcy case for a corporation may be filed in the federal judicial district in which a corporation's domicile, principal place of business, or principal United States assets have been located for the one hundred and eighty days immediately preceding the date of the bankruptcy petition.²⁶ Alternatively, a corporation may begin a bankruptcy case in a jurisdiction in which a case concerning the corporation's "affiliate" is already pending.²⁷

An "affiliate" includes a person who owns or controls voting power over twenty percent of the outstanding voting securities of the debtor in question.²⁸ The term also includes a corporation, twenty percent or more of the outstanding voting stock of which is owned or controlled by a person, including a corporation, who is already a debtor in a bankruptcy case.²⁹

23. FED. R. BANKR. P. 7004(d).

24. See *FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300, 1312 n.61 (D.C. Cir. 1980).

25. E.g., *Continental Air Lines v. Hillblom (In re Continental Airlines)*, 61 Bankr. 758 (S.D. Tex. 1986). See *infra* text accompanying notes 157-73.

The defendant must also, of course, be given notice of the proceeding and have the opportunity to respond. See, e.g., *In re First Hartford Corp.*, 63 Bankr. 479 (Bankr. S.D.N.Y. 1986); see generally *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

26. 28 U.S.C. § 1408(1) (1988).

27. *Id.* § 1408(2).

28. 11 U.S.C. § 101(2)(A) (1988).

29. *Id.* § 101(2)(B).

The practical impact of these rules is that a corporation can file a bankruptcy petition in any district in which its parent or one of its subsidiaries has filed.³⁰ For example, an Ohio corporation, with its principal place of business in Ohio, all of whose assets are located in Ohio, might file a Chapter 11 reorganization petition in the Southern District of California if an owner of twenty percent of its stock is already a debtor in a bankruptcy case venued in that distant district. The Ohio corporation might similarly commence its reorganization case in the District of Alaska if it has an Alaska subsidiary already in bankruptcy court there. These are, of course, extreme examples, but ones not unheard of in reported cases³¹ or among members of the bankruptcy bar.³²

C. Venue of Proceedings on Creditors' Claims

Among the most important types of proceedings in a bankruptcy case are proceedings to determine the allowability of claims. A claim is a "right to payment . . . or to an equitable remedy" ³³ A creditor's claim, once filed,³⁴ is "deemed allowed, unless a party in interest . . . objects."³⁵ If such a party objects to a claim, the court must determine the allowability and amount of the claim.³⁶

A proceeding to determine the allowability of a claim is a core proceeding that may be heard and finally determined by a bankruptcy judge³⁷ as a contested matter³⁸ in the bankruptcy court in which the bankruptcy case is pending.³⁹ Service of notice of a motion to disallow a claim is made pursuant to Rule 7004⁴⁰ thus making it clear that the nationwide service of process provision of Rule 7004(d) applies in a proceeding to determine a claim.

30. 1 COLLIER ON BANKRUPTCY, *supra* note 12, ¶ 3.02[1] [d].

31. See *In re Chateaugay Corp.*, 102 Bankr. 335 (Bankr. S.D.N.Y. 1989); *In re Johns-Manville Corp.*, 97 Bankr. 174 (Bankr. S.D.N.Y. 1989); *In re Ocean Properties of Delaware, Inc.*, 95 Bankr. 304 (Bankr. D. Del. 1988); *In re Pope Vineyards*, 90 Bankr. 252 (Bankr. S.D. Texas 1988); *In re Oceanguest Feeder Service, Inc.*, 56 Bankr. 715 (Bankr. D. Conn. 1986).

32. See, e.g., *Care Enterprise, Inc. v. Hazelbaker (In re Care Enterprises, Inc.)*, No. LA 88-01918 (AG) (Order Denying Motions to Dismiss and for Change of Venue) (copy on file with Author).

33. 11 U.S.C. § 101(4) (1988).

34. Section 501 of the Bankruptcy Code provides for the filing of claims. 11 U.S.C. § 501 (1988). See also FED. R. BANKR. P. 3001-3005.

35. 11 U.S.C. § 502(a) (1988).

36. *Id.* § 502(b). Claims can be disallowed or limited in amount for a variety of reasons not relevant to the topic of this paper. However, any claim unenforceable against the debtor and the debtor's property will be disallowed. *Id.* § 502(b)(1).

37. 28 U.S.C. § 157(b)(1), (b)(2)(B) (1988).

38. See FED. R. BANKR. P. 9014. If the trustee or debtor in possession wishes to bring a counterclaim against the claiming creditor, the proceeding to determine both the claim and counterclaim will be treated as an adversary proceeding. FED. R. Crv. P. 7001; see Advisory Committee Note to FED. R. BANKR. P. 3007.

39. See FED. R. BANKR. P. 9002(4).

40. FED. R. BANKR. P. 9014.

D. Venue of Adversary Litigation in Connection with a Bankruptcy Case

Adversary proceedings are disputes arising in the course of a bankruptcy case that may be brought to the court's attention only by filing a complaint.⁴¹ With few exceptions⁴² adversary litigation connected to a bankruptcy case can be brought in the district in which the underlying bankruptcy case is pending.⁴³

41. See FED. R. BANKR. P. 7003 & FED. R. CIV. P. 3. Such proceedings are limited to proceedings:

(1) to recover money or property, except a proceeding to compel the debtor to deliver property to the trustee, or a proceeding under § 554(b) or § 725 of the Code, Rule 2017, or Rule 6002; (2) to determine the validity, priority, or extent of a lien or other interest in property, other than a proceeding under Rule 4003(d); (3) to obtain approval pursuant to § 363(h) for the sale of both the interest of the estate and of a co-owner in property; (4) to object to or revoke a discharge; (5) to revoke an order of confirmation of a chapter 11 or chapter 13 plan; (6) to determine the dischargeability of a debt; (7) to obtain an injunction or other equitable relief; (8) to subordinate any allowed claim or interest, except when subordination is provided in a chapter 9, 11, or 13 plan; (9) to obtain a declaratory judgment relating to any of the foregoing; or (10) to determine a claim or cause of action removed pursuant to 28 U.S.C. § 1452.

FED. R. BANKR. P. 7001.

42. 28 U.S.C. § 1409(b), (e) (1988); see 1 COLLIER ON BANKRUPTCY, *supra* note 12, ¶ 3.02[2][b]- [e].

Actions brought by the trustee or debtor in possession, not arising under the Bankruptcy Code, to collect a money judgment of or property worth less than \$1,000 or a consumer debt of less than \$5,000 may be brought only in the district in which the defendant resides. 28 U.S.C. § 1409(b) (1988). This provision recognizes that there are cases in which the burden on the defendant of having to defend in the forum of the debtor's choice may be highly inconvenient and may result in the defendant suffering a default judgment rather than investing greater resources to resist liability. See Whelan, *Practice Under the 1984 Bankruptcy Amendments*, 55 PA. B.A.Q. 206 (1984).

Further, three types of actions may be commenced in the district in which the action might have been brought under the otherwise applicable nonbankruptcy venue provision. These include actions brought by the trustee based on a claim arising after the commencement of the underlying bankruptcy case, actions brought by the trustee or under sections 541 or 544(b) of the Bankruptcy Code, and actions brought against the estate, arising from the post-petition business activities of the debtor. 28 U.S.C. § 1409(c), (e) (1988).

43. 28 U.S.C. § 1409(a) (1988); see FED. R. BANKR. P. 5005(a).

Section 1409 is not expressly exclusive. See 1 COLLIER ON BANKRUPTCY, *supra* note 12, ¶ 3.02[2][a]. As a result, civil disputes have been filed by parties other than the debtor in districts different from, and in some cases, far away from the district in which the bankruptcy case is pending. Gibson, *Home Court, Outpost Court: Reconciling Bankruptcy Case Control with Venue Flexibility in Proceedings*, 62 AM. BANKR. L.J. 37 (1988). Debtors and Trustees, of course, have resisted litigating in so-called "outpost" courts, see Gibson, *supra*, at 40-47, and many courts have ruled that such proceedings cannot be maintained anywhere other than the home court in which the bankruptcy case itself is pending. See, e.g., *Brown v. Republic Oil Corp.* (*In re Republic Oil Corp.*), 59 Bankr. 884, 886 (Bankr. W.D. Ky. 1986) (holding that outpost court suits violate automatic stay); *In re Fields*, 55 Bankr. 294 (Bankr. D.D.C. 1985) (stating that Bankruptcy Rule 5005 requires proceedings to be brought in home court); *Hamilton v. Dahlquist* (*In re Dahlquist*), 53 Bankr. 428, 429 (Bankr. D.S.D. 1985) (ruling that home court has exclusive jurisdiction over debtor's property); *Wes-Flo Inc. v. Wilson Freight Co.*

The change of venue rule applicable to bankruptcy litigation is articulated in familiar language, emphasizing the interest of justice and the convenience of the parties,⁴⁴ but motions for change of venue in civil proceedings in a bankruptcy case are rarely granted. Bankruptcy judges highly value the administrative convenience and ability to preserve the debtor's assets that is achieved by keeping every aspect of the bankruptcy case in the same forum.⁴⁵ This rule, when combined with the venue provision for bankruptcy cases themselves and the nationwide service of process rule in bankruptcy litigation provides a potent weapon for conglomerate business entities involved in reorganization proceedings.

The operation of these rules would, for example, permit the hypothetical Ohio corporation, discussed above, to bring suits against its customers, suppliers, and creditors in federal bankruptcy court in San Diego, where its bankruptcy case was pending. At best, these rules facilitate the prompt and efficient administration of a corporate debtor's reorganization case.⁴⁶ In

(*In re Wilson Freight Co.*), 13 Bankr. 617, 620 (Bankr. S.D. Ohio 1984); *Littleton Nat'l Bank v. Coleman American Co.* (*In re Coleman American Co.*), 6 Bankr. 251 (Bankr. D. Colo. 1980), *required to be dismissed in Coleman American Co. v. Littleton Nat'l Bank* (*In re Coleman American Co.*), 8 Bankr. 384 (Bankr. D. Kan. 1981). Most courts have ruled that the outpost court has jurisdiction, but lacks venue. See Gibson, *supra*, at 42-43. Still other courts have attempted to draw a distinction between administrative matters and civil proceedings, 1 COLLIER ON BANKRUPTCY, *supra* note 12, § 3.02[2][a], at 3-125, and permit outpost courts to handle the latter, but not the former. See Gibson, *supra*, at 44-45. Although not yet satisfactorily resolved, this problem does not raise questions about the propriety of nationwide service, because actions in outpost courts usually have been brought by the geographically distant party who has conducted business with the debtor in the outpost forum. See *Coleman Am. Co. v. Littleton Nat'l Bank* (*In re Coleman Am. Co.*), 8 Bankr. 384 (Bankr. D. Kan. 1981) (involving creditor who held lien on property located in other state).

44. 28 U.S.C. § 1412 (1988).

45. See *Gulf States Exploration Co. v. Manville Forest Prods. Corp.* (*In re Manville Forest Prod. Corp.*), 898 F.2d 1384 (2d Cir. 1990); *Glassel v. Allegheny Int'l Credit Corp.* (*In re Allegheny Int'l, Inc.*), 111 Bankr. 495 (W.D. Pa. 1990); *GEX, Inc. v. Wolf Creek Collieries Co.* (*In re GEX Kentucky, Inc.*), 85 Bankr. 431 (Bankr. N.D. Ohio 1987); *Wyandotte Indus. v. E.Y. Neill & Co.* (*In re First Hartford Corp.*), 63 Bankr. 479 (Bankr. S.D.N.Y. 1986); *Frazier v. Lawyers Title Ins. Corp.* (*In re Butcher*), 46 Bankr. 109 (Bankr. N.D. Ga. 1985); *Windsor Communications Group, Inc. v. Five Towns Stationery* (*In re Windsor Communications Group, Inc.*), 53 Bankr. 293 (Bankr. E.D. Pa. 1985); *Nixon Mach. Co. v. Roy Energy, Inc.* (*In re Nixon Machinery Co.*), 27 Bankr. 871 (Bankr. E.D. Tenn. 1983); *In re Med Gen., Inc.*, 17 Bankr. 13 (Bankr. Minn. 1981); Gibson, *supra* note 43, at 37-38.

46. The need for improving the efficiency of estate administration was first noted by the now infamous Brookings Institution study, D. STANLEY & M. GIRTH, *BANKRUPTCY: PROBLEM, PROCESS, REFORM* (1971).

Prior to the adoption of the Bankruptcy Rules, bankruptcy procedure was governed by a variety of General Orders, local bankruptcy rules, and unwritten procedures. Landers, *The New Bankruptcy Rules: Relics of the Past as Fixtures of the Future*, 57 MINN. L. REV. 827, 828 (1973). In 1959 the Advisory Committee of Civil Rules of the Judicial Conference appointed an Advisory Committee on Bankruptcy Rules to revise the Supreme Court's General Orders in Bankruptcy and the Official Bankruptcy Forms. See ADVISORY COMMITTEE ON BANKRUPTCY RULES, PRELIMINARY DRAFT OF FED. R. BANKR. P. introductory note (1971) [hereinafter ADVISORY COMMITTEE NOTES]; Landers, *supra*, at 829. Following these revisions the Advisory

some cases, however, the rules may force an unwilling defendant to participate in litigation located in an inconvenient judicial forum with which the defendant has had not even minimal contact.⁴⁷ There is, as well, an as yet

Committee promulgated a comprehensive set of bankruptcy rules which the Supreme Court adopted in 1973 pursuant to its authority under the existing version of 28 U.S.C. § 2075 (1970). Under that version of § 2075, the Court had authority to adopt Bankruptcy Rules which would supersede provisions of the Bankruptcy Act. See Landers, *supra*, at 829, 834-35. See ADVISORY COMMITTEE NOTES, *supra*. The Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 1978 U.S. CODE CONG. & ADMIN. NEWS (92 Stat.) 2549, amended § 2075 to require the Bankruptcy Rules to be consistent with the provisions of the new Bankruptcy Code. See Bankruptcy Reform Act of 1978, Pub. L. No. 95-598 § 405(d), 1978 U.S. CODE CONG. & ADMIN. NEWS (92 Stat.) 2549, 2685. The Advisory Committee on Bankruptcy Rules was reconstituted in response to the adoption of the Bankruptcy Reform Act and the Committee promulgated a new set of bankruptcy rules which were adopted in 1983. Although the 1983 rules were drafted in the anticipation that they would be consistent with the Supreme Court's decision in Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982), those hopes were dashed by the substantive provisions of the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 1984 U.S. CODE CONG. & ADMIN. NEWS (98 Stat.) 333 (codified in scattered sections of 5 U.S.C., 11 U.S.C., & 28 U.S.C. (1984)). As a consequence the Judicial Council submitted another set of revisions, developed by the Bankruptcy Rules Advisory Committee, which were approved in 1987. See 1 COLLIER ON BANKRUPTCY, *supra* note 12, at ¶ 3.04[2]. In August 1989, the Judicial Conference promulgated yet another set of revisions to the Bankruptcy Rules made necessary by the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 3088. Most recently the Advisory Committee has promulgated a draft of revised Official Bankruptcy Forms in order to accommodate the introduction of electronic systems for performing bankruptcy case docketing and noticing functions in the bankruptcy courts and the increased number of bankruptcy case filings. COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED OFFICIAL BANKRUPTCY FORMS vii (1990).

47. In most cases dealing with Federal Rule of Bankruptcy Procedure 7004(d) courts have not addressed the issue of whether the defendant had minimum contacts with the forum state or district because of their rulings that such contacts were not necessary for personal jurisdiction to be asserted. Nevertheless, many cases exist in which it is doubtful that the defendant had such minimum contacts. See Nordberg v. Granfinanciera S.A. (*In re Chase & Sanborn Corp.*), 835 F.2d 1341, 1344 (11th Cir. 1988), *rev'd and remanded on other grounds*, Granfinanciera, S.A. v. Nordberg, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989); Teitelbaum v. Choquette & Co. (*In re Outlet Department Stores, Inc.*), 82 Bankr. 694 (Bankr. S.D.N.Y. 1988) (holding that due process under Fifth Amendment requires only that service be reasonably calculated to inform defendant of pendency of proceedings); Wyandotte Industries v. E.Y. Neill & Co. (*In re First Hartford Corp.*), 63 Bankr. 479 (Bankr. S.D.N.Y. 1986), *proposed findings of fact and conclusions of law adopted by district court* No. 81 B 10390, Adv. No. 82-5456A (S.D.N.Y. Jan. 15, 1987); Pongetti v. Laws (*In re Self*), 51 Bankr. 683 (Bankr. D.N.D. Miss. 1985); B.W. Dev. Co. v. John B. Pike & Son, Inc. (*In re B.W. Dev. Co.*), 49 Bankr. 129 (Bankr. W.D. Ky. 1985); Allard v. Benjamin (*In re DeLorean Motor Co.*), 49 Bankr. 900 (Bankr. E.D. Mich. 1985); Coby Glass Prods. Co. v. Torigian Labs, Inc. (*In re Coby Glass Prods. Co.*), 22 Bankr. 961 (Bankr. D.R.I. 1982); *In re Schack Glass Industries, Co.*, 20 Bankr. 967, 970 (Bankr. S.D.N.Y. 1982); Whippany Paper Board Co. v. Victory Container Corp. (*In re Whippany Paper Board Co.*), 15 Bankr. 312, 4 Collier Bankr. Cas. 2d (MB) 370 (Bankr. D.N.J. 1981); Whitlock v. Worrall (*In re American Aluminum Window Corp.*), 15 Bankr. 803 (D. Mass. 1981); Nixon Mach. Co. v. Roy Energy, Inc. (*In re Nixon Mach. Co.*), 15 Bankr. 131 (Bankr. E.D. Tenn. 1981); Beasley v. Kelco Foods, Inc. (*In re Trim-Lean Meat Prods., Inc.*), 11 Bankr. 1010 (D. Del. 1981); Scott v. Fort Ord Fed. Credit Union (*In re G. Weeks Sec., Inc.*), 5 Bankr. 220 (Bankr. W.D. Tenn. 1980).

unrealized potential that these rules may combine to induce an otherwise financially robust business to seek the protection of the bankruptcy laws solely to take advantage of the convenience of being able to consolidate geographically disparate litigation in one nearby forum.⁴⁸

III. MINIMUM CONTACTS, DUE PROCESS, AND NATIONWIDE SERVICE OF PROCESS

A. *Development of Minimum Contacts Analysis under the Fourteenth Amendment*

1. Introduction

The danger described above exists only because of the generally accepted rule that where Congress has provided for nationwide service of process, minimum contacts with the United States, or any part of it, are sufficient to satisfy the Fifth Amendment's Due Process Clause.⁴⁹ This rule, as will

48. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947) (stating that plaintiff may not vex, harass, or oppress defendant by inflicting an expense or trouble not necessary to plaintiff's own right); Aaron, *The Bankruptcy Reform Act of 1978: The Full-Employment-for-Lawyers's Bill—Part III Business Bankruptcy*, 1979 UTAH L. REV. 405, 451-454; Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1 (1929); McAllen, *Deference to the Plaintiff in Forum Non Conveniens*, 13 S. ILL. U. L.J. 191, 211-212 (1989); see generally *In re A.H. Robbins, Co.*, 880 F.2d 694 (4th Cir.) (affirming order confirming plan of reorganization), *cert. denied*, 110 S. Ct. 376 (1989). But see *In re Ravick Corp.*, 106 Bankr. 834 (Bankr. D.N.J. 1989) (dismissing Chapter 11 petition as having been brought in bad faith solely to remove civil dispute to federal court).

Others have noted substantive inducements for forum shopping among debtors who use the Bankruptcy Code to resolve their financial difficulties. See, e.g., Baird, *Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren*, 54 U. CHI. L. REV. 815, 822 (1987).

A bankruptcy court might dismiss a case brought exclusively for this reason if the court finds that "the interests of creditors and the debtor would be better served by such dismissal . . ." 11 U.S.C. § 305 (1988).

