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National Contacts As a Basis for In Personam Jurisdiction over Aliens in Federal Question Suits

In *Pennoyer v. Neff*, the Supreme Court anchored its landmark holding defining the limits of state court jurisdiction in the common law maxim that every sovereign possess exclusive jurisdiction over persons found within its territory. Sixty-eight years later, the Court in *International Shoe Co. v. Washington* reaffirmed its general adherence to this principle, yet moved one step further and empowered the courts of the sovereign to exercise jurisdiction over persons who, if not present within the territory, had certain “minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.”

In applying this rule to federal court jurisdiction over alien defendants in federal question suits, the jurisdictional determination might be expected to focus upon the alien defendant’s “minimum contacts” with the federal forum, namely, the United States. As a general rule, however, absent a special federal rule or statute, federal courts are required under Federal Rule of Civil Procedure 4(e) to confine their inquiry to the defendant’s minimum contacts with the state in which the district court sits. In other words, where process is served

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1. 95 U.S. 714 (1877).
2. 326 U.S. 310 (1945).
3. *Id.* at 316.
4. An alien is defined as a person who is not a resident of the United States. For purposes of this Comment, the term will also embrace corporations incorporated under the laws of a foreign nation, foreign sovereigns, and the agents thereof. See Comment, *The Minimum Contacts Standard and Alien Defendants*, 12 L. & Pol'y INT'L Bus. 783, 784 n.12 (1980). Aliens are still entitled to due process protections. See *Galvan v. Press*, 347 U.S. 522, 530 (1954).
6. The Federal Rules of Civil Procedure expressly provide for service of process on out-of-state defendants who, for example, certain defendants are found within 100 miles of the federal district court where the suit is filed, Fed. R. Civ. P. 4(f), or where a suit involves the condemnation of property, Fed. R. Civ. P. 71A(d)(3)(i). See also Fed. R. BANKR. P. 111.
pursuant to a state statute as incorporated by rule 4(e), only a state contacts inquiry is permitted. Although a few district courts have conducted a national contacts inquiry, the cases are rare and infrequently followed. The vast majority of federal courts that have considered aggregating a defendant's national contacts have declined in the absence of an enabling federal statute or rule. As a result, an alien defendant whose contacts are scattered throughout more than one state can conceivably escape federal court jurisdiction where a defendant either lacks sufficient contacts with any one state to meet the minimum contacts requirement as set forth in International Shoe, or is not amenable to service of process under a state long-arm statute pursuant to Federal Rule of Civil Procedure 4(e).

This Comment contends that federal courts should be permitted to aggregate the national contacts of alien defendants to determine in personam jurisdiction in federal question suits. Under this arrangement,

incorporated by rule 4(e), a federal court is forced to look to the state in which the district is located to determine whether jurisdiction may be asserted over an out-of-state defendant; see also 2 J. Moore, J. Lucas, H. Fink & C. Thompson, Moore's Federal Practice ¶ 4.22[3] (2d ed. 1981) [hereinafter cited as J. Moore].

9. See infra text accompanying notes 41-62.


Since an alien person or corporation may lack either a residence or a principal place of business in the United States, it is possible that no state will exist with which it has “minimum contacts” sufficient to support a district court’s exercise of personal jurisdiction. For a more detailed discussion of this immunity-by-diffusion phenomenon, see infra text accompanying notes 33-37.

12. The scope of this Comment is confined to federal question suits involving alien defendants, a group that warrants special treatment for two reasons. Their transient presence in the United States: (1) enables them on occasion to escape federal jurisdiction by broadly dispersing their contacts, and (2) reduces the likelihood that they will harbor a strong forum preference within the United States. The special alien venue statute, 28 U.S.C. § 1391(d) (1976), indicates congressional recognition of this need for special treatment.

This Comment does not advocate a national contacts inquiry in federal diversity suits. Diversity suits involve state claims. Thus, state legislatures properly determine the jurisdictional reach of federal courts since the matter in controversy involves state policy and arises under state law.

Chief Justice Marshall set forth the rationale underlying federal diversity jurisdiction in Bank of the United States v. Deveaux:

“[H]owever true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the Constitution itself either entertains apprehensions on this subject, or views with such
the territorial borders of the state in which a federal court sits would not limit the “minimum contacts” inquiry in suits involving alien defendants. Part I of this Comment examines the current federal jurisdictional framework with particular emphasis on its mechanics, the problems resulting from state-determined federal jurisdiction, and the current limited use of the national contacts doctrine. Part II offers a proposal for incorporating the national contacts doctrine into the federal jurisdictional scheme. Part III presents an analysis of the proposal’s mechanics, its underlying policy rationale, and the possible effect of its adoption on the enforcement of judgments abroad and on foreign commerce within the United States.

I
CURRENT JURISDICTIONAL PRACTICE IN FEDERAL QUESTION SUITS INVOLVING ALIEN DEFENDANTS

A. Mechanics

Generally, before a court can exercise personal jurisdiction over the parties to a dispute, three requirements must be met. First, the parties to a dispute must be notified of the judicial proceeding. Notice must be reasonably calculated to apprise all interested parties of the proceeding. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

Second, the court must have personal jurisdiction over the parties. Personal jurisdiction refers to the court’s power to adjudicate a dispute between two or more parties and enforce the ensuing judgment. Therefore, before a court can exercise jurisdiction, the defendant must be amenable to service of process under the applicable state or federal service provision, and have minimum contacts with the forum such that maintenance of the suit does not offend traditional notions of fair play and substantial justice. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

Finally, the court must have subject matter jurisdiction over the matter in controversy. Service of process, personal jurisdiction, and subject

indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.

9 U.S. (5 Cranch) 61, 87 (1809).

This statement does not suggest a reason for extending the federal courts’ in personam power beyond that of the state courts where a state claim is at issue. The Second Circuit also acknowledged the policy distinction between diversity and federal question suits in Arrowsmith v. United Press Int'l, 320 F.2d 219, 228 n.9 (2d Cir. 1963): “[S]uffice it to say that the considerations favoring the overriding of state policy would be far more persuasive [in a federal question suit] than in an ordinary diversity suit.” For further discussion of a federal standard for service of process in diversity suits, see Comment, Choice of Law in the Federal Courts: Use of State or Federal Law to Determine Foreign Corporations Amenability to Suit, 1964 DUKE L.J. 351; Note, Corporate Amenability to Process in the Federal Courts: State or Federal Jurisdictional Standards?, 48 MINN. L. REV. 1131 (1964).

