THE BANKRUPTCY OF DUE PROCESS: NATIONWIDE SERVICE OF PROCESS, PERSONAL JURISDICTION AND THE BANKRUPTCY CODE

JACKIE GARDINA*

INTRODUCTION

It is well settled that when a federal court is exercising its diversity jurisdiction, it must look to the state's long arm statute and the limitations contained in the Fourteenth Amendment to determine the scope of its *in personam* jurisdiction.[1] When the federal courts' subject matter jurisdiction is based on something other than diversity, however, it is the Fifth Amendment due process clause that defines the limits of the courts' personal jurisdiction.[2] The distinction would appear irrelevant given that the two clauses contain nearly identical language.[3] But when Congress has authorized nationwide service of process, as it has done in bankruptcy proceedings,[4] the distinction becomes extremely relevant.[5]

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* Associate Professor at Vermont Law School. I would like to thank Judge Colleen Brown, Michael Hillinger, Pamela Stephens, Peter Teachout, and Bruce Duthu for their comments and insights. I also must acknowledge Alison Share, whose hard-work, diligence, and good humor made the work possible and more enjoyable.

[1] *See, e.g.*, Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 772 (1984) (applying Fourteenth Amendment and New Hampshire's long arm statute to establish in personam jurisdiction); Seifirth v. Helicopteros Atuneros, Inc., 472 F.3d 266, 271 (5th Cir. 2006) (applying Mississippi long-arm statute to establish personal jurisdiction); Neogen Corp. v. Neo Gen Screening, Inc., 282 F.3d 883, 888 (6th Cir. 2002) ("Michigan's 'long-arm' statute extends 'limited' jurisdiction over nonresident corporations pursuant to Mich. Comp. Laws § 600.715 . . . ."); Far W. Capital, Inc. v. Towne, 46 F.3d 1071, 1074 (10th Cir. 1995) (stating in order to obtain personal jurisdiction in diversity action, jurisdiction must be legitimate under laws of forum state and under due process clause of Fourteenth Amendment).

[2] *See, e.g.*, United States v. Swiss Am. Bank, Ltd., 274 F.3d 610, 618 (1st Cir. 2002) (providing example of situation where personal diversity is established by applying due process clause of Fifth Amendment); Peay v. BellSouth Med. Assistance Plan, 205 F.3d 1206, 1211 (10th Cir. 2000) (asserting personal jurisdiction stems from due process clause of Fifth Amendment); SEC v. Carillo, 115 F.3d 1540, 1543 (11th Cir. 1997) (stating when case is in federal court due to federal question, personal jurisdiction is governed by due process clause of Fifth Amendment).

[3] *Compare* U.S. CONST. amend. V ("[N]or be deprived of life, liberty, or property without due process of law . . . ."), *with* U.S. CONST. amend. XIV § 1 ("[N]or shall any State deprive any person of life, liberty, or property without due process of law . . . .").

[4] *See* FED. R. BANKR. P. 7004(d) (providing "[t]he summons and the complaint and all other process . . . may be served anywhere in the United States"); FED. R. BANKR. P. 7004(e) (stating service is sufficient to establish personal jurisdiction "in a civil proceeding arising under the Code, or arising in or related to a case under the Code" as long as "the exercise of jurisdiction is consistent with the Constitution and laws of the United States"); *see also* Muralo Co. v. Synkoloid Asbestos Plaintiffs (*In re* Muralo Corp., Inc.), 295 B.R. 512, 520 (Bankr. D.N.J. 2003) (stating Rule 7004(d) provides for nationwide service of process).

[5] *See* U.S. CONST. amend. XIV § 1 ("[N]or shall any State deprive any person of life, liberty, or property without due process of law . . . ."); U.S. CONST. amend. V ("[N]or be deprived of life, liberty, or property without due process of law . . . ."); FED. R. BANKR. P. 7004(d) (providing "[t]he summons and the complaint and all other process . . . may be served anywhere in the United States"). Although the federal courts agree that the Fifth Amendment due process clause is applicable when the dispute involves federally created rights, they disagree on the required analysis in the absence of a nationwide service of process provision. *See* Cable/Home Commc'n Corp. v. Network Prods. Inc., 902 F.2d 829, 855 n.39 (11th Cir. 1990)

The following scenario provides a snapshot of the significantly different outcomes under the two due process clauses:

> CleanBrite, a small, locally owned cleaning company located in San Francisco, has a contract with SanFran Corporation to clean its office building in the city. The two companies have a contractual dispute regarding payment. SanFran files suit against CleanBrite in federal court in the Southern District of New York.

Assuming that the suit is properly in federal court based on diversity, SanFran can only maintain its suit if the courts in New York can assert personal jurisdiction over CleanBrite. The court would need both to examine the New York long arm statute and to determine whether the assertion of personal jurisdiction over CleanBrite was consistent with the Fourteenth Amendment Due Process Clause.[6] According to the Supreme Court, the due process clause requires that a defendant "not be subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'"[7] Thus, unless SanFran can show that CleanBrite "purposefully availed" itself of New York so that CleanBrite could "reasonably anticipate" being haled into court there, the cases will be dismissed for lack of personal jurisdiction.[8]

The analysis above changes dramatically, however, if SanFran Corporation, instead of filing a diversity suit, files for bankruptcy in the Southern District of New York. In the bankruptcy context, the court has jurisdiction over any cause of action that is related to the underlying bankruptcy, including one based in state law.[9] Using