49. The courts of appeals uniformly have permitted personal jurisdiction to be asserted over a defendant with national contacts where Congress has authorized nationwide service of process. See *Driver v. Helms*, 577 F.2d 147 (1st Cir. 1978) (affirming validity of nationwide service provision of 28 U.S.C. § 1391(e)), *rev'd on other grounds*, 444 U.S. 527 (1980); *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981) (finding valid nationwide service made pursuant to Federal Sovereign Immunities Act of 1976, 28 U.S.C. § 1608), *cert. denied*, 454 U.S. 1148 (1982); *Bersch v. Drexel Firestone, Inc.* 519 F.2d 974 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975); *Universal Display & Sign Co. v. Del Mar News Agency*, 541 F.2d 142 (3d Cir. 1976) (affirming validity of nationwide service pursuant to former Bankruptcy Rule 704(c)); *Mariash v. Morrill*, 496 F.2d 1138 (2d Cir. 1974) (approving nationwide service under what is now 15 U.S.C. § 78aa); *Horne v. Adolph Coors Co.*, 684 F.2d 255 (3d Cir. 1982); *Hogue v. Milodon Engineering, Inc.*, 736 F.2d 989 (4th Cir. 1984) (applying former Bankruptcy Rule 704(d)); *FTC v. Jim Walter Corp.*, 651 F.2d 251 (5th Cir. 1981) (authorizing nationwide service in cases brought by FTC in districts in which investigation is being conducted, pursuant to 15 U.S.C. § 49 (1988)); *Haile v. Henderson Nat'l Bank*, 657 F.2d 816 (6th Cir. 1981), *cert. denied*, 455 U.S. 949 (1982) (permitting nationwide service in

be seen below, rests upon the premise that the minimum contacts requirement is derived from the limits on the territorial sovereignty of state and federal court systems. One of the main purposes of this article is to show that this premise is seriously flawed. It will further show that the flaw has been recognized by the United States Supreme Court which, at least until recently, appeared poised to overturn the rule permitting a federal court to exercise personal jurisdiction over a geographically distant defendant merely because of that person's contacts with the United States generally.

Most issues regarding the propriety of a federal district court's personal jurisdiction over a nonresident defendant are governed by the Fourteenth Amendment. In all actions based on the diversity of the parties' citizenship⁵⁰ and in most cases involving the district court's authority over cases involving a federal question,⁵¹ the Fourteenth Amendment's Due Process Clause applies because Rule 4(e) of the Federal Rules of Civil Procedure provides for service of process consistently with the long-arm statute of the state in which the district court is located.⁵² However, the Fifth Amendment applies when a federal statute authorizes nationwide service of process.⁵³ Nevertheless, there is no reason to believe that the requirements of the Fifth Amendment will vary considerably from those imposed upon a state court

federal receivership, pursuant to 28 U.S.C. § 1692 (1988)); *Fitzsimmons v. Barton*, 589 F.2d 330 (7th Cir. 1979) (allowing nationwide service in securities fraud actions, pursuant to 15 U.S.C. § 78aa (1988)); *Securities Investors Protection Corp. v. Vigman*, 764 F.2d 1309 (9th Cir. 1985) (applying nationwide service in securities fraud cases); *US Telecom, Inc. v. Hubert*, 678 F. Supp. 1500 (D. Kan. 1987) (applying nationwide service under ERISA); *Briggs v. Goodwin*, 569 F.2d 1 (D.C. Cir. 1977), *rev'd on other grounds sub nom. Stafford v. Briggs*, 444 U.S. 527 (1980) (approving nationwide service under 28 U.S.C. § 1391(e) (1988)); *see also Berger, Acquiring in Personam Jurisdiction in Federal Question Cases: Procedural Frustration Under Federal Rule of Civil Procedure 4*, 1982 UTAH L. REV. 285, 318-20; Note, *Nationwide Personal Jurisdiction*, *supra* note 6, at 1123.

50. 28 U.S.C. § 1332 (1988); *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984). This practice, however, is not constitutionally mandated. *See, e.g., Arrowsmith v. UPI*, 320 F.2d 219 (2d Cir. 1963).

51. 28 U.S.C. §§ 1331, 1333-1364 (1988). *See generally* 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE, §§ 1117-1118 (1987) [hereinafter FEDERAL PRACTICE & PROCEDURE].

At least one commentator has argued that Rule 4 permits nationwide service of process in federal question cases. *See Berger, supra* note 49, at 318-25.

52. FED. R. CIV. P. 4(e). *See Arrowsmith v. UPI*, 320 F.2d 219 (2d Cir. 1963); Fullerton, *supra* note 6, at 4 & n.

53. *See Handley v. Indiana & Mich. Elec. Co.*, 732 F.2d 1265, 1271 (6th Cir. 1984). Every court of appeals called upon to address the issue of minimum contacts in a federal question case governed by a nationwide service of process statute has applied the Fifth Amendment and has used a national contacts standard. *See* 4 FEDERAL PRACTICE & PROCEDURE, *supra* note 51, § 1067.1, at 3318 n.24; Note, *Nationwide Personal Jurisdiction*, *supra* note 6, at 1140 n.149; *see also* sources cited *supra* note 49. The Supreme Court's decision in *Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97 (1987), assumed that the Fifth Amendment governed the ability of a federal court to exercise personal jurisdiction over a nonresident of the United States.

under the Fourteenth Amendment,⁵⁴ even though the parameters of the debate are quite different.

Modern Fourteenth Amendment analysis of a defendant's amenability to process began with the Supreme Court's 1945 decision in *International Shoe Co. v. State of Washington*.⁵⁵ There the Court determined that the activities of a Delaware Corporation, whose principal place of business was in Missouri, in employing a sales force to solicit orders in the state of Washington, constituted sufficient minimum contacts with the State of Washington that Washington State Courts could assert personal jurisdiction over the defendant consistently with the due process requirements of the Fifth and Fourteenth Amendments, even though the defendant was not otherwise "present" in Washington.⁵⁶

Since *International Shoe* the Supreme Court has employed this "minimum contacts" test as its mainstay approach in determining whether a state court can exercise personal jurisdiction over a nonresident defendant.⁵⁷ As indicated earlier, in bankruptcy litigation, service is accomplished under the nationwide service of process provision of Bankruptcy Rule 7004(d). Although the Fourteenth Amendment does not apply to the power of the federal government,⁵⁸ the due process concerns for fairness and the avoidance of undue governmental burdens that lie behind the Fifth Amendment generally are thought to be the same as those commonly associated with the Fourteenth Amendment.⁵⁹ Thus, the minimum contacts decisions of the Supreme Court under the Fourteenth Amendment are relevant to an analysis of the minimum contacts that may be required by the Fifth Amendment for a federal court to assert personal jurisdiction over a nonresident and perhaps geographically distant party.⁶⁰

The minimum contacts test, and restrictions on the exercise of personal jurisdiction generally, have historically been based on perceived limits of the territorial sovereignty of the states. These limitations can be traced to

54. See Fullerton, *supra* note 6, at 14-16.

55. 326 U.S. 310 (1945).

56. *International Shoe Co. v. Washington*, 326 U.S. 310, 319-20 (1945).

57. See *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220 (1957); *Hanson v. Denckla*, 357 U.S. 235 (1958); *Shaffer v. Heitner*, 433 U.S. 186 (1977); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987); *Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97 (1987); *Burnham v. Superior Court*, 110 S. Ct. 2105 (1990).

58. *E.g.*, *Driver v. Helms*, 577 F.2d 147, 157 (1st Cir. 1978), *rev'd on other grounds*, 444 U.S. 527 (1980).

59. *E.g.*, *Matthews v. Eldridge*, 424 U.S. 319 (1976) (stating that procedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interest within meaning of Due Process Clause of Fifth or Fourteenth Amendments); *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 314-15 n.37 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982).

60. See *Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97 (1987).

the use of forms of trespass in most civil actions at common law⁶¹ and the practical need to have physical power over a defendant's assets in order to levy on a judgment.⁶² This led to the notion that a court's physical control over a defendant was the *sine qua non* of a valid judgment.⁶³ Thus, the rule developed that a person could not, without his consent, be haled into court as a defendant unless he could be found within the territorial boundaries of the court's jurisdiction.⁶⁴

2. Jurisdiction Based on Territorial Sovereignty

The classic case of *Pennoyer v. Neff*⁶⁵ defined the territorial approach to personal jurisdiction.⁶⁶ In deciding against a state court's attempt to assert jurisdiction over a defendant not present in the forum state, the Supreme Court explained that:

[t]he 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 tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions.⁶⁷

61. See 4 FEDERAL PRACTICE & PROCEDURE, *supra* note 51, at 228.

62. *Id.*; Dodd, *Jurisdiction in Personal Actions*, 23 ILL. L. REV. 427, 427-28 (1929).

63. 4 FEDERAL PRACTICE & PROCEDURE, *supra* note 51, at 229; see RESTATEMENT (FIRST) OF CONFLICTS OF LAWS §§ 77-78 (1934); *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909, 915-16 (1960); Levy, *Mesne Process in Personal Actions at Common Law and the Power Doctrine*, 78 YALE L.J. 52 (1968); Ross, *The Shifting Basis of Jurisdiction*, 17 MINN. L. REV. 146, 148 (1933). *But see* Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289 (1956) (questioning historical basis for territorial approach to personal jurisdiction).

64. See FEDERAL PRACTICE & PROCEDURE, *supra* note 51, at 229 & n.8; Drobak, *supra* note 3, at 1022; Wasserman, *The Subpoena Power: Pennoyer's Last Vestige*, 74 MINN. L. REV. 37, 50-52 (1989).

65. 95 U.S. 714 (1877).

66. See Drobak, *supra* note 3, at 1026-28. In *Pennoyer*, Neff brought the action to eject Pennoyer from Oregon property that Pennoyer claimed under a sheriff's deed. The sheriff's deed had been obtained by Pennoyer at an execution sale following a judgment obtained against Neff in an action for services rendered to Neff by one Mitchell. At the time of the suit by Mitchell against Neff, Neff was not a resident of Oregon, and service was obtained upon Neff by publication. Neff failed to appear in the suit brought by Mitchell, and after the entry of a default judgment against him personally, his Oregon property was sold to Pennoyer at an otherwise valid execution sale. Neff asserted that Pennoyer's title was defective because the state court had not properly obtained jurisdiction over Neff, who made no appearance in the action, nor over his Oregon property by a proper attachment. The Court affirmed the judgment below in favor of Neff on the premise that "no State can exercise direct jurisdiction and authority over persons or property without its territory."

67. *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877).

Thus, the Supreme Court adopted the concept of territorial sovereignty as the basis for limits on a court's power to obtain personal jurisdiction over a non-resident defendant.⁶⁸

The Court's indication that this limitation on a court's power was derived from the constitution was equally important.

Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law.⁶⁹

Ever since *Pennoyer* the Court has relied on the Due Process Clauses of the Fourteenth and Fifth Amendments as the basis for its decisions outlining the limits of personal jurisdiction.⁷⁰

The Court's notion of what was necessary to provide due process expanded dramatically as modern methods of communication and transportation transformed the United States.⁷¹ Despite this expansion beyond the limitations articulated in *Pennoyer*, it was not until the Supreme Court's 1945 decision in *International Shoe Co. v. Washington*⁷² that the Court

68. Drobak, *supra* note 3, at 1026-33; Lewis, *The Three Deaths of "State Sovereignty" and the Curse of Abstraction in the Jurisprudence of Personal Jurisdiction*, 58 NOTRE DAME LAW. 699, 702-05 (1983); Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 619 (1988); Wasserman, *supra* note 64, at 51-52. Despite this, commentators have noted that the limits imposed by *Pennoyer* were based more on a concern for protecting the individual liberty interests of distant defendants, who might not have had an opportunity to defend, than out of a concern for limiting the territorial sovereignty of the forum state. Drobak, *supra* note 3, at 1023-24; Kogan, *supra* note 20, at 273; Redish, *supra* note 3, at 1124.

Justice Story's reliance in *Pennoyer* on notions of governmental sovereignty, borrowed from public international law, has been much criticized as out of place when applied to a federal union of previously independent states. Kogan, *supra* note 20, at 278 & n.91; Redish, *supra* note 3, at 1120-21; Whitten, *supra* note 3, at (Part 2) 738-835.

69. *Id.* at 733. The Fourteenth Amendment had not been adopted at the time the Oregon court asserted jurisdiction over Neff in the original action brought by Mitchell. Therefore, the Fourteenth Amendment's Due Process Clause could not have governed the outcome in *Pennoyer*. Kurland, *supra* note 3, at 572; Redish, *supra* note 3, at 1115 n.25; Whitten, *supra* note 3, at 504-05; Lewis, *supra* note 68, at 703 n.21. Nevertheless, the Court has consistently assumed that the Due Process Clause of the Fourteenth Amendment is the principle source of the minimum contacts doctrine.

70. See Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and Pennoyer Reconsidered*, 62 WASH. L. REV. 479, 503-08 (1987) (characterizing *Pennoyer* as manifestation of now discredited 19th century view of substantive due process).

71. See *Milliken v. Meyer*, 311 U.S. 457 (1940) (holding that domiciliary of state subject to jurisdiction of state even though not present at time of service); *Hess v. Pawloski*, 274 U.S. 352 (1927) (subjecting nonresident motorist to jurisdiction based on implied consent); *Lafayette Ins. Co. v. French*, 59 U.S. (18 How.) 404 (1855) (justifying jurisdiction over foreign corporations on theory of consent as condition of doing business); *Rothschild, Jurisdiction of Foreign Corporations in Personam*, 17 VA. L. REV. 129 (1930); Wasserman, *supra* note 64, at 52-53; *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909, 921 (1960).

72. 326 U.S. 310 (1945).

implemented its modern "minimum contacts" test for resolving questions of personal jurisdiction under the Fourteenth Amendment. The minimum contacts test developed in *International Shoe* did not reject state sovereignty as a basis for personal jurisdiction, but emphasized the importance of fairness to the defendant as the principal basis for its decision.⁷³ Thus, while state sovereignty played a role in the Court's analysis of personal jurisdiction, "traditional notions of fair play and substantial justice" supplanted sovereignty as the dominant concern.⁷⁴

The Court's concern that these notions of fair play and substantial justice be satisfied was expressed in the development of two basic branches of personal jurisdiction first suggested in *International Shoe*: *general and specific jurisdiction*.⁷⁵ General jurisdiction referred to the power to adjudicate any controversy based on the relationship between the forum and the defendant.⁷⁶ In cases asserting general jurisdiction it was held that a defendant with substantial or continuous and systematic contacts with a state could be subject to personal jurisdiction in that state even if the cause of action was unrelated to the defendant's activities in the state.⁷⁷ Specific jurisdiction refers to the power to adjudicate a controversy because of the relationship between the defendant's contact with the forum and the controversy itself.⁷⁸ In cases falling within the scope of specific jurisdiction a defendant who lacked the type of continuous and systematic contacts required for general jurisdiction could nevertheless be subject to personal

73. *International Shoe Co. v. Washington*, 326 U.S. 310, 317, 324-25; see Fullerton, *supra* note 6, at 10-11; Twitchell, *supra* note 68, at 625.

74. 326 U.S. at 320. See Lewis, *supra* note 68, at 706; Wasserman, *supra* note 64, at 54.

75. See *International Shoe*, 326 U.S. at 317-18. The distinction was first explained by von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966), and still engenders considerable debate. Compare Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 HARV. L. REV. 1444 (1988) with Twitchell, *supra* note 68, at 610.

76. See von Mehren & Trautman, *supra* note 75, at 1136-44; see generally Brilmayer, Haverkamp, Logan, Lynch, Neuwirth & O'Brien, *A General Look at General Jurisdiction*, 66 TEX. L. REV. 723, 727-72 (1988) (examining meaning of general jurisdiction); Brilmayer, *supra* note 75, at 1444-50 (discussing usefulness of terms general and specific); Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 80-81 (noting contacts supporting general jurisdiction); Twitchell, *supra* note 68, at 614-43; Twitchell, *A Rejoinder to Professor Brilmayer*, 101 HARV. L. REV. 1465, 1465-70 (1988); Richman, *Part I—Casad's Jurisdiction in Civil Actions, Part II—A Sliding Scale to Supplement the Distinction Between General and Specific Jurisdiction* (Book Review), 72 CALIF. L. REV. 1328, 1336-46 (1984) (examining cases satisfying neither general nor specific jurisdictional tests).

77. *International Shoe*, 326 U.S. at 318; *Cubbage v. Merchant*, 744 F.2d 665 (9th Cir. 1984), *cert. denied*, 470 U.S. 1005 (1985); *Hunt v. Erie Ins. Group.*, 728 F.2d 1244 (9th Cir. 1984); see FEDERAL PRACTICE & PROCEDURE, *supra* note 51, at 257.

Recently the Supreme Court has questioned whether jurisdiction based on a defendant's continuous and systematic contacts with a jurisdiction, unrelated to the cause of action involved in the dispute, can properly be asserted in an action against an individual defendant. See *Burnham v. Superior Court*, 110 S. Ct. 2105, 2110 n.1 (1990).

78. von Mehren & Trautman, *supra* note 75, at 1136, 1144-63.

jurisdiction in a particular forum if the more limited contacts the defendant had with the forum were those which gave rise to the action.⁷⁹ The distinction between general and specific jurisdiction, although modified somewhat since *International Shoe*,⁸⁰ is the dominant theme in the modern personal jurisdiction decisions.⁸¹

In the years since *International Shoe* the Supreme Court has been unclear about whether the primary focus of its due process analysis in minimum contacts cases is on individual liberty or territorial sovereignty.⁸² In *Hanson v. Denckla*,⁸³ decided in 1958, the court noted that its minimum contacts decisions represented "more than a guarantee of immunity from inconvenient or distant litigation."⁸⁴ Instead, the Court insisted that those limits were "a consequence of territorial limitations on the power of the respective States."⁸⁵ Nearly twenty years later, in 1977, the Court in *Shaffer v. Heitner*⁸⁶ refused to permit quasi-in-rem jurisdiction to be asserted over a defendant merely because the defendant owned property in the forum state. Rather, the Court applied the minimum contacts test of *International Shoe* and rejected state sovereignty as a basis for the assertion of personal jurisdiction.⁸⁷

In 1980, in *World-Wide Volkswagen Corp. v. Woodson*⁸⁸ the Court more directly addressed the respective roles of state sovereignty and fairness to the defendant in due process minimum contacts analysis under the Fourteenth Amendment.⁸⁹ There the Court identified what it specifically recognized as "two related, but distinguishable, functions" of the Fourteenth Amendment's minimum contacts test: "[i]t protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system."⁹⁰ The Court's inclusion of state sovereignty as one of the relevant factors was a retreat from its dictum in *Schaffer*.⁹¹

79. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *Elkart Engineering Corp. v. Dornier Werke*, 343 F.2d 861 (5th Cir. 1965); *Dommel's Hotel, Inc. v. East West Helicopter, Inc.*, 580 F. Supp. 15 (E.D. Pa. 1984).

80. Brilmayer, *supra* note 75, at 1444-50 (discussing usefulness of terms "general" and "specific").

81. See, e.g., Twitchell, *supra* note 68, at 610-11, 680.

82. See Twitchell, *supra* note 68, at 625 n.70.

83. 357 U.S. 235 (1958).

84. *Hanson v. Denckla*, 357 U.S. 235, 251 (1958). See Wasserman, *supra* note 64, at 57.

85. 357 U.S. at 251.

86. 433 U.S. 186 (1977).

87. *Shaffer v. Heitner*, 433 U.S. 186, 204, 212 (1977).

88. 444 U.S. 286 (1980). *World-Wide Volkswagen Corp.* involved a product liability action against an out-of-state automobile retailer and its wholesaler, neither of which did business in Oklahoma, the forum state.

89. See Lewis, *supra* note 68, at 706-18.

90. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-92 (1980).

91. See Fullerton, *supra* note 6, at 12-13; Lewis, *supra* note 68, at 710-11.

Further, Justice White's opinion for the Court paid tribute to the federalist context in which decisions about personal jurisdiction are made. While admitting the importance of not imposing undue burdens on a defendant, Justice White emphasized that "we have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution."⁹² His opinion further indicated that the Due Process Clause, acting as an instrument of interstate federalism, would divest a state of its power to assert jurisdiction over a defendant who lacked contacts with the forum state, despite the relative convenience for the defendant in litigating before the tribunals of that state.⁹³

Thus, while protecting defendants from unfair burdens was an appropriate consideration, *World-Wide Volkswagen* indicated that protecting the federalist system of sovereign sister states was the primary concern behind the minimum contacts requirements of the Due Process Clause of the Fourteenth Amendment.

3. Protection of Individual Liberty

In 1982 the Court dramatically revived the position asserted in *Schaffer* and reasserted the importance of protecting defendants' interest in individual liberty and the avoidance of undue burdens as the driving force behind its minimum contacts decisions. In *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*⁹⁴ the Court held that a federal district court could properly assert personal jurisdiction over a nonresident defendant, as a sanction, under Federal Rule of Civil Procedure 37⁹⁵ for the defendant's failure to comply with a discovery order relating to the question of personal jurisdiction. Justice White, in an opinion joined by seven other Justices, indicated that "[t]he personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty."⁹⁶ Justice White further noted that:

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.⁹⁷

92. 444 U.S. at 293 (1980).