13. Notice must be reasonably calculated to apprise all interested parties of the proceeding.


14. Personal jurisdiction refers to the court’s power to adjudicate a dispute between two or more parties and enforce the ensuing judgment. Therefore, before a court can exercise jurisdiction, the defendant must be amenable to service of process under the applicable state or federal service provision, and have minimum contacts with the forum such that maintenance of the suit does not offend traditional notions of fair play and substantial justice. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

15. Subject matter jurisdiction refers to the type of suit a court is competent to hear and is generally determined by the legislature. For example, the federal courts have subject matter jurisdiction over suits involving parties from different states where the matter in controversy exceeds
matter jurisdiction must be authorized by legislative grant in a manner consistent with the Federal Constitution. In federal question suits, personal jurisdiction and service of process are governed by Federal Rule of Civil Procedure 4, which refers to federal statutes or rules or state statutes for guidance, depending upon the nature of the suit and the location of the parties.

Few jurisdictional problems arise in federal question suits where the alien defendant is located within the forum state. Authority for service of process is found either in rule 4(d)(1), 4(d)(3), or a state or federal statute as incorporated by rule 4(d)(7). Where the alien or agent thereof is found within the state, its contacts will in all likelihood be sufficient to support an exercise of personal jurisdiction regardless of whether a state jurisdictional standard is applied under the state statute or a federal jurisdictional standard is applied under a federal statute.

$10,000, 28 U.S.C. § 1332 (1976); suits involving the violation or interpretation of a federal rule, regulation, or statute, 28 U.S.C.A. § 1331 (West Supp. 1981); and suits where the United States is a party, 28 U.S.C. §§ 1345-1346 (1976). Subject matter jurisdiction is not affected by the Federal Rules of Civil Procedure and is not reviewed in this Comment.


17. (d) Summons: Personal service. The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows: (1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling, house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

FED. R. CIV. P. 4(d)(1).

18. (3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

Id. 4(d)(3).

19. (7) Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if the summons and complaint are served in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state in which the district court is held for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state.

Id. 4(d)(7).

20. Where service of process is performed pursuant to a state statute, the subsequent due process inquiry into the defendant's contacts is governed by the 14th amendment. Hence, the scope of the inquiry is confined to the territory of the state in which the suit is filed. Gkiafis v. Steamship Yiosonas, 342 F.2d 546, 549-50 (4th Cir. 1965); Amburn v. Harold Forster Indus., Ltd., 423 F. Supp. 1302, 1309 (E.D. Mich. 1976); Scott Paper Co. v. Scott's Liquid Gold, Inc., 374 F. Supp. 184, 186-87 (D. Del. 1974).

21. Where a wholly federal means of serving process is used, for example under Federal Rules of Civil Procedure 4(d)(1) or 4(d)(3) or a federal statute, the fifth amendment's due process clause governs the contact inquiry. Fraley v. Chesapeake & Ohio Ry., 397 F.2d 1, 4 (3d Cir. 1968).
ute or rule.  

However, where an out-of-state alien defendant is involved and no special circumstances exist, process may be served upon an alien defendant only where such service would be permitted if the suit had been brought in a court of the state in which the district court sits. Thus, the incorporation of state statutes into the Federal Rules of Civil Procedure imposes state legislative and territorial constraints on federal court jurisdiction in federal question suits involving purely federal matters. The problems created by this imposition are considered in the next section.


22. Where the defendant is served within the state, the applicable due process standard is rarely an issue since the defendant's presence is usually attended by other contacts sufficient to support an exercise of personal jurisdiction under the state or federal standard.

23. For a discussion of these circumstances, see infra text accompanying notes 41-62.


Worldwide service of process under the patent statute is available only if the suit is filed in the District of Columbia. 35 U.S.C. § 293 (1976). Plaintiffs who find the District of Columbia filing requirement overly burdensome often attempt service of process on out-of-state alien defendants under a state long-arm statute pursuant to rule 4(e). The rationale underlying the District of Columbia filing requirement is perplexing indeed, except, perhaps, from the standpoint of the Washington, D.C. Bar.

The Sherman Act, 15 U.S.C. § 5 (1976), also contains a limited extraterritorial service provision. It is available only to bring in additional parties. Where the original defendant is served with process pursuant to rule 4(e), the state long-arm statute governs the manner and circumstances under which process may be served.

B. Problems Resulting from State-Determined Federal Jurisdiction

State regulation of federal court jurisdiction in federal question suits results in a doctrinal anomaly. As the Supreme Court noted in *Pennoyer v. Neff*, a fundamental principle of Anglo-American jurisdictional law is that a sovereignty has personal jurisdiction over any party within its territorial limits and may exercise such jurisdiction once the party has been served with process. Courts limited by state statutes, however, are only permitted to serve those defendants who fall within the ambit of the state long-arm statute as governed by the fourteenth amendment's due process clause. As a result of state limitations on jurisdiction, plaintiffs in federal question suits involving alien defendants are denied a domestic forum where the suit is filed in a state that has adopted a conservative long-arm statute or where the alien defendant enjoys immunity by diffusion of contacts among the states.

