

## The Territorial Reach of Federal Courts

A. Benjamin Spencer

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THE TERRITORIAL REACH OF FEDERAL COURTS

*A. Benjamin Spencer\**

Abstract

Federal courts exercise the sovereign authority of the United States when they assert personal jurisdiction over a defendant. As components of the national sovereign, federal courts’ maximum territorial reach is determined by the Fifth Amendment’s Due Process Clause, which permits jurisdiction over persons with sufficient minimum contacts with the United States and over property located therein. Why, then, are federal courts limited to the territorial reach of the states in which they sit when they exercise personal jurisdiction in most cases? There is no constitutional or statutory mandate that so constrains the federal judicial reach. Rather, it is by operation of the Federal Rules of Civil Procedure—specifically Rule 4(k)—that federal courts are not ordinarily permitted to exercise jurisdiction to the full extent that Fifth Amendment due process would support. This Article will lay out the various arguments in favor of revising the Federal Rules to enable federal courts to exercise personal jurisdiction to the full extent permissible under the Constitution. In doing so, this Article will address the issues that would arise out of such a revision and provide comprehensive treatment of the matters that would need to be addressed in order to move federal courts in this direction.

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## INTRODUCTION

Article III of the United States Constitution empowers Congress to create inferior courts that entertain various cases and controversies that Congress sees fit for those courts to hear.<sup>1</sup> Congress, through statutes, has given U.S. district courts much—but not all—of the judicial power that Article III contemplates.<sup>2</sup> Most notably, federal district courts have the power to hear disputes exceeding the value of \$75,000 between certain diverse parties<sup>3</sup> (referred to as diversity jurisdiction) and of cases arising under federal law<sup>4</sup> (referred to as federal question jurisdiction).<sup>5</sup> Together, these categories of cases accounted for nearly 85% of the civil dockets in district courts in 2018.<sup>6</sup>

In every one of these types of cases, an initial hurdle to surpass is establishing that the particular district court in which the case has been filed has territorial or personal jurisdiction over the defendants. However, in most cases (particularly diversity cases), one does not look to congressional enactments to determine the scope of the territorial jurisdiction of a federal district court. Rather, one must consult the judicially promulgated rules of court known as the Federal Rules of Civil Procedure (the Federal Rules). Within these Federal Rules, one finds Rule 4(k)(1)(A) which—with a succinctness that belies its import—announces that “[s]erving a summons or filing a waiver of service establishes personal jurisdiction over a defendant . . . who is subject to the jurisdiction of a court of general jurisdiction in the state where the district

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1. U.S. CONST. art. III, § 1.

2. *See, e.g.*, 28 U.S.C. § 1331 (2012) (giving district courts federal question jurisdiction); *id.* § 1332(a) (giving district courts diversity jurisdiction); *see also* Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569, 1569 (1990) (“[T]he traditional view of article III . . . [is] that Congress has plenary authority over federal court jurisdiction. According to that view, Congress may deprive the lower federal courts, the Supreme Court, or all federal courts of jurisdiction over any cases within the federal judicial power, excepting only those few that fall within the Supreme Court’s original jurisdiction.”).

3. 28 U.S.C. § 1332(a).

4. *Id.* § 1331.

5. This, of course, does not exhaust the scope of federal subject matter jurisdiction. *See, e.g., id.* § 1333 (giving district courts original jurisdiction over admiralty cases); *id.* § 1335 (giving district courts original jurisdiction over interpleaders); *id.* § 1346 (giving district courts original jurisdiction over actions against the United States); *id.* § 1367 (giving district courts supplemental jurisdiction over claims related to the action within the original jurisdiction of the courts).

6. For the period ending on December 31, 2018, of the total of 278,721 civil cases filed in U.S. district courts, 84,496 (roughly 30%) were diversity cases and 152,362 (roughly 55%) were federal question cases. *U.S. District Courts—Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, During the 12-Month Periods Ending December 31, 2017 and 2018*, U.S. CTS., <https://www.uscourts.gov/file/25840/download>. The bulk of the remaining cases were those involving the United States as a party. *Id.*

court is located.”<sup>7</sup> With that, the Supreme Court of the United States—the authority through which such rules are promulgated<sup>8</sup>—has declared that federal district courts may not exercise territorial jurisdiction beyond the reach of the state courts where they are geographically located. To be sure, there are other subdivisions in Rule 4(k) that provide additional, alternate bases for jurisdiction—most notably to the extent provided for by a federal statute.<sup>9</sup> But the lion’s share of a federal court’s territorial jurisdiction is determined with reference to the jurisdictional reach of local state courts under Rule 4(k)(1)(A).<sup>10</sup>

In previous work, I have indicated that this constraint on the territorial reach of federal courts is artificial and unwarranted from a policy perspective.<sup>11</sup> More recently, I have argued that the Supreme Court lacks the authority to promulgate a rule of court that determines the jurisdictional reach of inferior federal courts because the statute that authorizes judicial rulemaking—the Rules Enabling Act (REA)<sup>12</sup>—does not permit the Supreme Court to prescribe *jurisdictional* rules.<sup>13</sup> Together, these conclusions have led to the view, articulated in this Article, that the Federal Rules should be amended to revise Rule 4(k) in a manner that makes it compatible with the constraints of the REA and with a more sound policy regarding the appropriate scope of territorial jurisdiction in federal courts. Thus, in my capacity as a member of the Judicial Conference Advisory Committee on Civil Rules (the Committee),<sup>14</sup> I have proposed that it consider a review of Rule 4(k) to determine what action—if any—the Committee should take to address these concerns.<sup>15</sup>

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7. FED. R. CIV. P. 4(k)(1)(A).

8. 28 U.S.C. § 2072(a).

9. FED. R. CIV. P. 4(k)(1)(C); *see also id.* at 4(k)(1)(B) (establishing personal jurisdiction over third-party defendants and Rule 19 parties served within a 100-mile radius of the courthouse).

10. *Daimler AG v. Bauman*, 571 U.S. 117, 125 (2014) (citing FED. R. CIV. P. 4(k)(1)(A)) (“Federal courts ordinarily follow state law in determining the bounds of their jurisdiction over persons.”).

11. *See* A. Benjamin Spencer, *Nationwide Jurisdiction for our Federal Courts*, 87 DENV. U. L. REV. 325, 326–29, 334 (2010) (discussing the shortcomings of restraining federal jurisdiction by state laws and proposing a means of delinking them).

12. Pub. L. No. 100-702, 102 Stat. 4648 (1988) (codified as amended at 28 U.S.C. § 2072).

13. A. Benjamin Spencer, *Substance, Procedure, and the Rules Enabling Act*, 66 UCLA L. REV. 654 (2019).

14. The views expressed in this Article are those of this Author and do not represent those of the Advisory Committee.

15. This dialogue between myself and the Advisory Committee is publicly available in the agenda book from the April 2018 meeting of the Committee. *See* Letter from A. Benjamin Spencer, Professor of Law, Univ. of Va. Sch. of Law, to The Honorable John D. Bates, Senior U.S. Dist. Court Judge, U.S. Dist. Court of D.C. (Mar. 9, 2018), *in* ADVISORY COMM. ON CIV. RULES, AGENDA BOOK FOR APRIL 10, 2018, at 367–68 (2018), <http://www.uscourts.gov/>

This Article argues in favor of revising Rule 4(k) to decouple the territorial reach of federal courts from that of their host states and to address the collateral consequences that would accompany such a revision for the constitutional law of personal jurisdiction and for doctrines concerning venue and choice of law. Were the Committee to move in this direction, it would leave the constitutional law of personal jurisdiction at the federal level—which is governed by the Fifth Amendment<sup>16</sup>—to control the territorial reach of federal courts, unless Congress enacted legislation in this area. Once the Federal Rules retreat from limiting the jurisdictional reach of federal courts, statutes pertaining to venue and change of venue will bear the weight of further sorting out which federal districts are appropriate locales for hearing a case. This Article lays out what this would look like, addressing how Fifth Amendment jurisprudence and venue doctrine would need to develop to accommodate such a change and touching also on the impact of such a revision on choice of law.

### I. RETHINKING RULE 4(K)

Although we have for some time taken for granted that federal district courts exercise personal jurisdiction largely in a manner that is tethered to—and limited by—the territorial reach of their respective host states, this state of affairs is problematic for two reasons: (1) the Federal Rule imposing this limitation, Rule 4(k), exceeds the constraints imposed on federal rulemaking by the REA; and (2) limiting the territorial reach of federal district courts in this manner has proven to be problematic from a policy perspective. Each of these will be discussed, in turn, below.

#### A. REA Constraints

The first step in this exploration is reaching an understanding about how the REA constrains the Supreme Court's rulemaking authority.<sup>17</sup> The REA reads as follows:

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sites/default/files/2018-04-civil-rules-agenda-book.pdf [https://perma.cc/HZ6M-53BK]. The discussion of the Committee in reference to my proposal appears in the minutes of the April 2018 meeting, MINUTES OF ADVISORY COMM. ON CIV. RULES, APRIL 10, 2018, at 25–32 (2018), [https://www.uscourts.gov/sites/default/files/2018-04-10-cv\\_minutes\\_final\\_0.pdf](https://www.uscourts.gov/sites/default/files/2018-04-10-cv_minutes_final_0.pdf) [https://perma.cc/8G92-7SS6], and in the Committee's report to the Standing Committee, *see* ADVISORY COMM. ON CIV. RULES, REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES 320–22, 380–88 (2018), [http://www.uscourts.gov/sites/default/files/cv\\_report\\_0.pdf](http://www.uscourts.gov/sites/default/files/cv_report_0.pdf) [https://perma.cc/K6E3-NB8K].

16. *See infra* Section II.A.

17. I fully and more thoroughly explore this topic in a separate work, which should be consulted to review the argument in all its detail. *See generally* Spencer, *supra* note 13 (discussing in detail the constraints the REA imposes on Supreme Court rulemaking). This Article will not duplicate that level of detail.

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.<sup>18</sup>

This text indicates that rules prescribed by the Supreme Court must be rules of “practice and procedure” or evidence, and those rules may not “abridge, enlarge or modify any substantive right.”<sup>19</sup> As I have argued more fully elsewhere,<sup>20</sup> these are two separate admonitions that supply distinct constraints on the Court. The first—that they be *rules of procedure*—means that the rules must be internal case-processing rules as opposed to rules governing how a case is to be decided (rules of decision), rules governing where a case is to be decided (rules of jurisdiction and venue), or rules governing what consequences flow from resolving a case in a certain way (rules of redress).<sup>21</sup> The second admonition of the REA—that these rules not “abridge, enlarge or modify any substantive right”<sup>22</sup>—fulfills a twofold function: “It ensures that the Supreme Court does not (1) engage in the legislative act of creating or defining substantive rights prospectively or (2) deprive us of those rights under the guise of prescribing procedural rules.”<sup>23</sup> Overall, the admonitions of the REA are crafted to protect the separation of powers, keeping the Judicial Branch from encroaching on areas within the legislative sphere that have not been—and could not be—delegated to the courts.

The problem with Rule 4(k) is that it is undoubtedly a rule of jurisdiction—rather than a rule of procedure—as it identifies the circumstances under which service of process “establishes personal

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18. 28 U.S.C. § 2072 (2012).

19. *Id.*

20. See Spencer, *supra* note 13, at 659–81 (discussing both principal commands of the REA).

21. *Id.* at 661–72.

22. 28 U.S.C. § 2072(b).

23. Spencer, *supra* note 13, at 676.

jurisdiction over a defendant.”<sup>24</sup> Rule 4(n) is a rule of jurisdiction as well, as it identifies the circumstances under which a “court may assert jurisdiction over property.”<sup>25</sup> Although these rules do not “abridge, enlarge or modify any substantive right,”<sup>26</sup> they do constrain the jurisdictional reach of federal district courts, which only Congress can do.<sup>27</sup> As such, they are not rules of practice or procedure (or of evidence) and thus as currently written should be regarded as being outside the ambit of what the REA empowers the Supreme Court to prescribe.<sup>28</sup> That said, this is certainly a controversial proposition, for one could argue that Congress has effectively acquiesced to the Supreme Court’s regulation of personal jurisdiction through the Federal Rules by acceding to amendments to Rule 4 over time.<sup>29</sup> The Court itself certainly has not

24. FED. R. CIV. P. 4(k)(1), (2).

25. FED. R. CIV. P. 4(n)(1). This provision essentially provides for quasi-in-rem jurisdiction in federal district courts.

26. 28 U.S.C. § 2072.

27. This is so notwithstanding the admonition in Rule 82 that “[t]hese rules do not extend or limit the jurisdiction of the district courts,” language that the rule-makers likely intended to refer only to federal subject matter jurisdiction. FED. R. CIV. P. 82; *see also id.* advisory Committee notes to 1937 adoption (“These rules grant extensive power of joining claims and counterclaims in one action, but, as [Rule 82] states, such grant does not extend federal jurisdiction.”).