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(stating state long-arm statute governs when case is in court under federal question and federal statute does not provide service of process method); Handley v. Indiana & Michigan Elec. Co., 732 F.2d 1265, 1269 (6th Cir. 1984) (stating state's proscribed service of process governs in absence of federal statue); Bd. of Trs., v. McD Metals, Inc., 964 F. Supp. 1040, 1045 n.8 (E.D.Va. 1997) (describing disagreement). Because bankruptcy allows for nationwide service of process, the dispute is irrelevant to this Article; *cf.* Omni Capital, Int'l v. Rudolf Wolff & Co., 484 U.S. 97, 107–08 (1987) (noting lack of nationwide service of process provision); Action Embroidery Corp. v. Atlantic Embroidery, Inc., 368 F.3d 1174, 1180 (9th Cir. 2004) (stating when statute allows national service "minimum contacts" is satisfied by showing minimum contacts with United States); Denny's, Inc. v. Cake, 364 F.3d 521, 524 (4th Cir. 2004) (discussing ERISA's nationwide service of process provision).

[6] *See* Mid-Am. Tablewares, Inc. v. Mogi Trading Co., 100 F.3d 1353, 1358–59 (7th Cir. 1996) (stating Wisconsin Supreme Court has held personal jurisdiction exists over defendant when Wisconsin long-arm statute is satisfied and application of long-arms statute does not offend due process under Fourteenth Amendment); Wilson v. Belin, 20 F.3d 644, 646 (5th Cir. 1994) (evaluating personal jurisdiction in diversity suit by examining long-arm statute of forum state and due process clause of Fourteenth Amendment); *In re* Automotive Refinishing Paint, 229 F.R.D. 482, 487 (E.D. Pa. 2005) (stating personal jurisdiction depends on law of forum state).

[7] Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471–72 (1985) (quoting Int'l Shoe Co. v. Wash., 326 U.S. 310, 319 (1945)).

[8] *See id.* at 474 ("[T]he forseeability that is critical to due process analysis . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980))).

[9] *See* 28 U.S.C. § 1334 (2005); Bernstein v. Donaldson (*In re* Insulfoams**,** Inc**.),** 184 B.R. 694, 702 (Bankr. W.D. Pa. 1995) (confirming bankruptcy court has jurisdiction over any cause of action related to underlying

the nationwide service of process provision provided in the Bankruptcy Rules[10] and the current Fifth Amendment due process analysis, the court could assert personal jurisdiction over CleanBrite based on its contacts with the nation as a whole rather than its contacts with the state of New York.[11] In contrast to the Fourteenth Amendment analysis, courts have not construed the Fifth Amendment as creating a constitutional impediment to asserting personal jurisdiction over a domestic defendant.[12]

The Supreme Court has yet to define the parameters of the Fifth Amendment due process clause or sanction the current analysis adopted by the federal courts.[13] Its silence is deafening in circumstances in which Congress has allowed for nationwide service of process.[14] For the most part, courts have unquestionably

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bankruptcy); Mother African Union Methodist Church v. Conference of AUFCMP Church (*In re* AUFCMP Church), 184 B.R. 207, 221 (Bankr. D. Del. 1995) (stating under Bankruptcy Reform Act of 1978 Congress intended to grant bankruptcy jurisdiction over all causes of action related to underlying case).

[10] *See* BANKR. P. 7004(d) (providing that "the summons and the complaint and all other process . . . may be served anywhere in the United States").

[11] *See supra* notes 4–5 and accompanying text. It should be noted that in many bankruptcy proceedings personal jurisdiction is a non-issue. *See* 28 U.S.C. § 1334(e) (providing bankruptcy courts with *in rem* jurisdiction to adjudicate creditor's interests in debtor's estate); Tucker Plastics, Inc. v. Pay 'n Pak Stores, Inc. (*In re* PNP Holdings Corp.), 99 F.3d 910, 911 (9th Cir. 1996) (concluding when creditor files proof of claim in underlying bankruptcy it has consented to jurisdiction of bankruptcy court for all related proceedings); *In re* Hensley, 356 B.R. 68, 74 (Bankr. D. Kan. 2006) (stating court had jurisdiction because creditor filed proof of claim); Preston Trucking Co. v. Liquidity Solutions, Inc. (*In re* Preston Trucking Co.), 333 B.R. 315, 327 (Bankr. D. Md. 2005) (reasoning "bankruptcy court also has jurisdiction over a dispute regarding the proceeds of the claims that are currently within the Court's registry" because it has jurisdiction over WARN Act claims).

[12] *See infra* notes 48–55 and accompanying text; *see also* Mathews v. Diaz, 426 U.S. 67, 78 (1976) (explaining distinction between resident and nonresident aliens for purposes of applying Fifth Amendment); Walter W. Heiser, *Civil Litigation As a Means of Compensating Victims of International Terrorism*, 3 SAN DIEGO INT'L L.J. 1, 7–8 (2002) (noting "foreign defendants are entitled to at least the same level of due process protection with respect to the assertion of personal jurisdiction"); *Civil Procedure—Personal Jurisdiction—Eleventh Circuit Holds That Minimum Contacts with the United States Do Not Automatically Confer Jurisdiction over a Defendant Served via a Nationwide Service of Process Statute*—Panama v. BCCI Holdings, *119 F.3d 935 (11th Cir. 1997)*, 111 HARV. L. REV. 1359, 1362–63 (1998) (discussing two factors to examine when federal court asserts jurisdiction over domestic defendant via nationwide service of process statute).