I. State Long-Arm Statutes

Plaintiffs who file federal claims against out-of-state alien defendants are often required to serve the alien with process pursuant to the state's long-arm statute as incorporated by rule 4(e). If the state in which the plaintiff has filed suit has a restrictive long-arm statute, the alien defendant may be beyond the district court's jurisdictional reach, although within the jurisdictional reach of district courts in states that have adopted more liberal long-arm statutes. For example, the Ninth Circuit in *Wells Fargo & Co. v. Wells Fargo Express Co.*, noted that a plaintiff who files a suit against an alien defendant for patent infringement in Utah will succeed in obtaining jurisdiction, while a plaintiff who files an identical suit against an identical alien defendant in Ne-

26. 95 U.S. 714 (1877).
27. 95 U.S. at 721-22.
29. A state long-arm statute typically enumerates the acts or omissions over which a state court has jurisdiction. A conservative statute excludes certain acts or omissions from the court's jurisdictional reach even though the exercise of such jurisdiction would be permissible under the 14th amendment. *See* Masonite Corp. v. Hellenic Lines, Ltd., 412 F. Supp. 434, 438 (S.D.N.Y. 1976) (New York has not extended long-arm jurisdiction to the outer limits of due process); Escambia Treating Co. v. Otto Candies, Inc., 405 F. Supp. 1235, 1235-36 (N.D. Fla. 1975) (Florida requires contacts which exceed the due process threshold). A liberal long-arm statute, on the other hand, may grant its courts jurisdiction over an exhaustive list of acts and omissions which the state courts subsequently construe as coextensive in breadth with the 14th amendment. *See* Conwed Corp. v. Nortene, S.A., 404 F. Supp. 497, 501 (D. Minn. 1975); Walsh v. National Seating Co., 411 F. Supp. 564, 568 (D. Mass. 1976); *see also* 2 J. Moore, *supra* note 8, ¶ 4.41-1[n] n.48. Some state legislatures explicitly grant the courts such coextensive jurisdictional power. *See* 42 PA. CONS. STAT. ANN. § 5322(b) (West 1981); CAL. CIV. PROC. CODE § 410.10 (West 1973); *see also* 2 J. Moore, *supra* note 8, ¶ 4.41-1[n], n.51.
30. *See supra* note 11 and *infra* text accompanying notes 33-37.
31. 556 F.2d 406 (9th Cir. 1977).
vada will fail where the plaintiff's case for jurisdiction rests on injuries occurring within the state caused by the defendant's activities outside the state.\textsuperscript{32} Hence, the unfortunate plaintiff who finds herself the victim of her state's conservative long-arm statute is left with two alternatives. She may either prosecute the suit in the courts of the alien defendant's country of origin where her claim may not be judicially cognizable, or forego the assertion of her rights. Few plaintiffs likely possess either the conviction or the financial resources necessary to pursue the former course. The latter course of action, or perhaps more appropriately, inaction, satisfies even fewer aggrieved parties.

2. Immunity by Diffusion

Under the current scheme, a plaintiff in a federal question suit may also be denied a forum where the alien defendant enjoys immunity by diffusion. This phenomenon occurs when an alien defendant, particularly a corporation, has substantial contacts with the nation as a whole, yet lacks sufficient contacts with any one state for the exercise of jurisdiction.\textsuperscript{33} For example, where an alien corporation manufactures a product in violation of a federal patent,\textsuperscript{34} trademark, or copyright law, a broad dispersion of its product over the fifty states could conceivably result in the unavailability of a forum simply because each state makes up only a fraction of the substantial nationwide market for the alien's product.\textsuperscript{35} In \textit{Velandra v. Regie Nationale des Usines Renault}, the alien defendant managed to escape the federal court's jurisdiction under the Michigan long-arm statute, even though the defendant had imported automobiles worth nearly $100,000 into Michigan alone.\textsuperscript{36} Among the factors the court considered in its jurisdictional calculus were the "number and value of sales within the state [and] the percentage of total output within the state."\textsuperscript{37} Assuming

\begin{itemize}
  \item \textsuperscript{32} \textit{Id.} at 417. Similarly, in Gkiafis v. Steamship Yiosonis, 342 F.2d 546, 549 (4th Cir. 1965), the court noted that plaintiffs in some states are able to obtain service on alien defendants while such service is unavailable to plaintiffs in federal courts in other states. \textit{See also} Hartley v. Sioux City & New Orleans Barge Lines, 379 F.2d 354, 356 n.2 (3d Cir. 1967).
  \item \textsuperscript{33} The immunity-by-diffusion phenomenon is unique to alien corporations, \textit{see supra} note 4, since domestic corporations will always be subject to suit in either their state of incorporation or the state in which their principal place of business is located.
  \item \textsuperscript{34} For a discussion of the limitations on the service provision in the federal patent statute, 35 U.S.C. § 293 (1976), \textit{see supra} note 24.
  \item \textsuperscript{36} 336 F.2d 292, 298 (6th Cir. 1964).
  \item \textsuperscript{37} \textit{Id.} at 298. The decision suggests that "where only casual sales were made within the state or only a small portion of the manufacturer's production was sold within the state," jurisdiction will not be asserted.
\end{itemize}
Michigan was not the only state in which the defendant marketed its product, a national contacts inquiry would clearly have enhanced the plaintiff’s chances of establishing jurisdiction. State-determined federal jurisdiction, however, barred the court from considering the defendant’s contacts with other states in the federal forum.

A few courts have attempted to overcome the doctrinal anomaly of state-determined federal jurisdiction. The next section discusses the limited application of the national contacts doctrine under the present jurisdictional scheme.

C. Current Limited Application of the National Contacts Doctrine

Federal Rule of Civil Procedure 4(e), which governs federal court jurisdiction over out-of-state defendants in federal question suits, generally sanctions a national contacts inquiry only where authorized by federal statute or rule. A wholly federal means of service of process permits the “minimum contacts” of the defendant to be aggregated nationally for purposes of satisfying the fifth amendment’s due process requirement. These laws, however, apply to only a limited number of federal question matters and often only under special circumstances.

In the absence of a special federal rule or statute, the doctrine has been successfully invoked by plaintiffs in only a handful of federal question cases. These cases can generally be grouped into three categories: where (1) process was served upon the alien defendant while in the forum state under federal rule 4(d)(3); (2) the alien defendant waived its objection to service of process; and (3) the court construed the state long-arm statute in light of the fifth, rather than the fourteenth, amendment.