93. *Id.* at 294.

94. 456 U.S. 694 (1982).

95. See FED. R. CIV. P. 37(b)(2).

96. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). See Kogan, *supra* note 20, at 263-64 n.38.

97. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702-03 n.10.

The Court's rationale in *Insurance Corp. of Ireland* appeared to reject the emphasis on state sovereignty stressed by the court in *World-Wide Volkswagen* and established instead that the primary concern behind the minimum contacts standards of the Fifth and Fourteenth Amendments is individual liberty.⁹⁸

Until recently, the Court's personal jurisdiction decisions have consistently emphasized the importance of avoiding undue burdens on the defendant and de-emphasized the relevance of federalism and the limits it imposes on state sovereignty. In *Keeton v. Hustler Magazine, Inc.*⁹⁹ Justice Rehnquist balanced the defendant's right to fairness with the state of New Hampshire's interest in holding a defendant responsible for claims related to the defendant's activities within that state.¹⁰⁰

Subsequently, in *Burger King Corp. v. Rudzewicz*¹⁰¹ the Court permitted an assertion of personal jurisdiction over the plaintiff's nonresident franchisee based on the substantial and continuing relationship of the defendant with the plaintiff's corporate headquarters in the forum state. Justice Brennan's opinion for the Court stressed the purpose of the Due Process Clause as "protect[ing] an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'"¹⁰² Justice Brennan underscored this point by emphasizing the Court's ruling in *Insurance Corp. of Ireland* that "[a]lthough this protection operates to restrict state power, it 'must be seen as ultimately a function of the individual liberty interest preserved by

98. See generally Braveman, *Interstate Federalism and Personal Jurisdiction*, 33 SYRACUSE L. REV. 533, 540-54 (1982) (regarding Court's reliance on state sovereignty and federalism); Gottlieb, *In Search of the Link Between Due Process and Jurisdiction*, 60 WASH. U.L.Q. 1291, 1299 (1983) (criticizing any role for state sovereignty in design of Due Process Clause); Drobak, *supra* note 3, at 1046-48; Kogan, *supra* note 20, at 263-64 n.38; Lewis, *supra* note 68, at 718-27; Lilly, *Jurisdiction Over Domestic and Alien Defendants*, 69 VA. L. REV. 85, 109 (1983); Redish, *supra* note 3, at 1120-42 (1981) (contending that federalism should play no role in questions of personal jurisdiction); Stewart, *A New Litany of Personal Jurisdiction*, 60 U. COLO. L. REV. 5, 8 n.15 (1989); Twitchell, *supra* note 68, at 625 n.70; Wasserman, *supra* note 64, at 58-59. *But see* Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 707 (1987) (arguing that absent concern with sovereignty, due process limits on personal jurisdiction will be indistinguishable from change of venue).

99. 465 U.S. 770 (1984).

100. See *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 798 (1984). The plaintiff, whose own contacts with the forum state were limited, brought suit on a libel claim and asserted personal jurisdiction, for damages arising from the nationwide distribution of the defendant's publication, based on the defendant's sales of copies of its magazines in the forum state. *Id.* at 796. The court permitted the assertion of personal jurisdiction even though the bulk of the plaintiff's injuries were sustained outside the state in question. *Id.* at 796, 800. See also *Calder v. Jones*, 465 U.S. 783 (1984) (deeming sufficient defendant's intentional conduct as basis for assertion of jurisdiction where conduct was calculated to cause injury in forum state).

101. 471 U.S. 462 (1985).

102. *Id.* at 471-72 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)).

the Due Process Clause' rather than as a function of federalism concerns."¹⁰³

The Court's rejection of federalism as a source of the minimum contacts requirement of the Due Process Clause is further accentuated in *Burger King* by the Court's reiteration of the generally accepted rule that defendants may waive the minimum contacts requirement.¹⁰⁴ Constitutional limitations on the powers of the several states, vis-a-vis one another, would not seem to be the sort of concerns that could be waived by individual parties.¹⁰⁵ Rather, the ability of an individual to waive a limitation on a state's power points more toward a limitation designed primarily, if not exclusively, for the protection of the individual in question. The mere fact that the Fourteenth Amendment imposes its limits on coequal states does nothing to suggest that the Due Process Clause's protection is derived from the federalist nature of the union.¹⁰⁶

More recently, in *Asahi Metal Industry Co. v. Superior Court*, the Supreme Court prevented a California court's attempt to assert jurisdiction over a Japanese company based on its sales of components to a Taiwanese concern which incorporated the components into finished goods ultimately sold in the American market.¹⁰⁷ An important portion of Justice O'Connor's opinion indicated that permitting the assertion of personal jurisdiction under the circumstances of the case, "would offend 'traditional notions of fair play and substantial justice.'"¹⁰⁸ This portion of the opinion rested on the Court's consideration of five factors: "[1] the burden on the defendant, [2] the interests of the forum State . . ." [3] the interests of the plaintiff, [4] the interest of "the interstate judicial system . . . in obtaining the most efficient resolution of the [controversy] combined with [5] the shared interest of the several States in furthering fundamental substantive social policies."¹⁰⁹

Justice Brennan, in an opinion joined by Justices White, Marshall, and Blackmun, agreed with O'Connor's conclusion that "the exercise of personal jurisdiction . . . in this case would not comport with 'fair play and sub-

103. *Burger King*, 471 U.S. at 472, n.13 (quoting *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702-03, n.10 (1982)); see Drobak, *supra* note 3, at 1016; Wasserman, *supra* note 64, at 92. In *Burger King*, however, the Court considered the state's interest in exercising jurisdiction relevant. *Burger King*, 471 U.S. at 473. This has led some commentators to characterize reports of the death of federalism as premature. See Kogan, *supra* note 20, at 263-64 n.38; see generally Stein, *supra* note 98 (supporting role of federalism in jurisdictional decisions).

104. *Burger King*, 471 U.S. at 472 & n.14.

105. Cf. 13 FEDERAL PRACTICE & PROCEDURE, *supra* note 51, § 3522 (stating that parties cannot confer subject matter jurisdiction on federal court nor can they waive lack of jurisdiction by consent, conduct, or estoppel); FED. R. CIV. P. 12(h)(3) (same).

106. *But see* 4 FEDERAL PRACTICE & PROCEDURE, *supra* note 51, § 1067, at 293.

107. 480 U.S. 102 (1987).

108. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

109. *Id.* at 113 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)).

stantial justice"¹¹⁰ In a separate concurrence, Justice Stevens, joined by Justices White and Blackmun, expressed a similar belief that an examination of minimum contacts was unnecessary in cases like *Asahi* where the burden on the defendant combined with the negligible interest of the state in asserting jurisdiction made it unreasonable and unfair to assert jurisdiction.¹¹¹ Thus, a majority of the court, consisting of Justices Brennan, White, Marshall, Blackmun, and Stevens, concluded that unfairness to the defendant prevented an assertion of jurisdiction over the defendant regardless of whether it had engaged in the type of conduct that would have resulted in a conclusion that it purposefully availed itself of the California market for its products.

After *Insurance Corp. of Ireland, Burger King, and Asahi*, at least one aspect of the Court's minimum contacts analysis should have been clear: the Court's primary concern was fairness toward the defendant. The Court would reject an assertion of personal jurisdiction where the burden on the defendant is severe and the interest of the state and the judicial system generally, in asserting jurisdiction over the defendant, is slight.¹¹² This will be true regardless of whether the defendant has purposefully availed itself of the privilege of conducting activities within the forum state.

The Court's most recent analysis of the standards for asserting personal jurisdiction raises more questions about this analysis than it resolves. In *Burnham v. Superior Court*¹¹³ the Court unanimously concluded that personal jurisdiction could be asserted over a nonresident defendant who was served while present in the forum state without analyzing the extent of the defendant's other contacts with the forum. The Court was, however, seriously divided over the rationale that supported this result. Although *Burnham* did not involve service on a geographically distant defendant, the disparate views expressed by members of the Court regarding the meaning of due process are likely to have an impact on any evaluation by the Court of the validity of nationwide service of process provisions like Bankruptcy Rule 7004(d).

Justice Scalia's conclusion that the defendant's mere presence in the state was a sufficient basis for asserting jurisdiction was founded on the assertion that "jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of 'traditional notions of fair play and substantial justice.'"¹¹⁴ He indicated that this standard, originally articulated in *International Shoe*, was developed merely as an "analogy to 'physical

110. *Id.* at 116 (Brennan, J., concurring) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945)); see McAllen, *supra* note 48, at 201-202 & 201 n.30.

111. 480 U.S. at 121 (Stevens, J., concurring).

112. See generally Degnan & Kane, *The Exercise of Jurisdiction Over and Enforcement of Judgments Against Alien Defendants*, 39 HASTINGS L.J. 799 (1988); Perdue, *supra* note 70, at 509-10; Stewart, *supra* note 98.

113. 110 S. Ct. 2105 (1990).

114. *Burnham v. Superior Court*, 110 S. Ct. 2105, 2115 (1990).

presence,' and [that] it would be perverse to say it could now be turned against that touchstone of jurisdiction."¹¹⁵

In a portion of his opinion in which only Justices Kennedy and Rehnquist joined, Justice Scalia re-emphasized that the validation of the practice of asserting personal jurisdiction based on mere presence "is its pedigree,"¹¹⁶ and that when "a jurisdictional principle is both firmly approved by tradition and still favored, it is impossible to imagine what standard we could appeal to for the judgment that it is 'no longer justified.'"¹¹⁷ In this portion of his opinion, Scalia went even further to challenge the notion, expressed in the concurring opinion of Justice Brennan,¹¹⁸ that contemporary notions of due process should include consideration of any concern for fairness that is not recognized in the traditional and historic practices in the United States.¹¹⁹

Justice Scalia's position that the traditional acceptance of a jurisdictional practice imbues that practice with a due process pedigree that is sufficient to withstand modern due process based challenges to the propriety of the practice has broad ramifications for due process as we currently understand it. His position is particularly relevant to the analysis proposed in this article that questions the validity of nationwide service of process despite our long and traditional acquiescence in the practice.

The rest of the Court in *Burnham* agreed with the result, but not with Justice Scalia's reasoning. Justice White questioned Scalia's broad assertion that traditionally accepted procedures could not be declared invalid.¹²⁰ Justice Brennan, joined by Justices Marshall, Blackmun, and O'Connor, criticized Justice Scalia's "reliance solely on historical pedigree."¹²¹ Justice Brennan based his conclusion instead, on the ability of the defendant to have reasonably predicted his vulnerability to suit in the forum state by virtue of his voluntary visit to the forum.¹²²

Brennan's view then is consistent with the premise of this article: that the constitutional validity of a particular assertion of personal jurisdiction has more to do with the reasonableness of the burdens imposed on the defendant than on the territorial sovereignty of the forum.¹²³

115. *Id.* at 2115 (emphasis in original).

116. *Id.* at 2116.

117. *Id.* at 116.

118. *Id.* at 2120, 2122-26 (Brennan, J., concurring).

119. *Id.* at 2117-19.

120. *Id.* at 2119 (White, J., concurring).

121. *Id.* at 2120.

122. *Id.* at 2124 (Brennan, J., concurring).

123. Justice Steven's opinion in *Burnham* added little to the Court's analysis because he indicated merely that his concurrence in the result was swayed by the historical consensus noted by Justice Scalia, the fairness considerations expressed by Justice Brennan, and the common sense of Justice White. 110 S. Ct. at 2126 (Stevens, J., concurring). Justice Stevens at least continues to acknowledge, as he did in *Shaffer v. Heitner*, 433 U.S. 186, 218-19 (1977) (Stevens, J., concurring), that the Court is properly concerned with the fairness of the forum's assertion of personal jurisdiction over the defendant, and therefore presumably not with territorial power alone.

The impact of *Burnham* on the Court's analysis of nationwide service of process provisions will depend on whether the views expressed in that case by Justice Scalia or those of Justice Brennan command a majority of the newly constituted Court. Justice Scalia's willingness to rely on the historical pedigree of a jurisdictional practice, combined with the tradition of permitting Congress to provide for nationwide service, would surely result in the Court's approval of the practice, despite a defendant's lack of contacts with the forum state. Justice Brennan's approach, on the other hand, with its emphasis on the ability of the defendant to reasonably predict his vulnerability to suit in the forum, would appear to support the analysis proffered by this article.

Under any reading of *Burnham* the role of state sovereignty in minimum contacts analysis under the Fourteenth Amendment remains unclear. In cases dealing with nationwide service of process statutes, like Bankruptcy Rule 7004(d), however, where the extent of the defendant's contacts with the nation as a whole are certain, state sovereignty is not an issue. Rather, with the basic question of governmental power satisfied, the only remaining issue is the extent to which the Due Process Clause of the Fifth Amendment requires something more than national minimum contacts before personal jurisdiction can be obtained over a geographically distant party. The next section will describe and analyze cases which have discussed the contention that nationwide service of process should be tempered by a concern, based on the Fifth Amendment, with procedural fairness toward the defendant.

B. *Judicial Treatment of Bankruptcy Rule 7004(d) and Other Nationwide Service of Process Statutes*

Most courts have rejected the contention that the Fifth Amendment imposes restrictions upon nationwide service of process statutes like Bankruptcy Rule 7004(d).¹²⁴ Such courts have summarily concluded that national contacts alone are sufficient to justify assertion of personal jurisdiction over a defendant, regardless of the lack of contacts the defendant has with the forum or the burden imposed on the defendant of having to defend in a geographically distant or otherwise inconvenient location.¹²⁵ Many of these

124. *E.g.*, *Mariash v. Morrill*, 496 F.2d 1138 (2d Cir. 1974) (approving nationwide service of process under § 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa (1976)); *Hogue v. Milodon Engineering, Inc. (In re Hogue)*, 736 F.2d 989 (4th Cir. 1984) (approving nationwide service under former FED. R. BANKR. P. 704). For a more complete list of authorities see note 6, *supra*.

125. *See Haile v. Henderson National Bank*, 657 F.2d 816 (6th Cir. 1981), *cert. denied*, 455 U.S. 949 (1982) (asserting personal jurisdiction under 28 U.S.C. § 1682 (1988), permitting federal receiver to sue in any federal judicial district); *Driver v. Helms*, 577 F.2d 147 (1st Cir. 1978), *rev'd on other grounds sub nom. Stafford v. Briggs*, 444 U.S. 527 (1980) (relying on 28 U.S.C. § 1391(e) (1988) in permitting nationwide service of process in actions against federal officers or employees acting under color of legal authority); *Mariash v. Morrill*, 496 F.2d 1138 (2d Cir. 1974) (accomplishing nationwide service under 15 U.S.C. § 78aa (1986) in actions for violations of the Securities Act of 1934).

decisions were reached prior to the Supreme Court's shift, in *Insurance Corp. of Ireland*, away from reliance on territorial sovereignty, and toward the need to avoid imposing undue burdens on a geographically distant party.¹²⁶ Others, decided since *Insurance Corp. of Ireland*, simply have rejected the analogy drawn between that case and those decided under the Fifth Amendment,¹²⁷ with some of these concluding that the opportunity for a change of venue adequately protects defendants from the burden of litigating in an inconvenient forum.¹²⁸ Finally, some cases have held that the express language of Article III of the Constitution permits federal courts to assume personal jurisdiction over anyone within the territory of the United States.¹²⁹ The Supreme Court has never fully addressed the issue.¹³⁰

Mariash v. Morrill,¹³¹ decided before *Ireland*, is typical of the first category of cases in which a defendant's resistance to nationwide service was summarily rejected.¹³² There, an action was brought alleging violations of federal securities laws regarding manipulations of the value of publicly traded stock. Service was accomplished under section 27 of the Securities Exchange Act of 1934 which authorizes nationwide service of process in such actions.¹³³ Judge Tyler of the Southern District of New York dismissed

126. *E.g.*, *Securities Investor Protection Corp. v. Vigman*, 764 F.2d 1309, 1315 (9th Cir. 1985), *cert. granted in part sub nom.* *Holmes v. Securities Investor Protection Corp.*, 11 S. Ct. 1618 (1991); *Waffenschmidt v. MacKay*, 763 F.2d 711, 722-23 (5th Cir. 1985); *Johnson Creative Arts, Inc. v. Wool Masters, Inc.*, 743 F.2d 947 (1st Cir. 1984) (stating: "If a person is served within the territory of the sovereign represented by the issuing court, there is no question that maintenance of the suit against him will not offend traditional notions of fairness."); *Trans-Asiatic Oil, Ltd., S.A. v. Apex Oil Co.*, 743 F.2d 956 (1st Cir. 1984); *Piper Acceptance Corp. v. Slaughter*, 600 F. Supp. 169 (D. Colo. 1985).

127. *See* *Lapeyrouse v. Texaco, Inc.*, 693 F.2d 581 (5th Cir. 1982), *overruled on other grounds by* *Point Landing, Inc. v. Omni Capital Int'l, Ltd.*, 795 F.2d 415 (5th Cir. 1986); *Continental Air Lines, Inc. v. Hillblom (In re Continental Air Lines, Inc.)*, 61 Bankr. 758 (1986); *GRM v. Equine Investment & Management Group*, 596 F. Supp. 307 (S.D. Tex. 1984); *Bamford v. Hobbs*, 569 F. Supp. 160, 164-67 (S.D. Tex. 1983).

128. *See infra* text accompanying notes 157-90.

129. *See infra* text accompanying notes 191-200.

130. *Omni Capital Int'l v. Rudolf Wolff & Co.*, 108 S. Ct. 404, 408 n.5 (1987) (declining to address issue); *Asahi Metal Ind. Co. v. Superior Court*, 480 U.S. 102, 113 (1987) (declining to address issue); *see Note, Pendent Personal Jurisdiction, supra* note 6, at 124-128.

In *Stafford v. Briggs*, 444 U.S. 527 (1980), the Court held that 28 U.S.C. § 1391(e), providing for nationwide service of process in certain actions, did not apply to actions of the type involved in the case brought against federal officials in their individual capacities. 444 U.S. at 544-45. Justice Stewart's dissent took the position that the nationwide service provision of § 1391(e) did apply, 444 U.S. at 547, and that due process required only that a defendant have minimum contacts with the sovereign authority that created the court. 444 U.S. at 554. Justice Brennan joined in this dissenting opinion. 444 U.S. at 545.

131. 496 F.2d 1138 (2d Cir. 1974).

132. *See* *Lusardi, supra* note 6, at 17-18; *Note, Fifth Amendment Limitations, supra* note 6.

133. 15 U.S.C. § 78aa (1988). The relevant portion of § 27 provides:

Any suit or action to enforce any liability or duty created by this title or rules and regulations thereunder, . . . may be brought in any such district [wherein any act or transaction constituting the violation occurred] or in the district wherein the defendant

the plaintiff's complaint for lack of personal jurisdiction over the defendants, all of whom had been served in Massachusetts where they resided.¹³⁴ The Second Circuit concluded that it was "too late in the day to argue that Section 27 does not authorize nationwide service of process on any person named in the complaint"¹³⁵

The court acknowledged the constraints of the Fifth Amendment, but treated the Due Process Clause as requiring no more than that service "be reasonably calculated to inform the defendant of the pendency of the proceedings"¹³⁶ The court rejected the defendant's claim that minimum contacts were also required by noting that because the defendants resided within the territorial boundaries of the United States, the "'minimum contacts' required to justify the federal government's exercise of power over them, were present."¹³⁷ To the court in *Mariash*, the defendant's assertion of the minimum contacts doctrine was irrelevant to the issue of the constitutionality of personal jurisdiction accomplished by service within the territory of the United States pursuant to a nationwide service of process statute.¹³⁸ The court's view was that Congress could authorize service over a defendant located anywhere within the territorial boundaries of the United States, as long as the Fifth Amendment's requirement that the defendant be given reasonable notice of the action was satisfied. Otherwise the question was one of territorial sovereignty alone, and in cases involving defendants domiciled within the territorial limits of the United States, the answer to the question was clear. The second circuit's decision in *Mariash v. Morrill* is one of the leading cases in support of this reasoning and result.¹³⁹

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

15 U.S.C. § 78aa (1986) (emphasis supplied).

134. *Id.* at 1139-40.

135. *Id.* at 1142.

136. *Id.* at 1143.