[13] *See* Omni Capital, Int'l v. Rudolf Wolff & Co., 484 U.S. 97, 103–04 n.5 (1987) (stating court has no reason to consider whether contacts with United States rather than state is sufficient to satisfy Fifth Amendment due process); David Carlebach, *Nationwide Service of Process in State Courts*, 13 CARDOZO L. REV. 223, 235 (1991) ("The Supreme Court has not articulated what the federal due process clause of the fifth amendment mandates insofar as personal jurisdiction is concerned."); *see also*, Robert J. Rosenberg, *Beyond Yale Express: Corporate Reorganization and the Secured Creditor's Rights of Reclamation*, 123 U. PA. L. REV. 509, 522 (stating it is "very difficult" to delimit Fifth Amendment limitations on the bankruptcy power).

[14] *See, e.g.*, Johnson Creative Arts, Inc. v. Wool Masters, Inc., 743 F.2d 947, 950 (1st Cir. 1984) (stating Congress has authority to implement nationwide service of process for questions of federal law without violating due process); Warfield v. KR Entm't, Inc. (*In re* Fed. Fountain), 165 F.3d 600, 602 (8th Cir. 1999) ("Congress has in fact quite frequently exercised its authority to furnish federal district courts with the power to exert personal jurisdiction nationwide.").

accepted congressional power in this area.[15] It is presumed that that Congress has the authority to require a domestic defendant to litigate an action grounded in federal law anywhere in the United States, and due process does not act as a limitation on that authority.[16] What has emerged is essentially a circular argument—courts conclude that when Congress has authorized nationwide service of process the assertion of personal jurisdiction is constitutional because Congress has authorized nationwide service of process.[17]

But Congress' power to legislate is not unlimited and federal courts have an obligation to monitor Congress' exercise of its authority.[18] In creating the current Fifth Amendment analysis, federal courts have fallen woefully short in defining the scope of congressional authority. Courts must develop an analytical framework that recognizes and responds to the varying strengths of the federal interest. Returning to the hypothetical, CleanBrite is being sued on a state law cause of action in a state to which neither CleanBrite nor the contract has any connection. The only reason the court is able to assert personal jurisdiction over the defendant is because the plaintiff filed for bankruptcy.[19] While the existence of the bankruptcy certainly suggests a federal interest not necessarily present in a traditional diversity case, it seems excessive to declare that the federal interest is automatically paramount to CleanBrite's liberty interests protected by the due process clause. In such a scenario

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[15] *See* Med. Mut. of Ohio v. DeSoto, 245 F.3d 561, 568 (6th Cir. 2001) (upholding personal jurisdiction when defendant resides in United States). There has also been very little scholarly discussion in this area. *See generally* Robert C. Casad, *Personal Jurisdiction in Federal Question Cases*, 70 TEX. L. REV. 1589 (1992); Jeffrey T. Ferriell, *The Perils of Nationwide Service of Process in a Bankruptcy Context*, 48 WASH. & LEE L. REV. 1199 (1991); Maryellen Fullerton, *Constitutional Limits on Nationwide Personal Jurisdiction in the Federal Courts*, 79 NW. U. L. REV. 1 (1984–85); Robert A. Lusardi, *Nationwide Service of Process: Due Process Limitations on the Power of the Sovereign*, 33 VILL. L. REV. 1 (1988); Michael W. Silberman, *Far-Reaching Changes: The Future Expansion of Personal Jurisdiction Over Foreign Defendants Under the Federal Rules of Bankruptcy Procedure*, 11 BANKR. DEV. J. 819 (1994–95).

[16] *See* Mariash v. Morrill, 496 F.2d 1138, 1143 n.6 (2d Cir. 1974) (describing Congress's authority in this area as "beyond question"). *But see* Graham C. Lilly, *Jurisdiction Over Domestic and Alien Defendants*, 60 VA. L. REV. 85, 135 (1983) ("Congress's power to vest federal courts with power over persons found anywhere with the nation's borders remains largely unused.").

[17] *See supra* notes 9–12 and accompanying text; Fitzsimmons v. Barton, 589 F.2d 330, 334–35 (7th Cir. 1979) (upholding Congress's authorization of nationwide service of process).

[18] *See* Christopher L. Eisgruber & Lawrence G. Sager, *Why The Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437, 462 (1994) (noting Supreme Court should monitor Congress); *see also* David Gray Adler, *George Bush and the Abuse of History: The Constitution and Presidential Power in Foreign Affairs*, 12 UCLA J. INT'L L. & FOREIGN AFF. 75, 137 (2007) ("The Framers, it will be recalled, viewed the judiciary as an institution to 'check' Congress and the exercise of powers."). *But see* Richard E. Levy, *New York v. United States: An Essay on the Uses and Misuses of Precedent, History, and Policy in Determining the Scope of Federal Power*, 41 U. KAN. L. REV. 493, 498 (stating court in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 518 (1985), held framers did not intend for Supreme Court to monitor Congress's power).

[19] *See* Edward S. Adams & Rachel E. Iverson, *Personal Jurisdiction in the Bankruptcy Context: A Need for Reform*, 44 CATH. U. L. REV. 1081, 1082 (1995) ("Jurisdiction in bankruptcy cases is idiosyncratic, due to its derivation."); Louis M. Solomon, *International Comity at the Crossroads: Practical Implications and Public Policy Challenges*, 1 N.Y.U. J. L. & BUS. 269, 271 (2004) ("U.S. creditors have quite recently attempted to invoke the jurisdiction of domestic bankruptcy courts by filing involuntary bankruptcy petitions.").

courts should consider the nature of the claim and its relation to the sovereign's interest in defining the limits of congressional power, not simply the source of the court's jurisdiction or the presence of a nationwide service of process provision.