28. What Rule 4(k) could do—but does not do—is create a geographical region within which service of process will be effective. The predecessor to Rule 4(k)—Rule 4(f)—did precisely that. As originally adopted in 1938, Rule 4(f) read:

TERRITORIAL LIMITS OF EFFECTIVE SERVICE. All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held and, when a statute of the United States so provides, beyond the territorial limits of that state. A subpoena may be served within the territorial limits provided in Rule 45.

FED. R. CIV. P. 4(f) (1938); *see also* Spencer, *supra* note 13, at 683–84 (discussing former Rule 4(f)’s consistency with the limits of the REA). The Supreme Court affirmed the validity of Rule 4(f) in *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 445 (1946). The Court has not similarly affirmed the validity of Rule 4(k) in its present form, which goes beyond prescribing the territorial limits of effective service and provides for when federal courts may exercise personal jurisdiction.

29. In April 1993, the Supreme Court approved the amendments that resulted in Rule 4(k), with Congress acquiescing to its enactment by not blocking them by December 1, 1993. FED. R. CIV. P. 4(k) credits. Interestingly, in a “Special Note” preceding the Advisory Committee’s note to the 1993 amendments to Rule 4, the Committee stated, “Mindful of the constraints of the Rules Enabling Act, the Committee calls the attention of the Supreme Court and Congress to new subdivision (k)(2).” FED. R. CIV. P. 4 advisory committee notes to 1993 amendment. This provision permitted jurisdiction in federal question cases where no state could exercise personal jurisdiction if jurisdiction was consistent with the laws and the Constitution of the United States; that is, if the defendant had minimum contacts with the United States as a whole. FED. R. CIV. P. 4(k)(2); *see also* Adams v. Unione Mediterranea Di Sicurtà, 364 F.3d 646, 650 (5th Cir. 2004) (“Rule 4(k)(2) provides for . . . personal jurisdiction in any district court for cases arising under

questioned its authority in this regard. Thus, convincing the members of the Committee to embrace this position would be a heavy lift, to say the least.<sup>30</sup>

### B. *The Policy Ills of the Rule 4(k) Regime*

Reaching the conclusion that Rule 4(k) is *ultra vires* under the REA provides a sufficient—but perhaps not satisfying—basis for revising that Rule.<sup>31</sup> The REA argument fails to address what many perceive to be the virtues of the present regime or what life would look like in the absence of this Rule. Turning to the first point (and leaving the second to subsequent sections of this Article), there are several compelling policy reasons to turn away from rules that limit the jurisdictional reach of federal courts to less than what the Fifth Amendment’s Due Process Clause would otherwise allow.<sup>32</sup>

First, linking the territorial reach of federal courts to that of their host states means that the jurisdictional reach of federal courts can vary from state to state,<sup>33</sup> even though federal courts are courts of the same

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federal law where the defendant has contacts with the United States as a whole sufficient to satisfy due process concerns and the defendant is not subject to jurisdiction in any particular state . . .”). Although the Committee’s concern appears to have been whether it had the authority to promulgate such a rule, as this Article argues, the constitutional limits of personal jurisdiction in federal court—which are governed by the Fifth Amendment—are the default limits that would exist on the territorial reach of federal courts absent any Rule on the topic. Thus, a Rule that simply acknowledges that scope would not be *ultra vires* under the REA; it is only when the Committee crafts a rule that alters the territorial reach of federal courts from that permitted under the Constitution that it acts outside its mandate to craft merely procedural rules.

30. At its April 2018 meeting, the Advisory Committee voted to carry forward the topic of amending Rule 4(k) “but not pursue it actively now.” MINUTES OF ADVISORY COMM. ON CIV. RULES, APRIL 10, 2018, at 32 (2018), [https://www.uscourts.gov/sites/default/files/2018-04-10-cv\\_minutes\\_final\\_0.pdf](https://www.uscourts.gov/sites/default/files/2018-04-10-cv_minutes_final_0.pdf) [<https://perma.cc/S3CR-HL96>]. In the absence of any reform of Rule 4(k)—and Rule 4(n)—by the Committee, Congress could legislatively enact these Rules to resolve the REA problem that this Article has identified.

31. The REA argument is similarly sufficient to support the abrogation of Rule 4(n). However, the policy arguments this Article offers in favor of the abrogation of Rule 4(k) do not apply to Rule 4(n). The remedy for Rule 4(n)’s violation of the REA should be congressional enactment of a Rule or statute that articulates its limits on quasi-in-rem jurisdiction in federal court. *See* Spencer, *supra* note 13, at 715–16 (“The way to maintain the regulatory status quo without running afoul of the REA, then, would be to have Congress enact Rule 4(k) and Rule 4(n) legislatively.”).

32. I previously touched on some of these policy arguments in a prior work. *See generally* Spencer, *supra* note 11 (discussing the shortcomings of having federal jurisdiction linked to state law).

33. Practically speaking, because most states have statutes that permit the exercise of jurisdiction to the constitutional limit—or interpret their statutes to the same effect—there will be a large number of federal districts in which only the limits of the Fourteenth Amendment are being applied. *See, e.g.*, ARIZ. R. CIV. P. 4.2(a) (“An Arizona state court may exercise personal



(national) sovereign. This makes especially little sense when federal courts are handling matters arising under federal law, where we should be concerned that jurisdictional limits on the reach of state courts might hamper a federal court's ability to reach and to adjudicate claims with respect to defendants accused of violating federal law. Indeed, because of the complexities of personal jurisdiction doctrine, variation in the application of that doctrine arises between districts within the same state and from judge to judge.<sup>34</sup> Such lack of uniformity creates inefficiency, inconsistency, and unpredictability, all drains on a system that is supposed to deliver the "just, speedy, and inexpensive determination of every action."<sup>35</sup> In the vast majority of cases, operating under a Fifth Amendment regime would make the territorial reach of federal courts much clearer by giving these courts the same constitutional reach without regard to the vagaries of how far their respective host state's courts could reach.

Second, shackling federal courts to the territorial limits of their host states deprives them of the ability to fulfill a key role as providers of an important forum for qualifying civil disputes when state courts are unavailable.<sup>36</sup> When federal courts have subject matter jurisdiction over a matter and federal venue statutes are not offended, there is no constitutional or practical reason why the federal court should not be able to proceed with the case simply because the doors of the local state court would be closed. A prime example of this situation is found in *J. McIntyre Machinery, Ltd. v. Nicastrò*,<sup>37</sup> where the Court held that a New Jersey state court could not exercise personal jurisdiction over a United Kingdom manufacturer because doing so would be beyond the constitutional reach of that court.<sup>38</sup> Had the case been filed in New Jersey

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jurisdiction over a person . . . to the maximum extent permitted by the Arizona Constitution and the United States Constitution.”).

34. 4A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & ADAM N. STEINMAN, FEDERAL PRACTICE AND PROCEDURE § 1069 (4th ed. 2015) (“[There is] tremendous flexibility of both the due process requirements in jurisdictional inquiries and the differences in language of various long-arm statutes. Although generalizations can be made as to some recurrent issues, the resolution of individual cases to a great extent will turn on the particular facts of a case and the decisional law of the jurisdiction in which the federal court is sitting.”).

35. FED. R. CIV. P. 1.

36. *Arrowsmith v. United Press Int'l*, 320 F.2d 219, 235 (2d Cir. 1963) (Clark, J., dissenting) (“[I]ndeed to put [the question of personal jurisdiction in federal court] in the hands of the states would be to destroy all reason for having a federal tribunal (in which the litigant has more confidence) enforce a litigant’s rights accorded by state law.”).

37. 564 U.S. 873 (2011) (plurality opinion).

38. *Id.* at 887. There was no majority opinion articulating the basis of this conclusion. *Id.* at 876. Justice Kennedy, joined by three other Justices, found that the defendant failed to engage in conduct showing an intent to serve the forum state, New Jersey, *id.* at 876, while Justices Breyer and Alito felt that the isolated sale of a handful (four or fewer) of the machines in question did

federal court, the outcome would have been the same under Rule 4(k)(1)(A), even though there would have been no Fifth Amendment or venue-based objection to litigating the case in federal court there.<sup>39</sup> Numerous other examples are available among lower court decisions.<sup>40</sup>

As I have noted elsewhere,<sup>41</sup> one might respond that the policy behind *Erie Railroad v. Tompkins*<sup>42</sup> suggests that at least in actions arising under state law, federal district courts should not be able to exercise territorial jurisdiction to a greater extent than could their respective host states.<sup>43</sup> Indeed, one can find several judicial opinions expressing this view.<sup>44</sup> Although the policy of *Erie* seeks to align state and federal courts with respect to the substantive law applied when state law claims are at issue, the Court has rejected slavish adherence to outcome affectiveness as the

not support the conclusion that the defendant expected its product to be marketed in New Jersey, *id.* at 887–88 (Breyer, J., concurring).

39. The scope of territorial jurisdiction under the Fifth Amendment is set out below. See discussion *infra* Section II.A. Given the defendant’s confessed and demonstrated intent to sell its product throughout the United States and its shipment of its product into the United States, minimum contacts with the United States as a whole—the touchstone of Fifth Amendment due process—would have been readily demonstrable. See *J. McIntyre*, 564 U.S. at 886. Further, there would have been no venue objection in *J. McIntyre* had the case been filed in New Jersey federal court because the accident in which the plaintiff was injured occurred in New Jersey. See 28 U.S.C. § 1391(b)(2) (2012); *J. McIntyre*, 564 U.S. at 878.

40. See, e.g., *Dakcoll Inc. v. Grand Cent. Graphics, Inc.*, 352 F. Supp. 2d 990, 1000 (D.N.D. 2005) (finding jurisdiction over defendant Minnesota corporation based on alleged copyright infringement against a North Dakota corporation but declining to find jurisdiction over the Minnesota-based individual defendant who directed and controlled the Minnesota defendant corporation; jurisdiction would have been proper under a Fifth Amendment regime); *Krambeer v. Eisenberg*, 923 F. Supp. 1170, 1176 (D. Minn. 1996) (finding that a Connecticut attorney who sent a debt collection letter to the plaintiff, a Minnesota resident, had insufficient minimum contacts with Minnesota to satisfy Fourteenth Amendment due process). As a Connecticut domiciliary, jurisdiction would have been proper under a Fifth Amendment regime in *Krambeer*. See *Krambeer*, 923 F. Supp. at 1172.

41. Spencer, *supra* note 13, at 716.

42. 304 U.S. 64 (1938).

43. See *Guar. Tr. Co. v. York*, 326 U.S. 99, 109 (1945) (“In essence, the intent of [*Erie*] was to [e]nsure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court. The nub of the policy that underlies *Erie* . . . is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result.”).

44. See, e.g., *Allred v. Moore & Peterson*, 117 F.3d 278, 281 (5th Cir. 1997) (“A federal district court sitting in diversity may exercise personal jurisdiction only to the extent permitted a state court under applicable state law.”); see also *Arrowsmith v. United Press Int’l*, 320 F.2d 219, 231 (2d Cir. 1963) (holding that under *Erie*, federal courts sitting in diversity must apply state long-arm statutes to determine the scope of their territorial jurisdiction).

defining indicium of a federal court's obligation to apply a state law.<sup>45</sup> Furthermore, *Erie* has no bearing on jurisdictional matters.<sup>46</sup> *Erie* was an interpretation of the Rules of Decision Act (RDA),<sup>47</sup> which obligates federal courts to apply state substantive law as the rules of decision in cases where no federal constitutional, statutory, or treaty provision applies.<sup>48</sup> This, the Supreme Court has explained, means that "[i]n diversity cases, of course, the substantive dimension of the claim asserted finds its source in state law."<sup>49</sup> State law governing the jurisdictional reach of local courts is by no measure substantive law that the RDA obligates federal courts to apply.<sup>50</sup> The RDA does not purport to address the territorial reach of federal courts at all, and thus it would be inappropriate to apply *Erie* to limit the extent to which federal courts may exercise personal jurisdiction over litigants before them. Indeed, this was the essence of the Supreme Court's position in *Byrd v. Blue Ridge Rural*

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45. See *Hanna v. Plumer*, 380 U.S. 460, 466–67 (1965) (“‘Outcome-determination’ analysis was never intended to serve as a talisman.” (quoting *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 537 (1958))); see also *Byrd*, 356 U.S. at 537–38 (“The policy of uniform enforcement of state-created rights and obligations cannot in every case exact compliance with a state rule—not bound up with rights and obligations . . . .” (footnote omitted) (citation omitted)).