137. *Id.*

138. *Id.*

139. See *Go-Video, Inc. v. AKAI Electronic Co.*, 885 F.2d 1406, 1415 (9th Cir. 1989); *Securities Investor Protection Corp. v. Vigman*, 764 F.2d 1309 (9th Cir. 1985), *cert. granted in part sub nom.* *Holmes v. Securities Investor Protection Corp.*, 111 S. Ct. 1618 (1991); *Trans-Atlantic Oil, Ltd. v. Apex Oil Co.*, 743 F.2d 956, 959 (1st Cir. 1984); *Johnson Creative Arts, Inc. v. Wool Masters, Inc.*, 743 F.2d 947, 950 (1st Cir. 1984); *Haile v. Henderson Nat'l Bank*, 657 F.2d 816, 826 (6th Cir. 1981), *cert. denied*, 455 U.S. 949 (1982); *FTC v. Jim Walter Corp.* 651 F.2d 251, 256 n.8 (5th Cir. 1981); *Klein v. Tabatchnick*, 610 F.2d 1043, 1051 (2d Cir. 1979); *Blackburn v. Goodwin*, 608 F.2d 919, 925 (2d Cir. 1979); *Fitzsimmons v. Barton*, 589 F.2d 330, 333-34 (7th Cir. 1979); *Great Western United Corp. v. Kidwell*, 577 F.2d 1256, 1293 n.14 (5th Cir. 1978), *rev'd on other grounds sub nom.* *Leroy v. Great Western United Corp.*, 443 U.S. 173 (1979); *Driver v. Helms*, 577 F.2d 147, 157 (1st Cir. 1978), *rev'd on other grounds sub nom.* *Stafford v. Griggs*, 444 U.S. 527 (1980); *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 418 (9th Cir. 1977); *US Telecomm, Inc. v. Hubert*, 678 F. Supp. 1500, 1508 (D. Kan. 1987); *Hirt v. UM Leasing Corp.*, 614 F. Supp. 1066, 1069 (D. Neb. 1985); *Rose v. Arkansas Valley Envtl. & Utility Authority*, 562 F. Supp. 1180, 1211

Bankruptcy judges, solicitous toward the validity of Bankruptcy Rule 7004(d), have been particularly enamored with the territorial analysis employed by the *Mariash* court.¹⁴⁰ In *Nixon Machinery Co. v. Roy Energy, Inc.*, (*In re Nixon Machinery*)¹⁴¹ for example, a Chapter 11 debtor in possession¹⁴² brought an action to collect a simple debt and served process under former Bankruptcy Rule 704, which also provided for nationwide service of process in adversary proceedings in bankruptcy.¹⁴³ The defendant, who claimed to lack minimum contacts with the federal district in which the action had been brought, objected to the court's assertion of personal

(W.D. Mo. 1983); *Wallace v. Millrob Corp.* (*In re Rusco Indus., Inc.*), 104 Bankr. 548 (Bankr. S.D. Ga. 1989); *Metro Communications, Inc. v. The Baltimore Radio Show, Inc.*, 68 Bankr. 9, 10 (W.D. Pa. 1986); *Wyandotte Indus. v. E.Y. Neill & Co.* (*In re First Hartford Corp.*), 62 Bankr. 479, 486 (Bankr. S.D.N.Y. 1986); *Whippany Paper Board Co. v. Victory Container Corp.* (*In re Whippany Paper Board Co.*), 15 Bankr. 312, 314-15 (Bankr. D.N.J. 1981); *Nixon Mach. Corp. v. Roy Energy, Inc.* (*In re Nixon Mach. Co.*), 15 Bankr. 131, 135 (Bankr. E.D. Tenn. 1981); *Fullerton*, *supra* note 6, at 17-18; *Lilly*, *supra* note 98, at 132; *Redish*, *supra* note 3 (regarding state court jurisdiction under Fourteenth Amendment).

140. See *Nordberg v. Granfinanciera, S.A.* (*In re Chase & Sanborn Corp.*), 835 F.2d 1341, 1344 (11th Cir. 1988), *rev'd and remanded on other grounds*, *Granfinanciera, S.A. v. Nordberg*, 109 S. Ct. 2782, 106 L.Ed.2d 26 (1989); *Teitelbaum v. Choquette & Co.* (*In re Outlet Company Stores, Inc.*), 82 Bankr. 694 (Bankr. S.D.N.Y. 1988) (stating that due process under Fifth Amendment requires only that service be reasonably calculated to inform defendant of pendency of proceedings); *Wyandotte Industries v. E.Y. Neill & Co.* (*In re First Hartford Corp.*), 63 Bankr. 479 (Bankr. S.D.N.Y. 1986), *proposed findings of fact and conclusions of law adopted by district court* No. 81 B 10390, Adv. No. 82-5456A (S.D.N.Y. Jan. 15, 1987); *Pongetti v. Laws* (*In re Self*), 51 Bankr. 683 (Bankr. D.N.D. Miss. 1985); *B.W. Development Co., Inc. v. John B. Pike & Son, Inc.* (*In re B.W. Development Co., Inc.*), 49 Bankr. 129 (Bankr. W.D. Ky. 1985); *Allard v. Benjamin* (*In re DeLorean Motor Co.*), 49 Bankr. 900 (Bankr. E.D. Mich. 1985); *Coby Glass Prods. Co. v. Torigian Labs, Inc.* (*In re Coby Glass Prods. Co.*), 22 Bankr. 961 (Bankr. D.R.I. 1982); *In re Schack Glass Industries, Co.*, 20 Bankr. 967, 970 (Bankr. S.D.N.Y. 1982); *Whippany Paper Board Co. v. Victory Container Corp.* (*In re Whippany Paper Board Co., Inc.*), 15 Bankr. 312, 4 Collier Bankr. Cas. 2d (MB) 370 (Bankr. D.N.Y. 1981); *Whitlock v. Worrall* (*In re American Aluminum Window Corp.*), 15 Bankr. 803 (Bankr. D. Mass. 1981); *Nixon Mach. Co. v. Roy Energy, Inc.* (*In re Nixon Mach. Co.*), 15 Bankr. 131 (Bankr. E.D. Tenn. 1981); *Beasley v. Kelco Foods, Inc.* (*In re Trim-Lean Meat Prods., Inc.*), 11 Bankr. 1010 (D. Del. 1981); *Scott v. Fort Ord Fed. Credit Union* (*In re G. Weeks Sec., Inc.*), 5 Bankr. 220 (Bankr. W.D. Tenn. 1980).

141. 15 Bankr. 131 (Bankr. E.D. Tenn. 1981).

142. In a reorganization case under Chapter 11 of the bankruptcy code, 11 U.S.C. §§ 1101-1174 (1988), the "debtor in possession" means the debtor. *Id.* § 1101(1). The debtor in possession has most of the same rights, powers, and duties that a trustee would have in a Chapter 11 case if a trustee were to be appointed. *Id.* § 1107. See *id.* §§ 704 & 1106. The debtor in possession thus serves as the estate's representative in the case, but, like the trustee, owes a fiduciary duty to creditors of the estate. See 5 COLLIER ON BANKRUPTCY, *supra* note 12, ¶ 1106.01[2][b].

143. Former Bankruptcy Rule 704(f)(1) provided:

The summons, together with the complaint and notice of trial or pre-trial conference, and all other process except a subpoena may be served anywhere within the United States. "United States," as used in this subdivision, includes the Commonwealth of Puerto Rico and the territories and possessions to which the Act is or may hereafter be applicable.

Former FED. R. BANKR. P. 704(f)(1) (repealed 1983).

jurisdiction. In this typical pre-*Ireland* decision the court gave short shrift to the defendant's Fifth Amendment argument and concluded that because a federal court can constitutionally exercise jurisdiction over any person found within the borders of the United States, the defendant's lack of contacts with Tennessee in particular did not control its amenability to suit in that state's federal judicial districts.¹⁴⁴

Pre-*Ireland* decisions, such as *Mariash* and *Nixon Machinery*, draw what has been correctly characterized as a "faulty analogy" between state and national borders¹⁴⁵ and improperly conclude that minimum contacts with any part of the United States justifies the federal government in compelling a person to defend a lawsuit brought in any other part of the United States.¹⁴⁶ These decisions completely disregard the fairness concerns expressed in the Supreme Court's minimum contacts decisions dating as far back as *International Shoe Co. v. Washington*¹⁴⁷ and, at their worst, accommodate plaintiffs' interests in avoiding a full and fair litigation of disputes by bringing the action in a forum inconvenient to the defendant.¹⁴⁸ This latter concern is particularly salient in bankruptcy litigation where already disaffected creditors may be reluctant to invest additional sums in resisting the debtor's choice of forum.¹⁴⁹

Post-*Ireland* decisions have taken the statements about the individual liberty interests protected by the Fourteenth Amendment's Due Process Clause in *Ireland* seriously, but courts have felt constrained by controlling precedent in their circuits.¹⁵⁰ Other post-*Ireland* courts have used bankruptcy or nonbankruptcy venue rules to evade the issue. *Continental Airlines v. Hillblom (In re Continental Airlines)*¹⁵¹ is typical of such decisions. In that case, a Chapter 11 debtor in possession brought an adversary proceeding¹⁵²

144. *Nixon Mach. Co. v. Roy Energy, Inc.*, 15 Bankr. 131, 135 (Bankr. E.D. Tenn. 1981). The court further noted that any unfairness that might result from this rule could be cured by transfer of the case to a more convenient forum. *Id.*

145. Fullerton, *supra* note 6, at 16-22.

146. *Id.* at 19.

147. 326 U.S. 310, 317 (1945); see Fullerton, *supra* note 6, at 19.

148. See Fullerton, *supra* note 6, at 20; *Gulf Oil v. Gilbert*, 330 U.S. 501, 507 (1947).

149. See SOUTHERN METHODIST UNIVERSITY BANKRUPTCY LAW INSTITUTE, REPRESENTING DEBTORS IN BANKRUPTCY ¶ 1.03[1], at 1-12 (1987) (regarding disinclination of severely over-extended creditors to challenge debtor's choice of venue).

150. See, e.g., *Wallace v. Millrob Corp. (In re Rusco Indus., Inc.)*, 104 Bankr. 548, 551 n.2, 551-52 (Bankr. S.D. Ga. 1989).

151. 61 Bankr. 758 (S.D. Tex. 1986).

152. Adversary proceedings are conducted in the same general manner as ordinary civil proceedings in federal district court. They include proceedings:

(1) to recover money or property, except a proceeding to compel the debtor to deliver property to the trustee, or a proceeding under § 544(b) or § 725 of the Code, Rule 2017, or Rule 6002, (2) to determine the validity, priority, or extent of a lien or other interest in property, other than a proceeding under Rule 4003(d), (3) to obtain approval pursuant to § 363(h) for the sale of both the interest of the estate and of a co-owner in property, (4) to object to or revoke a discharge, (5) to revoke an order of confirmation of a chapter 11, chapter 12 or chapter 13 plan, (6) to

to enjoin certain minority shareholders of a corporation that the debtor was attempting to acquire from pursuing litigation outside of bankruptcy court. The defendants resisted the court's assertion of personal jurisdiction on the grounds that they lacked sufficient minimum contacts with the forum to permit the court to assert personal jurisdiction over them.¹⁵³ The district court¹⁵⁴ took the defendant's objections seriously and discussed the significance of the Fifth Amendment to the question of personal jurisdiction,¹⁵⁵ but concluded that the case was improperly venued and should be transferred to the district in which the defendant resided.¹⁵⁶

Other post-*Ireland* courts have held that the *opportunity* for a change of venue is the only source of relief for a defendant concerned with the burden of having to defend in an inconvenient forum with which it has few, if any, contacts. The leading bankruptcy case in support of this position is *Hogue v. Milodon Engineering, Inc. (In re Hogue)*.¹⁵⁷ In *Hogue*, decided after *Ireland* but nevertheless under the Bankruptcy Act of 1898,¹⁵⁸ a Chapter

determine the dischargeability of a debt, (7) to obtain an injunction or other equitable relief, (8) to subordinate any allowed claim or interest, except when subordination is provided in a chapter 9, 11, 12, or 13 plan, (9) to obtain a declaratory judgment relating to any of the foregoing, or (10) to determine a claim or cause of action removed pursuant to 28 U.S.C. § 1452.

FED. R. BANKR. P. 7001. Part VII of the Federal Rules of Bankruptcy Procedure, which governs adversary proceedings, closely parallels, and in many cases incorporates by reference, the Federal Rules of Civil Procedure. See FED. R. BANKR. P. 7002; advisory committee's note FED. R. BANKR. P. 7002.

153. *Continental Air Lines, Inc. v. Hillblom*, 61 Bankr. 758, 764 (Bankr. S.D. Tex. 1986).

154. The action was initially brought in bankruptcy court. The district court, however, "[w]ith 'one eye cocked toward the decision of the Supreme Court in *Northern Pipeline Constr. v. Marathon Oil Pipe Line Co.*' . . ." withdrew the reference of the adversary action from the bankruptcy court. *Continental Air Lines*, 61 Bankr. at 764 (quoting *Holland America Ins. Co. v. Union Bank & Central Pecan Shelling Co.*, 777 F.2d 992, 998 (5th Cir. 1985)).

The Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984) (codified in scattered sections of 28 U.S.C., 11 U.S.C.) permits district courts to refer bankruptcy matters to the bankruptcy court for the district in which the district court sits. 28 U.S.C. § 157(a) (1988). All federal judicial districts have entered general orders, pursuant to § 157(a), referring all bankruptcy matters to the bankruptcy court for the district. See, e.g., *In re Ermco Erectors, Inc.*, 69 Bankr. 233 (Bankr. E.D.N.Y. 1986). The district court may, however, withdraw its reference of any bankruptcy case or proceeding from the bankruptcy court, for good cause shown. 28 U.S.C. § 157(d) (1988). The district court is required to withdraw a proceeding requiring consideration of both the Bankruptcy Code and other nonbankruptcy federal laws affecting interstate commerce. *Id.* See, e.g., *In re Tammaro*, 56 Bankr. 999 (D.N.J. 1986); Ferriell, *The Constitutionality of the Bankruptcy Amendments and Federal Judgeship Act of 1984*, 63 AM. BANKR. L.J. 109, 175 n.499 (1989).

155. *Continental Air Lines*, 61 Bankr. at 766.

156. *Id.* at 769-73.

157. 736 F.2d 989 (4th Cir. 1984).

158. *Hogue v. Milodon Eng'g, Inc.*, 736 F.2d 989, 990 (4th Cir. 1984).

The Bankruptcy Act of 1898 was repealed with the adoption of the Bankruptcy Reform Act of 1978. Pub. L. No. 95-598 § 401(a), reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS (92 Stat.) 2549, 2682.

XI¹⁵⁹ debtor brought an action in the bankruptcy court for the Western District of Virginia to enjoin a former creditor from continuing an action initiated against the debtor in California on a debt previously discharged in the debtor's bankruptcy case. The creditor objected to the bankruptcy court's assertion of personal jurisdiction in the bankruptcy court action to obtain an injunction. The bankruptcy court asserted jurisdiction over the creditor and enjoined continuation of the California suit, but was overruled by the district court which ruled that the bankruptcy court lacked in personam jurisdiction over the California creditor and directed the bankruptcy judge to dismiss the adversary proceeding.¹⁶⁰ The United States Court of Appeals for the Fourth Circuit reversed, ruling that the defendant's lack of contacts with the forum state placed no limit on the bankruptcy court's ability to obtain personal jurisdiction in the case before it.¹⁶¹ In doing so the court rejected the distinction, advanced by the defendant, between service of process, clearly authorized by former Bankruptcy Rule 704, and personal jurisdiction.

Former Rule 704(f)(1), like current Bankruptcy Rule 7004(d), permitted service of a summons in an adversary proceeding "anywhere within the United States."¹⁶² It is, of course, an accepted rule that the validity of service and personal jurisdiction are distinct concepts.¹⁶³ The court indicated however, that the distinction was unimportant in cases involving federal questions where a court's ability to assert jurisdiction over a defendant is limited only by the need for congressional authorization and the constraints of due process.¹⁶⁴ Rule 704 provided the necessary congressional authorization, and, the court reasoned, the constitutional yardstick for measuring

159. Chapter XI, along with former Chapters X and XII, were the predecessors of current Chapter 11. See Downey, Ferriell, & Pfeiffer, *The Proposed Bankruptcy Reorganization Provisions: A Comparison of the Current Law with Chapter 11 of H.R. 8200 and S. 2266*, 18 SANTA CLARA L. REV. 567 (1978); King, *The Business Reorganization Chapter of the Proposed Bankruptcy Code—Or Whatever Happened to Chapters X, XI, and XII*, 78 COM. L.J. 429 (1973).

Chapter X was intended to be used primarily by large publicly held corporations. Chapter XI, on the other hand, was designed for the reorganization of smaller business enterprises. Because Chapter X required the appointment of a trustee, and the ouster of existing management, officers of publicly held business entities were understandably reluctant to file a case under Chapter X of the Bankruptcy Act and tried, usually with little success, to reorganize their companies under Chapter XI which permitted management to remain in control of the business during reorganization. See 124 CONG. REC. 32403-32408 (1978) (statement of Rep. Edwards). Chapter 11 of the current law eliminates the distinction between publicly and privately held corporations, and permits current management to remain in control of the reorganizing company unless cause exists for the appointment of a trustee. *Id.* See 11 U.S.C. § 1104(a) (1988).

160. *Hogue*, 736 F.2d at 990.

161. *Id.* at 990.

162. Former Federal Rule of Bankruptcy Procedure 704(f)(1) provided: "The summons, together with the complaint and notice of trial, and all other process except a subpoena may be served anywhere within the United States."

163. See 4 FEDERAL PRACTICE & PROCEDURE, *supra* note 51, at §§ 1075, 1127.

164. *Hogue*, 736 F.2d at 991.

due process was different in cases arising under federal law than those involving exclusively state law because of the national character of the issues involved.¹⁶⁵

This analysis, relied on in cases involving Bankruptcy Rule 7004(d),¹⁶⁶ is flawed. Instead of analyzing the interests served by nationwide service of process in a bankruptcy context and comparing them with the burdens placed on the defendant, the court simply reasoned that nationwide service was constitutionally permissible because actions arising under federal law raise issues involving federal law.

Further, the court's reasoning draws an invalid distinction between federal question and diversity cases. Diversity actions, although arising under purely state law, are as much at the core of the federal judicial power as actions arising under federal law.¹⁶⁷

Finally, although *Hogue* was decided two years after the Supreme Court's *Insurance Co. of Ireland* decision, the Fourth Circuit's opinion makes no reference to the case, nor to any other due process decision of the United States Supreme Court. This alone raises doubts about the validity of the court's entire approach.

This can perhaps be explained by the court's reliance on the seventh circuit's pre-*Ireland* decision in *Fitzsimmons v. Barton*.¹⁶⁸ There, the court, in an action brought under the nationwide service provision of the Securities Exchange Act of 1934,¹⁶⁹ concluded that the fairness standard imposed by the Supreme Court's minimum contacts decisions under the Fourteenth Amendment related to the "fairness of the exercise of power by a particular sovereign, not the fairness of imposing burdens of litigating in a distant forum."¹⁷⁰ The court indicated that the latter concern was more appropriately considered in applying the judicial code's change of venue provisions.

Even though the *Fitzsimmons* court purported to respond to the defendant's Fifth Amendment argument regarding the unfair burdens of having to defend in an inconvenient forum, it twisted the fairness debate into a similar rehash of the now outdated territorial sovereignty approach to minimum contacts analysis.¹⁷¹ Further, the *Fitzsimmons* decision was decided before *Insurance Company of Ireland and Burger King*. The court thus

165. *Id.*

166. *United States v. Premises Known as Lots 50 & 51, 2050 Brickell Ave., Miami, Fla.*, 681 F. Supp. 309 (E.D.N.C. 1988); *United States ex rel. Pittman Mechanical Contractors, Inc. v. Irvine & Assoc., Inc.*, 645 F. Supp. 845 (E.D. Va. 1986); *Sonnyco Coal, Inc. v. Bartley (In re Sonnyco Coal, Inc.)*, 89 B.R. 658 (S.D. Ohio 1988); *Teitelbaum v. Choquette & Co. (In re Outlet Dept. Stores, Inc.)*, 82 Bankr. 694 (Bankr. S.D.N.Y. 1988); *Wyandotte Industries v. E.Y. Neill & Co. (In re First Hartford Corp.)*, 63 Bankr. 479 (Bankr. S.D.N.Y. 1986); *Pongetti v. Laws (In re Self)*, 51 B.R. 683 (Bankr. N.D. Miss. 1985).

167. U.S. CONST. art III, § 2. See C. WRIGHT, *THE LAW OF FEDERAL COURTS* 26-27, 127-37 (4th ed. 1983).

168. 589 F.2d 330 (7th Cir. 1979).