Because it incorporates both state and federal law, bankruptcy provides a unique framework for deconstructing the current Fifth Amendment analysis.[20] Congress has granted bankruptcy courts a broad jurisdictional range, including claims that arise under the Bankruptcy Code and state law claims with only a tangential relationship to the underlying bankruptcy.[21] To complement the expansive jurisdictional reach of bankruptcy courts, Congress has also inserted liberal venue provisions in the Code, allowing the bankruptcy court in which the initial petition was filed to hear all related proceedings.[22] Within this jurisdictional framework, bankruptcy courts must also ensure that a party is afforded in federal bankruptcy the same protection they would have had under state law if no bankruptcy had ensued.[23] The jurisdictional reach of the courts, coupled with the Supreme Court's concern regarding the unnecessary alteration of the parties' rights, suggests that in bankruptcy the Fifth Amendment balance must be calculated differently.[24]

This Article contends that federal courts must adjust the current Fifth Amendment analysis to better respond to the varying interests at stake. In the bankruptcy context, the nature of the claim being litigated alters the balance under the Fifth Amendment analysis and acts as a limitation on Congress' otherwise broad power to authorize bankruptcy courts to exercise personal jurisdiction based on nationwide service of process. Specifically, when a bankruptcy court resolves a dispute that arises under state law, the federal interest is arguably at its nadir and the defendant's liberty interests protected by the due process clause are at their apex. In such instances, the bankruptcy court is enforcing state substantive rights not a federally-created right, and thus the interests of the sovereign are diminished as are

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[20] *See* Darrel W. Dunham, *Postpetition Transfers in Bankruptcy*, 39 U. MIAMI L. REV. 1, 9 (1984) ("In the bankruptcy setting, only the due process clause of the [F]ifth [A]mendment can limit the federal government.").

[21] *See* 28 U.S.C. § 1334(a) & (b) (2005).

[22] *See* 28 U.S.C. §§ 1408 & 1409 (2005).

[23] *See, e.g.*, Butner v. United States, 440 U.S. 48, 55 (1979) ("[T]he federal Bankruptcy court should take whatever steps are necessary to ensure that the mortgagee is afforded in federal bankruptcy court the same protection he would have under state law if no bankruptcy had ensued."); Valley Forge Plaza Assoc. v. Schwartz, 114 B.R. 60, 62 (Bankr. E.D. Pa. 1990) (finding "debtor in bankruptcy has no greater rights or powers under a contract than the debtor would have outside of bankruptcy"); White Motor Corp. v. Nashville White Trucks, Inc., (*In re* Nashville White Trucks), 5 B.R. 112, 117 (Bankr. M.D. Tenn. 1980) (stating Bankruptcy Code does not give debtor more rights than they would have outside bankruptcy).

[24] *See Butner*, 440 U.S. at 55 ("Property interests are created and defined by state law . . . [u]nless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding."); Sturges v. Crowninshield, 17 U.S. 122, 196 (1819) (holding state insolvency laws are only suspended to extent they conflict with Bankruptcy System provided by Congress); *In re* Lair, 235 B.R. 1, 14 (Bankr. M.D. La. 1999) (discussing propriety of establishing federal rule of equity to supplant state law).

its coercive powers. In these circumstances, the current, one-size-fits-all Fifth Amendment analysis is ill-suited to protect the individual liberty interests at stake.

To lay the groundwork, Part II contrasts the personal jurisdiction analysis that has developed under the Fourteenth Amendment due process clause with the analysis that has emerged under the due process clause of the Fifth Amendment. After comparing the two approaches, Part III sets the stage for discussing due process concerns in bankruptcy with a description of the bankruptcy courts' expansive subject matter jurisdiction and liberal venue provisions. In addition, it exposes the intersection of personal jurisdiction and choice of law, suggesting that courts should consider the affect of the choice of law when balancing the interests involved in the due process analysis. Finally, Part IV addresses the various federal interests at stake in bankruptcy and offers a proposal for balancing those interests with the individual liberty interests that animate due process clause.

I. DUE PROCESS AND PERSONAL JURISDICTION

Despite the nearly identical language of the two amendments,[25] courts have adopted differing approaches to addressing due process considerations under the Fifth and Fourteenth Amendments. Under the Supreme Court's jurisprudence, the Fourteenth Amendment analysis has evolved from one rooted in questions of sovereignty[26] to one focused on individual liberty interests and fairness.[27] In contrast, courts interpreting the Fifth Amendment have remained tied to nineteenth century concepts of sovereignty, paying scant attention to the liberty interests that now dominate the Fourteenth Amendment analysis.[28] The variation in the protection

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[25] *Compare* U.S. CONST. amend. V ("[N]or be deprived of life, liberty, or property without due process of law . . . .") *with* U.S. CONST. amend. XIV § 1 ("[N]or shall any State deprive any person of life, liberty, or property without due process of law . . . .").

[26] *See* Pennoyer v. Neff, 95 U.S. 714, 722 (1877) ("Every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory."); Jonnet v. Dollar Sav. Bank, 530 F.2d 1123, 1132 (3d Cir. 1976) ("Although the Supreme Court in *Pennoyer v. Neff* had acknowledged that the limitations on judicial jurisdictions drew content from the due process clauses, until International Shoe the Court had permitted jurisdiction to be defined more by reference to common law rules than by probing analysis of constitutional precepts.").