46. See, e.g., *Arrowsmith*, 320 F.2d at 235 (Clark, J., dissenting) (“[A]ctually there is no such compulsion from *Erie*; the bite there was to see that a litigant’s substantive rights are to be determined by the appropriate state law and are not to be prejudiced by the fact that they are being enforced in a federal court. . . . But this does not say how the federal courts shall be organized and how one is brought before them; indeed to put this in the hands of the states would be to destroy all reason for having a federal tribunal (in which the litigant has more confidence) enforce a litigant’s rights accorded by state law.”). The author of the dissent in *Arrowsmith* was Judge Charles Clark, widely regarded as the father of the Federal Rules of Civil Procedure for his role as the original Reporter to the Committee. Michael E. Smith, *Judge Charles E. Clark and the Federal Rules of Civil Procedure*, 85 YALE L.J. 914, 915 (1976) (“[Judge Clark] was principally responsible for the drafting of the Federal Rules . . . .”).

47. Pub. L. No. 80-773, § 1652, 62 Stat. 869, 944 (1948) (codified as amended at 28 U.S.C. § 1652 (2012)) (“The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.”).

48. *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938) (“Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State.”).

49. *Simler v. Conner*, 372 U.S. 221, 222 (1963).

50. See *Spencer*, *supra* note 13, at 673 (“[A] ‘substantive right’ under the REA concerns what I may and may not do to others and what I can expect others not to do to me.”). Justice Powell expressed a contrary—and erroneous—view on this point in his concurrence in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 711 (1982) (Powell, J., concurring) (“Under the Rules of Decision Act . . . in the absence of a federal rule or statute establishing a federal basis for the assertion of personal jurisdiction, the personal jurisdiction of the district courts is determined in diversity cases by the law of the forum State.”). The Supreme Court has not endorsed the view that the RDA compels adherence to state long-arm statutes in diversity cases.

*Electric Cooperative*,<sup>51</sup> when it wrote, “The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction.”<sup>52</sup> So long as federal courts adhere to *Erie*’s admonition to apply state substantive law,<sup>53</sup> neither the RDA nor the *Erie* doctrine are transgressed.

Third, the current regime too often leads to unjust outcomes, dismissing cases that otherwise present no Fifth Amendment or venue concerns on jurisdictional grounds solely because the host state’s courts could not hear the case. For example, in *Hernandez-Denizac v. Kia Motors Corp.*,<sup>54</sup> the plaintiff was injured in a car accident in Puerto Rico because his vehicle’s air bags did not deploy.<sup>55</sup> The court denied personal jurisdiction over the defendant air bag designer because its contacts with Puerto Rico did not satisfy the stream of commerce test applicable within the First Circuit.<sup>56</sup> However, because the air bag designer was a U.S. corporation, there would have been no Fifth Amendment obstacle to federal court territorial jurisdiction.<sup>57</sup> Further, there would have been no valid venue objection, as the incident that gave rise to the plaintiff’s injuries—the failure of the air bags to deploy in an accident—occurred in Puerto Rico.<sup>58</sup>

A similar result emerged in *Krier v. Bartram’s Equipment Sales & Service*,<sup>59</sup> where the foreign manufacturer of a swather—a large farm implement used to cut hay or small grains—shipped the swather to Texas for distribution to an Oklahoma dealership; the swather thereafter ended up being sold in Kansas, where it caught fire and caused injury.<sup>60</sup> The federal district court in Kansas rejected personal jurisdiction over the foreign defendants on the ground that they were not responsible for the product ending up in Kansas.<sup>61</sup> Were the Fifth Amendment standard in place here, the foreign defendants would have been deemed to have minimum contacts with the United States based on their shipment of the

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51. 356 U.S. 525 (1958).

52. *Id.* at 537.

53. The issue of which state’s substantive law must be followed is addressed below. *See infra* Section II.C.

54. 257 F. Supp. 3d 216 (D.P.R. 2017).

55. *Id.* at 219.

56. *Id.* at 225.

57. *Id.* at 220; *see also infra* Section II.A (discussing Fifth Amendment due process jurisprudence).

58. *Hernandez-Denizac*, 257 F. Supp. 3d at 220; *see also* 28 U.S.C. § 1391(b)(2) (2012) (providing for venue in a district where a “substantial part of the events . . . giving rise to the claim occurred”).

59. No. 14-1072-MLB, 2014 WL 3092918 (D. Kan. July 7, 2014).

60. *Id.* at \*1.

61. *See id.* at \*3.

product to Texas; venue in the District of Kansas would have been appropriate based on the fact that the incident giving rise to the suit occurred there.<sup>62</sup> Thus, the outcome in *Krier* is nonsensical in that it prevents the exercise of personal jurisdiction where there is no constitutional or venue obstacle, and where there was clearly no reasonableness argument that would make litigating in Kansas unduly burdensome.

The current state-based approach to personal jurisdiction is particularly pernicious in actions arising out of contacts mediated through the Internet. Prevailing approaches to jurisdiction based on virtual or Internet contacts among the circuit courts require some form of “express aiming” or “targeting” of the Internet activity toward the forum state.<sup>63</sup> Thus, for example, in *Young v. New Haven Advocate*,<sup>64</sup> although a Connecticut-based newspaper allegedly defamed a Virginia prison warden via its website, the Fourth Circuit concluded that the web activity was directed at Connecticut—not Virginia—and rejected the assertion of personal jurisdiction in Virginia federal court.<sup>65</sup> Because the warden lived and worked in Virginia and the allegedly defamatory content was published there, his alleged harm would undoubtedly have supported venue in Virginia federal court. A nationwide jurisdiction regime would have permitted the warden’s case to remain in Virginia, rather than forcing him to travel to Connecticut to file his suit, which seems unfair. Websites and other Internet activities may frequently be untargeted or passive but still cause harm in places beyond their states of origin; requiring federal courts to engage in an analysis in the Internet context that is wedded to state lines seems quite disconnected from the reality of virtual activity and senseless given the constitutional authority of federal courts to reach defendants that are clearly connected by their actions to the United States as a whole.

Finally, personal jurisdiction doctrine with respect to the Fourteenth Amendment “is notoriously confusing and imprecise”;<sup>66</sup> the linkage

62. 28 U.S.C. § 1391(b)(2).

63. See, e.g., *Tamburo v. Dworkin*, 601 F.3d 693, 703 (7th Cir. 2010) (extrapolating an “express aiming” requirement in the Internet context from *Calder v. Jones*, 465 U.S. 783 (1984)); *ALS Scan, Inc. v. Digital Service Consultants, Inc.*, 293 F.3d 707 (4th Cir. 2002) (stating that jurisdiction is appropriate based on a website when the defendant directs electronic activity into the state with an intent to engage in business or other interactions there); *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 419–20 (9th Cir. 1997) (holding that passive website was insufficient to support personal jurisdiction in the plaintiff’s home state in a suit over the allegedly infringing use of the plaintiff’s service mark on that website).

64. 315 F.3d 256 (4th Cir. 2002).

65. *Id.*

66. See Spencer, *supra* note 11, at 328; see also A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617, 618 (2006) (“With each decision, the

mandated by Rule 4(k)(1)(A) needlessly hobbles federal courts and litigants—in ordinary cases as well as in consolidated multidistrict proceedings<sup>67</sup>—with having to perpetuate and endure expensive, wasteful, and time-consuming satellite litigation over jurisdictional disputes that would largely be obviated under a regime governed solely (or primarily) by the Due Process Clause of the Fifth Amendment.<sup>68</sup> This is particularly unfortunate given the fact that the federal venue statutes and accompanying doctrine largely (though perhaps not completely) attend to the locational concerns wrapped up in state-based personal jurisdictional determinations, meaning that the personal jurisdiction fight, in many cases, yields not much more than would be attained via a venue analysis. The linkage with the jurisdictional reach of States and the attendant satellite litigation that such linkage induces is also out of step with the current trend to move the Federal Rules in the direction of facilitating the “just, speedy, and inexpensive determination of every action.”<sup>69</sup> Thus, stepping away from Rule 4(k) to leave matters to the Fifth Amendment and to federal venue constraints would produce a uniform and simplified standard that would retain much of the locational rationality of the current system, while opening the courts to hearing cases where state constraints unduly restrict access to local federal courts.

### C. Revising Rule 4(k)

To free federal district courts to assert territorial jurisdiction to the fullest extent permitted under the Fifth Amendment, the Advisory

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Court has convulsed away from the simple notion in *International Shoe* that state sovereignty and due process permit jurisdiction over nonresidents who are minimally connected with the forum, to a confused defendant-centric doctrine obsessed with defendants’ intentions, expectations, and experiences of inconvenience.” (footnote omitted)).

67. See, e.g., *In re Testosterone Replacement Therapy Prods. Liab. Litig.*, 164 F. Supp. 3d 1040, 1046–50 (N.D. Ill. 2016) (engaging in personal jurisdiction analysis with respect to the transferor district); *In re Papst Licensing GMBH & Co. KG Litig.*, 602 F. Supp. 2d 10, 14–15 (D.D.C. 2009) (same).

68. This would be a tremendous benefit in the multidistrict litigation context, where transferee courts frequently must resolve personal jurisdiction challenges pertaining to transferred cases with respect to multiple districts of origin. See Andrew D. Bradt, *The Long Arm of Multidistrict Litigation*, 59 WM. & MARY L. REV. 1165, 1208–24 (2018) (discussing the personal jurisdiction issues the Judicial Panel on Multidistrict Litigation addressed after the creation of the multidistrict litigation statute). A nationwide personal jurisdiction regime in federal court would eliminate the need for such an analysis in most cases.

69. FED. R. CIV. P. 1; see also *Daimler AG v. Bauman*, 571 U.S. 117, 141 n.20 (2014) (describing personal jurisdiction as “an issue that should be resolved expeditiously at the outset of litigation”); JOHN G. ROBERTS, JR., 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY 11 (2015), <https://www.supremecourt.gov/publicinfo/year-end/year-endreports.aspx> [<https://perma.cc/A5V5-E96E>] (“[W]e must engineer a change in our legal culture that places a premium on the public’s interest in speedy, fair, and efficient justice.”).

Committee should amend Rule 4(k) to pare it down simply to announcing the national reach of federal process that the Fifth Amendment supports. To wit, the revised version of Rule 4(k) that this Article proposes would entirely replace the existing text as follows:

(k) TERRITORIAL LIMITS OF EFFECTIVE SERVICE. All process other than a subpoena may be served anywhere within the territorial limits of the United States. Nothing in these Rules limits the personal jurisdiction of a district court.<sup>70</sup>

This language roughly tracks that found in Federal Rule of Bankruptcy Procedure 7004(d), which reads: “The summons and complaint and all other process except a subpoena may be served anywhere in the United States.”<sup>71</sup> Revised in this manner, Rule 4(k) would no longer purport to limit or announce the jurisdictional reach of federal courts in violation of the REA. Instead, it would be a rule of procedure that addresses service of process in line with other parts of Rule 4. Let this be clear: This Article is not proposing that the Committee revise Rule 4(k) to expand the jurisdictional reach of federal district courts. Rather, this Article proposes that the Committee revise Rule 4(k) *to take it out of the business of delimiting the jurisdictional reach of federal district courts*, which would have the effect of leaving only the constitutional limits on personal jurisdiction as the standard by which federal courts ascertain their territorial reach in any given case.

For those more comfortable with an approach that gives some nod to the jurisdictional consequences of service of process, that could be done in a manner consistent with the REA by taking the approach found in Federal Rule of Bankruptcy Procedure 7004(f)<sup>72</sup> to revise Rule 4(k) as follows:

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70. An additional—though redundant—sentence could be added as follows: “Effective service outside the United States must be in compliance with Rule 4(f).”

71. FED. R. BANKR. P. 7004(d). This language also bears some resemblance to the approach taken in the predecessor to Rule 4(k), original Rule 4(f), which provided that “[a]ll 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 a statute of the United States so provides, beyond the territorial limits of that state.” FED. R. CIV. P. 4(f) (1938).

72. Federal Rule of Bankruptcy Procedure 7004(f) addresses personal jurisdiction explicitly as follows:

If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service in accordance with this rule or the subdivisions of [Federal Rule of Civil Procedure] 4 . . . made applicable by these rules is effective to establish personal jurisdiction over the person of any defendant with respect to a case under the Code . . . .

FED. R. BANKR. P. 7004(f).

(k) TERRITORIAL LIMITS OF EFFECTIVE SERVICE. ~~(1) *In General*~~—Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant: when exercising jurisdiction is consistent with the United States Constitution and laws [deleting the remainder of the present rule].<sup>73</sup>

Either approach—or a combination of the two<sup>74</sup>—would do the job: removing from the Federal Rules a rule purporting to limit the jurisdictional reach of federal district courts. While the first proposed revision is silent on jurisdiction, the latter approach merely acknowledges the otherwise applicable statutory and constitutional constraints, which is helpful—but not necessary—for those constraints to apply. Going the latter route would be consistent with the approach currently taken in Rule 38(a), which superfluously announces that a right of trial by jury is preserved<sup>75</sup> (something no rule could take away).