169. 15 U.S.C. § 78aa (1986).

170. *Fitzsimmons v. Barton*, 589 F.2d 330, 333 (7th Cir. 1979).

171. *Fitzsimmons*, 589 F.2d at 332-33; see Fullerton, *supra* note 6, at 19.

relied on the Supreme Court's then most recent decision regarding minimum contacts, *Shaffer v. Heitner*.¹⁷² The *Shaffer* decision emphasized the limits on the territorial sovereignty of the forum state without regard to the fairness or unfairness of any burdens that might be imposed upon the defendant. In light of the Supreme Court's recent emphasis on the fairness of imposing these burdens, decisions like *Fitzsimmons*, decided without the benefit of the Supreme Court's most recent analysis of the problem, should no longer be persuasive.¹⁷³

These arguments in favor of the constitutionality of nationwide service of process are mistaken. Most importantly, a statutory right ought not serve as a substitute for constitutional protection. Unless a defendant's right to avoid having to defend in an inconvenient forum is recognized as one of constitutional derivation, the right would be subject to repeal or revision at any time by act of Congress.¹⁷⁴ This is particularly important in the context of litigation connected to a bankruptcy case where the statutory goal of preserving assets of the debtor's estate is frequently paramount.¹⁷⁵

Second, if a motion for a change of venue was genuinely designed to ensure that the defendant's constitutional rights were protected, it would be inappropriate for such motions to be heard and finally determined by a bankruptcy judge in a core proceeding.¹⁷⁶ Although withdrawal of the

172. 433 U.S. 186 (1977).

173. See, e.g., *Mariash v. Morrill*, 496 F.2d 1138 (2d Cir. 1974); *International Controls Corp. v. Vesco*, 490 F.2d 1334 (2d Cir.), cert. denied, 417 U.S. 932 (1974); *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972); see also *FTC v. Jim Walter Corp.*, 651 F.2d 251, 256 n. 8 (5th Cir. 1981) (questioning national contacts test in light of *Insurance Corp. of Ireland*).

174. See Fullerton, *supra* note 6, at 36.

175. See *Southwinds Assoc., Ltd. v. Reedy (In re Southwinds Assoc., Ltd)*, 115 Bankr. 857, 862 (Bankr. W.D. Pa. 1990); *Glassel v. Allegheny Int'l Credit Corp. (In re Allegheny Int'l, Inc.)*, 111 Bankr. 495 (W.D. Pa. 1990); *GEX Kentucky, Inc. v. Wolf Creek Collieries, Co. (In re GEX Kentucky, Inc.)*, 85 Bankr. 431 (Bankr. N.D. Ohio 1987); *F/S Airlease II, Inc. v. Aerothrust Corp. (In re F/S Airlease II, Inc.)*, 67 Bankr. 428, 432 (Bankr. W.D. Pa. 1986); *Foursquare Properties v. Akins Keyboard Sales, Inc. (In re Akins)*, 54 Bankr. 529 (Bankr. E.D. Wisc. 1985); *Windso Communications Group, Inc. v. Five Towns Stationery, Inc. (In re Windsor Communications Group, Inc.)*, 53 Bankr. 293, 296 (Bankr. E.D. Pa. 1985); *Frazier v. Lawyers Title Ins. (In re Butcher)*, 46 Bankr. 109 (Bankr. N.D. Ga. 1985); *Colarusso v. Burger King Corp.*, 35 Bankr. 365 (Bankr. E.D. Pa. 1984); *Nixon Mach. Co. v. Roy Energy, Inc. (In re Nixon Mach. Co.)*, 27 Bankr. 871, 873 (Bankr. E.D. Tenn. 1983); *Stamm v. Rapco Foam, Inc.*, 21 Bankr. 715 (Bankr. W.D. Pa. 1982); *Cole Assoc. v. Howes Jewelers, Inc. (In re Cole Associates, Inc.)*, 7 Bankr. 154 (Bankr. D. Utah 1980); see also *Commonwealth v. Commonwealth Oil Refining Co. (In re Commonwealth Oil Refining Co.)*, 596 F.2d 1239 (5th Cir. 1979), cert. denied, 444 U.S. 1045 (1980) (concerning venue of Chapter 11 case); *In re Portjeff Dev. Corp.*, 118 Bankr. 184 (Bankr. E.D.N.Y. 1990) (involving transfer of venue of debtor's Chapter 11 case to district in which affiliate's case was pending in order to promote efficient administration of two estates).

176. Bankruptcy judges may hear and finally determine all core proceedings arising under the bankruptcy code and those arising in a bankruptcy case. 28 U.S.C. § 157(b)(1) (1988).

A greater degree of participation by article III judges is required where constitutional rights are at stake. See Currie, *Bankruptcy Judges and the Independent Judiciary*, 16 CREIGHTON

reference to the bankruptcy judge might solve this particular problem,¹⁷⁷ resorting to the district court docket will slow the reorganization process further. Motions for a change of venue are, however, treated as "matters concerning the administration of the estate"¹⁷⁸ and, thus, are core proceedings fully within the power of the bankruptcy judge to determine.¹⁷⁹ This designation indicates that, at least in bankruptcy court, motions for a change of venue are not designed to provide the defendant with protection under the Fifth Amendment against undue governmental burdens.

Additionally, absent constitutional protection from being forced to litigate in an inconvenient forum, a defendant would be unable to use the procedurally powerful tactic of collateral attack and would instead be forced to answer and defend if its motion for change of venue failed.¹⁸⁰ Moreover, the defendant, as moving party, is saddled with the burden of proof in a proceeding to obtain a change of venue.¹⁸¹

L. REV. 441, 465 (1983); Ferriell, *supra* note 154, at 131-32, 156-57; Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 DUKE L.J. 197, 224-26, 229.

177. See 28 U.S.C. § 157(d) (1988).

178. 28 U.S.C. § 157(b)(2)(a) (1988).

179. *E.g.*, *Storage Equities, Inc. v. Delisle*, 91 Bankr. 616 (N.D. Ga. 1988) (ruling that motion to transfer venue of dischargeability action was core proceeding); *In re Texaco, Inc.*, 89 Bankr. 382 (Bankr. S.D.N.Y. 1988) (declaring change of venue motion in action to recover royalty payments as core proceeding); *In re Ofia Realty Corp.*, 74 Bankr. 574, 576 (Bankr. S.D.N.Y. 1987); *In re Waits*, 70 Bankr. 591, 594 (Bankr. S.D.N.Y. 1987); *Mann v. Michael Industries, Inc. (In re Inland Shoe Mfg. Co.)*, 90 Bankr. 981, 983 (Bankr. E.D. Mo. 1988); *In re Oklahoma City Associates*, 98 Bankr. 194 (Bankr. E.D. Pa. 1989) (holding motion to transfer bankruptcy case core); *In re A & D Care Inc.*, 86 Bankr. 43, 45 (Bankr. M.D. Pa. 1988) (same); *In re Baltimore Food Systems, Inc.*, 71 Bankr. 795, 796 (Bankr. D.S.C. 1986) (same).

There is some question as to whether bankruptcy courts are permitted to determine change of venue motions brought in noncore civil disputes merely related to a bankruptcy case. 28 U.S.C. § 1412 (1988), dealing with motions for change of venue, does not mention civil proceedings arising in or related to a bankruptcy case. Instead, its language refers only to cases or proceedings *under* the bankruptcy code. 28 U.S.C. § 1412 (1988). The absence of any language in § 1412 referring to proceedings related to a bankruptcy case has led some courts to suggest that motions for a change of venue of such a proceeding must be made under the general federal change of venue provision, 28 U.S.C. § 1404 (1988). *Compare* *Goldberg Holding Corp. v. NEP Productions Inc.*, 93 Bankr. 33, 34 (S.D.N.Y. 1988); *In re Retirement Inn At Forest Lane, Ltd.*, 83 Bankr. 795 (D. Utah 1988) *with* *Storage Equities, Inc. v. Delisle*, 91 Bankr. 616 (N.D. Ga. 1988) (stating that motion to transfer venue of core dischargeability action was core proceeding); *In re Texaco, Inc.*, 89 Bankr. 382 (Bankr. S.D.N.Y. 1988) (deciding that change of venue motion in action to recover royalty payments was core proceeding). If motions for a change of venue are not properly characterized as core proceedings, then the bankruptcy court would be limited to submitting proposed findings of fact and conclusions of law for de novo review by the district court. See *In re Retirement Inn At Forest Lane, Ltd.*, 83 Bankr. 795 (D. Utah 1988).

180. See *Durfee v. Duke*, 375 U.S. 106, 108-11 (1963); Fullerton, *supra* note 6, at 36.

181. See, *e.g.*, *In re Texaco, Inc.*, 89 Bankr. 382, 389 (Bankr. S.D.N.Y. 1988); *In re the Willows Ltd.*, 87 Bankr. 684, 686 (Bankr. S.D. Ala. 1988) (citing *In re Butcher*, 46 Bankr. 109 (Bankr. N.D. Ga. 1985)).

Further, both statutory transfer of venue and forum non conveniens are matters of judicial discretion¹⁸² not easily reversed on appeal.¹⁸³ The standard of review in appeals of motions for a change of venue is the "clearly erroneous" standard,¹⁸⁴ which is more difficult to satisfy than the de novo standard used in appeals from motions to quash for lack of personal jurisdiction.¹⁸⁵ Moreover, the statutory value placed on convenience to the debtor and the importance in bankruptcy proceedings of preserving estate assets invariably result in rulings in favor the debtor-in-possession or trustee.¹⁸⁶ The difficulty of prevailing on appeal is particularly troublesome given the unfavorable light in which bankruptcy judges sometimes view motions for a change of venue.¹⁸⁷

Finally, rulings adverse to motions for transfer or dismissal are not usually appealable until the conclusion of the underlying litigation.¹⁸⁸ Even then, the trial judge's ruling on the motion for change of venue is subject to an abuse of discretion standard of review,¹⁸⁹ rather than the de novo standard that governs rulings on personal jurisdiction.¹⁹⁰ Moreover, a defendant who loses a motion for change of venue, and thus suffers the burden of having to defend in a distant forum, is highly unlikely to appeal from the adverse ruling after the inconvenient trial has been completed. For these reasons, the opportunity for a change of venue is an inadequate substitute for a Fifth Amendment challenge to the court's assertion of personal jurisdiction over a nonresident defendant.

Another argument that has been advanced in support of nationwide service of process provisions like Bankruptcy Rule 7004(d) is based upon

182. See, e.g., *In re Texaco, Inc.*, 89 Bankr. 382, 387 (Bankr. S.D.N.Y. 1988); McAllen, *supra* note 48, at 193.

183. See Fullerton, *supra* note 6, at 37; *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241, 249-51 (1981).

184. E.g., *Storage Equities, Inc. v. Delisle*, 91 Bankr. 616, 617 (N.D. Ga. 1988).

185. E.g., *Securities Investment Protection Corp. v. Vigman*, 764 F.2d 1309 (9th Cir. 1985).

186. See 1 COLLIER ON BANKRUPTCY, *supra* note 12, ¶ 3.02[4][c][iii], at 3-144 and the authorities cited *supra* note 175.

187. E.g., *Lipshie v. AM Cable TV Indus., Inc. (In re Geauga Trenching Corp.)*, 110 Bankr. 638, 649-650 (Bankr. E.D.N.Y. 1990).

188. *Pacor Inc. v. Higgins*, 743 F.2d 984, 988 (3d Cir. 1984); *Nascone v. Spudnuts, Inc.*, 735 F.2d 763 (3d Cir. 1984); *In re Dalton*, 733 F.2d 710, 714 (10th Cir. 1984), *cert. dismissed*, 469 U.S. 1185 (1985); *In re Delaware & Hudson Ry. Co.*, 96 Bankr. 469 (Bankr. D. Del. 1989).

Subject to certain statutory exceptions not usually applicable to denials of motions to transfer or dismiss due to forum non conveniens, federal appellate courts lack jurisdiction to consider appeals until a final order has been issued. 28 U.S.C. § 1291 (1988). See Fullerton, *supra* note 6, at 37; 15 FEDERAL PRACTICE & PROCEDURE, *supra* note 51, § 3855.

189. See, e.g., *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981) (dismissing suit on grounds of forum non conveniens because more convenient foreign forum was available); Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 749-54 (1982).

190. E.g., *Securities Investment Protection Corp. v. Vigman*, 764 F.2d 1309 (9th Cir. 1985).

the express language of article III of the Constitution, which provides that the federal judicial power may be vested not only in the Supreme Court, but also in "such inferior courts as the Congress may from time to time ordain and establish."¹⁹¹

Article III does not require Congress to establish inferior federal courts at all.¹⁹² Nor does it require that any inferior courts established by Congress have jurisdictional limits that parallel state boundaries.¹⁹³ Therefore, the boundaries of federal judicial districts might extend beyond the scope of existing state lines.¹⁹⁴ It has been suggested that Congress might therefore be permitted to establish only one federal district court which would be able to exercise personal jurisdiction over all persons who have minimum contacts with the United States or any portion of it.¹⁹⁵

The validity of this negative implication arguably is supported by a number of Supreme Court cases decided before the advent of modern due process minimum contacts analysis.¹⁹⁶ Despite wide reliance on these cases in support of nationwide service provisions,¹⁹⁷ none of them holds that a federal district court may assert jurisdiction over a defendant residing beyond the borders of the state in which litigation is pending.¹⁹⁸ More recent lower court opinions relying on this textual argument¹⁹⁹ therefore make the mistakes not only of relying on outmoded dicta, but also of ignoring the superseding effect of the Due Process Clause of the Fifth Amendment.²⁰⁰

191. U.S. CONST. art. III, § 1.

192. U.S. CONST. art. III, § 1. See *Johnson Creative Arts, Inc. v. Wool Masters, Inc.*, 743 F.2d 947, 950 (1st Cir. 1984) (stating that "minimum contacts' with a particular district or state for purposes of personal jurisdiction is not a limitation imposed on the federal courts in a federal question case by due process concerns. The Constitution does not require the federal districts to follow state boundaries.") (citations omitted).

193. 4 FEDERAL PRACTICE & PROCEDURE, *supra* note 51, at 324; *Johnson Creative Arts, Inc. v. Wool Masters, Inc.*, 743 F.2d 947, 950 (1st Cir. 1984).

194. See, e.g., Green, *Federal Jurisdiction In Personam of Corporations and Due Process*, 14 VAND. L. REV. 967, 985-86 (1960-61).

195. See, e.g., *United States v. Union Pac. R.R.*, 98 U.S. 569 (1878).

196. *Mississippi Publ. Co. v. Murphree*, 326 U.S. 43 (1946); *Robertson v. Railroad Labor Bd.*, 268 U.S. 619 (1925); *United States v. Union Pac. R.R.*, 98 U.S. 569 (1878); *Toland v. Sprague*, 37 U.S. (12 Pet.) 729 (1838); *Picquet v. Swan*, 19 F. Cas. 609 (C.C. Mass. 1828) (No. 11,134); *Ex parte Graham*, 10 F. Cas. 911 (C.C.E.D. Pa. 1818 (No. 5,657)). See Fullerton, *supra* note 6, at 23-30. As noted by Professor Fullerton, *Graham*, *Picquet*, and *Toland* were all decided prior to *Pennoyer v. Neff*. All but *Mississippi Publ. Co. v. Murphree* were decided before *International Shoe*. Fullerton, *supra* note 6, at 30.

197. See, e.g., *United States v. Hill*, 694 F.2d 258, 261 (D.C. Cir. 1982); *Teitelbaum v. Choquette & Co. (In re Outlet Dept. Stores, Inc.)*, 82 Bankr. 694, 697 (Bankr. S.D.N.Y. 1988); *Whitlock v. Worrall (In re American Aluminum Window Corp.)*, 15 Bankr. 803, 809 (Bankr. D. Mass. 1981); Fullerton, *supra* note 6, at 29.

198. Fullerton, *supra* note 6, at 29-30.

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

200. See Fullerton, *supra* note 6, at 32.

IV. NATIONWIDE SERVICE OF PROCESS IN A BANKRUPTCY CONTEXT:
RECONCILING THE FIFTH AMENDMENT WITH THE VALUES OF NATIONWIDE
SERVICE OF PROCESS IN BANKRUPTCY

A. *Due Process and Rule 7004(d)*

1. Minimum Contacts as Required: Aggregate Nationwide Contacts as a
Threshold Requirement

As indicated by the preceding discussion, a defendant's aggregate nationwide contacts ought not, standing alone, be sufficient to permit a federal bankruptcy court to exercise personal jurisdiction over a defendant who lacks contacts with the state or federal judicial district in which the adversary proceeding is pending. The judicial code's venue rules for bankruptcy cases and attendant litigation are far too heavily weighted in favor of the debtor's choice of forum to adequately safeguard every defendant's Fifth Amendment due process right of avoiding litigation in an unfairly burdensome location.

Despite this, territorial sovereignty still has a role to play in due process analysis under the Fifth Amendment. Traditional minimum contacts analysis, of the type applied in *Asahi Metal Industry Co. v. Superior Court*²⁰¹ and *World-Wide Volkswagen Corp. v. Woodson*²⁰² should be used to make a threshold determination of whether the defendant is sufficiently within the territorial sovereignty of the United States to permit *any* federal court to exercise personal jurisdiction over the defendant. This analysis would be similar to that conducted by the Supreme Court in part II A of Justice O'Connor's opinion in *Asahi*.²⁰³ It would seek to establish whether the defendant has established minimum contacts with the United States as a whole by purposefully availing itself of the privilege of conducting activities within the United States.²⁰⁴ This threshold analysis would establish whether the United States, as a sovereign state, has the power to assert jurisdiction over the defendant consistent with the Due Process Clause of the Fifth Amendment.

Although such an approach has never been propounded by the courts, it would comport with the Supreme Court's decision in *Asahi*. It would have the further advantage of incorporating the analysis of existing cases, which treat the territorial sovereignty of the United States as an important feature of Fifth Amendment analysis of nationwide service of process statutes, into the Supreme Court's newfound emphasis on fairness to the defendant.

As explained in a preceding section of this article²⁰⁵ the Supreme Court in *Asahi* adopted a two-tiered approach, under the Fourteenth Amendment,

201. 480 U.S. 102 (1987).

202. 444 U.S. 286 (1980).

203. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987).

204. *See id.* at 103.

205. *See supra* text accompanying notes 107-12.

when personal jurisdiction is asserted under a state long-arm statute. A majority of the Court indicated that it would first inquire into whether the defendant had established minimum contacts with the forum state by purposefully availing itself of the privilege of conducting activities within the forum state by action purposefully directed toward the forum state.²⁰⁶ Although the justices disagreed in *Asahi* over the exact formulation and application of this branch of personal jurisdiction analysis,²⁰⁷ an analysis of whether the defendant had established minimum contacts with the forum was clearly only the first step in the Court's analysis.

Similarly, when jurisdiction is asserted under a nationwide service of process statute, like Bankruptcy Rule 7004(d), a court should first determine whether the defendant has sufficient minimum contacts with the United States to justify the judicial branch of the federal government in asserting its sovereign power over the defendant. Most of the time this will present no problem as the circumstances that gave rise to the claim asserted in the action will be sufficient to establish the defendant's minimum contacts with some part of the United States. Such contacts might not exist, however, where a customer or supplier of a debtor has dealt only with foreign subsidiaries or divisions of an otherwise domestic debtor.²⁰⁸

2. Fairness under the Fifth Amendment: Burdens on the Defendant and the Governmental Interest in Nationwide Service under Rule 7004(d)

a. Balancing Competing Interests

As in *Asahi*, after making this threshold determination of government sovereignty, a court should then determine whether asserting personal juris-

206. See *Asahi*, 480 U.S. at 111-12.

207. See generally Stewart, *supra* note 98 (discussing split among members of Court regarding purposeful availment).

208. See *Deak & Co. v. R.M.P. Soedjono (In re Deak & Co.)*, 63 Bankr. 422 (Bankr. S.D.N.Y. 1986).

A similar problem may arise if a foreign entity deals with a foreign corporation which, by virtue of assets located within the United States, is permitted to file a bankruptcy petition under United States law. See 11 U.S.C. § 109(a) (1988).

Service upon a foreign defendant having minimum contacts with the United States would have to be accomplished pursuant to Federal Rule of Bankruptcy Procedure 7004(e), which provides:

(e) Service on debtor and others in foreign country. The summons and complaint and all other process except a subpoena may be served as provided in Rule 4(d)(1) and (d)(3) F.R.Civ.P. in a foreign country (A) on the debtor, any person required to perform the duties of a debtor, any general partner of a partnership debtor, or any attorney who is a party to a transaction subject to examination under Rule 2017; or (B) on any party to an adversary proceeding to determine or protect rights in property in the custody of the court; or (C) on any person whenever such service is authorized by a federal or state law referred to in Rule 4(c)(2)(C)(i) or (e) F.R.Civ.P. [sic].