[27] *See* Int'l Shoe Co. v. State of Wash., 326 U.S. 310, 316 (1945) (stating lawsuit against defendant not present in forum state must not offend "notions of fair play and substantial justice" under Due Process Clause) (citations omitted); Milliken v. Meyer, 311 U.S. 457, 463 (1940) (recognizing "notions of fair play and substantial justice" are implicit in Due Process Clause); Ins. Corp. of Ir., Ltd. v. Compaigne des Bauxites de Guinee, 456 U.S. 694, 702 (1982) ("The personal jurisdiction requirement recognized and protects an individual liberty interest.").

[28] *See* Johnson Creative Arts, Inc. v. Wool Masters, Inc., 743 F.2d 947, 950 (1st Cir. 1984) (asserting nationwide service to defendant corporation which had no ties to forum state does not offend due process); *see also* Warfield v. KR Entm't, Inc. (*In re* Fed. Fountain), 165 F.3d 600, 602 (8th Cir. 1999) ("In this case, KR is concededly present in the territory of the United States, and the courts of the United States may therefore legally exercise the authority to proceed to judgment against it . . . ."); Wallace v. Milrob Corp. (*In re* Rusco Indus., Inc.), 104 B.R. 548, 552 (Bankr. S.D. Ga. 1989) ("A federal court adjudicating federally created rights and exercising the sovereign power of the United States is not bound by limitations developed under the due process clause of the Fourteenth Amendment, an amendment which by its terms applies only to the fifty states and not to the federal government.").

provided to defendants cannot always be explained or supported by a shift in the court's subject matter jurisdiction or the presence of a nationwide service of process provision. Yet few courts have seriously questioned the current regime.

A. Fourteenth Amendment and Personal Jurisdiction

It is well established that the Fourteenth Amendment's due process clause limits the exercise of personal jurisdiction by the States as well as federal courts sitting in diversity.[29] The Supreme Court's jurisprudence in this area is robust and, for the most part, well known. Nonetheless, it is necessary to set forth the evolution of the current analysis to adequately contrast it with its Fifth Amendment counterpart.

Starting with *Pennoyer v. Neff*, the Court concluded that the limits of the Fourteenth Amendment's due process clause were synonymous with state sovereignty.[30] Pursuant to this so-called sovereignty theory of personal jurisdiction, state courts were prohibited from exercising personal jurisdiction over a defendant located beyond its borders not because doing so was unfair to the defendant, but because of federalism concerns.[31] It wasn't until *International Shoe Co. v. Washington*,[32] that the Court began to associate due process with fairness to the defendant.[33] Under the emerging analysis, the Court became less concerned with geographic boundaries, allowing a state court to exercise personal jurisdiction over a non-resident defendant if he had sufficient contact with the forum.[34]

In subsequent cases, the Court continued to fine-tune its due process test, making fairness rather than sovereignty the cornerstone of the analysis.[35] The Court began to explicitly equate a defendant's liberty interests protected under the due process clause with receiving "fair warning" that a particular activity could subject

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[29] Whether the federal courts are bound by the same restrictions as the State in which they are sitting because of the *Erie* doctrine or congressional acquiescence remains an open question. *See* F.R.C.P. 4, commentary ("State law is still adopted for authorization for extraterritorial service . . . but even if state law is adopted for that purpose, the form of the summons will remain its federal prescription."); United Rope Distribs., Inc. v. Seatriumph Marine Corp., 930 F.2d 532, 535 (7th Cir. 1991) ("Federal courts . . . absorb the 'whole law' of the states, including limitations on personal jurisdiction, except to the extent a national rule requires otherwise.").

[30] *See Pennoyer*, 95 U.S. at 722.

[31] *See id.*

[32] 326 U.S. 310 (1945).

[33] *See id.* at 316.

[34] *See id.* (requiring "minimum contacts" with forum state).

[35] *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985) (noting fairness under due process is established if defendant could predict being haled into courts of forum state);World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297–98 (1980) (stating forum state does not overstep its boundaries within due process clause when "it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State"); Shaffer v. Heitner, 433 U.S. 186, 218 (1977) (Stevens, J. concurring) (stating Due Process Clause requires "actual notice of the particular claim" to be given to defendants and explaining requirement of "fair notice" to "include[ ] fair warning that a particular activity may subject a person to the jurisdiction of a foreign sovereign").

him to the jurisdiction of the court.[36] "Minimum contacts" became a surrogate for adequate notice of the potential location of the suit and a court's assertion of personal jurisdiction in the absence of such notice a violation of the defendant's due process rights.[37]

The most definitive statement regarding the death of the sovereignty theory of personal jurisdiction came in *Insurance Company of Ireland, Ltd. v. Compaigne des Bauxites de Guinee*.[38] There, the Court seemed to sever the connection between state sovereignty and due process all together, declaring that personal jurisdiction "represents a restriction on power not as a matter of sovereignty, but as a matter of individual liberty."[39] With this statement the Court shifted completely the primary focus of the due process analysis from the right of the sovereign to questions of individual rights.[40]

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[36] *See Burger King*, 471 U.S. at 472 (observing "fair warning" requirement, as described in Justice Stevens' concurring option in *Shaffer*, allows defendants to tailor their activities based on degree of predictability that requirement creates in legal system); *World-Wide Volkswagen Corp.*, 444 U.S. at 297 (stating Due Process Clause gives "a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not rend them liable to suit"); *see also* Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702–03 n.10 (1982) (noting restriction on "sovereign power" as seen in *World-Wide Volkswagen Corp.* must be viewed as "ultimately a function of the individual liberty interest preserved by Due Process Clause" and not connected to "federalism concerns").