1. Service Within the Forum State

National contacts of an alien defendant may be considered by the court where an agent of the defendant, usually a corporation, has been served with process in the state where the district court sits. Federal rule 4(d)(3), which authorizes such service, merely prescribes the manner of service. The circumstances under which the defendant may be served are governed by the fifth amendment’s due process clause. Service under rule 4(d)(3) is available, however, only when the alien

38. See supra note 10.
39. See supra note 21.
40. See supra note 24.
defendant is present or has an agent present in the state. In these situations, invocation of the national contacts doctrine becomes both possible and necessary where the defendant's contacts either fall below the constitutional minimum for specific or general jurisdiction,\textsuperscript{42} or above the constitutional minimum but below the threshold set by the state long-arm statute.

\textit{First Flight v. National Carloading Co.},\textsuperscript{43} the decision that fashioned the blueprint for the national contacts doctrine, presented such a situation. In a suit brought under the Interstate Commerce Act,\textsuperscript{44} an agent of the defendant was served with process pursuant to rule 4(d)(3), which provides plaintiffs with an exclusively federal means of service. Hence, the federal district court in \textit{First Flight} was permitted to expand the scope of its minimum contact inquiry to the national forum.\textsuperscript{45}

Here, the national contacts doctrine is available only when service is performed upon the defendant or an agent of the defendant within the state in which the district court sits. An inquiry into the defendant's national contacts will rarely be necessary in these circumstances, however, since the defendant's physical presence will often be attended by other contacts sufficient to satisfy the state's jurisdictional requirements.

2. \textit{Failure to Challenge Service of Process}

Cases in which the defendant fails to challenge the validity of service of process represent a second instance where the national contacts doctrine has been applied. In \textit{Cryomedics Inc. v. Spembly, Ltd.},\textsuperscript{46} and \textit{Holt v. Klosers Rederi A/S},\textsuperscript{47} process was served pursuant to state long-arm statutes as incorporated by rule 4(e). Both defendants contested the courts' personal jurisdiction, but failed to object to the validity of service of process under the state statutes. The district courts held that contacts between the defendant and the federal forum were sufficient to sustain an exercise of jurisdiction under the fifth amendment's

\textsuperscript{42} The court in Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406 (9th Cir. 1977), distinguished the two jurisdictional standards in the following manner: "If the defendant . . . has sufficient deliberate 'minimum contacts' with the forum state, a court may acquire [specific] in personam jurisdiction over it in actions which arise from forum contacts. If, however, a [defendant's] activities in the forum are so 'continuous and systematic' that the [defendant] may in fact be said already to be 'present' there, it may also be served [under the rule of general jurisdiction] in causes of action unrelated to its forum activities." \textit{Id.} at 413.

\textsuperscript{43} 209 F. Supp. 730, 734 (E.D. Tenn. 1962).


\textsuperscript{45} 209 F. Supp. at 738.

\textsuperscript{46} \textit{Cryomedics Inc. v. Spembly, Ltd.}, 397 F. Supp. 287 (D. Conn. 1975) (patent suit involving a British defendant).

Whether service of process on the parties was valid under the statute, however, was another matter. Valid service is generally conditioned upon the existence of minimum contacts between the defendant and the forum state. Each court tacitly admitted that the absence of minimum contacts between the defendant and the forum state made service of process under the state statute invalid. In both cases the defendants' failure to challenge the validity of service enabled the court to conduct a national contacts inquiry under circumstances which otherwise would have forbidden it.

3. Long-Arm Statutes Construed Under the Fifth Amendment

Service of process pursuant to a liberal state long-arm statute represents a third situation where national contacts have been considered by a court in the absence of a special federal statute. For example, in Engineered Sports Prods. v. Brunswick Corp., a patent suit, the court approved service of process on a European defendant under the state long-arm statute pursuant to rule 4(e), even though the defendant lacked minimum contacts with the forum state. The court reasoned that since the fifth amendment's due process clause governed jurisdiction in federal question cases, only a showing of minimum national contacts would be necessary for a court to exercise jurisdiction where the state long-arm statute's requirements were met. In short, the court interpreted rule 4(e) to permit the use of a state long-arm statute for service of process upon an alien defendant without the fourteenth amendment's restriction on the scope of the minimum contacts inquiry.

The increasing availability of open-ended state long-arm statutes modeled, for instance, along the lines of California's long-arm statute could foreseeably spark a trend among federal courts to open up the due process contacts inquiry to the national forum. Two obstacles,
however, remain. First, a court may not disregard the plain language of the state statutes. Often, they contain elaborate lists of acts that, if performed, subject a party to the court’s jurisdiction. Even in states where courts have construed their long-arm statutes to extend jurisdiction to the limits of due process, jurisdiction may not be exercised where the acts giving rise to the claim do not fall within one of the statutory categories. In states where the long-arm statutes expressly provide for maximum reach, this problem does not arise. Even the language of these statutes, however, will not necessarily lend itself to a construction coextensive with federal due process. The California state long-arm statute, for example, authorizes its courts to exercise jurisdiction “on any basis not inconsistent with the Constitution of this state or of the United States.” Arguably, to serve an out-of-state defendant under this statute in a federal question suit, a plaintiff may still have to demonstrate that the defendant had “minimum contacts” with California. Although the Federal Constitution may not require minimum contacts between a defendant and a forum state, the state constitution may impose such a requirement, particularly in states where the constitution contains a due process provision.

Second, it is questionable whether a federal court may avail itself of the benefits of the state long-arm statute without also importing the limits imposed upon its use by the fourteenth amendment. A number of courts have held that the fifth amendment ceases to govern federal

54. See, e.g., Section 1.03 of the Uniform Interstate and International Procedure Act which has been adopted by several states. It provides:

(a) A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a [cause of action] [claim for relief] arising from the person’s

(1) transacting any business in this state;
(2) contracting to supply services or things in this state;
(3) causing tortious injury by an act or omission in this state;
(4) causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state; [or]
(5) having an interest in, using, or possessing real property in this state; [or]
(6) contracting to insure any person, property, or risk located within this state at the time of contracting.

(b) When jurisdiction over a person is based solely upon this section, only a [cause of action] [claim for relief] arising from acts enumerated in this section may be asserted against him.