Regardless of how it is done, if Rule 4(k) as we presently know it is revised, what would that mean for the territorial jurisdiction of federal courts? The direct consequence of revising Rule 4(k) as suggested would be that the jurisdictional reach of federal courts would be constrained only by the Due Process Clause of the Fifth Amendment, which requires minimum contacts with the United States as a whole rather than with any particular state.<sup>76</sup> Additionally, geographical constraints on federal district court selection would be confined to federal venue statutes, a responsibility that—with some interpretive assistance—they should be

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73. By permitting jurisdiction when consistent with both the Constitution and “laws” of the United States, the proposed language addresses the concern raised by Professor Ed Cooper, Reporter to the Advisory Committee on Civil Rules, that federal statutes providing for jurisdiction to a lesser extent than the Constitution might otherwise permit would not be superseded by the scope of jurisdiction contemplated by this revised rule. MINUTES OF ADVISORY COMM. ON CIV. RULES, APRIL 10, 2018, at 29 (2018), [https://www.uscourts.gov/sites/default/files/2018-04-10-cv\\_minutes\\_final\\_0.pdf](https://www.uscourts.gov/sites/default/files/2018-04-10-cv_minutes_final_0.pdf) [<https://perma.cc/D4EE-4DBH>] (“Congress has enacted a number of statutes that assert some form of ‘nationwide’ personal jurisdiction. It is not clear whether all of them would be interpreted to reach as far as a new court rule might. If the rule goes farther than the statute, there might be a supersession question. . . . A different approach would be to cut the rule short if the statute does not go so far—that might be accomplished by retaining the requirement in present Rule 4(k)(2)(B) that exercising jurisdiction be consistent with the United States ‘laws.’”).

74. That is the approach taken in the Federal Rules of Bankruptcy Procedure, which address the permissible territorial scope of service of process and the jurisdictional consequences of service. *See* FED. R. BANKR. P. at 7004(d), (f).

75. FED. R. CIV. P. 38(a) (“The right of trial by jury as declared by the Seventh Amendment to the Constitution—or as provided by a federal statute—is preserved to the parties inviolate.”).

76. *United Elec., Radio & Mach. Workers v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1085 (1st Cir. 1992) (“[T]he Constitution requires only that the defendant have the requisite ‘minimum contacts’ with the United States, rather than with the particular forum state . . .”).



able to shoulder. And, finally, plaintiffs may be able to access a broader set of conflict-of-laws regimes were the courts that hear cases to become increasingly located outside of states whose laws bear the closest connection to any given dispute. These collateral consequences of moving towards nationwide jurisdiction are addressed in the next Part.

## II. COLLATERAL CONSEQUENCES OF NATIONWIDE JURISDICTION

### A. *Fifth Amendment Due Process Jurisprudence*

It is well-established that the Fifth Amendment’s Due Process Clause<sup>77</sup>—not the Due Process Clause of the Fourteenth Amendment—is the relevant provision that limits the territorial jurisdiction of federal courts.<sup>78</sup> Because federal courts are components of a separate sovereign, these distinct constitutional constraints mean that federal courts may constitutionally exercise personal jurisdiction under circumstances that state courts could not.<sup>79</sup> Further, unlike subject matter jurisdiction, where long-held wisdom maintains that inferior federal courts require an

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77. U.S. CONST. amend. V. The Fifth Amendment was not adopted until 1791, leaving a gap between 1789—the year that inferior federal courts were established and granted jurisdiction over certain cases—and 1791, when the Due Process Clause came online. An interesting question might be what protected litigants against obstreperous assertions of power by inferior federal courts before 1791. Congress provided the relevant protection itself in the Judiciary Act of 1789, limiting the territorial reach of the newly created circuit courts to their respective districts. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 79 (“[N]o civil suit shall be brought before [district or circuit] courts against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ . . . .”); see also *id.* §§ 3–4 (establishing U.S. district courts and circuit courts). Thus, there was no occasion to test the limits of the territorial reach of district courts prior to 1791 because those limits were statutorily constrained to an extent beyond what the Fifth Amendment would have otherwise required.

78. *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 619–20 (1992) (concluding that the Fifth Amendment’s Due Process Clause did not foreclose personal jurisdiction because the defendant had “purposefully avail[ed] itself of the privilege of conducting activities within the [United States]” (alterations in original) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985))); *Nordberg v. Granifinanciera, S.A. (In re Chase & Sanborn Corp.)*, 835 F.2d 1341, 1344 (11th Cir. 1988) (“The [D]ue [P]rocess [C]lause of the [F]ifth [A]mendment constrains a federal court’s power to acquire personal jurisdiction via nationwide service of process.” (footnote omitted)), *rev’d on other grounds*, 492 U.S. 33 (1989); *Mariash v. Morrill*, 496 F.2d 1138, 1143 (2d Cir. 1974) (noting that personal jurisdiction predicated on nationwide service “remains subject to the constraints of the Due Process [C]lause of the Fifth Amendment”); *Antonini v. Ford Motor Co.*, No. 3:16-CV-2021, 2017 WL 3633287, at \*2 (M.D. Pa. Aug. 23, 2017) (“In the context of federal courts, it is the Fifth Amendment that imposes restrictions on the exercise of personal jurisdiction.” (citing *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1783–84 (2017))).

79. *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 884 (2011) (plurality opinion) (“Because the United States is a distinct sovereign, a defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State.”).

affirmative legislative enactment authorizing them to hear a case or controversy of a particular kind,<sup>80</sup> federal courts do not require statutory authorization to exercise territorial jurisdiction over litigants.<sup>81</sup> A federal court may render a binding judgment against a litigant to the limit of the national sovereign's authority—which is constrained only by the Due Process Clause of the Fifth Amendment<sup>82</sup>—so long as proper service of process can be rendered on that litigant.<sup>83</sup> The constitutional scope of

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80. See *Palmore v. United States*, 411 U.S. 389, 401 (1973) (“[Congress] was not constitutionally required to create inferior Art. III courts to hear and decide cases within the judicial power of the United States . . . . Nor, if inferior federal courts were created, was it required to invest them with all the jurisdiction it was authorized to bestow under Art. III.”); 13 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3522 (4th ed. 2008) (“They are empowered to hear only those cases that (1) are within the judicial power of the United States, as defined in the Constitution, and (2) that have been entrusted to them by a jurisdictional grant by Congress.” (footnote omitted)); see also A. Benjamin Spencer, *The Judicial Power and the Inferior Federal Courts: Exploring the Constitutional Vesting Thesis*, 46 GA. L. REV. 1, 3 (2011) (“One possible reading of [Article III and the debates surrounding it] suggests that the Constitution vests the *full* Judicial Power of the United States in the inferior federal courts, directly extending to them jurisdiction over matters that Congress may not abridge. This position is controversial and has been rejected.”).

81. See *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987) (“Omni’s argument that Art. III does not itself limit a court’s personal jurisdiction is correct. ‘The requirement that a court have personal jurisdiction flows not from Art. III, but from the Due Process Clause. . . . It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.’” (quoting *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982))).

82. See FED. R. CIV. P. 4 advisory committee notes to 1993 amendment (“The Fifth Amendment requires that any defendant have affiliating contacts with the United States sufficient to justify the exercise of jurisdiction over that party.”); see also *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 418 (9th Cir. 1977) (“[W]hen a federal statute authorizes world-wide service of process . . . the only relevant constraint is [F]ifth [A]mendment due process rather than statutory authorization.” (citations omitted)).

83. Congress, in the Judiciary Act of 1789, limited the territorial reach of federal courts by providing that no person could be brought before a district court except by process issued by a court of the district they inhabited or where they were found. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 79 (“[N]o civil suit shall be brought before [district or circuit] courts against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ . . . .”). This was the means through which Congress limited the territorial reach of federal courts until the enactment of the Federal Rules of Civil Procedure in 1938. Under the 1938 Rules, the Supreme Court did not directly regulate jurisdiction but, rather, limited the territorial reach of federal courts by limiting the reach of process issued by federal courts to the states in which their respective districts were located. FED. R. CIV. P. 4(f) (1938) (“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 a statute of the United States so provides, beyond the territorial limits of that state. A subpoena may be served within the territorial limits provided in Rule 45.”); see also *Omni Capital*, 484 U.S. at 104 (“[B]efore a court may exercise personal jurisdiction over a defendant, there must be more than notice to the defendant and a constitutionally sufficient relationship between the defendant and the forum. There also must be a basis for the defendant’s amenability to service of summons.

territorial jurisdiction can be constrained by Congress, of course, pursuant to its authority to create and regulate inferior federal courts.<sup>84</sup> The Supreme Court lacks such authority and Congress did not confer it through the REA.<sup>85</sup>

What is less well-established is the standard for exercising jurisdiction under the Fifth Amendment. In part due to the fact that federal courts have been largely confined to the jurisdictional reach of their host states,<sup>86</sup> the Supreme Court has not yet had occasion to develop a robust Fifth Amendment due process jurisprudence as it pertains to personal jurisdiction.<sup>87</sup> Those circuits that have addressed the matter, however, have concluded that there is no meaningful difference between the doctrine under the Fifth and Fourteenth Amendments except for the territorial referent for the analysis. That is, while the Fourteenth Amendment confines a state to exercising jurisdiction over litigants having minimum contacts with that state,<sup>88</sup> the Fifth Amendment limits federal courts to exercising jurisdiction over litigants having minimum contacts *with the United States as a whole*<sup>89</sup>—sometimes referred to as

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Absent consent, this means there must be authorization for service of summons on the defendant.”).

84. See U.S. CONST. art. I, § 8, cl. 18; U.S. CONST. art. III, § 1.

85. See Spencer, *supra* note 13, at 669–70.

86. See FED. R. CIV. P. 4(k)(1)(A).

87. Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773, 1783–84 (2017) (“[S]ince our decision concerns the due process limits on the exercise of specific jurisdiction by a State, we leave open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court.”); *Omni Capital*, 484 U.S. at 102 n.5 (indicating that there was no occasion in the case to address the scope of jurisdictional reach under the Fifth Amendment); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 n.\* (1987) (plurality opinion).

88. See, e.g., *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 321 (1945) (applying the Fourteenth Amendment to determine the scope of state court jurisdiction).

89. See *Livnat v. Palestinian Auth.*, 851 F.3d 45, 55 (D.C. Cir. 2017) (“The only difference in the personal-jurisdiction analysis under the two Amendments is the *scope* of relevant contacts: Under the Fourteenth Amendment, which defines the reach of state courts, the relevant contacts are state-specific. Under the Fifth Amendment, which defines the reach of federal courts, contacts with the United States as a whole are relevant.”); see also *Republic of Panama v. BCCI Holdings (Lux.) S.A.*, 119 F.3d 935, 946–47 (11th Cir. 1997) (“[A] defendant’s contacts with the forum state play no magical role in the Fifth Amendment analysis. . . . Thus, determining whether litigation imposes an undue burden on a litigant cannot be determined by evaluating only a defendant’s contacts with the forum state. A court must therefore examine a defendant’s aggregate contacts with the nation as a whole rather than his contacts with the forum state in conducting the Fifth Amendment analysis.” (footnote omitted)); *United States v. De Ortiz*, 910 F.2d 376, 381–82 (7th Cir. 1990) (indicating that Fifth Amendment due process is satisfied where the defendant has “sufficient contacts with the United States as a whole rather than any particular state or other geographic area”).

the “national contacts” test.<sup>90</sup>

Recognizing that the minimum contacts analysis of *International Shoe Co. v. Washington*<sup>91</sup> is the relevant standard in the Fifth Amendment context, however, does not provide everything needed to engage in a personal jurisdiction analysis in the absence of Rule 4(k). Additional refinement is necessary to operationalize the applicable due process constraints. Beginning with the basics, *general jurisdiction* under the Fifth Amendment would be appropriate over any litigant who could call the United States its home.<sup>92</sup> For individuals, that would be those persons who are domiciled in the United States;<sup>93</sup> for entities, the paradigmatic connection with the United States needed to consider it at home would be having a headquarters in the United States or being incorporated or

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90. *Max Daetwyler Corp. v. Meyer*, 762 F.2d 290, 293 (3d Cir. 1985) (“Under the national contacts theory, the proper inquiry in determining personal jurisdiction in a case involving federal rights is one directed to the totality of a defendant’s contacts throughout the United States.”); *Schrader v. Trucking Emps. of N. Jersey Welfare Fund, Inc.*, 232 F. Supp. 2d 560, 571–72 (M.D.N.C. 2002) (applying the “national contacts test” to the Employee Retirement Income Security Act, which provides for nationwide service of process).

91. 326 U.S. 310 (1945).