See Degan & Kane, *supra* note 112; Dessem, *Personal Jurisdiction after Asahi: The Other (International) Shoe Drops*, 55 TENN. L. REV. 41 (1987); Green, *supra* note 194; Note, *Alien Corporations and Aggregate Contacts: A Genuinely Federal Jurisdictional Standard*, 95 HARV. L. REV. 470 (1981).

diction over the defendant comports with the defendant's Fifth Amendment due process right to avoid the imposition of unfair governmental burdens.²⁰⁹ As noted earlier,²¹⁰ the Court in *Asahi* examined five factors to determine whether a particular assertion of personal jurisdiction over a geographically distant defendant would comport with that defendant's due process rights. Those factors are: "[1] the burden on the defendant, [2] the interests of the forum State . . ." [3] the interests of the plaintiff, [4] the interest of "the interstate judicial system . . . in obtaining the most efficient resolution of the [controversy] combined with [5] the shared interest of the several States in furthering fundamental substantive social policies."²¹¹

Unlike the situation in *Asahi*, which was decided under the Fourteenth Amendment, the latter two factors have no relevance in resolving questions of fairness under the Fifth Amendment where there is no interstate judicial system involved and where the competing interests of the several states are not important. Further, despite the analysis of the Court in *Asahi*, it is unclear why the plaintiff's interests should be taken into account separately from whatever interest the federal government has in accommodating the plaintiff's desires. As noted above, although consideration of the plaintiff's interests may be appropriate to resolve a question of change of venue, they seem irrelevant as an independent value when determining whether the burden imposed on the defendant violates the defendant's constitutional right to due process. The federal government may have an interest in cooperating with the private goals of the plaintiff, but this interest should be treated as part of the government's interest rather than as an independent factor worthy of separate consideration.

Thus, instead of examining the five *Asahi* factors, the propriety of nationwide service of process should depend on the burdens to be suffered by the defendant and the interests of the federal government in asserting personal jurisdiction in the particular forum chosen by the plaintiff. Proper application of this test will depend on an understanding of the reasons and policies in support of Bankruptcy Rule 7004(d), as well as the precise nature of the burdens imposed on a defendant by having to answer and defend in a specific case.²¹²

The remainder of this section will explain the nature of the government's interest in nationwide service of process under Bankruptcy Rule 7004(d). It will also describe how the various burdens imposed on a nonresident defendant are to be analyzed against the backdrop of the interests and policies supporting nationwide service under Rule 7004(d). The section that

209. See, e.g., Drobak, *supra* note 3; Gottlieb, *supra* note 98, at 1299; Kogan, *supra* note 20, at 367; Lewis, *supra* note 68, at 735-36; Redish, *supra* note 3.

210. See *supra* text accompanying notes 108-09 & 205.

211. 480 U.S. at 113 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)).

212. See Sinclair, *Service of Process: Rethinking the Theory and Procedure of Serving Process Under Federal Rule 4(c)*, 73 VA. L. REV. 1183, 1243 (1987); Note, *Nationwide Personal Jurisdiction*, *supra* note 6, at 1124 n.34.

follows will analyze how the governmental interest in nationwide service, in bankruptcy cases,²¹³ can be reconciled with a defendant's right to avoid undue burdens in the context of a federal judicial system currently, but not inevitably, tied to state boundaries.²¹⁴

b. Governmental Interests: Efficient Central Administration of Assets in Bankruptcy

The primary policy in support of Bankruptcy Rule 7004(d) is the efficiency of bankruptcy case administration that is obtained through the ability to resolve all issues related to the debtor's circumstances in a single forum. The Advisory Committee's Introductory Note to the Preliminary Draft of the Bankruptcy Rules indicates that the nationwide service of process provision of Rule 7004(d)'s predecessor, former Bankruptcy Rule 704(f)(1),²¹⁵ was intended "to achieve the advantages of a unitary organic administration of each bankrupt estate to the extent compatible with fairness and justice to parties in interest and with jurisdictional limitations."²¹⁶

Prior to adoption of Rule 704(f)(1) the territorial jurisdiction of a bankruptcy court depended on whether the court was exercising its summary or its plenary jurisdiction,²¹⁷ and whether the underlying bankruptcy case

213. Cf. Stein, *supra* note 98 (supporting role of federalism and state sovereignty in questions of state court jurisdiction).

214. See *infra* text accompanying notes 244-53.

215. Current rule 7004(d) was based on former rule 704(f)(1), which provided:

The summons, together with the complaint and notice of trial or pre-trial conference, and all other process except a subpoena may be served anywhere within the United States. "United States," as used in this subdivision includes the Commonwealth of Puerto Rico and the territories and possessions to which the Act is or may hereafter be applicable.

FED. R. BANKR. P. 704(f)(1) (repealed 1983).

216. COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED BANKRUPTCY RULES AND OFFICIAL FORMS UNDER CHAPTERS I TO VII OF THE BANKRUPTCY ACT xxxii (1971) [hereinafter PRELIMINARY DRAFT OF PROPOSED BANKRUPTCY RULES].

217. See Gendel, *Summary Jurisdiction in Bankruptcy Related to Possible Referee Disqualification*, 51 CALIF. L. REV. 755 (1963); MacLachlan, *Scope of the Summary Jurisdiction of the Bankruptcy Court*, 40 COLUM. L. REV. 489 (1940); Mussman & Riesenfeld, *Jurisdiction in Bankruptcy*, 13 LAW & CONTEMP. PROBS. 88, 97-99 (1948).

Sections 77(a), 111, and 311 of the Bankruptcy Act of 1898, as amended prior to its 1979 repeal, gave courts of bankruptcy jurisdiction over property of the debtor "wherever located." *E.g.*, Bankruptcy Act of 1898 § 70a, 11 U.S.C. § 110 (1976) (repealed 1979). This language was interpreted by the Supreme Court to permit a court of bankruptcy to extend its process, for the purpose of protecting property within its power, beyond the territorial limits of the bankruptcy court's authority. See *Ex parte Baldwin*, 291 U.S. 610 (1934); *Continental Ill. Nat'l Bank & Trust v. Rick Island Ry.*, 294 U.S. 648, 683-84 (1935); Mussman & Riesenfeld, *supra*, at 98. Despite the Court's recognition that there was no reason for a different result in summary proceedings in a liquidation case, lower federal courts routinely required disputes over property located beyond the court's territorial boundaries to be prosecuted via ancillary proceedings in the district in which the property was located. *Id.* at 98-99. In plenary proceedings, on the other hand, jurisdiction could be obtained only over persons within the territorial limits of the court in which the liquidation or reorganization case was pending. *Id.* at 99.

was a liquidation or a reorganization proceeding.²¹⁸ Although the complex distinction between summary and plenary jurisdiction was unaffected by the bankruptcy rules,²¹⁹ the availability of nationwide service of process constituted an important stride toward simplifying the jurisdictional terrain in bankruptcy cases. For the first time, bankruptcy matters within the court's summary jurisdiction could at least be resolved in the same general geographic location, if not yet the same courtroom. Matters beyond the bankruptcy judge's summary jurisdiction remained subject to whatever territorial restraints applied to the district court's process generally.²²⁰

The drafters of the Bankruptcy Reform Act of 1978, acting shortly after adoption of the original Bankruptcy Rules,²²¹ sought to enhance the efficiency of bankruptcy administration by consolidating all litigation related to a bankruptcy case in a single forum. The inefficiencies and delays caused by the archaic distinction in the Bankruptcy Act of 1898, between summary and plenary jurisdiction,²²² caused extensive delays and considerable expense that both disrupted the bankruptcy process and also drained assets from the estate that might otherwise have been used to satisfy the claims of creditors or rehabilitate the debtor.²²³ Thus, the jurisdictional provisions of

218. See Mussman & Riesenfeld, *supra* note 217, at 98-99.

219. The distinction between summary and plenary proceedings was a difficult one. See generally REPORT OF THE COMM'N ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. Doc. No. 137, 93d Cong., 1st Sess., part 1, at 89-91 (1973) [hereinafter COMM'N REPORT, pt. 1]; Hollins, *Summary Jurisdiction of Referees*, 14 J. NAT'L A. REF. IN BANKR. 17 (1939); Ross, *Federal Jurisdiction in Suits by Trustees in Bankruptcy*, 20 IOWA L. REV. 565 (1935). Its complexities led the drafters of the Bankruptcy Reform Act of 1978 to propose a less cumbersome jurisdictional structure for bankruptcy courts as part of that legislation's overhaul of the bankruptcy system. See H.R. REP. No. 595, 95th Cong., 1st Sess. 43-48 (1977) [hereinafter 1977 HOUSE REPORT], reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6004-09; S. REP. No. 9899, 95th Cong., 2d Sess. 17 (1977) [hereinafter 1977 SENATE REPORT], reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5803. Unfortunately, the Supreme Court's 1982 decision in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, modified *per curiam*, 459 U.S. 813 (1982), declared much of the new and simpler bankruptcy court structure unconstitutional.

Summary proceedings were those conducted by the bankruptcy court in matters relating to estate administration and in proceedings dealing with estate property in the court's possession, or, in the absence of such possession, when the adverse claimant had given consent to the summary jurisdiction of the court. See generally 2 COLLIER ON BANKRUPTCY ¶ 23.02[1] (L. King 14th ed. 1976). Plenary proceedings were conducted by the district court, sitting as a court of bankruptcy or as a district court, over actions brought by the trustee against parties, other than the debtor, who had not consented to the bankruptcy court's authority, and where the property involved in the dispute was not in the actual or constructive possession of the court. See generally *id.*

220. *Sarf v. Arnovitz*, 19 Bankr. 78 (Bankr. E.D.N.Y. 1982); *In re Continental Mortgage Investors*, 465 F. Supp. 614, 617 (D. Mass. 1979).

221. The original Bankruptcy Rules were finally officially promulgated in 1973. See Landers, *supra* note 46, at 827. At approximately the same time, the Commission on the Bankruptcy Laws of the United States, formed in 1970, issued its report. See Klee, *Legislative History of the New Bankruptcy Code*, 54 AM. BANKR. L.J. 275, 277 (1980).

222. See note 219, *supra*.

223. COMM'N REPORT, pt. 1, *supra* note 219, at 89-90. See *Katchen v. Landy*, 382 U.S.

the Bankruptcy Reform Act gave original jurisdiction to bankruptcy judges to finally determine "all civil proceedings arising under [the bankruptcy code] or arising in or related to cases under [the bankruptcy code]."²²⁴

The purpose of this broad grant of jurisdiction was to ensure that any litigation arising in the course of a bankruptcy case was to be conducted before a bankruptcy judge instead of in federal district court or in a state court.²²⁵ The advantages of this system over the regime under the Bankruptcy Act were obvious. The court in which a bankruptcy case had been filed had original jurisdiction over all types and categories of litigation affecting the bankrupt debtor or the estate. Disputes even remotely connected to a bankruptcy case could be resolved on the relatively efficient bankruptcy court docket before a judge already familiar with the underlying bankruptcy case, without resort to the more deliberate docket of a nearby state court or a district court. Further, except for disputes involving negligible sums²²⁶ and those arising after the commencement of the case,²²⁷ venue of all such litigation was proper in the bankruptcy court in which the underlying bankruptcy case was pending.²²⁸ Thus, with few exceptions, all bankruptcy litigation could be conducted before the same court.

Unfortunately, this broad grant of jurisdiction violated the doctrine of separation of powers. In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*²²⁹ the Supreme Court held that bankruptcy judges, who lacked the lifetime appointment and undiminishable salary protection provided for in article III of the Constitution, could not finally determine a dispute between a Chapter 11 debtor and one of its customers arising from a simple state-law based contract claim.²³⁰ District judges, accorded the undiminishable salary and good-behavior appointments required by article III of the Constitution, could have heard the dispute,²³¹ but untenured

323, 328 (1966) (noting congressional policy of prompt and efficient administration of bankrupts' estates effectuated by prompt resolution of attendant litigation).

224. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 241(a), 1978 U.S. CODE CONG. & ADMIN. NEWS (92 Stat.) 2549, 2668 (originally codified in 28 U.S.C. § 1471) (repealed 1984).

225. 1977 HOUSE REPORT, *supra* note 219, at 7-23, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 5968-84; *In re Bell & Beckwith*, 41 Bankr. 697, 699 (Bankr. N.D. Ohio 1984); *In re Schack Glass Indus., Co.*, 20 Bankr. 967 (Bankr. S.D.N.Y. 1982); *In re G. Weeks Sec., Inc.*, 3 Bankr. 215 (Bankr. W.D. Tenn. 1980).

226. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 241(a), 1978 U.S. CODE CONG. & ADMIN. NEWS (92 Stat.) 2549, 2668 (originally codified in 28 U.S.C. § 1473(b)) (repealed 1984).

227. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 241(a), 1978 U.S. CODE CONG. & ADMIN. NEWS (92 Stat.) 2549, 2668 (originally codified in 28 U.S.C. § 1473(d), (e)) (repealed 1984).

228. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 241(a), 1978 U.S. CODE CONG. & ADMIN. NEWS (92 Stat.) 2549, 2668 (originally codified in 28 U.S.C. § 1473(a)) (repealed 1984).

229. 458 U.S. 50, modified *per curiam* 459 U.S. 813 (1982).

230. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 & n.40, 90-91, modified *per curiam*, 459 U.S. 813 (1982).

231. *Id.* at 73, n.26.

bankruptcy judges could not. Congress had not included a severability provision in the jurisdictional provisions of the Bankruptcy Reform Act and, thus, the Court ruled that the entire jurisdictional grant regarding bankruptcy matters was unconstitutional.²³²

When Congress finally addressed the crisis in the bankruptcy system that had been created by *Marathon*,²³³ the revised jurisdictional structure it created necessarily lacked many of the efficiencies originally incorporated in the Bankruptcy Reform Act. Instead of vesting jurisdiction in bankruptcy judges, Congress gave authority to hear bankruptcy cases, and litigation arising in the course of such cases, to the district courts.²³⁴ The district courts, in turn, are permitted to refer bankruptcy cases and civil proceedings arising under the bankruptcy code or arising in or related to a bankruptcy case, to a bankruptcy judge for the district in which the case was pending.²³⁵

232. *Id.* at 87-88 n.40 (Brennan, J.), 91 (Rehnquist, J. concurring).

At the time, it seemed that it would be impossible for bankruptcy courts, or district courts for that matter, to exercise any jurisdiction over bankruptcy matters, except as might be permitted under the general federal question and diversity statutes. The Court therefore took the unusual step of staying the effect of its decision until Oct. 4, 1982, to give Congress time to resolve the matter. *Id.* at 88-89. The Court subsequently extended its stay until midnight Dec. 24, 1982, 459 U.S. 813 (1982), at which time the stay was permitted to expire. 459 U.S. 1094 (1982).

233. In immediate response to the crisis, the Administrative Office of the United States Courts issued an interim Emergency Rule for use by district courts to avoid the burden that otherwise would be placed on their dockets by having to resolve all matters pending or brought in bankruptcy court. See Memorandum from William E. Foley, Director, Administrative Office of the United States Courts, to the judges of the U.S. courts of Appeal, District Courts, Bankruptcy Courts, and the clerks of the Bankruptcy Courts (Sept. 27, 1982), reprinted in 1 COLLIER ON BANKRUPTCY, *supra* note 12, ¶ 3.01[1][b][vi] [hereinafter Emergency Rule].

The drafters of the Emergency Rule assumed, perhaps incorrectly, that *Northern Pipeline* had not affected the validity of then judicial code sections 1471(a) and (b). See Countryman, *Emergency Rule Compounds the Emergency*, 57 AM. BANKR. L.J. 1, 6-9 (1983); Countryman, *Scrambling to Define Bankruptcy Jurisdiction: The Chief Justice, The Judicial Conference, and the Legislative Process*, 22 HARV. J. ON LEGIS. 1, 19-28 (1985); Vihon, *Delegation of Authority and The Model Rule: The Continuing Saga of Northern Pipeline*, 88 COM. L.J. 66-76 (1983); Chatz & Tatelbaum, *Conference Report: Bankruptcy Courts and the Emergency Rule*, 88 COM. L.J. 61 (1983); Weisbart, *A Practical Look at the Interim Rule*, 88 COM. L.J. 371, 377 (1983); King, *The Unmaking of a Bankruptcy Court: Aftermath of Northern Pipeline v. Marathon*, 40 WASH. & LEE L. REV. 99, 116-17 (1983). Some bankruptcy judges held the Emergency Rule invalid. See *In re Wildman*, 10 Bankr. Ct. Dec. (CRR) 668 (Bankr. N.D. Ill. 1983); *In re Johnson County Gas Co.*, 10 Bankr. Ct. Dec. (CRR) 885 (Bankr. E.D. Ky. 1983).

The Emergency Rule proposed that bankruptcy cases and civil proceedings connected to bankruptcy cases be referred to the bankruptcy judges of the district in question. Emergency Rule § (c)(1), *supra*. The Rule permitted the district court to withdraw any part of a case or civil proceeding and also permitted de novo review by the district court of any ruling objected to by a party in interest. *Id.* § (e)(2)(B). See generally Ferriell, *supra* note 154, at 118-19.

Congress did not settle on a resolution of the problem until July 10, 1984. See Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (codified in scattered sections of 5 U.S.C., 11 U.S.C., & 28 U.S.C.) [hereinafter BAFJA]. The provisions of BAFJA relevant to this article are contained in Title I, Pub. L. No. 98-353, 98 Stat. 333, 333-46 (1984).

234. 28 U.S.C. § 1334(a), (b) (1988).

235. 28 U.S.C. § 157(a) (1988).

Bankruptcy judges have power to enter final orders, however, only in "core proceedings" arising under the bankruptcy code or arising in a case under the bankruptcy code.²³⁶ Civil proceedings merely "related to" a bankruptcy case, like the one involved in *Marathon Pipe Line*, can be heard, but not finally decided by a bankruptcy judge.²³⁷ In these non-core proceedings the bankruptcy judge can submit only proposed findings of fact and conclusions of law for de novo review by the district court.²³⁸ Further, the district court is, of course, permitted, and in some cases required, to withdraw its reference of a dispute from the bankruptcy court for resolution on the district court's docket.²³⁹ Finally, the district court's authority over civil proceedings is specifically subject to both permissive and mandatory abstention rules in many cases involving questions of state law that can be resolved in a timely fashion in state court.²⁴⁰

The complexities of the current system, although perhaps mandated by *Marathon* and political realities,²⁴¹ detract considerably from one of the central goals of the original Bankruptcy Reform Act, that of streamlining bankruptcy case administration.²⁴² However, the existing jurisdictional regime was established to satisfy the requirements of the Constitution, without giving bankruptcy judges article III powers, not to further the goal of efficient case administration. Nevertheless, efficient estate administration remains as the most important purpose behind Rule 7004(d).²⁴³

c. Burdens on the Defendant—Litigation in a Distant Forum

If fairness toward the defendant is a legitimate Fifth Amendment concern, as it must certainly be, then the government's legitimate interest

236. 28 U.S.C. § 157(b)(1) (1988).

237. 28 U.S.C. § 157(c)(1) (1988).

238. *Id.*

239. 28 U.S.C. § 157(d) (1988).

240. 28 U.S.C. § 1334(c) (1988). See generally Ferriell, *supra* note 154, at 182-84.

241. See Downey, Ferriell, & Pfeiffer, *supra* note 159, at 569-71.

242. The jurisdictional structure established by the Bankruptcy Reform Act and struck down by *Marathon* were not the only features of the Code designed to promote this goal. Others, such as establishing the United States Trustee's office to take over many of the administrative chores previously handled by bankruptcy judges, remain in effect. See 1 COLLIER ON BANKRUPTCY, *supra* note 12, ¶ 6.02[3].

243. See, e.g., Beasley v. Kelco Foods, Inc. (*In re Trim-Lean Meat Prod., Inc.*), 11 Bankr. 1010 (Bankr. D. Del. 1981) (citing efficient administration of estate assets as purpose for former Rule 704(f)(1)).