[37] *See Burger King Corp.*, 471 U.S. at 474 (stating minimum contacts standard is "the constitutional touchstone"); *World-Wide Volkswagen*, 444 U.S. at 291–92 (noting minimum contacts requirement protects defendants from the burdens associated with litigating in a foreign state and "ensure[s] that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system"); Int'l Shoe Co. v. Wash., 326 U.S. 310, 316 (1945) (requiring defendant to have minimum contacts with forum state to be haled into court).

[38] 456 U.S. 694 (1982).

[39] *Id.* at 702.

[40] *See id.* (observing constitutional requirement of personal jurisdiction stems from Due Process Clause and not from Article III); Burstein v. State Bar of Cal., 693 F.2d 511, 515–16 n.8 (5th Cir. 1982) (noting court in *Compaigne des Bauxites de Guinee* "rejected sovereignty as the basis for fourteenth amendment due process limitations on personal jurisdiction"); Bank Atlantic v. Coast to Coast Contractors, Inc., 947 F. Supp. 480, 489 (S.D. Fla. 1996) (confirming *Compaigne des Bauxites de Guinee* stressed requirement of personal jurisdiction derives from Due Process Clause). That is not to say that the sovereign's interests were stripped from the analysis but they became a secondary concern. *See Compaigne des Bauxites de Guinee*, 456 U.S. at 703 n.10 (recognizing resections on sovereign power are "ultimately a function of the individual liberty interest preserved by the Due Process Clause"); *see also* Crawford v. Glenns, Inc., 637 F. Supp. 107, 109 n.2 (N.D. Miss. 1986) (noting concerns of sovereignty are no longer independent of due process but still play significant role in determining if jurisdiction may be asserted). *But see World-Wide Volkswagen*, 444 U.S. at 291–92 (placing no greater weight on individual liberty interests versus sovereign interests). Courts were to consider the state's interests in adjudicating the underlying claim only after it had been determined that the defendant had established sufficient contacts with the forum. *See* Donatelli v. Nat'l Hockey League, 893 F.2d 459, 465 (1st Cir. 1990) (noting court must first examine defendant's contact with forum state before it can consider other personal jurisdiction factors); *see also World-Wide Volkswagen*, 444 U.S. at 292 (observing that "the burden on the defendant" will always be "a primary concern"); *Crawford*, 637 F. Supp. at 110 ("Once minimum contacts have been established, a presumption is raised that jurisdiction in reasonable."). In rare circumstances, however, the Court allowed that a state's interests could be so great as to render the assertion of personal jurisdiction fair even in the absence of the necessary contacts. *See Burger King*, 471 U.S. at 473–74 (stating where defendants intentionally derive benefits "from their interstate activities" it might be "unfair to allow them to escape having to account in other States for consequences that

B. Fifth Amendment and Personal Jurisdiction

Unlike its Fourteenth Amendment counterpart, the Supreme Court's Fifth Amendment jurisprudence is, to put it mildly, undeveloped. On two occasions, the Court has explicitly declined to decide its parameters.[41] As a result, federal courts have struggled to find a coherent analytical framework that responds adequately to the liberty interests protected by due process. Courts rarely acknowledge the concepts of "notice" and "fair warning" that have become the touchstone of the Fourteenth Amendment due process analysis, focusing almost exclusively on issues of sovereignty.[42]

Courts have steadfastly maintained that the Fourteenth Amendment analysis is inapplicable in the Fifth Amendment context.[43] Jurists have argued that that the due process clause of the Fifth Amendment involves a unique federal standard and consequently it would be inappropriate "for a federal court adjudicating federally created rights and exercising the sovereign power of the United States to be bound by limitations developed under the Fourteenth Amendment, which by its own language applies only to the states."[44] As a result, courts are unwilling to place the same constitutional constraints on federal power as the Supreme Court has attached to state authority.

Nonetheless, courts have largely defined the Fifth Amendment limitations by adopting an analytical framework similar to the one developed under the Fourteenth Amendment,[45] modifying it to address the federal interests not necessarily present

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arise proximately from such activities . . . ."); *see also World-Wide Volkswagen Corp.*, 444 U.S. at 292, 294 (stating requirement of minimum contacts is necessary "even if the forum State has a strong interest in applying its law to the controversy" but "State's interest in adjudicating the dispute" is still a relevant consideration).

[41] *See* Omni Capital Int'l v. Rudolf Wolff & Co., 484 U.S. 97, 102–03 n.5 (1987) (deciding not to entertain Fifth Amendment argument); Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113 (1987) (plurality opinion).

[42] *See* F.T.C. v. Jim Walter Corp., 651 F.2d 256 (5th Cir. 1981).

[43] *See, e.g.*, *In re* Auto. Refinishing Paint, 229 F.R.D. 482, 489 (E.D. Pa. 2005) ("Thus, the Fourteenth Amendment's forum state analysis has no bearing on the assessment of minimum contacts in federal question cases under the Fifth Amendment."); Hallwood Realty Partners, L.P. v. Gotham Partners, L.P., 104 F. Supp. 2d 279, 283 (S.D.N.Y. 2000) ("Federal courts of course are not subject to the constraints of the Fourteenth Amendment, which control only state action."); Robert C. Casad, *Personal Jurisdiction in Federal Question Cases*, 70 TEX. L. REV. 1589, 1596 (1992) ("Considerations of importance to Fourteenth Amendment due process . . . are irrelevant in federal question cases.").