13 U.L.A. 461, 466 (1980); see also 2 J. Moore, supra note 8, § 4.41-1(3).

55. See Timberlake v. Summers, 413 F. Supp. 708, 711 (W.D. Okla. 1976); 2 J. Moore, supra note 8, § 4.41-1[1] (“Many other state statutes have been construed to extend jurisdiction to the full constitutional limits, although this cannot be done in disregard of the plain reach of the statutes.”).


58. See supra note 21.

59. See, e.g., CAL. CONST. art. 1, § 7(a).
court jurisdiction the instant a state long-arm statute is invoked under rule 4(e). Use of these statutes would confine the contacts inquiry to the state in which the district court sits. Moreover, the framers of rule 4(e) may have intended to grant the federal courts only those jurisdictional powers enjoyed by the courts of the state in which they sit.

Hence, a plaintiff who relies on the Engineered Sports Prods. rationale to establish jurisdiction should be prepared to demonstrate that the court's assertion of jurisdiction would be: (1) permissible under the language of the statute; (2) not subject to the state constitution's due process requirements; and (3) not inconsistent with the intent of the framers of rule 4(e).

Despite the limited examples presented by these three categories, the vast majority of courts that have considered the national contacts approach have rejected its application in the absence of statutory authority. The next Part advocates uniform application of national contacts as a basis for in personam jurisdiction over aliens in federal question suits.

II

NATIONAL CONTACTS DOCTRINE AS A BASIS FOR IN PERSONAM JURISDICTION

To remedy the problems caused by state-determined federal jurisdiction, federal courts should be permitted to aggregate the national contacts of alien defendants to determine in personam jurisdiction in federal question suits. The mechanics of the doctrine are simple. The United States becomes the relevant forum for determining contact sufficiency under the International Shoe standard in federal question suits involving alien defendants. The due process clause of the fifth amendment represents the only constraint upon a federal court's in per-

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63. See supra note 10.
64. Results of the application of the national contacts doctrine will vary depending on whether the plaintiff seeks to establish specific or general jurisdiction. Specific jurisdiction grants a court the power to adjudicate a controversy involving a defendant who has minimum contacts with the forum where the matter in dispute arises out of such contacts. See Von Mehren & Trautman, supra note 25, at 1123 n.6. The national contacts doctrine shifts the contacts inquiry from the state forum to the national forum, thereby increasing the likelihood that a court can assert jurisdiction over an alien defendant. Where such factors as volume of business, number of employees working in the state, or number of outlets in the state selling defendant's merchandise are included in the court's calculus for determining specific jurisdiction, see International Shoe Co. v.
sonam power where the claim arises under federal law. Most federal courts that have considered the question agree that the applicable due process test under the fifth amendment is whether the defendant has such minimum contacts with the United States that the maintenance of the suit would not offend traditional notions of fair play and substantial justice. This standard is currently used by federal courts in federal question suits where service of process is performed pursuant to extraterritorial service provisions.

While it may be possible under certain circumstances to convince a federal court to conduct a national contacts inquiry in the absence of an enabling statute, uniform application of the national contacts doc-

Washington, 326 U.S. 310, 320 (1975), the size of the forum for purposes of aggregating contacts will matter greatly.

A court may also exercise personal jurisdiction in a suit where defendant's activities in the forum are so "continuous and systematic" that the defendant may in fact be treated as being "present" in the forum, even though the cause of action is unrelated to the defendant's forum activities. See Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 445 (1952). Where general jurisdiction is sought, the advantage to the plaintiff of an enlarged forum for determining "presence" is clear. Where an alien's contacts with the United States meet or exceed the "continuous and systematic" threshold, suits may be brought against the alien in federal court even though "presence" cannot be established in any single state.


68. Conceivably, a court could invoke the national contacts doctrine ad hoc under Federal Rule of Civil Procedure 83. In Petrol Shipping Corp. v. Kingdom of Greece, 360 F.2d 103, 108 (2d Cir.), cert. denied, 388 U.S. 931 (1966), the court fashioned a means of serving process on foreign governments under rule 83 since rule 4 failed to provide for such service.

Arguably, where a state long-arm statute does not provide for service of process on an alien defendant, a federal court may adopt this approach. Rule 83 permits each district court to: "make and amend rules governing its practice not inconsistent with these rules. . . . In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these Rules." Rule 4(f), in addition, permits extraterritorial service of process when authorized by the rules. Read together, these provisions arguably provide for extraterritorial service of process upon alien defendants when conventional means are inadequate.

It is doubtful whether the means employed by the above court to supplement the federal rules could serve as a basis for invoking the national contacts doctrine. First, Petrol Shipping Corp. involved manner of service, not the circumstances where service of process is permitted. Jurisdictional statutes defining the circumstances under which a party may be served circumscribe the
trine in federal question suits involving alien defendants will require structural reform. This reform should be made by amending the Federal Rules of Civil Procedure or by adopting a special alien jurisdiction statute.69

Amendments to the Federal Rules of Civil Procedure are prepared by a special American Bar Association Judicial Committee and submitted to the Supreme Court for approval.70 Congress grants the Court power to adopt and promulgate the rules.71 Congress' capacity to expand the federal courts' in personam power is confirmed by case law,72 treatise73 and the federal rules themselves.74

Congress, of course, has the capacity to provide for extraterritorial service of process upon alien defendants in federal question suits. The

adjudicatory power of a court. Statutes or rules governing manner are designed to ensure that interested parties to an action are adequately apprised of a hearing. These provisions are not intended to limit the court's jurisdictional power. Hence, where the circumstances are proper for jurisdiction, service procedures should always be available. The converse, however, is not true. If the circumstances for service of process on a party do not exist under the federal rules, it is presumed that the framers intended the party to be beyond the court's jurisdiction, regardless of whether he or she was served in the proper manner.