92. *See Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011) (“A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so ‘continuous and systematic’ as to render them essentially at home in the forum State.”). The Supreme Court appears to have rejected a separate reasonableness analysis as necessary or appropriate in the context of general jurisdiction. *See Daimler AG v. Bauman*, 571 U.S. 117, 139 n.20 (2014) (“[A] multipronged reasonableness check was articulated in *Asahi*, but not as a free-floating test. Instead, the check was to be essayed when *specific* jurisdiction is at issue.” (citation omitted)). Justice Sotomayor would have the reasonableness factors apply to general jurisdiction cases. *See id.* at 146 (Sotomayor, J., concurring in the judgment) (“[I]t would be unreasonable for a court in California to subject Daimler to its jurisdiction.”). It is unclear whether the Court would view things differently were it to become engaged in the business of regularly fleshing out the contours of federal court personal jurisdiction under the Fifth Amendment. This Article asserts that any company incorporated or headquartered in the United States is subject to the judicial sovereignty of U.S. district courts and cannot conceive of a circumstance in which it would be so unreasonable for a *federal* court to exercise jurisdiction over such a company that a court would conclude that it *lacked* jurisdiction. Again, as has been a frequent refrain, issues pertaining to convenience to defendants and the mobility of their defense should be attended to by the venue and change-of-venue doctrines, not via the denial of territorial jurisdiction that the Constitution supports.

93. A relevant question here is whether U.S. *citizenship* would suffice for general jurisdiction under the Fifth Amendment. *Goodyear* suggests that *domicile* is the relevant determinant of one’s at-home connection with a jurisdiction. *Goodyear*, 564 U.S. at 924 (“For an individual, the paradigm forum for the exercise of general jurisdiction is the individual’s domicile . . .”). A U.S. citizen domiciled abroad would arguably have an insufficiently “continuous and systematic” and “substantial” connection with the United States to warrant the exercise of general jurisdiction. *Daimler*, 571 U.S. at 138.

organized there.<sup>94</sup> Thus, for example, a company like Bristol Myers Squibb (BMS)—which is incorporated in Delaware and headquartered in New York—would be subject to general jurisdiction in federal district courts throughout the United States, meaning that a group of nationwide plaintiffs, whose attempt to sue BMS in California state court was recently rebuffed, would be able to get jurisdiction over their claims against BMS in a California federal court.<sup>95</sup> Service of process on natural persons within the United States should also be a basis for exercising jurisdiction consistent with the concept of transient or “tag” jurisdiction,<sup>96</sup> although the Court has not agreed on a rationale explaining why this would be so.<sup>97</sup>

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94. *Goodyear*, 564 U.S. at 924 (citing *Lea Brilmayer et al., A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 728 (1988)) (“For an individual, the paradigm forum for the exercise of general jurisdiction is the individual’s domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home.”).

95. *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1783–84 (2017). If BMS were to be uncomfortable with this result, it could seek to sever the non-California-related claims and have them transferred to more appropriate venues. Alternatively, it might be arguable that the non-California-related claims in that case would have been subject to dismissal in California federal court based on a venue objection. Pendent venue could not be employed to retain the non-California-related claims as that doctrine is typically restricted to permit a court to hear additional claims between the same parties, not to acquire venue over the claims of additional parties. *Lomanno v. Black*, 285 F. Supp. 2d 637, 641 n.7 (E.D. Pa. 2003) (noting that pendent venue “is generally applied when the causes of action have identical parties and proofs” (quoting *Christian Dalloz, S.A. v. Holden*, No. CIV. A. 90–0835, 1990 WL 121342, at \*2 n.2 (E.D. Pa. Aug. 20, 1990))).

96. *See Burnham v. Superior Court*, 495 U.S. 604, 612 (1990) (plurality opinion); *see also Lorelei Corp. v. County of Guadalupe*, 940 F.2d 717, 719 (1st Cir. 1991) (“It is clear that the [F]ifth [A]mendment ‘permits a federal court to exercise personal jurisdiction over a defendant in a federal question case if that defendant has sufficient contacts with the United States as a whole,’ and that sufficient contacts exist whenever the defendant is served within the sovereign territory of the United States.” (citations omitted) (quoting *Whistler Corp. v. Solar Elecs., Inc.*, 684 F. Supp. 1126, 1128 (D. Mass. 1988))); *In re HNRC Dissolution Co.*, No. 02-14261, 2018 WL 2970722, at \*4 (Bankr. E.D. Ky. June 11, 2018) (“Under the Fifth Amendment, bankruptcy courts can constitutionally exercise personal jurisdiction over any person or entity within the sovereign territory of the United States.”).

97. In *Burnham*, Justice Scalia justified jurisdiction based on in-state service of process on the ground that it was a traditional basis for establishing jurisdiction, which *International Shoe* was attempting to approximate, not supplant. *Burnham*, 495 U.S. at 621 (“We have conducted no independent inquiry into the desirability or fairness of the prevailing in-state service rule, leaving that judgment to the legislatures that are free to amend it; for our purposes, its validation is its pedigree, as the phrase ‘*traditional notions of fair play and substantial justice*’ makes clear.”). Justice Brennan, on the other hand, argued that transient jurisdiction was fair and equitable under the circumstances. *Id.* at 637–38 (Brennan, J., concurring in the judgment) (“By visiting the forum State, a transient defendant actually ‘avail[s]’ himself of significant benefits provided by the State. . . . The potential burdens on a transient defendant are slight. “[M]odern transportation and communications have made it much less burdensome for a party sued to defend himself” in a

Determining the propriety of *specific jurisdiction* under the Fifth Amendment—that is, jurisdiction in a suit arising out of the defendant’s contacts with the forum<sup>98</sup>—would depend on “the defendant’s relationship to the forum”<sup>99</sup> and “an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State and is therefore subject to the State’s regulation.”<sup>100</sup> When the activity, occurrence, or omission that is the basis for the suit is connected to a particular forum (here, the United States) as a result of the defendant’s purposeful actions, the Supreme Court has traditionally regarded this as sufficient to conclude that the defendant “purposefully avail[ed] itself of the privilege of conducting activities within the forum State” such that it has “clear notice that it is subject to suit there.”<sup>101</sup> There are myriad ways that courts have found defendants to have connected themselves with a forum state in a manner sufficient to support specific jurisdiction; extrapolating from those cases to conclude that similar contacts with the United States as a whole would likewise support a finding of purposeful availment in the Fifth Amendment context is not an analysis that would be complicated to undertake.<sup>102</sup>

It would be more challenging to convert the reasonableness prong<sup>103</sup> of the specific jurisdiction analysis to one that enforces the limits of Fifth Amendment due process.<sup>104</sup> In the Fourteenth Amendment context, the

State outside his place of residence.” (citation omitted) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985)).

98. *Bristol-Myers Squibb*, 137 S. Ct. at 1780 (“In order for a state court to exercise specific jurisdiction, ‘the *suit*’ must ‘aris[e] out of or relat[e] to the defendant’s contacts with the *forum*.’” (alterations in original) (quoting *Daimler*, 571 U.S. at 118)).

99. *Id.* at 1779.

100. *Id.* at 1780 (alteration in original) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)).

101. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

102. *See, e.g., Bricklayers & Trowel Trades Int’l Pension Fund v. Kel-Tech Constr., Inc.*, 319 F. Supp. 3d 330, 340 (D.D.C. 2018) (“Exercising personal jurisdiction over Kel-Tech is also consistent with the Fifth Amendment. Given that the complaint concerns Kel-Tech’s obligations under CBAs entered into in the United States (presumably, in its home state of New York), there are obviously sufficient contacts with the United States to satisfy the Fifth Amendment.”).

103. *See World-Wide Volkswagen*, 444 U.S. at 292 (articulating the factors bearing on an assessment of the “reasonableness” or “fairness” of an assertion of jurisdiction over a defendant); *see also Siegel v. HSBC Holdings, PLC*, No. 17cv6593(DLC), 2018 WL 501610, at \*3 (S.D.N.Y. Jan. 19, 2018) (“Here, the question is whether HSBC Holdings and Al Rajhi Bank have sufficient contacts with the United States in general. Only if the SAC establishes this minimum contacts inquiry does the Court proceed to the second stage of the due process inquiry, considering whether the exercise of personal jurisdiction is reasonable.”).

104. *Republic of Panama v. BCCI Holdings (Lux.) S.A.*, 119 F.3d 935, 947 (11th Cir. 1997) (“A defendant’s ‘minimum contacts’ with the United States do not, however, automatically satisfy

Supreme Court recently reiterated that “a court must consider a variety of interests,” including “the interests of the forum State and of the plaintiff in proceeding with the cause in the plaintiff’s forum of choice” and what the court has labeled the “primary concern”—“the burden on the defendant.”<sup>105</sup> That burden is not simply the inconvenience of travel; rather, it is the type of burden that would “make litigation ‘so gravely difficult and inconvenient’ that a party unfairly is at a ‘severe disadvantage’ in comparison to his opponent.”<sup>106</sup> Additionally, the Court has stated that a court “must also weigh in its determination ‘the interstate judicial system’s interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.’”<sup>107</sup>

In the Fifth Amendment context, the relevant forum government’s interest becomes that of the United States in litigating the dispute in the chosen forum.<sup>108</sup> That is a more straightforward analysis when a federal statute is involved:

In evaluating the federal interest, courts should examine the federal policies advanced by the statute, the relationship between nationwide service of process and the advancement of these policies, the connection between the exercise of jurisdiction in the chosen forum and the plaintiff’s

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the due process requirements of the Fifth Amendment. There are circumstances, although rare, in which a defendant may have sufficient contacts with the United States as a whole but still will be unduly burdened by the assertion of jurisdiction in a faraway and inconvenient forum.” (footnote omitted)); *see id.* at 946 (“In determining whether the defendant has met his burden of establishing constitutionally significant inconvenience, courts should consider the factors used in determining fairness under the Fourteenth Amendment. Courts should not, however, apply these factors mechanically in cases involving federal statutes. As we noted in *Chase & Sanborn*, ‘[t]he due process concerns of the [F]ifth and [F]ourteenth [A]mendments are not precisely parallel.’” (first alteration in original) (quoting *Nordberg v. Granfinanciera (In re Chase & Sanborn Corp.)*, 835 F.2d 1341, 1345 n.9 (11th Cir. 1988), *rev’d on other grounds*, 492 U.S. 33 (1989))).

105. *Bristol-Myers Squibb*, 137 S. Ct. at 1780 (first quoting *Kulko v. Superior Court*, 436 U.S. 84, 92 (1978); then quoting *World-Wide Volkswagen*, 444 U.S. at 292).

106. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478 (1985) (quoting *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18 (1972)); *see also World-Wide Volkswagen*, 444 U.S. at 301 (Brennan, J., dissenting) (“The burden, of course, must be of constitutional dimension. Due process limits on jurisdiction do not protect a defendant from all inconvenience of travel . . . . Instead, the constitutionally significant ‘burden’ to be analyzed relates to the mobility of the defendant’s defense.”).

107. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987) (plurality opinion) (quoting *World-Wide Volkswagen*, 444 U.S. at 292).

108. *Republic of Panama*, 119 F.3d at 948 (“When a defendant makes a showing of constitutionally significant inconvenience, jurisdiction will comport with due process only if the federal interest in litigating the dispute in the chosen forum outweighs the burden imposed on the defendant.”).

vindication of his federal right, and concerns of judicial efficiency and economy.<sup>109</sup>

However, in diversity cases, it is less clear what the federal interest would be in litigating a matter in one federal court versus another. This Article offers that, in such cases, if there is little federal interest in a particular federal district court hearing a case, any undue burden faced by a defendant could be mitigated by transferring the case rather than by denying jurisdiction.<sup>110</sup>

Because in the Fifth Amendment context the reasonableness analysis is necessary principally—though perhaps not exclusively—in cases involving non-U.S. defendants over whom general jurisdiction could not be exercised under the Fifth Amendment,<sup>111</sup> the defendant-burden assessment must be employed mainly for foreign defendants.<sup>112</sup> For such defendants, litigating in a foreign country—potentially many thousands of miles away—under the rules of an unfamiliar judicial system may impose significant burdens that warrant finding that an exercise of jurisdiction by a federal court would be unreasonable, notwithstanding

109. *Id.*

110. See 28 U.S.C. § 1404(a) (2012) (“For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.”); see also *Burger King*, 471 U.S. at 483–84 (“[T]o the extent that it is inconvenient for a party who has minimum contacts with a forum to litigate there, such considerations most frequently can be accommodated through a change of venue.”).

111. *Trs. of the Plumbers & Pipefitters Nat’l Pension Fund v. Plumbing Servs., Inc.*, 791 F.3d 436, 444 (4th Cir. 2015) (“[W]hen a defendant is a United States resident, it is ‘highly unusual . . . that inconvenience will rise to a level of constitutional concern.’” (second alteration in original) (quoting *ESAB Grp., Inc. v. Centricut, Inc.*, 126 F.3d 617, 627 (4th Cir. 1997))).