[44] 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER & EDWARD H. COOPER, FED. PRACTICE AND PROC. § 1068.1 at 598 (3d ed. 2002). *See* Bd. of Trs. v. McD Metals, Inc., 964 F. Supp. 1040, 1045 (E.D. Va. 1997) (stating many commentators have argued that there is no reason to apply Fourteenth Amendment requirement of minimum contacts to federal question cases); Wallace v. Milrob Corp. (*In re* Rusco Indus., Inc.), 104 B.R. 548, 552 (Bankr. S.D. Ga. 1989) ("A federal court adjudicating federally created rights and exercising the sovereign power of the United States is not bound by limitations developed under the due process clause of the Fourteenth Amendment.").

[45] *See* Republic of Panama v. BCCI Holdings (Lux.) S.A., 119 F.3d 935, 944 (11th Cir. 1997) ("Because the language and motivating policies of the due process clauses of these two amendments are substantially similar, opinions interpreting the Fourteenth Amendment due process clause provide important guidance for

in a diversity case.[46] Unfortunately, the courts' modifications have severely undermined the protections provided by the due process clause. In the Fifth Amendment context, courts remain tied to concepts of sovereignty and power, ignoring the individual liberty interests encompassed within the amendment.[47] While the reasoning differs slightly among courts, they essentially reach the same conclusion—that a federal court does not violate the Fifth Amendment due process clause when it exercises personal jurisdiction over a domestic defendant subject to a nationwide service of process provision.

Some courts rely solely on the sovereignty theory of personal jurisdiction first articulated in *Pennoyer*.[48] These courts contend that the United States is a sovereign power with authority over all persons and property located within its borders.[49] A federal court's exercise of jurisdiction over a resident of the United States is analogous to a state court's exercise of jurisdiction over a resident of the state. Because the defendant is physically present within the relevant territory—the United States—then, by definition, there are no due process concerns.[50] In essence,

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us in determining what due process requires in cases involving nationwide service of process."); Nordberg v. Granfinanciera, S.A. (*In re* Chase & Sanborn Corp.), 835 F.2d 1341, 1345 (11th Cir. 1988) (using due process analysis under Fourteenth Amendment in *International Shoe v. Washington*, 326 U.S. 310 (1945), as guidance); Bamford v. Hobbs, 569 F. Supp. 160, 165–66 (S.D. Tex. 1983) (noting Fourteenth Amendment standards "may be applied to the Fifth Amendment . . . or at least used as guidelines").

[46] Courts have acknowledged that the Supreme Court's Fourteenth Amendment jurisprudence provides some guidance in determining the limits of the Fifth Amendment. *See Panama*, 119 F.3d at 944.

[47] *See, e.g.*, Med. Mut. of Ohio v. DeSoto, 245 F.3d 561, 567 (6th Cir. 2001) ("When, however, a federal court sitting pursuant to federal question jurisdiction exercises personal jurisdiction over a U.S. citizen or resident based on congressionally authorized nationwide service of process provision, that individual liberty interest is not threatened."); Mariash v. Morrill, 496 F.2d 1138, 1143 (2d Cir. 1974) ("[T]he 'minimal contacts' principle does not, in our view, seem particularly relevant in evaluating the constitutionality of in personam jurisdiction on nationwide, but not extraterritorial, service of process."); B.W. Dev. Co. v. John B. Pike & Son, Inc. (*In re* B.W. Dev. Co., Inc.), 49 B.R. 129, 132 (Bankr. W.D. Ky. 1985) ("Pike misperceives the scope and purpose of the minimum contacts doctrine. That doctrine involves the *extraterritorial* assertion of personal jurisdiction by a *state* court.").

[48] *See* United States v. Union Pac. R.R. Co., 98 U.S. 569, 604 (1878) (observing Congress has power to bring before it all necessary parties to an action by process served anywhere in United States); Warfield v. KR Entertainment, Inc. (*In re* Federal Fountain, Inc.), 165 F.3d 600, 602 (8th Cir. 1999) ("In this case, KR is concededly present in the territory of the United States, and the courts of the United States may therefore legally exercise the authority to proceed to judgment against it."); Johnson Creative Arts, Inc. v. Wool Masters, Inc., 743 F.2d 947, 950 (1st Cir. 1984).

[49] *See* Bd. of Trs., Sheet Metal Worker's Nat'l Pension Fund v. Elite Erectors, Inc., 212 F.3d 1031, 1036 (7th Cir. 2000) ("No limitations on sovereignty come into play in federal courts when all litigants are citizens. It is one sovereign, the same 'judicial Power,' whether the court sits in Indianapolis or Alexandria."). *But see* Omni Capital Int'l v. Rudolf Wolff & Co., 484 U.S. 97, 104 (1987) (concluding defendant must have adequate contacts with federal district in which the litigation will occur, and not just with United States as whole); Peay v. Bell South Med. Assistance Plan, 205 F.3d 1206, 1210 (10th Cir. 2000).