Furthermore, rule 83 only permits procedural modifications not inconsistent with the federal rules. Here, rule 4(e) clearly mandates state governance of the manner and circumstances of service when performed pursuant to a state long-arm statute. Such an inconsistency would seem to render rule 83 inapplicable. Finally, a number of courts have refused to permit a national contacts inquiry unless expressly authorized by federal statute or rule. See supra note 10. Any cavalier construction of the federal rules for purposes of conducting a national contact inquiry where not otherwise permitted might render the subsequently obtained judgment susceptible to collateral attack under rule 60(b)(4). Cf. New England Merchants Nat'l Bank v. Iran Power Generation & Transmission Co., 495 F. Supp. 73, 79 (S.D.N.Y. 1980) (court sanctioned a means of serving process not expressly authorized by federal statute or rule where conventional means of service had proved ineffective). For reasons not unlike those expressed above, New England Merchants Nat'l Bank also fails to provide a basis for the ad hoc use of the national contacts doctrine.

69. Congressional adoption of the national contacts proposal is probably the preferable means of implementation. Adoption would provide the reform with a popular mandate that an amendment to the federal rules would lack. Moreover, clear precedent exists for the radical expansion by Congress of the federal courts' in personam powers. See supra note 7. Although certain amendments to the federal rules have broadened the court's in personam power, they have generally done so only out of a need either to resolve a conflict in the rules or to enhance administrative convenience. See generally 2 J. Moore, supra note 8, ¶ 4.01[23 & 27], 4.32[1-2], 4.42[1]. An amendment to the federal rules, however, would probably prove to be the more expedient alternative.

70. 1B J. Moore, supra note 8, ¶ 0.511 (2d ed. 1981).
72. Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 418 (9th Cir. 1977).
73. 2 J. Moore, supra note 8, ¶ 4.42[2].
74. Rules 4(f) and 71A(d)(3)(i) both provide for extraterritorial service of process under certain circumstances even in the absence of an enabling federal or state statute. See supra note 6. Rule 82, which states that "these rules shall not be construed to extend or limit the jurisdiction of the U.S. District Court or the venue of actions therein," has been interpreted by the Supreme Court as referring only to the subject matter jurisdiction of the federal courts. See Mississippi Publishing Co. v. Murphree, 326 U.S. 438, 445 (1946). See also 2 J. Moore, supra note 8, ¶ 4.42[2].
Supreme Court often has acknowledged Congress' power to make such provision. The numerous federal laws that provide for nationwide service of process are further proof of this authority. Moreover, the adoption of the alien venue statute and the Foreign Sovereign Immunity Act of 1976 evidence a distinct willingness by Congress to provide for the special treatment of aliens in suits brought in federal court.

The next section will attempt to demonstrate that a rejection of state-determined federal jurisdiction in favor of a national contacts inquiry will: (1) assure plaintiffs of a domestic forum where due process requirements are met; (2) enhance plaintiff convenience where more than one forum is available without prejudicing the interests of the alien defendant; and (3) align federal choice of law interests with the jurisdictional reach of its courts. Potential negative repercussions resulting from the application of the national contacts doctrine will also be assessed, particularly the doctrine's effect on enforcement of judgments abroad and on foreign commerce within the United States.

III

POTENTIAL EFFECTS OF A NATIONAL CONTACTS DOCTRINE

A. Availability of a Domestic Forum

Under the current jurisdictional regime, a plaintiff is denied a domestic forum where either the alien defendant's contacts fall short of the threshold set by the state long-arm statute yet satisfy the due process "minimum contacts" requirement, or the defendant's contacts are so scattered throughout the fifty states that the contacts do not meet the minimum threshold in any one state. Adoption of the national contacts doctrine would assure the plaintiff of a domestic forum when the alien defendant's national contacts satisfy the federal due process standard.

In the first instance, all federal district courts under the national contacts doctrine would conduct the same jurisdictional inquiry to determine whether an alien defendant should be haled into court to defend against a federal claim. As a consequence, the two similarly

75. See supra note 67.
76. See supra note 7.
77. 28 U.S.C. § 1391 (1976). The alien venue statute permits an alien to be sued in any district court where jurisdiction over the alien may be exercised.
78. 28 U.S.C. § 1608 (1976). The Foreign Sovereign Immunity Act of 1976 provides for extraterritorial service of process on foreign sovereigns who act in the capacity of a private commercial party. Jurisdiction over such a sovereign may be obtained by an aggregation of the sovereign's contacts with the United States. If Congress decides that national contacts may be aggregated for the purpose of obtaining jurisdiction over a foreign country functioning as a private party, a fortiori, a similar jurisdictional inquiry should be adopted in suits involving private foreign parties functioning as private foreign parties.
situated plaintiffs discussed in the *Wells Fargo & Co.* decision would be treated similarly in their efforts to obtain jurisdiction over similarly situated alien defendants. In the second instance, alien defendants who under the current scheme might escape federal court jurisdiction under the immunity-by-diffusion phenomenon would have their contacts subject to a national inquiry.

**B. Party Convenience**

1. **The Plaintiff**

Adoption of the national contacts doctrine would also generally permit the plaintiff to select a more convenient forum, since the plaintiff could bring suit against an alien in any federal district court as long as the chosen forum did not greatly inconvenience the defendant. In contrast, state-determined federal jurisdiction often fails to afford the plaintiff a convenient forum, even where the provision of such a forum would not inconvenience the alien defendant. Alien corporations based in foreign countries that solicit business in the United States, and occasionally send sales representatives abroad, often do not have a strong preference for litigating in one district over another where jurisdiction is firmly established in some federal court. The principal inconvenience to alien defendants stems from the necessity of hiring American attorneys to defend the suit and from transporting witnesses and evidence that are often located in the defendant's country of incorporation. In the modern age of rapid and inexpensive transportation and communication, these costs will not be markedly affected by the choice of districts, whether the suit is brought in Chicago, New York, or Boston. Moreover, even if the alien defendant's costs are higher, they will still be less than the costs incurred by a plaintiff who because of rule 4(e)'s adherence to state territorial limits, may be forced to bring suit in a distant, albeit domestic, forum.