The court's reliance on the legislative history of the Bankruptcy Reform Act, as a means of interpreting former Rule 704(f)(1), was seriously misplaced. Rule 704(f)(1) was promulgated prior to the Report of the Commission on the Bankruptcy Laws of the United States upon which the court so heavily depended for its analysis. Rule 704(f)(1) was adopted on October 1, 1973, while the Bankruptcy Commission's Report was transmitted a few months earlier, on July 30, 1973. The first official draft of the rules containing the nationwide service of process provision was submitted by the Committee on Rules of Practice and Procedure of the Judicial Conference in March, 1971. See, Landers, *supra* note 46, at 827. The *Trim-Lean Meat Prods.* decision nevertheless reflects the relationship between the nationwide service of process rule and the policy of promoting the efficient administration of estate assets.

in the efficient administration of bankruptcy cases must be measured against the burdens on the defendant from having to defend in a geographically distant and inconvenient forum in order to evaluate the constitutionality of any particular application of Bankruptcy Rule 7004(d).

The burdens suffered by a defendant, on account of having to litigate in a forum away from home, will depend to some extent on the sheer distance between the defendant's location and the forum. While modern forms of transportation and communication have made cross-country litigation possible, they have not totally dissipated its burdens.²⁴⁴ Meal, travel, and lodging expenses will be incurred for parties, witnesses, attorneys, and staff for court appearances, discovery, and consultations with local counsel.²⁴⁵ Although testimony of otherwise unavailable witnesses may be made available via videotape,²⁴⁶ this frozen version of the witnesses' evidence is a poor substitute for live testimony.²⁴⁷ Further, documents and exhibits will have to be transported and provision made for their care while in a distant location.²⁴⁸ Additionally, agents and officers of the defendant will incur intangible expenses of stress and missed business opportunities²⁴⁹ associated with being away from home.

Further, local counsel, although experienced in the customs of the forum court, may be less responsive and attentive to the needs of the defendant. Because of the defendant's lack of contacts with the forum state, the defendant will be unlikely to become a regular client of the local firm retained to conduct the litigation, and equally unlikely to refer the firm to other prospective local clients.²⁵⁰

This latter burden suggests that the defendant's opportunity for a full and fair litigation of the dispute may be adversely affected by the need to rely on local counsel.²⁵¹ Even where local counsel is diligent, the additional

244. Fullerton, *supra* note 6, at 41; Wasserman, *supra* note 64, at 112-17.

245. See National Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 326 (1964) (Black, J., dissenting); Fullerton, *supra* note 6, at 41; Gottlieb, *supra* note 98, at 1325; Note, *Fifth Amendment Limitations*, *supra* note 6.

Most jurisdictions require that locally admitted counsel participate in litigation conducted in a state forum. Note, *The Practice of Law by Out-of-State Attorneys*, 20 VAND. L. REV. 1276 (1967). Furthermore, the custom among lawyers for the receiving attorney to forward one-third of the fee to the referring lawyer is likely to result in increased costs to a defendant forced to rely on a referral to counsel in the forum state. See Schwartz & Mitchell, *An Economic Analysis of the Contingent Fee in Personal-Injury Litigation*, 22 STAN. L. REV. 1125 (1970); but see Note, *Division of Fees Between Attorneys* 3 J. LEGAL PROF. 179, 194-96 (1978).

246. Wasserman, *supra* note 64, at 41.

247. *Id.*

248. Fullerton, *supra* note 6, at 41.

249. *Id.*

250. G. BELLOW & B. MOULTON, *THE LAWYERING PROCESS* 35-123 (1978); Gottlieb, *supra* note 98, at 1325.

251. Lopucki & Whitford, *supra* note 22, at 38-40; Gibson, *supra* note 43; cf. Boddie v. Connecticut, 401 U.S. 371, 376 (1971) (stating that denial of defendant's full access to judicial process raises grave problems for its legitimacy).

expenses of litigating in a distant forum may drain resources from the defendant that might otherwise have been used more directly in the presentation of evidence in the case.²⁵²

These burdens—the additional direct costs of litigating in a distant forum, and the increased risk of an incorrect decision due to the allocation of resources away from the collection and presentation of evidence to the trier of fact—must be outweighed by the governmental interest in ensuring efficient bankruptcy case administration by litigating the dispute in a single forum in order to justify conducting the litigation in a forum with which the defendant has no contact. As the next section will more fully explain, some courts have suggested that these competing interests can be appropriately balanced in a proceeding to transfer venue of the action to another district.

Another important burden, associated with having to defend in a forum with which the defendant lacks meaningful contact, is the risk that the forum court will apply the law of its own jurisdiction. Although not yet fully recognized by the Supreme Court, the relationship between decisions about personal jurisdiction and choice of law has been noted by other scholars.²⁵³

d. Transfer of Venue and Forum Non Conveniens

As suggested in an earlier section, bankruptcy courts have responded to charges that Rule 7004(d) may be unconstitutionally applied by indicating that the opportunity of a change of venue of the civil dispute provides a defendant with all of the protection it is due against having to litigate in an unfairly burdensome forum. As discussed earlier, however, such decisions fail to adequately consider the limitations inherent in any statutory or

252. See Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEG. STUDIES 399 (1973).

One of the salient effects of this use of resources is an increase in what scholars who analyze law from an economic perspective call "error costs." Error costs are defined by Posner as "the social costs generated when a judicial system fails to carry out the allocative or other social functions assigned to it . . ." *Id.* at 400. To the extent that a distant trial makes one party more likely than another to bear the risks of such errors, due to the increased expenses and other difficulties of proof in a distant forum, these errors are "biased" against that party. See *id.* at 406-08. A biased increase in the likelihood of an incorrect imposition of liability, resulting from having to defend in an inconvenient forum is the type of burden that the Fifth Amendment might seek to avoid.

253. See Hill, *Choice of Law and Jurisdiction in the Supreme Court*, 81 COLUM. L. REV. 960 (1981); Martin, *Personal Jurisdiction and Choice of Law*, 78 MICH. L. REV. 872 (1980); Sedler, *Judicial Jurisdiction and Choice of Law: The Consequences of Shaffer v. Heitner*, 63 IOWA L. REV. 1031 (1978); Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U. L. REV. 33, 87-89 (1978); Stein, *supra* note 98, at 738-65; Cox, *The Interrelationship of Personal Jurisdiction and Choice of Law: Forging New Theory Through Asahi Metal Indus. Co. v. Superior Court*, 49 U. PITT. L. REV. 189, 190 n.1, 222-27 (1987); see also Peterson, *Jurisdiction and Choice of Law Revisited*, 59 U. COLO. L. REV. 37, 52 (1988) (stating that "Asahi reinforces and expands the proposition that choice of law and the exercise of judicial jurisdiction are relevant to one another").

equitable right to request a transfer of venue that do not adequately consider a defendant's constitutional right to due process.

Bankruptcy Rule 7087 and section 1412 of the Judicial Code govern transfer of venue in adversary proceedings in bankruptcy cases. Rule 7087 provides that "[o]n motion and after a hearing, the court may transfer an adversary proceeding or any part thereof to another district pursuant to 28 U.S.C. § 1412. . . ." ²⁵⁴ Section 1412, in turn, provides for transfer of a "case or proceeding under title 11 to a district court for another district, in the interest of justice or for the convenience of the parties." ²⁵⁵

Similarly, the equitable doctrine of forum non conveniens may permit a bankruptcy judge to dismiss a case brought in an inconvenient forum. ²⁵⁶ Forum non conveniens is an alternative avenue for protecting a defendant from an overly burdensome forum. ²⁵⁷ The doctrine permits a court to dismiss a case on the ground that another forum is better suited to entertain an action even though venue is proper and the court has jurisdiction over the case and the parties. ²⁵⁸ Although bankruptcy courts are courts of equity, ²⁵⁹ they do not normally dismiss actions brought in a proper venue under the doctrine of forum non conveniens, except in cases in which a more convenient forum might be found in another country. ²⁶⁰

254. FED. R. BANKR. P. 7087.

255. 28 U.S.C. § 1412 (1988).

At first blush, Rule 7087 appears to provide protection against an inconvenient forum only in a very narrow range of cases. The language of Rule 7087 applies to all "adversary proceedings," which would include, among other things, a proceeding "to recover money or property . . . [or] to obtain an injunction or other equitable relief . . ." FED. R. BANKR. P. 7001 (defining "adversary proceeding"). However, the language of section 1412, upon which rule 7087 depends, only permits the court to transfer venue in a case or proceeding "under Title 11." 28 U.S.C. § 1412 (1988). If the ability of the court to transfer venue of an adversary proceeding under Rule 7087 is limited to adversary proceedings under Title 11, venue could be transferred pursuant to Rule 7087 only in adversary proceedings involving a cause of action brought directly under one of the substantive provisions of the bankruptcy code.

Limiting transfer of venue in this way would, however, be undesirable. By permitting change of venue only in cases arising under the Bankruptcy Code, such a limitation would permit transfer only in those adversary proceedings most directly connected to the substantive provisions of the Bankruptcy Code. Actions arising under state law, perhaps only tangentially related to the underlying bankruptcy cases, would not be subject to transfer. Thus, this limited reading of section 1412 and Rule 7087 would permit transfer in cases most directly related to the policy of efficient estate administration and preclude transfer in cases more remotely connected with this purpose. In any event, a court could undoubtedly dismiss an adversary proceeding under the doctrine of forum non conveniens if change of venue was limited by the technical language of these provisions.

256. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

257. See Comment, *Forum Non Conveniens, A New Federal Doctrine*, 56 YALE L.J. 1234 (1947).

258. See McAllen, *supra* note 48, at 192-93.

259. See *Katchen v. Landy*, 382 U.S. 323 (1966); *Pepper v. Litton*, 308 U.S. 295, 304 (1939); *Local Loan Co. v. Hunt*, 292 U.S. 234, 240 (1934); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 57-58 (1989); Gibson, *Jury Trials in Bankruptcy: Obeying the Commands of Article III and the Seventh Amendment*, 72 MINN. L. REV. 967 (1988).

260. See *Baumgart v. Fairchild Aircraft Corp.* (*In re Fairchild Aircraft Corp.*), 4 Tex.

The standards that govern transfer of venue of proceedings under section 1412 and Rule 7087 fail to adequately take a defendant's Fifth Amendment rights into account. Although some courts sometimes confuse the standards for transferring venue of an entire bankruptcy case with those relevant to transferring venue of an individual adversary proceeding arising in the course of a bankruptcy case,²⁶¹ the factors frequently considered in applying Rule 7087 are: (1) the proximity of witnesses to the court; (2) the proximity of assets and creditors to the court; (3) the economics involved in the administration of the proceeding; (4) the relative ease of access to sources of proof; (5) the ease of obtaining unwilling witnesses, or availability of a compulsory process to require attendance of unwilling witnesses; (6) the enforceability of the judgment; (7) the state's interest in having local controversies resolved within state borders when that state's laws are being applied in the action; and (8) all other practical problems that make trial of a case easy, expeditious and inexpensive.²⁶²

Consideration of some of these factors, such as the proximity of creditors and estate assets to the court, seems inappropriate to the question of whether to transfer venue of an adversary proceeding.²⁶³ While such factors are significant in determining whether the entire bankruptcy case should be transferred, the location of creditors of the estate bears no logical connection to the most convenient forum for a civil proceeding arising out of the bankruptcy case. Similarly, the proximity of the debtor's assets to the forum court should be ignored in determining whether venue of a civil proceeding should be transferred to another district.

Apart from these general factors, courts are heavily influenced by the general bankruptcy policy of promoting the economic and efficient admin-

Bankr. Ct. Rep. 308, 1990 WL 119650 (Bankr. W.D. Tex. 1990) (WESTLAW, Fbkr-cs database); *Refco F/S Assoc. v. Mebro Bank, S.A.*, 108 Bankr. 29 (S.D.N.Y. 1989); *Liman v. Midland Bank, Ltd.*, 309 F.Supp. 163 (S.D.N.Y. 1970).

261. *Compare, e.g., GEX Kentucky, Inc. v. Wolf Creek Collieries Co. (In re GEX Kentucky, Inc.)* 85 Bankr. 431 (Bankr. N.D. Ohio 1987) (transfer of adversary proceeding) and *Frazier v. Lawyers Title Ins. Corp. (In re Butcher)*, 46 Bankr. 109 (Bankr. N.D. Ga. 1985) (adversary proceeding) with *In re Pope Vineyards*, 90 Bankr. 252, 255 (Bankr. S.D. Tex. 1988) (transfer of bankruptcy case) and *In re Willows Ltd.*, 87 Bankr. 684, 686 (Bankr. S.D. Ala 1988) (transfer of bankruptcy case). See generally *Young Properties Corp. v. United Equity Corp.* 394 F. Supp. 1243 (S.D. Cal. 1975), *appeal dismissed* 534 F.2d 847 (9th Cir.), *cert. denied*, 429 U.S. 830 (1976) (regarding difference between motion to transfer and adversary proceeding and motion to transfer entire bankruptcy case).

262. These factors were derived from *In re Commonwealth Refining Co., Inc.*, 596 F.2d 1239 (5th Cir. 1979), *cert. denied*, 444 U.S. 1045 (1980), a case dealing with the transfer of a bankruptcy case, not a civil proceeding arising in or related to such a case. They have been applied extensively in cases under Rule 7087. See, e.g., *Mann v. Michael Industries, Inc. (In re Inland Shoe Mfg. Co.)*, 90 Bankr. 981, 983-84 (Bankr. E.D. Mo. 1988); *GEX Kentucky, Inc. v. Wolf Creek Collieries Co. (In re GEX Kentucky, Inc.)*, 85 Bankr. 431 (N.D. Ohio 1987); *Frazier v. Lawyers Title Ins. Corp. (In re Butcher)*, 46 Bankr. 109 (Bankr. N.D. Ga. 1985); see also *Beaulieu v. Amatex Corp.*, 28 Bankr. 171, 174 (Bankr. D. Maine 1983) (providing more extensive list of factors to be used in determining motions for change of venue).

263. *E.g., Kotlicky v. Belford*, 64 Bankr. 679 (Bankr. N.D. Ill. 1986).

istration of the bankruptcy estate. This general policy has resulted in a presumption that adversary proceedings should be conducted in the same court in which the bankruptcy case itself is pending.²⁶⁴

On the other hand, change of venue provisions occasionally have been used to provide relief to defendants who failed to make an objection on constitutional grounds. In *Wander v. Steinhardt Partners (In re Sheridan Associates)*,²⁶⁵ a bankruptcy trustee brought suit in the district in which the bankruptcy case was pending to recover an alleged preference.²⁶⁶ The defendant, who lacked contact with the forum in which the adversary proceeding was filed, moved for a change of venue and used its lack of minimum contacts with the forum—not to challenge the constitutionality of Bankruptcy Rule 7004(d)—but instead as grounds for a change of venue under the predecessor to section 1412.²⁶⁷ The court conducted a careful inquiry into the proof involved in an action to recover a preference,²⁶⁸ and determined that the largest number of potential witnesses were located in New York, beyond the subpoena power of the bankruptcy court for the Northern District of Illinois where the action had been brought.²⁶⁹

Cases like *Wander* in which important witnesses are beyond the court's subpoena power²⁷⁰ present the strongest case for the efficacy of rules

264. See *Brock v. American Messenger Service*, 65 Bankr. 670 (Bankr. D.N.H. 1986); *GEX Kentucky, Inc. v. Wolf Creed Collieries, Co. (In re GEX Kentucky, Inc.)*, 85 Bankr. 431, 435 (Bankr. N.D. Ohio 1987); *Windsor Communications Group v. Five Towns Stationary, Inc. (In re Windsor Communications Group, Inc.)*, 53 Bankr. 293, 296 (Bankr. E.D. Pa. 1985); *Seybolt v. Bio-Energy of Lincoln, Inc.*, 38 Bankr. 123, 10 Collier Bankr. Cas. 2d (MB) 1124 (Bankr. D. Mass. 1984); *Colarusso v. Burger King Corp.*, 35 Bankr. 365 (Bankr. E.D. Pa. 1984); *Nixon Mach. Co. v. Roy Energy, Inc. (In re Nixon Mach. Co.)*, 27 Bankr. 871 (Bankr. E.D. Tenn. 1983); *National Sugar Refining Co. v. Lentz Milling Co. (In re National Sugar Refining Co.)*, 26 Bankr. 762 (Bankr. S.D.N.Y. 1982); *Stamm v. Rapco Foam, Inc. (In re Stamm)*, 21 Bankr. 715 (Bankr. W.D. Pa. 1982).

265. 20 Bankr. 759 (Bankr. N.D. Ill. 1982).

266. See 11 U.S.C. § 547(b) (1986). An action to recover a preference is characterized as a core proceeding under 28 U.S.C. § 157(b)(2)(F) (1986).

267. *Wander v. Steinhardt & Partners (In re Sheridan Assoc.)*, 20 Bankr. 759, 760, 765 (Bankr. N.D. Ill. 1982).

Section 1412 is based on former 28 U.S.C. § 1475, Pub. L. No. 95-598, 92 Stat. 2549, 2670, § 241(a) (repealed 1984). Section 1475 was identical to current 28 U.S.C. § 1412 (1988). Section 1475 was, in turn, based on former Bankruptcy Rules 117 and 782. See H.R. Rep. 95-595, 95th Cong., 2d Sess. 447, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6403.

268. 20 Bankr. at 762. See 11 U.S.C. § 547(b) (1988).

269. 20 Bankr. at 764.

The subpoena power of a bankruptcy court is limited by Federal Rule of Bankruptcy Procedure 7004(d), which does not permit nationwide service of a subpoena. FED. R. BANKR. P. 7004(d). Subpoenas are governed by Bankruptcy Rule 9016 which simply incorporates by reference Rule 45 of the Federal Rules of Civil Procedure into the Bankruptcy Rules. FED. R. BANKR. P. 9016. As indicated by the Advisory Committee Note to Bankruptcy Rule 9016, Federal Rule 45(e)(1) limits the subpoena power to the judicial district in which the action is pending and to places outside the district which are within 100 miles of the place of trial. FED. R. CIV. P. 45(e)(1).

270. It should be noted here that limits imposed on the subpoena power are purely

regarding change of venue in addressing the burdens imposed on a distant defendant. There are, however, few reported decisions granting a change of venue in adversary proceedings in bankruptcy court.²⁷¹ The paucity of such decisions suggests that few defendants are successful in advancing their attempts to avoid litigating in a burdensome forum via a motion for change of venue.

B. A Due Process-Minimum Contacts Test for Personal Jurisdiction in Bankruptcy Litigation

The fairness concern of the Due Process Clause of the Fifth and Fourteenth Amendments requires that parties not be required to defend a suit in a jurisdiction related to neither the defendant nor the dispute.²⁷² The foregoing analysis demonstrates that the law relating to nationwide service of process statutes pays insufficient attention to the degree of procedural fairness provided to geographically distant defendants who lack contacts with the forum to which they have been haled. The immediately preceding section shows how existing bankruptcy venue rules exacerbate the potential for unfairness to a defendant because of their solicitousness toward the desires of the debtor in possession or trustee in the name of efficient case administration. Although these dangers might be mitigated by adjustments in the venue rules applicable to bankruptcy litigation, greater protection for the defendant would be achieved through a recognition of some sort of fairness test for use, not only in bankruptcy cases, but in all cases where nationwide service of process seems otherwise desirable.

The due process test we are accustomed to, of course, is the minimum contacts standard of *International Shoe* and its progeny. A state may assert personal jurisdiction over a nonresident defendant only if the defendant has continuous and systematic contacts with the forum, or if the defendant's sporadic contacts with the forum gave rise to the cause of action involved in the dispute.²⁷³ As we have seen, most courts apply a similar test in nationwide service of process cases, seeking to determine not whether the assertion of jurisdiction is fair to the defendant, but simply whether the defendant has contacts with the United States or any part of it. This article has demonstrated the inadequacy of this simple sovereignty approach if procedural fairness to a geographically distant defendant is to have any real meaning.

One alternative would be simply to borrow the minimum contacts analysis used in cases in state court under the Fourteenth Amendment's

statutory. The legion of cases which permit bankruptcy and other federal courts to exercise personal jurisdiction over a geographically distant defendant could also be used to support the constitutionality of a rule permitting nationwide service of subpoenas.

271. *E.g.*, *Lipshie v. AM Cable TV Industries, Inc. (In re Geauga Trenching Corp.)*, 110 Bankr. 638 (Bankr. E.D. New York 1990).

272. *See Cox, supra* note 253, at 288-91.

273. *See generally* J. FRIEDENTHAL, M. KANE, & A. MILLER, *CIVIL PROCEDURE* 123-39 (1985).