112. The reasonableness analysis has typically not been employed by the Supreme Court in the general jurisdiction context. However, it is possible that things would be different once the general jurisdiction analysis is scaled up to the national level. Thus, skeptics might be wont to ask whether a Maine domiciliary could be unconstitutionally burdened by having to litigate a case in Hawaii federal court, notwithstanding having minimum contacts with the United States by virtue of being a U.S. citizen. See, e.g., *Republic of Panama*, 119 F.3d at 947 (“[E]ven when a defendant resides within the United States, courts must ensure that requiring a defendant to litigate in plaintiff’s chosen forum is not unconstitutionally burdensome.”). The response is that venue and change-of-venue doctrines (discussed below) would be the proper avenue for vindicating such concerns. But in rare circumstances, a court might be inclined to use the reasonableness analysis as the vehicle for denying jurisdiction based on the burdens of distant interstate travel. *Id.* at 947–48 (“We emphasize that it is only in highly unusual cases that inconvenience will rise to a level of constitutional concern. . . . ‘[M]odern means of communication and transportation have lessened the burden of defending a lawsuit in a distant forum.’” (citation omitted) (quoting *Nordberg v. Granfinanciera (In re Chase & Sanborn Corp.)*, 835 F.2d 1341, 1346 (11th Cir. 1988), *rev’d on other grounds*, 492 U.S. 33 (1989))). However, in the view contained in this Article, the sovereign authority of federal courts over all U.S. citizens is unquestionable, making the contortion of jurisdictional analysis to attend to venue concerns unnecessary and inappropriate.



the presence of purposeful minimum contacts.<sup>113</sup> This was the conclusion of the Court in *Asahi Metal Industry Co. v. Superior Court*,<sup>114</sup> where it found jurisdiction to be unreasonable because, in part, the international aspect of hailing the defendant into a California court would have been too burdensome:

Certainly the burden on the defendant in this case is severe. Asahi has been commanded by the Supreme Court of California not only to traverse the distance between Asahi's headquarters in Japan and the Superior Court of California in and for the County of Solano, but also to submit its dispute with Cheng Shin to a foreign nation's judicial system. The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders.<sup>115</sup>

The significant burden on the defendant recognized by the Court in *Asahi* was not warranted in light of the thin interests of the forum (California) in an indemnification dispute between two foreign companies and in light of the fact that the plaintiff (as a non-U.S. entity) had no particular interest in litigating the action in the United States.<sup>116</sup>

In addition to the thin interests of California and the plaintiff, the *Asahi* Court gave weight to the interests of other jurisdictions that might have had a claim to entertaining this dispute:

*World-Wide Volkswagen* also admonished courts to take into consideration the interests of the "several States," in addition to the forum State, in the efficient judicial resolution of the dispute and the advancement of substantive policies. In the present case, this advice calls for a court to consider the procedural and substantive policies of other *nations* whose interests are affected by the assertion of jurisdiction by the California court. The procedural and substantive interests of other nations in a state court's assertion of

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113. *Republic of Panama*, 119 F.3d at 947 ("A defendant's 'minimum contacts' with the United States do not, however, automatically satisfy the due process requirements of the Fifth Amendment. There are circumstances, although rare, in which a defendant may have sufficient contacts with the United States as a whole but still will be unduly burdened by the assertion of jurisdiction in a faraway and inconvenient forum." (footnote omitted)); *Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534, 1551 (11th Cir. 1993) (explaining that even though an alien defendant has purposely directed activities at the United States, the Fifth Amendment requires that litigation in this country "comport[] with traditional notions of fair play and substantial justice").

114. 480 U.S. 102 (1987).

115. *Id.* at 114.

116. *Id.*

jurisdiction over an alien defendant will differ from case to case. In every case, however, those interests, as well as the Federal Government's interest in its foreign relations policies, will be best served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum State. "Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field."<sup>117</sup>

Thus, *Asahi* provides a relatively straightforward model for what a reasonableness analysis should look like under the Fifth Amendment. Taking defendant burdens seriously, accurately accounting for the interests of the forum country (the United States) and of the plaintiffs, and giving due regard for the competing interests of other foreign sovereigns in the dispute is the path to making sure that federal court assertions of specific jurisdiction do not become obstreperous or exorbitant.<sup>118</sup> As with cases decided under the Fourteenth Amendment, the courts will flesh this out on a case-by-case basis as foreign defendants press these issues in individual cases. That said, if a case arises out of the purposeful U.S. activities of foreign defendants, the burden of defending in a federal court in the United States is not likely to be undue.<sup>119</sup>

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117. *Id.* at 115 (quoting *United States v. First Nat'l City Bank*, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting)).

118. *See, e.g.*, FED. R. CIV. P. 4 advisory committee notes to 1993 amendment (cautioning that a "district court should be especially scrupulous to protect aliens who reside in a foreign country from forum selections so onerous that injustice could result").

119. *See, e.g.*, *Republic of Panama v. BCCI Holdings (Lux.) S.A.*, 119 F.3d 935, 948 (11th Cir. 1997) ("[I]n this case, we find no constitutional impediment to jurisdiction. First, we note that the First American defendants are large corporations providing banking services to customers in major metropolitan areas along the eastern seaboard. The fact that they may not have had significant contacts with Florida is insufficient to render Florida an unreasonably inconvenient forum. In addition, the fact that discovery for this litigation would be conducted throughout the world suggests that Florida is not significantly more inconvenient than other districts in this country. The First American defendants have presented no evidence that their ability to defend this lawsuit will be compromised significantly if they are required to litigate in Miami."); *Hengle v. Curry*, No. 3:18-cv-100, 2018 WL 3016289, at \*9 (E.D. Va. June 15, 2018) ("All defendants here operate in the United States, so they could presumably be served with process in a judicial district where they reside, are found, or transact their affairs. Furthermore, there is no evidence that any defendant would suffer extreme inconvenience or unfairness from litigating in the Newport News Division. Defendants have conducted their business in connection with the underlying dispute in states like Oklahoma, Delaware, and New York. Even if there would be some inconvenience in having to defend the action in Virginia instead of one of those states, 'it is not so extreme as to defeat the exercise of personal jurisdiction pursuant to valid service of process, although it may certainly factor into a transfer decision.' . . . Consequently, a court in the

The concept of pendent personal jurisdiction—under which courts assert “personal jurisdiction over a defendant with respect to a claim for which there is no independent basis of personal jurisdiction so long as it arises out of a common nucleus of operative facts with a claim in the same suit over which the court does have personal jurisdiction”<sup>120</sup>—would be less relevant in a world of nationwide personal jurisdiction where only the Fifth Amendment due process limitations are operative.<sup>121</sup> However, for foreign defendants, courts would need to employ more caution to make sure that pendent personal jurisdiction is not used in ways that violate the Fifth Amendment limitations outlined above. Such an affront is unlikely, however, given that pendent personal jurisdiction merely permits a court to hear additional claims against a defendant over whom the court has personal jurisdiction based on other related claims. In other words, there is not likely to be any constitutionally cognizable burden on defendants with respect to assertions of pendent personal jurisdiction, given their obligation to defend against those claims that independently supply the court with personal jurisdiction.<sup>122</sup> Additionally, the interests of judicial economy are furthered by an embrace of pendent personal jurisdiction, preventing the disaggregation of related claims to be litigated separately.<sup>123</sup>

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Newport News Division could exercise personal jurisdiction over the defendants as to the RICO claims consistent with the Fifth Amendment.” (footnotes omitted) (quoting *ESAB Grp., Inc. v. Centricut, Inc.*, 126 F.3d 617, 627 (4th Cir. 1997))).

120. *Action Embroidery Corp. v. Atl. Embroidery, Inc.*, 368 F.3d 1174, 1180 (9th Cir. 2004); *see also* *United States v. Botefuhr*, 309 F.3d 1263, 1272–73 (10th Cir. 2002) (discussing pendent personal jurisdiction); *Robinson Eng’g Co. Pension Plan & Tr. v. George*, 223 F.3d 445, 449–50 (7th Cir. 2000) (discussing supplemental personal jurisdiction); *ESAB Grp.*, 126 F.3d at 628–29 (deciding that the court had authority to decide a case under the doctrine of pendent personal jurisdiction); *IUE AFL–CIO Pension Fund v. Herrmann*, 9 F.3d 1049, 1056–57 (2d Cir. 1993) (discussing pendent personal jurisdiction); *Oetiker v. Werke*, 556 F.2d 1, 4–5 (D.C. Cir. 1977) (discussing district court discretion to dismiss pendent claims); *Robinson v. Penn Cent. Co.*, 484 F.2d 553, 555–56 (3d Cir. 1973) (discussing district court discretion to dismiss pendent claims).

121. This is because most cases filed in federal court involve defendants based in the United States, making personal jurisdiction under a Fifth Amendment regime much easier to establish. *See, e.g.*, Daniel N. Gregoire, *Fifth Amendment Due Process Limitations on Nationwide Federal Jurisdiction*, 61 B.U. L. REV. 403, 403 (1981) (discussing a federal court’s ability to assert personal jurisdiction over U.S. citizens, subject to the Fifth Amendment Due Process Clause).

122. *See, e.g.*, *Wultz v. Islamic Republic of Iran*, 755 F. Supp. 2d 1, 36 (D.D.C. 2010) (discussing how the doctrine of pendent personal jurisdiction “insures against due-process concerns over hauling the defendant into court to defend against [pendent claims], because the defendant is already justifiably hauled in to defend against [other claims with respect to which the Court has original personal jurisdiction]”).

123. One court recently discussed judicial economy and pendent personal jurisdiction:

[T]he overarching circumstances meriting the exercise of pendent personal jurisdiction—“judicial economy, avoidance of piecemeal litigation, and overall

To summarize, it is important to recognize that casting off the constraints of Rule 4(k) does not plunge federal courts into some lawless abyss of global jurisdiction. Rather, there are well-established constitutional principles that will continue to guide federal courts in evaluating the propriety of exercising jurisdiction over non-U.S. defendants. For U.S. defendants over whom the Fifth Amendment will tolerate general jurisdiction, venue doctrine will become the principal constraint against inordinate geographical impositions.

### B. *Venue Doctrine*

Currently, the general venue statute allows a federal district court to hear a case if the defendants all “reside[]” within the same state and at least one of them resides in the district in question or if a “substantial part” of the events or omissions giving rise to the dispute occurred in the district; if neither of these approaches yields a proper venue, the statute lays venue in any district where any defendant would be subject to personal jurisdiction in the action.<sup>124</sup> These provisions are designed to ensure that the district where a case is litigated has a meaningful connection with the dispute. Because the concept of personal jurisdiction is interwoven into the venue statute in various ways, tinkering with personal jurisdiction elsewhere has the potential to impact venue doctrine. Thus, it is critical to examine each of the ways that personal jurisdiction is used within the venue analysis to determine whether the venue statutes would be capable of providing meaningful additional constraints if Rule 4(k) were to be revised in favor of nationwide personal jurisdiction.

The first encounter with personal jurisdiction in the venue context is embedded in the definition of residency. Although natural persons are deemed to reside in the district where they are domiciled<sup>125</sup>—a concept

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convenience of the parties”—counsel in favor of jurisdiction. Judicial economy is better served by having the claims of all plaintiffs heard in this Court where they involve similar legal issues and all arise out of a common nucleus of operative facts relating principally to whether GM’s engine was defective, whether the defect was material or posed an unreasonable safety risk, and when GM became aware of the defect. The alternative to hearing those claims in a single forum is to populate the dockets of up to fifty federal courts with nearly identical legal and factual issues. Additionally, there is an interest in avoiding piecemeal litigation . . . . Finally, the overall convenience of the parties—including Defendant’s—is much better served by having the claims heard in a single forum rather than fifty.

Sloan v. Gen. Motors LLC, 287 F. Supp. 3d 840, 863 (N.D. Cal. 2018) (footnote omitted) (citation omitted).

124. 28 U.S.C. § 1391(b) (2012).

125. *Id.* § 1391(c)(1).

unaffected by personal jurisdiction—entities are deemed to reside in districts where they are subject to the court’s personal jurisdiction in the action.<sup>126</sup> Under the current Rule 4(k) regime, an entity is only subject to personal jurisdiction in a district if the host state’s long-arm statute is satisfied<sup>127</sup> and if the entity has sufficient minimum contacts with the state in which the district is located.<sup>128</sup> In multidistrict states, districts are treated as states for the residency determination, with minimum contacts with a district sufficing to make an entity a resident there.<sup>129</sup> However, if nationwide personal jurisdiction were to become the norm in federal court based on the overhaul of Rule 4(k) proposed above, then this definition of residency could mean that an entity having minimum contacts with the

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126. *Id.* § 1391(c)(2) (“[A]n entity with the capacity to sue and be sued in its common name under applicable law, whether or not incorporated, shall be deemed to reside, if a defendant, in any judicial district in which such defendant is subject to the court’s personal jurisdiction with respect to the civil action in question . . .”).

127. See John P. Lenich, *A Simple Question that Isn’t So Simple: Where Do Entities Reside for Venue Purposes?*, 84 MISS. L.J. 253, 301–02 (2015) (“[W]hile the long-arm statute may not be part of the analysis under § 1391(d), it is part of the analysis under § 1391(c)(2). . . . An entity is normally subject to personal jurisdiction when the state long-arm statute is satisfied and the corporation has sufficient contacts to satisfy the Due Process Clause.”). Because most states explicitly or through judicial interpretation have long-arm statutes that go to the constitutional limit, this is not typically a relevant additional consideration.