As an illustration of the additional convenience afforded by the
national contacts approach, consider the hypothetical plight of the California heirs of an American merchant seaman killed aboard a Panamanian steamer docked off New Jersey. Even though the claim filed against the Panamanian steamer corporation would be federal\(^8\) and the alien defendant would lack a forum preference within the United States, under the current jurisdictional scheme the California heirs likely would have to file suit against the alien defendant in the New Jersey federal district court. The absence of minimum contacts between the alien defendant and the state of California would prevent plaintiffs from bringing suit in the most convenient forum, even though that forum choice would pose no substantial burden to defendants.

Under the national contacts approach, suit could properly be brought in a federal district court in California. If the defendant had a legitimate forum preference, he could move for a change of venue.\(^4\) This mechanism allows the court to select a forum on the basis of the relative conveniences of the parties rather than on the basis of defendant's contacts with the state.\(^5\)

2. The Defendant

Constitutional, statutory, and common law safeguards under the current scheme protecting the defendant from unfair treatment are retained under the national contacts doctrine. The due process requirement of "minimum contacts" under *International Shoe* would still have to be met before a court could exercise jurisdiction. The scope of the jurisdictional inquiry would merely be broadened by the adoption of the United States as the relevant forum.\(^6\)

Safeguards also would be afforded the alien defendant by the change of venue statute and the common law doctrine of forum non conveniens. The change of venue statute,\(^7\) designed by Congress to


\(^4\) *See* Engineering Equipment Co. v. S.S. Selene, 446 F. Supp. 706, 710 (S.D.N.Y. 1978) where the court observed that "an alien defendant can rarely prefer one district over another. In any event, such a preference will seldom rise to the level of a constitutional objection to jurisdiction and is more properly vindicated by a transfer pursuant to [the change of venue statute] 28 U.S.C. § 1404(a)."

\(^5\) *See infra* text accompanying notes 87-91.

\(^6\) An identical type of inquiry is now conducted in suits brought under federal laws that provide for nationwide service of process. *See* Wagman v. Astle, 380 F. Supp. 497, 502 (S.D.N.Y. 1974) (even where service of process is made under an extraterritorial service of process statute, due process requires that minimum contacts exist between defendant and the United States for service to be valid); SEC v. Briggs, 234 F. Supp. 618 (N.D. Ohio 1964) (court applied the *International Shoe* fairness standard to defendant's contacts with the United States); 2 J. Moore, *supra* note 8, at ¶ 4.25[3] ("Minimum contacts may be invoked under these [federal nationwide service of process] statutes, however, when extraterritorial service of process is sought on foreign nationals").

allocate suits to the most appropriate or convenient federal forum, allows an alien defendant who would be unduly inconvenienced by defending a suit in a distant forum to move for a change of venue. This motion permits a district court to weigh the inconveniences of the defendant and the plaintiff, and to determine which federal court would be most appropriate for trial. Where, for example, the alien defendant is a large multinational corporation and the plaintiff is a local resident of the district in which the court sits, the presumption would likely be tipped in favor of the plaintiff’s choice of forum. Conversely, where the defendant is a small border enterprise and the plaintiff brings suit in a distant forum to harass the defendant, the court in all likelihood would grant the relief provided under 28 U.S.C. § 1404(a). Experience with section 1404(a) has demonstrated that, on the whole, it is an effective safeguard against plaintiff abuses.

The common law doctrine of forum non conveniens is also available in federal courts. It allows a court to dismiss a suit, even though it has jurisdiction and venue, if there exists another forum significantly more convenient for the parties and witnesses. Here, a court may find the convenience of the alternative forum, particularly for the defendant, outweighs the plaintiff’s traditional privilege of choosing a forum. The defendant must prove, however, that the balance of conveniences “strongly favors” referral to a foreign forum in order to obtain a dismissal. Such a dismissal may be made conditional on the defendant’s willingness to submit to the jurisdiction of a foreign tribunal and to satisfy any judgment ultimately obtained by the plaintiff in such a tribunal.

C. Choice of Law Interest

The national contacts doctrine recognizes that the federal government has a special interest in ensuring that federal law be applied to
controversies involving the violation of a federal law. This special interest is thwarted when the federal jurisdictional reach is defined by state statutes. These statutes reflect the interests each state has in providing a forum for its residents' disputes rather than the policy interests of the federal government.

The potential for divergence of state and federal interests is apparent in the choice of law field. A state may have little interest in ensuring the availability of a forum for the enforcement of a state right when the law of a sister state would likely yield similar results. However, where a federal right is concerned, the federal government's interest in exercising jurisdiction is understandably stronger when the only other available forum is foreign. Relegation of a plaintiff to a foreign court might easily result in a complete loss of remedy where no actionable counterpart to the federal statutory violation exists under the laws of the foreign country. Even where a foreign remedy is available, the prohibitive cost of pressing such a claim would likely have the effect of pricing all but the most affluent plaintiffs out of the legal market. In contrast, the adoption of the national contacts doctrine would assure that if due process requirements are met, the claim could be brought in federal court.

D. Enforcement of Judgments in Foreign Courts

The potential effect of the national contacts doctrine on the enforceability of judgments has been a cause for concern among some legal commentators. They argue that foreign courts who view the aggregation of national contacts as fundamentally unfair will refuse to recognize judgments obtained in actions where the doctrine was invoked to assert jurisdiction.

These courts, absent a treaty, are not bound to recognize judgments obtained in the United States. If a foreign court chooses to enforce an American judgment, it is only out of deference for the principle of international comity, a practice grounded in the respect nations harbor for fairness and global cooperation. Some writers have expressed the fear that a loosening of the jurisdictional requirements necessary to bind alien defendants will jeopardize this mutual respect


98. "Comity" is the principle in accordance with which the courts of one jurisdiction will give effect to the laws and judicial decisions of another, not as a matter of obligation, but out of deference and respect. Hilton v. Guyot, 159 U.S. 113, 163-64 (1895).
and possibly lead foreign courts to refuse to recognize American judgments.\(^9\)