Due Process Clause and apply it directly to cases involving personal jurisdiction under the Fifth Amendment. This would have the relative advantages of applying a well developed, albeit sometimes ambiguous, set of rules already recognized by the legal community. The minimum contacts doctrine, however, has its roots in our federalist system which, at one time at least, recognized real limitations on the sovereign power of its units to exercise jurisdiction over nonresident individuals.²⁷⁴ It is not well suited to use by a federal judicial system that has true sovereign power over all of its residents, except as limited by the due process concerns of the Fifth Amendment.

A second alternative would be the adoption of a simple fairness test, somewhat akin to that used in determining whether to transfer venue, but with a greater emphasis on protecting the defendant from unfair burdens and less concerned with administrative efficiency. Such a test would compare the interests of the federal government in the efficiency of bankruptcy estate administration with the burdens placed on the defendant to determine whether asserting personal jurisdiction over the defendant comports with the fairness component of the Fifth Amendment's Due Process Clause.

This was the type of test adopted in the leading case imposing meaningful due process limitations on a federal court's power to exercise personal jurisdiction under a nationwide service of process statute, *Oxford First Corp. v. PNC Liquidating Corp.*²⁷⁵ There, an action was brought in federal district court in Philadelphia, alleging that shareholders located in California had violated section 10(b) of the Securities Exchange Act of 1934 and of section 17(a) of the Securities Act of 1933.²⁷⁶ In response to the defendant's motion to dismiss due to a lack of personal jurisdiction, the court first acknowledged that the Due Process Clause imposes some limits on federal service of process.²⁷⁷ The court then applied a five-part fairness test to determine whether a federal court's assertion of personal jurisdiction comported with these limitations.²⁷⁸

The first part of the court's test examined "the extent of the defendant's contacts with the place where the action was brought"²⁷⁹ In the case in question the defendants had disseminated allegedly false and misleading financial statements that they knew would be used by the plaintiff in Philadelphia.²⁸⁰ The court further determined that the defendants had received benefits from the plaintiff as a result of negotiations conducted in Philadelphia.²⁸¹

274. See *Pennoyer v. Neff*, 95 U.S. 714 (1877); 4 FEDERAL PRACTICE & PROCEDURE, *supra* note 51, at 294.

275. 372 F. Supp. 191, 198-205 (E.D. Pa. 1974).

276. *Oxford First Corp. v. PNC Liquidating Corp.*, 372 F. Supp. 191, 192 n.1 (E.D. Pa. 1974).

277. *Id.* at 198-99.

278. *Id.* at 203-05.

279. *Id.* at 203.

280. *Id.* at 204.

281. *Id.*

The second part of the court's test examined the "inconvenience to the defendants from having to defend in a jurisdiction other than that of [its] residence or place of business."²⁸² The court acknowledged that this criterion weighed against jurisdiction because of the geographic distance between California and Pennsylvania.²⁸³

The third element was judicial economy, including the likelihood and the extent of an adverse impact on the litigation as a result of having a part of the action dismissed, and the costs associated with the duplication of efforts caused by having to conduct two parts of a lawsuit simultaneously in different judicial districts.²⁸⁴ In *Oxford First* this factor was significant in that some defendants were located in California and others in Pennsylvania. Dismissal of the action against the California defendants would have resulted in an otherwise unnecessary and costly bifurcation of the action.²⁸⁵

The fourth part of the court's fairness test, "probable situs of discovery proceedings,"²⁸⁶ mitigated in favor of conducting the litigation in Philadelphia where most of the discovery would be likely to occur, regardless of where the actual trial took place.²⁸⁷

The fifth element, deemed irrelevant on the particular facts of *Oxford First*, was the nature of the activity of the defendant and the extent of its impact beyond the borders of the defendant's state.²⁸⁸

This straightforward balancing test would be simple to articulate and, in all but the most troubling cases, easy to apply. Ignoring state and district boundaries, however, would conflict with the traditions associated with assertions of personal jurisdiction, and, in an unusual case, might prevent personal jurisdiction from being asserted over a defendant located in the same state as the district in which the litigation is pending.²⁸⁹ A defendant would undoubtedly be subject to personal jurisdiction in a state court action brought in the defendant's home state²⁹⁰ and, therefore, should also be subject to personal jurisdiction in a federal court located in his or her home state. There is no doubt, however, that the factors used by the *Oxford First* court will be relevant in any sort of fairness test employed under the Fifth Amendment.

282. *Id.* at 203.

283. *Id.* at 205.

284. *Id.* at 203.

285. *Id.* at 205.

286. *Id.* at 203.

287. *Id.* at 205.

288. *Id.* at 204-05.

289. A defendant in Yreka, California, located in the extreme northern portion of California, for example, might experience severe financial or personal burdens to appear and defend a lawsuit pending in United States Bankruptcy Court in the Southern District of California, located in San Diego. See 4 FEDERAL PRACTICE & PROCEDURE, *supra* note 51, § 1067.1, at 327.

290. However unlikely it seems that a court would ever rule against an assertion of personal jurisdiction over a defendant clearly located in the forum state, such a result is theoretically possible under an analysis which merely balances the competing interests of the state and the individual defendant.

A third alternative, proposed by this article, would establish a set of rebuttable presumptions based on state boundaries and the defendant's contacts with the state in which the forum district is located.

Defendants who neither reside in the forum state nor have minimum contacts with the forum state would be rebuttably presumed to be beyond the personal jurisdiction of federal bankruptcy forums located within that state. This presumption could, however, be rebutted, and jurisdiction could be asserted over a nonresident defendant if the plaintiff could establish that no unfair burden would be imposed on the defendant by the exercise of jurisdiction.²⁹¹ A resident of Covington, Kentucky, for example, would probably suffer no unfair burden in being forced to defend in bankruptcy court across the river in Cincinnati, Ohio, despite the Kentucky defendant's lack of minimum contacts with Ohio.²⁹² That same Kentucky resident should, on the other hand, not be forced to defend a suit brought in bankruptcy court in California, absent minimum contacts with that distant state.

The 100 mile bulge provision of Federal Rule of Civil Procedure 4(f)²⁹³ is based on a similar presumption. Rule 4(f) subjects parties impleaded pursuant to Rule 14²⁹⁴ or brought in as necessary parties pursuant to Rule 19²⁹⁵ to the jurisdiction of a federal district court if the party in question is served within 100 miles of the courthouse, even if service is made outside

291. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811 (1985); cf. Wasserman, *supra* note 64, at 128 (suggesting total disregard of state sovereignty in actions brought in state court).

292. Cf. *GEX Kentucky, Inc. v. Wolf Creek Collieries Co. (In re GEX Kentucky, Inc.)*, 85 Bankr. 431 (Bankr. N.D. Ohio 1987) (involving Chapter 11 debtor's action in bankruptcy court in Cincinnati to determine ownership of real estate in Kentucky). The extent of the burden on the defendant would be different if the action had been commenced, as it was in *GEX Kentucky, Inc.*, in the Northern District of Ohio.

293. FED. R. CIV. P. 4(f) provides:

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, parties 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.

294. "Impleader" refers to a claim brought by the defendant against a third party who may be liable to the defendant if the defendant is held liable to the plaintiff. See FED. R. CIV. P. 14; *Tate v. Frey*, 735 F.2d 986, 988-89 (6th Cir. 1984). See generally 6 FEDERAL PRACTICE & PROCEDURE, *supra* note 51, § 1441.

295. Under Rule 19, a necessary party is a party who must be joined as a defendant in a pending action, if such joinder is feasible. See FED. R. CIV. P. 19; *West Coast Exploration Co. v. McKay*, 213 F.2d 582, 592-93 (D.C. Cir.), *cert. denied*, 347 U.S. 989 (1954); see generally 7 FEDERAL PRACTICE & PROCEDURE, *supra* note 51, § 1604.

the state in which the court is located.²⁹⁶ Under the analysis used in this article, the 100 mile bulge rule could be said to be based on an irrebuttable statutory presumption that parties served within 100 miles of the courthouse will suffer no undue burden from having to answer in a court in such close proximity to the place at which service was accomplished.²⁹⁷

Under the set of presumptions proposed here, defendants who reside in the state in which the district court sits would, of course, be subject to service in the same manner as they would have been if the action had been brought in state court. Further, nonresident defendants who have minimum contacts with the forum state would be subject to personal jurisdiction in a bankruptcy court located within that state, unless the defendant could establish, as in *Asahi*,²⁹⁸ that it would offend traditional notions of fair play and substantial justice for the court to exercise personal jurisdiction over the defendant.

This suggested approach is analogous to existing Fourteenth Amendment minimum contacts analysis, but is modified to account for the territorial sovereignty of the federal government. Under the Fourteenth Amendment a defendant who lacks minimum contacts with the forum state is beyond the sovereign power of the forum state and beyond the reach of that state's courts. The Fourteenth Amendment's traditional concern with the constraints inherent in a federalist system²⁹⁹ prevents a state from exercising personal jurisdiction over a defendant who lacks minimum contacts with the forum regardless of how convenient it might be for the defendant to defend in the forum state. However, because federal courts exercise the sovereign power of the United States, no similar limitation applies to cases governed by the Fifth Amendment. A resident of the United States is subject to the sovereign power of the United States government except to the extent, in this context, that she is protected, under the Fifth Amendment, from unfair governmental burdens. If the plaintiff can show that the defendant is subject to the sovereign power of the United States, and that the proposed assertion of personal jurisdiction would impose no unfair burden, the court should be able to exercise jurisdiction over the defendant.

This approach has the further advantage of clarifying the respective roles of state sovereignty and procedural fairness in cases dealing with both federal and state sovereignty. In cases arising under both the Fifth or Fourteenth Amendments, sovereignty is necessary, but is not sufficient to establish personal jurisdiction. In suits properly brought in federal bank-

296. FED. R. CIV. P. 4(f). See also FED. R. CIV. P. 45(e) (applying similar 100 mile bulge rule for service of subpoenas).

These bulge rules do not apply to original defendants, but only to those brought in as third party defendants or as necessary parties.

297. See 4A FEDERAL PRACTICE & PROCEDURE, *supra* note 51, §§ 1127-1128; but see *Nationwide Personal Jurisdiction*, *supra* note 6, at 1143.

298. *Asahi Metal Indus., Co. v. Superior Court*, 480 U.S. 102 (1987).

299. FEDERAL PRACTICE & PROCEDURE, *supra* note 51, § 1067, at 293.

ruptcy court³⁰⁰ any person located in the United States or having minimum contacts with the United States is subject to the sovereign power of the federal government.³⁰¹ Personal jurisdiction should be asserted only, however, when to do so would not impose an unfair governmental burden on the defendant.³⁰²

Similarly, state courts have sovereign power over persons located in the state or who have minimum contacts with the state. As in *Asahi*, though, jurisdiction cannot be exercised when, despite the presence of minimum contacts, the assertion of jurisdiction would impose an unfair governmental burden on the defendant. This approach thus acknowledges the importance of governmental sovereignty, but unlike most decisions dealing with nationwide service of process, does not confuse the concept of basic governmental power with the fairness of the burden that might be imposed on an individual defendant through the use of such power.³⁰³

Procedural fairness to the defendant can be accomplished through a set of presumptions which, as indicated above, seek first to determine whether the defendant has minimum contacts with the forum state. In most cases in bankruptcy court the defendant's contacts with the debtor, which gave rise to the dispute, will be sufficient to establish the defendant's contacts with the forum in which the debtor's bankruptcy petition is pending. Exceptions will occur only when the defendant has dealt with a branch or affiliate of the debtor exclusively in the defendant's home state.

If the defendant has such contacts with the forum state, the bankruptcy court will be able to assert jurisdiction unless the defendant establishes that the burdens of defending in the forum state outweigh the government's interest in having the litigation conducted in that forum. In most cases in bankruptcy court the defendant's voluntary contacts with the debtor in the forum state that gave rise to the claim asserted by the debtor will make it difficult for the defendant to contest the fairness of being expected to answer a lawsuit arising from those contacts.

In other cases in which the defendant lacks minimum contacts with the state in which the bankruptcy case is pending, there should be a presumption against the bankruptcy court's assertion of personal jurisdiction over the nonresident defendant. These will be cases in which the defendant's contacts with the debtor, which gave rise to the dispute, were beyond the boundaries of the state in which the debtor's bankruptcy case is pending.

These circumstances will arise most commonly, as indicated above, when the defendant has dealt with a branch or affiliate of the debtor which has subsequently filed its bankruptcy case in the jurisdiction in which its

300. See 28 U.S.C. §§ 1334 & 157 (1988); Ferriell, *Core Proceedings in Bankruptcy Court*, 56 UMKC L. REV. 47 (1987).

301. See, e.g., *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 314 (2d Cir. 1981), cert. denied, 454 U.S. 1148 (1982).

302. See *Max Daetwyler Corp. v. R. Meyer*, 762 F.2d 290 (3d Cir.), cert. denied, 474 U.S. 980 (1985).

303. See Fullerton, *supra* note 6, at 18-20.

chief executive office or parent corporation is located or if that debtor's corporate parent has properly filed a petition in that distant forum. Those sued by a New York corporation should be able to resist defending in bankruptcy court in Oregon if they lack minimum contacts with Oregon because of the unfair burden of suffering the procedural disadvantages of litigating in a geographically distant court.

C. Personal Jurisdiction in Proceedings on Creditors' Claims and the Effect of Discharge

As indicated earlier, proceedings to determine the allowability of creditors' claims are commonly heard in the bankruptcy court in which the debtor's case is pending.³⁰⁴ Similarly, the substantive effect of a bankruptcy discharge, granted by the court in which the case is pending, is to invalidate any dischargeable claim held against the debtor prior to its bankruptcy proceeding.³⁰⁵ A bankruptcy court's determination of the allowability of a creditor's claim, and the effect of the bankruptcy court's discharge order on geographically distant creditors must be binding on those creditors in order for the debtor's bankruptcy case to achieve its basic goal of providing the debtor a fresh start.³⁰⁶ In most bankruptcy cases in which the debtor has filed its petition in a location close to its principal place of business, most creditors will be within the court's jurisdiction because of their contacts with the debtor there. Personal jurisdiction is likely to be a problem only in cases of subsidiary or other affiliate entities which have taken advantage of the bankruptcy venue rules³⁰⁷ to file in the same district as its affiliate located in another jurisdiction. As the foregoing analysis suggests, these situations and the Fifth Amendment's concerns for fairness may place some creditors beyond the scope of the forum court's jurisdiction.

In rare situations involving only loosely affiliated enterprises, this potential problem could be resolved by transferring the debtor's entire bankruptcy case to another district.³⁰⁸ This solution, however, would be highly impractical in cases involving closely connected corporate enterprises, as it almost certainly would result a serious and costly duplication of administrative expenses.³⁰⁹ In this latter and far more common situation, an alternative solution must be devised.

The bankruptcy court's jurisdiction over a creditor to determine the allowability of that creditor's claim can be established through the creditor's

304. See *supra* text accompanying notes 37-39.

305. 11 U.S.C. § 524(a) (1988).

306. See, e.g., *Lines v. Fredrick*, 400 U.S. 18, 19 (1970); *Segal v. Rochelle*, 382 U.S. 375, 379-80 (1966); *Local Loan Co. v. Hunt*, 292 U.S. 234, 244-45 (1934).

307. See *supra* text accompanying notes 27-32.

308. See 28 U.S.C. § 1412 (1988).

309. See, e.g., *Gulf States Exploration Co. v. Manville Forest Prod. Co.* (*In re Manville Forest Prod. Corp.*), 896 F.2d 1384 (2d Cir. 1990); *Glassel v. Allegheny Int'l Credit Corp.* (*In re Allegheny Int'l, Inc.*), 111 Bankr. 495 (Bankr. W.D. Pa. 1990); *Wyandotte Indus. v. E.Y. Neill & Co.* (*In re First Hartford Corp.*), 63 Bankr. 479 (Bankr. S.D.N.Y. 1986).

consent, given by filing a proof of claim in the first location.³¹⁰ The filing of a proof of claim has long been treated as giving consent to a bankruptcy court's subject matter jurisdiction,³¹¹ and, thus, no difficulty should arise in treating such an action as conferring consent to the bankruptcy court's personal jurisdiction over the filing creditor.

The effect of the debtor's bankruptcy discharge on creditors who are beyond the scope of the court's personal jurisdictional power is a more serious problem. Unless the debtor's discharge is binding upon those creditors it will, under the analysis suggested by this article, have no binding effect on them.

This difficulty could be resolved in a variety of ways. One solution would be to issue notice of the bankruptcy proceeding through a bankruptcy court in the district in which the creditors are located. Alternatively, notice of the debtor's bankruptcy proceeding might be issued through a district in which the debtor has its principal place of business, relying on the strong likelihood that creditors will have sufficient contacts with the debtor in that location to warrant personal jurisdiction over them there. While such an approach may, in an unusual case, require a proceeding on the debtor's right to a discharge to be conducted distantly from the forum in which the debtor's reorganization case is pending, it would be a simple solution to an otherwise vexing problem.

V. CONCLUSION

This article has identified the ways in which the nationwide service of process provision of Bankruptcy Rule 7004(d) combined with the liberal venue provisions in bankruptcy cases can impose unfair and, in this author's view, unconstitutional burdens on parties forced to litigate their disputes with a bankrupt debtor in a distant and inconvenient forum. The constitutional validity of these rules, although ratified by many inferior federal courts, has not been addressed by the Supreme Court since before the advent of the modern jurisprudence of personal jurisdiction in *International Shoe Co. v. Washington*. Furthermore, the Supreme Court's recent decisions regarding personal jurisdiction under the minimum contacts standard of the Fourteenth Amendment, particularly *Insurance Corp. of Ireland*, have emphasized the significance of ensuring that the defendant is not saddled with the unanticipated and unfair burdens of litigating in a distant forum with which the defendant has had no salient contact. These same decisions have rejected territorial sovereignty, the only basis for the validity of Bankruptcy Rule 7004(d), as a sufficient explanation for modern constitutional analysis of questions of personal jurisdiction.

Unlike other nationwide service of process provisions, Rule 7004(d) is accompanied by a liberal set of venue rules and restricted opportunities for

310. See 11 U.S.C. § 501(a) (1988).

311. 28 U.S.C. § 157(c)(2) (1988); see *Katchen v. Landy*, 382 U.S. 323 (1966); Ferriell, *supra* note 154, at 134-141.

defendants to obtain a change of venue.³¹² When considered together these features provide a bankrupt plaintiff with a particularly convenient forum in which to litigate disputes connected to its bankruptcy case. As this article has shown, these rules are indeed designed for the convenience of the bankrupt plaintiff, and, thus, show little regard for the inconveniences and burdens that may be suffered by those who have had the misfortune to have disputed dealings with the debtor.

In response to these concerns, this article proposes tempering the rule permitting nationwide service of process with a simple set of presumptions that would protect a defendant from being forced to litigate with a bankrupt debtor in a distant and procedurally inconvenient forum. As with current practice under the Fourteenth Amendment, defendants located in the forum state would be subject to the personal jurisdiction of state and federal courts in that state.

Nonresident defendants having minimum contacts with the bankruptcy forum state normally would be subject to the jurisdiction of the forum court. Consistent with the Supreme Court's decision in *Asahi*, however, nonresident defendants would be able to rebut the presumption in favor of personal jurisdiction by showing that the assertion of jurisdiction would impose on them an unfair burden.

Most importantly, and in sharp deviation from current doctrine, nonresident defendants who lack minimum contacts with the bankruptcy forum state, would, under the approach suggested here, be protected from having to defend in that state absent a showing that the defendant would suffer no undue burden by being forced to defend. In such cases there should be a presumption against assertions of jurisdiction over defendants who lack minimum contacts with the forum. That presumption could be rebutted, however, by evidence that the defendant would suffer no unfair burden on account of having to defend in what might be a geographically nearby, but nevertheless distant, state.

The Supreme Court's adoption of this set of standards would gain the principal advantage of protecting defendants from some of the otherwise unfair burdens associated with having once dealt with a now bankrupt debtor. It would have the additional advantage of clarifying that the Supreme Court's minimum contacts decisions rest on the modern due process principle of protecting defendants against unfair governmental burdens rather than the outmoded and mostly otherwise rejected importance of territorial sovereignty manifested by *Pennoyer v. Neff*. Finally, it would ensure a strong degree of symmetry between the standards for personal jurisdiction under the Fifth and Fourteenth Amendments.

312. See *Hogue v. Milodon Engineering, Inc.*, 736 F.2d 989 (4th Cir. 1984); *Driver v. Helms*, 577 F.2d 147, 156 (1st Cir. 1978), *rev'd on other grounds sub nom. Stafford v. Briggs*, 444 U.S. 527 (1980).