128. There has been some debate over whether, in cases where a defendant is subject to nationwide personal jurisdiction based on a federal statute, that renders the defendant a resident in all federal districts. The better view appears to be that § 1391(c)(2) should be read to indicate that personal jurisdiction for purposes of establishing residency is measured by the minimum contacts standards, not by alternate means such as nationwide service of process. See, e.g., *Stickland v. Trion Grp., Inc.*, 463 F. Supp. 2d 921, 927 (E.D. Wis. 2006) (“The legislative history of § 1391(c) and the historical context in which Congress enacted it supports an *International Shoe* minimum contacts reading of the phrase ‘subject to personal jurisdiction.’ Prior to the enactment of § 1391(c), courts determined residency for venue purposes based on amenability to jurisdiction. However, they understood amenability to jurisdiction based on an *International Shoe* analysis regardless of nationwide service of process.”); Rachel M. Janutis, *Pulling Venue up by Its Own Bootstraps: The Relationship Among Nationwide Service of Process, Personal Jurisdiction, and § 1391(c)*, 78 ST. JOHN’S L. REV. 37, 47–48 (2004) (arguing that, read contextually, § 1391(c) means that a corporation resides in a district for venue purposes only if it is subject to personal jurisdiction under the minimum contacts standard of *International Shoe* and not because it is amenable to nationwide service of process).

129. 28 U.S.C. § 1391(d). This Article says “entity,” even though § 1391(d) speaks only of corporations. *Id.* In what may be the result of a congressional drafting oversight, § 1391(d) retains the reference to “corporations” that predates changes made by the Jurisdiction and Venue Clarification Act of 2011, thereby inadvertently leaving the residency of entities in multidistrict states unaddressed. See 14D CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3811.1 (4th ed. 2013) (“Congress’s failure to amend what is now [§] 1391(d) to conform to what it changed in what is now [§] 1391(c)(2) appears to be an oversight.”); *id.* § 3805 (“Section 1391(d) expressly applies only to ‘corporations’ and not to unincorporated associations. . . . The courts appear to reach the commonsense conclusion that [§] 1391(d) should apply to all entities . . .”); Lenich, *supra* note 127, at 266–77.

United States could be regarded as being subject to personal jurisdiction in every judicial district (assuming reasonableness) and thus deemed to reside in all ninety-four federal districts. Under such an understanding, § 1391(b)(1)—which permits venue in any “district in which any defendant resides, if all defendants are residents of the State in which the district is located”<sup>130</sup>—would provide little to no constraint on the array of eligible venues for an action.<sup>131</sup>

But that is not the inevitable approach to venue that would govern were Rule 4(k) to broaden to reflect nationwide jurisdiction. The general venue statute—§ 1391—focuses on district-level contacts for the residency analysis, not on nationwide contacts.<sup>132</sup> Although it is true that under a revised Rule 4(k) a defendant with U.S. contacts would be subject to personal jurisdiction in federal court throughout the United States, provided that it would be reasonable, such nationwide reach is manifestly not the orientation of § 1391. Reading § 1391(c)(2) and § 1391(d) together<sup>133</sup> reveals an intent to use district-level contacts as the basis for identifying the residency of an entity, not to treat the actual fact of susceptibility to personal jurisdiction in a district as dispositive. This explains how it is possible for a defendant to be subject to personal jurisdiction throughout a state but only be “resident” in a particular district within the state: Section 1391(d) instructs that when districts are regarded as separate states, only those districts with which the defendant has minimum contacts may be designated as that defendant’s district of residence.<sup>134</sup> So too once Rule 4(k) is revised to permit personal

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130. 28 U.S.C. § 1391(b)(1).

131. This argument was raised when the Advisory Committee initially took up the proposal to amend Rule 4(k) in 2018. See MINUTES OF ADVISORY COMM. ON CIV. RULES, APRIL 10, 2018, at 29 (2018), [https://www.uscourts.gov/sites/default/files/2018-04-10-cv\\_minutes\\_final\\_0.pdf](https://www.uscourts.gov/sites/default/files/2018-04-10-cv_minutes_final_0.pdf) [<https://perma.cc/D4EE-4DBH>] (“If there are multiple defendants, venue again is no limit if all are entities subject to personal jurisdiction. Other examples may be found, but these suffice to suggest that present venue statutes are not adequate to the task.”); see also Stephen E. Sachs, *How Congress Should Fix Personal Jurisdiction*, 108 NW. U. L. REV. 1301, 1329 (2014) (“If jurisdiction is available nationwide, then these defendants ‘reside’ everywhere—and suits against corporations could be filed in any district, no matter how distant or unfair the forum.”).

132. *Hood v. Cal. Dep’t of Corr.*, No. CIV S-08-0783 MCE GGH P, 2008 WL 1899915, at \*2 (E.D. Cal. Apr. 28, 2008) (“[P]ersonal jurisdiction is a state-wide, not individual district, concept. However, venue concepts are oriented to individual districts.”).

133. See WRIGHT ET AL., *supra* note 129, § 3805 (“This statutory linkage of a defendant entity’s residence with its being subject to personal jurisdiction must be read in conjunction with the ‘multiple district’ provision of [§] 1391(d).”); *id.* § 3811.1 (“Though nothing in [§] 1391(c)(2) expressly discusses the assessment of defendant’s contacts with the forum, [§] 1391(d) does discuss such contacts. And though these are now found in different subsections, the latter was, until 2011, part of [§] 1391(c).”).

134. *Injen Tech. Co. v. Advanced Engine Mgmt., Inc.*, 270 F. Supp. 2d 1189, 1193 (S.D. Cal. 2003) (“[W]hether resolving the issue of personal jurisdiction or the question of corporate

jurisdiction based on nationwide contacts: The residency analysis is focused on district-level contacts; amenability to personal jurisdiction nationally does not bear on the district-level contacts analysis.<sup>135</sup>

Beyond the likelihood that courts would continue to look at district-level contacts to determine the residency of entities under a nationwide personal jurisdiction regime, venue-transfer doctrine would also remain available to relocate cases to more appropriate districts in the event that the plaintiff selected a district lacking any rational connection to the dispute. For example, in a case by a plaintiff from Virginia against a Delaware corporation for wrongdoing that occurred in Texas, one would ordinarily expect the plaintiff to select federal districts in Texas, Delaware, or perhaps Virginia as the place to file the action. If the plaintiff were to file the action in an Alaska federal court instead, although there would be no valid personal jurisdiction objection under the proposed revision to Rule 4(k)—and although one would expect a court to conclude that the Delaware corporation did not reside in the District of Alaska and thus could not be sued there—the defendant could quite readily obtain a transfer of the action to a more appropriate district that furthered the interests of justice and the convenience of the parties and witnesses.<sup>136</sup> Although one could argue that the defendant should not have to go through this, in most cases they will not; plaintiffs are not

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residence for purposes of the venue statute, the district court employs the same framework: it examines ‘minimum contacts.’ The only difference is the scope of the contacts to be examined. In the personal jurisdiction context, the court examines statewide contacts, while for purposes of venue, the court examines only those contacts pertaining to the judicial district.”).

135. WRIGHT ET AL., *supra* note 129, § 3811.1 (“[C]ases in which federal law permits nationwide service of process [presents a fundamental interpretive problem]. To conclude that a defendant entity that is subject to personal jurisdiction in a district because of such a statute automatically ‘resides’ there for venue purposes strikes many as unfair. Doing so essentially creates ‘nationwide venue.’ The problem is interpreting what Congress meant in stating that a corporation is deemed to reside in any district in which it is ‘subject to personal jurisdiction’ in [§] 1391(c)(2). Though nothing in that provision expressly discusses the assessment of defendant’s contacts with the forum, [§] 1391(d) does discuss such contacts. And though these are now found in different subsections, the latter was, until 2011, part of [§] 1391(c). This may give credence to the view that the intent of [§] 1391(c)(2) is to allow venue to be based on personal jurisdiction only if the entity defendant has minimal contacts with the forum to establish jurisdiction as a matter of due process under [*International Shoe*] and its progeny. Under this view, a defendant who is subject to a nationwide service of process provision would not automatically reside in every district for venue purposes.” (footnotes omitted)).

136. 28 U.S.C. § 1404(a). This author does not propose—as Professor Sachs has proposed—that the change-of-venue statute be revised to create a presumption that a case should be transferred in the context of a nationwide personal jurisdiction regime. *See* Sachs, *supra* note 131, at 1339. If a plaintiff’s choice of venue is truly beyond the pale, it would be an abuse of discretion to deny a transfer motion. In other words, leaving to the sound discretion of the district court the decision of whether to transfer an action should be sufficient to protect the respective interests of the parties.

likely to choose wholly inappropriate federal districts in the first instance, particularly in the face of an inevitable and immediate defeat on a transfer motion, if not on a motion to dismiss for improper venue.<sup>137</sup> Better for the plaintiff to choose a federal district that makes sense than to yield the choice to the defendant on a motion to transfer.

For those unconvinced by the analysis presented above or who require additional certainty that a broadening of Rule 4(k) would not inadvertently broaden the general venue statute, a possible—but not necessary—response to loosening up Rule 4(k) would be to revise its definition of residency by linking it explicitly to the jurisdictional reach of a district’s host state. This would require Congress to amend § 1391, which may be too much to expect. Nevertheless, were it so inclined, Congress could confine the range of available venues in a world of nationwide personal jurisdiction by adopting the following changes to § 1391(c)(2):

**§ 1391(c) Residency.**—For all venue purposes . . . (2) an entity with the capacity to sue and be sued in its common name under applicable law, whether or not incorporated, shall be deemed to reside, if a defendant, in any judicial district in which ~~such defendant is subject to the court’s its~~ contacts would be sufficient to subject it to personal jurisdiction with respect to the civil action in question in a court of general jurisdiction in the State where the district is located if that district were a separate State and, if a plaintiff, only in the judicial district in which it maintains its principal place of business . . . .

This language carries forward the intent behind the existing language—that entities be treated as residing in those districts with which they have minimum contacts. Section 1391(d), which refers to personal jurisdiction to define residency for corporations in states with multiple districts, would be redundant in light of the above change and could be abrogated.<sup>138</sup> However, were it retained, it would not require revision, as

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137. The choice-of-law implications associated with transferring from one proper district to another under a nationwide jurisdiction regime will be discussed in Section II.C below.

138. There is evidence that the retention of the provision now found in § 1391(d)—which only covers corporations—was unnecessary in light of the 2012 revisions that resulted in § 1391(c)(2)—which covers all entities and sufficiently provides for the determination of their residency on its own. See Lenich, *supra* note 127, at 266–77 (discussing the congressional history behind the revisions to § 1391 and identifying the gap and conundrum that arises out of Congress’s decision to promulgate § 1391(c)(2) and retain the language of § 1391(d)). This Article’s proposed revision to § 1391(c)(2) makes the redundancy of § 1391(d) absolute.



it currently calls for a state-based analysis (at the district level) of jurisdiction to determine residency.<sup>139</sup>

The other principal incorporation of personal jurisdiction into venue analysis is found in subsection (b)(3)—the so-called “fallback provision”—which provides for venue wherever “any defendant is subject to the court’s personal jurisdiction with respect to such action” if the other preceding provisions fail to provide any venue.<sup>140</sup> Under the proposed nationwide personal jurisdiction regime, defendants having minimum contacts with the United States would be subject to a federal court’s personal jurisdiction in all federal districts, making venue proper in any district under circumstances in which § 1391(b)(3) applies.<sup>141</sup> However, as noted above, untoward results that might be imagined are not likely to happen against the backdrop of the change-of-venue regime imposed by § 1404(a). If Congress remained concerned with the resulting breadth of § 1391(b)(3), it could amend that provision as follows:

**1391(b) Venue in General.**—A civil action may be brought in . . . (3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant’s contacts would be sufficient to ~~is subject it to the court’s~~ personal jurisdiction with respect to such action in a court of general jurisdiction in the State where the district is located.

Again, this revision maintains the intended district-level minimum contacts approach for laying venue under the fallback provision, which would only come into play in disputes arising out of non-U.S. events or omissions involving defendants residing in different states.

There is one other implication for venue doctrine worth mentioning: venue for non-U.S. residents. Under § 1391(c)(3), “a defendant not resident in the United States may be sued in any judicial district.”<sup>142</sup> Because the venue statute fails to provide any geographical protections for non-U.S. residents, under a nationwide personal jurisdiction regime, the principal geographical protection for foreign defendants will come

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139. 28 U.S.C. § 1391(d) (“For purposes of venue under this chapter, in a State which has more than one judicial district and in which a defendant that is a corporation is subject to personal jurisdiction at the time an action is commenced, such corporation shall be deemed to reside in any district in that State within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State, and, if there is no such district, the corporation shall be deemed to reside in the district within which it has the most significant contacts.”).