This concern seems largely unwarranted for several reasons. First, countries that have entered into treaties with the United States providing for mandatory recognition of each other's judicial decrees would not be affected by a broadened jurisdictional inquiry.\(^{10}\) Hence, the applicability of this argument is restricted to those cases where execution of a judgment is sought outside of the United States in countries not bound by international treaty. Second, comity is not an issue in suits where a money judgment is sought and is capable of being satisfied in the United States, or where an injunction is sought and its scope of enforcement is confined to the United States. Third, the national contacts doctrine does not strip the jurisdictional inquiry of due process protections; it merely shifts the relevant field of inquiry from the state to the national forum. The same approach is currently used to establish jurisdiction in suits involving the violation of federal statutes that provide for extraterritorial service of process.\(^{11}\) Foreign courts have shown little hostility to the broadened minimum contacts inquiry authorized by these statutes.\(^{12}\) Fourth, a number of foreign courts rely on a substantially lesser showing of defendant contacts to sustain their own grants of jurisdiction. For example, French courts will exercise jurisdiction over an alien corporate defendant solely on the basis of the plaintiff's French nationality.\(^{13}\) It is unlikely that the standard that these courts use to determine the validity of foreign judgments would be higher than the standard they apply to their own judgments. Finally, foreign courts would be reluctant to refuse to enforce American

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99. See supra note 97.

100. The bilateral treaties dealing with international judicial cooperation to which the United States is a party are enumerated in Appendix A to H. SMIT & A. MILLER, INTERNATIONAL COOPERATION IN CIVIL LITIGATION—A REPORT ON PRACTICES AND PROCEDURES PREVAILING IN THE UNITED STATES (1961). See also C. WRIGHT & A. MILLER, supra note 41, at 1133. In light of the recent provisions made by Congress for extraterritorial service of process, e.g., 28 U.S.C. § 1608 (1976) (adopted in 1976), and the transitory nature of the due process balancing test, it seems unlikely that the adoption of a national contacts proposal would impinge upon the prospective validity or application of these treaties.

101. See supra note 86.

102. Although there has been some reaction, it has been mostly in response to the treble damage remedy rather than the extraterritorial service provisions in the federal antitrust laws. See Rahl, INTERNATIONAL APPLICATION OF AMERICAN ANTITRUST LAWS: ISSUES AND PROPOSALS, 2 NW. J. INT'L L. & BUS. 336, 337-46 (1980); COMMONWEALTH NATIONS ADOPT RESOLUTION CRITICIZING U.S. TREBLE DAMAGE JUDGMENTS, [APR.-JUNE 1980] ANTITRUST & TRADE REG. REP. (BNA) No. 963, at A-10 (May 8, 1980).

judgments if only because such refusal might jeopardize the enforce-
ment of their own judgments in American courts. 104 Hence, it is prob-
able that foreign courts that enforced American judgments prior to the
adoption of the national contacts doctrine would continue to enforce
them after its adoption.

E. Foreign Commerce

Some commentators have also suggested that increased suscepti-
bility of alien defendants to suit in the United States through a liberal-
izing of jurisdictional practices might have an adverse effect on the
level of foreign commercial activity in the United States and the treat-
ment by foreign courts of American corporations abroad. 105 Alien cor-
porations, so the argument runs, will choose to withdraw or refrain
from introducing their products on the American market in order to
avoid the risks of being sued in American courts. These commentators
conclude that the national contacts doctrine would increase the likeli-
hood that a court might assert jurisdiction over an alien defendant, and
hence, increase the potential costs of doing business in the United
States.

The national contacts doctrine’s impact on foreign commerce
would be negligible. First, the due process requirement of “minimum
contacts” remains intact. Only those alien corporations whose contacts
reached or exceeded the due process threshold would be susceptible to
lawsuit. Second, no evidence is adduced by the critics to substantiate
or quantify the significance of the doctrine’s impact on foreign com-
merce. However, assuming that there is a net reduction in commercial
activity, it is not clear whether such a result is undesirable. Alien de-
fendants who avail themselves of the benefits of the American market
should expect to bear the cost of civil liability when their conduct vio-
lates federal law. If the alien entrepreneur concludes that the potential
liability for damages arising from commerce with the United States ex-
ceeds his prospective profit, perhaps both he and the American con-
sumer are better off without such a commercial exchange. Civil
liability merely forces an enterprise to internalize the costs otherwise
borne by innocent consumers. Where access to the courts is enhanced
within the parameters of due process, the efficiency of the internaliza-
tion process is improved 106 consistent with “traditional notions of fair

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104. The principle of comity rests on the expectation of reciprocity of enforcement. See Com-
ment, supra note 4, at 819.
105. See supra note 97.
1974); see also Spence, Consumer Misperceptions, Product Failure, and Product Liability, 44 Rev.
play and substantial justice."

It is also improbable that foreign courts, in response to the national contacts doctrine, would retaliate by subjecting U.S. corporations to vindictive exercises of jurisdiction. As pointed out earlier, some countries already have less stringent requirements for jurisdiction than under the new proposal. The retaliatory motive of these countries would be mysterious, indeed. Moreover, for such a backlash to occur, foreign courts would have to set up separate jurisdictional standards for American defendants as distinct from all other defendants. A defense of such practice in a court of law would be difficult to maintain consistent with contemporary principles of western jurisprudence.

CONCLUSION

The adoption of the national contacts doctrine would assure plaintiffs of a domestic forum in federal question suits involving alien defendants where due process requirements are met. The national contacts approach also would enhance party convenience and align the federal jurisdictional reach with its underlying choice of law policy. Its projected adverse effect on the enforcement of judgments abroad and foreign commerce within the United States lacks convincing empirical and theoretical support.

These policy considerations and the special federal treatment accorded aliens under the alien venue statute both favor the rejection of state-determined federal jurisdiction and suggest the means by which it might be effected. An appropriate amendment to either the Federal Rules of Civil Procedure or the federal jurisdiction statutes would, however, do more than merely reconcile the inconsistency in treatment of alien defendants in federal question suits. It would also begin to bring about a harmony between the jurisprudential principles laid down in Pennoyer and revised in International Shoe, and the current practice of federal courts in determining jurisdiction.

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108. See supra note 103 and accompanying text.
109. 28 U.S.C. § 1391 (1976); see supra note 77.
110. 95 U.S. 714 (1877).
111. 326 U.S. 310 (1945).

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