140. *Id.* § 1391(b)(3).

141. *See* Sachs, *supra* note 131, at 1336 (“[I]f this provision [§ 1391(b)(3)] were left unchanged, nationwide jurisdiction would create a nationwide fallback venue.”).

142. *Id.* § 1391(c)(3).

from the reasonableness prong of the Fifth Amendment jurisdictional analysis. This fact simply reinforces the seriousness with which that analysis should be taken.<sup>143</sup> Further, plaintiffs would be advised to consider carefully which federal district they select in such cases so as not to run afoul of the more robust reasonableness constraints that the Fifth Amendment will impose in the international context. Finally, foreign defendants will have recourse through the change-of-venue statute to relocate their cases to districts that are better connected to the parties and witnesses involved in the action. Thus, there would be no great need to revise § 1391(c)(3) were Rule 4(k) revised as this Article suggests.

Ultimately, under a Fifth Amendment personal jurisdiction regime, residency-based venue under the venue statute should remain confined to those districts with which defendants have minimum contacts. The other basis for laying venue—that a “substantial part” of the events or omissions giving rise to the action occurred in the district—will provide additional locales in which litigating a claim logically follows. Courts have tended not to go so far as to treat any district where harm occurs as qualifying as such a district,<sup>144</sup> meaning that there will remain little risk that a defendant will be amenable to suit in a district where the sole connection is that the plaintiff—wholly through his own actions—happened to have experienced harm or injuries there.<sup>145</sup> Ultimately, by

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143. See discussion *supra* Section II.A.

144. See, e.g., *Wisland v. Admiral Beverage Corp.*, 119 F.3d 733, 736 (8th Cir. 1997) (rejecting the plaintiff’s argument that Wisconsin was a proper forum “because a substantial part of the events giving rise to her damage claims occurred in Wisconsin where she received the majority of her medical treatment” and concluding that “the events giving rise to her action involve the alleged negligence of the defendants in South Dakota, not the nature of her medical treatment in Wisconsin”); *Fedele v. Harris*, 18 F. Supp. 3d 309, 318 (E.D.N.Y. 2014) (“[V]enue determinations based solely on the location of the harm is contrary to Congress’s intent in drafting [§] 1391(b) and the Second Circuit’s directive that the venue analysis should focus on the relevant activities of the defendants.”); *Cold Spring Harbor Lab. v. Ropes & Gray LLP*, 762 F. Supp. 2d 543, 556 (E.D.N.Y. 2011) (“[W]hen a court examines the question of whether venue in a forum is proper, it must focus on where the *defendant’s* acts or omissions occurred.” (quoting *Prospect Capital Corp. v. Bender*, No. 09-CV-826, 2009 WL 4907121, at \*3 (S.D.N.Y. Dec. 21, 2009))); *MB Fin. Bank v. Walker*, 741 F. Supp. 2d 912, 919 (N.D. Ill. 2010) (finding the plaintiff’s “economic harm in Illinois by virtue of its being situated [t]here, d[id] not mean that venue [was] proper in th[e] district”); see also *Gulf Ins. v. Glasbrenner*, 417 F.3d 353, 357 (2d Cir. 2005) (“[F]or venue to be proper, significant events or omissions material to the plaintiff’s claim must have occurred in the district in question . . . . It would be error . . . to treat the venue statute’s ‘substantial part’ test as mirroring the minimum contacts test employed in personal jurisdiction inquiries.” (emphasis omitted)).

145. In what appears to be a minority view, the Ninth Circuit has found that the situs of economic harm—which was distinct from the location where the alleged wrongdoing occurred—sufficed to render a district a proper venue under § 1391(a)(2), the predecessor to § 1391(b)(2). *Fiore v. Walden*, 688 F.3d 558, 587 (9th Cir. 2012) (stating that “the locus of the injury [is] a

applying venue doctrine as described above, meaningful constraints would remain in place to offset the breadth that would arise from a national-contacts jurisdictional regime in federal courts.

### C. Choice of Law Under a Nationwide Jurisdiction Regime

Currently, under *Klaxon Co. v. Stentor Electric Manufacturing Co.*, federal courts apply the choice-of-law rules of their respective host states when deciding what law to apply to state law claims.<sup>146</sup> If personal jurisdiction in federal courts were to become untethered from state court jurisdictional limits, there would be the possibility that the relevant host state would be less closely connected with the dispute than would be the case were minimum contacts with the state the basis for jurisdiction. Further, in a world of nationwide personal jurisdiction, there would be a greater ability for plaintiffs to shop for the most advantageous conflicts principles through their ability to choose from a wider array of available venues.<sup>147</sup> Although these points are well-taken, the concerns reflected in them are overblown.

First, such a potential disconnect between the forum state and the dispute is already a possibility; in cases where jurisdiction is based on in-state service of process or general jurisdiction or where a nationwide class action is involved, the conduct giving rise to a plaintiff's dispute may have occurred in another state, but the forum state's conflicts rules will apply. Courts have not found this to be problematic.<sup>148</sup> What matters is the substance of the conflicts rules that are applied; they can only point to the law of a state that has a significant connection with the dispute to

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relevant factor' in making this determination" of where a substantial part of the events giving rise to the claim occurred and that the fact that economic harm was suffered in Nevada was sufficient to establish Nevada as a proper forum (alteration in original) (quoting *Myers v. Bennett Law Offices*, 238 F.3d 1068, 1076 (9th Cir. 2001))), *rev'd on other grounds*, 571 U.S. 277 (2014).

146. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941) ("We are of opinion that the prohibition declared in *Erie* . . . against such independent determinations by the federal courts, extends to the field of conflict of laws. The conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware's state courts." (citation omitted)).

147. This concern was raised in the April 2018 meeting of the Advisory Committee that initially considered proposed revisions to Rule 4(k). See MINUTES OF ADVISORY COMM. ON CIV. RULES, APRIL 10, 2018, at 28 (2018), [https://www.uscourts.gov/sites/default/files/2018-04-10-cv\\_minutes\\_final\\_0.pdf](https://www.uscourts.gov/sites/default/files/2018-04-10-cv_minutes_final_0.pdf) [<https://perma.cc/D4EE-4DBH>] ("Expanding personal jurisdiction could expand a plaintiff's opportunity to choose governing law by picking among the courts that have venue.").

148. See, e.g., *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821–23 (1985) (faulting Kansas for applying its law to the claims of all plaintiffs in a nationwide class action but finding no fault with the use of Kansas conflicts law to make the choice-of-law determination).

comport with the constitutional limits on applicable law.<sup>149</sup> So although the chances that a dispute will be sited in a state other than one whose courts could themselves exercise personal jurisdiction will increase once the federal courts enjoy nationwide personal jurisdiction, the conflicts principles that will be applied will continue to be constrained by the limits of Fourteenth Amendment due process. In any event, as the Court has admonished, “choice-of-law concerns should [not] complicate or distort jurisdictional inquiry”<sup>150</sup> because the two concepts are distinct.

Second, nationwide jurisdiction does not open all federal district courts to hearing all cases. As previously noted, venue doctrine—combined with use of the change-of-venue statutes—limits the number of available district courts to those with a connection to the dispute or to the defendants in the case. Thus, there is no great threat of a free-for-all where some distant federal court in a location with no connection to the dispute would impose some untoward choice-of-law rules in a way that offends the rights of the litigants. Indeed, plaintiffs are already empowered to shop for the most advantageous forum under existing jurisdiction and venue doctrines, with a panoply of choices—state versus federal court, this state versus that state, this district versus another. There is nothing inherently suspect about forum shopping.<sup>151</sup>

What about the fact that with a wider array of options, plaintiffs will be able to shop for a forum with favorable conflict-of-law rules and retain access to those rules—under the *Van Dusen/Ferens* doctrine—post-transfer to another district?<sup>152</sup> If venue statutes are interpreted broadly to permit suit in any district simply because the defendant is subject to jurisdiction nationwide—an interpretation previously rebuffed in this

149. *Allstate Ins. v. Hague*, 449 U.S. 302, 312–13 (1981) (“[F]or a State’s substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.”).

150. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 778 (1984) (“Strictly speaking, however, any potential unfairness in applying New Hampshire’s statute of limitations to all aspects of this nationwide suit has nothing to do with the jurisdiction of the Court to adjudicate the claims. ‘The issue is personal jurisdiction, not choice of law.’ The question of the applicability of New Hampshire’s statute of limitations to claims for out-of-state damages presents itself in the course of litigation only after jurisdiction over respondent is established, and we do not think that such choice-of-law concerns should complicate or distort the jurisdictional inquiry.” (quoting *Hanson v. Denckla*, 357 U.S. 235, 254 (1958))).

151. See Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1682–83 (1990) (“[I]n *Goad v. Celotex Corp.*, the Fourth Circuit noted that ‘[t]here is nothing inherently evil about forum shopping’ . . . .” (second alteration in original) (footnote omitted) (quoting *Goad v. Celotex Corp.*, 831 F.2d 508, 512 n.12 (4th Cir. 1987))).

152. See *Ferens v. John Deere*, 494 U.S. 516, 527 (1990); *Van Dusen v. Barrack*, 376 U.S. 612, 639 (1964).

Article as unwarranted and unlikely<sup>153</sup>—could not a Texas plaintiff file suit in Alaska federal court against a Virginia defendant for a car accident that occurred in Massachusetts, simply to access Alaska’s favorable conflicts rules that could then be taken to wherever the case might subsequently be transferred? Although theoretically possible, the chances of such an eventuality are remote. Conflicts rules among the states fall into a few predictable categories; it is not likely that an irrelevant state’s conflicts principles will be so distinct from those of the other available and more rationally-connected states that plaintiffs will be incentivized to go through such machinations. Further, to the extent that a state is wholly unconnected with a dispute in any way, one could argue that there would be a valid due process objection to the *Klaxon* rule requiring application of that state’s conflicts law. Under *Allstate Ins. v. Hague*,<sup>154</sup> a state’s law cannot apply, consistent with due process, if that would be “arbitrary” or “fundamentally unfair.” Thus, due process protections would trump the pull of the *Erie*-based *Klaxon* doctrine towards applying state conflicts law under such circumstances,<sup>155</sup> likely leading courts to favor application of the conflicts rules of the transferee district instead.<sup>156</sup>

#### CONCLUSION

As the Chief Justice has admonished, “[W]e must engineer a change in our legal culture that places a premium on the public’s interest in speedy, fair, and efficient justice.”<sup>157</sup> Embracing nationwide personal jurisdiction moves the system decidedly in that direction. Contemporary litigation in federal courts is characterized by needless satellite litigation over personal jurisdiction when no actual federal due process concerns

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153. See *supra* Section II.B.

154. 449 U.S. 302 (1981).

155. The Court’s decision in *Klaxon* was based on an application of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941).

156. Under the *Erie* doctrine, countervailing federal interests can overcome a determination that state law should apply under the “twin aims” analysis. See *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 537 (1958) (finding that “countervailing considerations” informed by “the influence—if not the command—of the Seventh Amendment” indicated that the federal court should assign a particular issue to the jury notwithstanding a conflicting state practice of judge-only determinations of that issue). Due process concerns would be the countervailing interest here, analogous to the Court’s determination that the *Klaxon* and *Ferens/Van Dusen* doctrines do not apply when a plaintiff files suit in a district contrary to that agreed upon in a mandatory forum-selection clause. See *Atlantic Marine Const. Co. v. U.S. Dist. Court for Western Dist. of Texas*, 571 U.S. 49 (2013) (“The policies motivating our exception to the *Klaxon* rule for § 1404(a) transfers, however, do not support an extension to cases where a defendant’s motion is premised on enforcement of a valid forum-selection clause. To the contrary, those considerations lead us to reject the rule that the law of the court in which the plaintiff inappropriately filed suit should follow the case to the forum contractually selected by the parties.” (citing *Ferens v. John Deere Co.*, 494 U.S. 516, 523 (1990))).

157. ROBERTS, *supra* note 69.

exist; this would largely be obviated were the Fifth Amendment to become the only relevant limitation on federal court personal jurisdiction. Further, the current rule purporting to constrain the territorial reach of federal courts violates the REA by being a jurisdictional rather than a procedural rule, supplying an additional reason to overhaul Rule 4's jurisdictional provisions. By eliminating federal courts' ties to the territorial reach of their host states, in cases where state courts might not be able to exercise jurisdiction, federal courts that otherwise serve as proper venues would no longer be prevented from opening their doors to claims over which they have subject-matter competence. Principles pertaining to Fifth Amendment due process, as well as considerations accounted for within the venue and change-of-venue doctrines, will serve the interests of defendants well if this change comes about. This Article's hope is that the rule-makers will take seriously the benefits that can derive from moving in this direction and embrace this proposed reform.