[50] *See* Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 442 (1946) (stating Congress can provide for service anywhere in United States); *Wool Masters*, 743 F.2d at 950 n.3 ("If a person is served *within* the territory of the sovereign represented by the issuing court, there is no question that maintenance of the suit against him will not offend traditional notions of fairness."); Driver v. Helms, 577 F.2d 147, 156 (1st Cir.1978) (holding United States does not lose sovereignty when state's border is crossed).

the Fifth Amendment due process clause acts only as a limitation on the extraterritorial scope of federal sovereign power.[51]

Other courts have adopted a form of the "minimum contacts" analysis developed in *International Shoe* and its progeny.[52] Instead of assuming that service within the boundaries of the United States is sufficient to meet due process concerns, these courts ask the additional question of whether the defendant has sufficient minimum contacts with the United States.[53] Although the question mimics the inquiry under the Fourteenth Amendment analysis, it differs dramatically in its definition of the relevant forum. According to these courts, due process requires only minimum contacts between the defendant and the sovereign that has created the court.[54] As a result, domestic defendants properly served within the United States have no basis for challenging personal jurisdiction.[55]

Conspicuously absent from the Fifth Amendment "minimum contacts" test is any discussion of the "fair warning" concept that has become so central to the Supreme Court's Fourteenth Amendment decisions. To the extent courts recognize the notice concerns that are imbedded in the Fourteenth Amendment analysis, they appear to assume that an individual defending against a claim based in federal law

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[51] *See Med. Mut.*, 245 F.3d at 567 ("When, however, a federal court sitting pursuant to federal question jurisdiction exercises personal jurisdiction over a U.S. citizen or resident based on congressionally authorized nationwide service of process provision, that individual liberty interests is not threatened."); *Mariash*, 496 F.2d at 1143 ("[T]he 'minimal contacts' principle does not, in our view, seem particularly relevant in evaluating the constitutionality of in personam jurisdiction on nationwide, but *not* extraterritorial, service of process."); *In re B.W. Dev. Co.*, 49 B.R. at 132 ("Pike misperceives the scope and purpose of the minimum contacts doctrine. That doctrine involves the *extraterritorial* assertion of personal jurisdiction by a *state* court.").

[52] *See* Busch v. Buchman, Buchman & O'Brien Law Firm, 11 F.3d 1255, 1258 (5th Cir. 1994) ("Given that the relevant sovereign is the United States, it does not offend traditional notions of fair play and substantial justice to exercise personal jurisdiction over a defendant residing with the United States."); Sec. Investors Prot. Corp. v. Vigman, 764 F.2d 1309, 1316 (9th Cir. 1985) ("[S]o long as a defendant has minimum contacts with the United States, Section 27 of the Act confers personal jurisdiction over the defendant in any federal district court."); Colonial Realty Co. v. Hirsch, 163 B.R. 431, 433 (Bankr. D. Conn. 1994).

[53] *See In re* Auto. Refinishing Paint Antitrust Litig., 358 F.3d 288, 298 (3d Cir. 2004); Harman Auto., Inc. v. Barrincorp (*In re* Harvard Indus.), 173 B.R. 82, 89 (D. Del. 1994) ("Where the litigation arises out of the defendants' contacts with the forum, 'specific jurisdiction' may exist."); Finova Capital Corp. v. Cote (*In re* Finova Capital Corp.), 358 B.R. 113, 119–20 (Bankr. D. Del. 2006) ("Given that service of process occurred under a federal law that allows for national service of process, rather than a long-arm statute, a showing of minimum contacts within the United States is necessary, rather than minimum contacts within the state of Deleware.").

[54] *See* Wallace v. Milrob Corp. (*In re* Rusco Indus., Inc.), 104 B.R. 548, 551 (Bankr. S.D. Ga. 1989).

[55] *See* Cent. States, Se. & Sw. Areas Pension Fund v. Phencorp Reinsurance Co., 440 F.3d 870, 875 (7th Cir. 2006); Fitzsimmon v. Barton, 589 F.2d 330, 333 (7th Cir. 1999) ("[T]here can be no question that the defendant, a resident of the United States, has sufficient contacts with the United States to support the fairness of the exercise of jurisdiction over by a United States court."); Republic of Panama v. BCCI Holdings (Lux.) S.A., 119 F.3d 935, 945 n.16 (11th Cir. 1997) ("Because the relevant forum under the Fifth Amendment is the United States, this 'purposeful availment' prong of due process will have no application in the case of domestic defendants, who, through their choice of residence or incorporation, have purposefully directed their activities at the United States."). The so-called "national contacts" approach did obtain the support of two Supreme Court Justices in *Stafford v. Briggs*. *See* 444 U.S. 527, 554 (1980) (Stewart, J. dissenting).

is on notice that he could be sued anywhere in the federal system.[56] Thus, under the current analysis, a domestic defendant is deemed to have "fair warning" that he could be sued in any federal court by virtue of his contacts with the United States as a whole.[57]

Noting the identical language of the two amendments, a handful of courts have gone beyond the minimum contacts test and asked the additional question of whether the assertion of personal jurisdiction "would comport with 'fair play and substantial justice.'"[58] This second inquiry mirrors the second prong of the Fourteenth Amendment analysis, requiring the courts to balance the burdens placed on the defendant in distant litigation against the federal interest involved, and plaintiff's interest in obtaining relief in the chosen forum.[59] Because there is a presumption of constitutionality, it is only in rare cases that a defendant will be able to establish that the chosen forum is unconstitutionally burdensome.[60] In practice, this approach offers little additional protection to defendants.

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[56] *See* Securities Investor Protection, Corp. v. Vigman, 764 F.2d 1309, 1316 (9th Cir. 1985) (holding that so long as defendant has minimum contacts with United States, there could be personal jurisdiction); Mariash v. Morrill, 496 F.2d 1138, 1142 (2d Cir. 1974) (noting when federal statute gives nationwide personal jurisdiction to federal courts, defendant only needs to have minimum contacts with United States); Nelson v. Quimby Island Reclamation Dist. Facilities Corp., 491 F. Supp. 1364, 1379 (D. Cal. 1980) (holding that any federal court has in personam jurisdiction as long as defendant has minimum contacts with United States).

[57] *See* Duckworth v. Med. Electro-Therapeutics, 768 F. Supp. 822, 829–30 (D. Ga. 1991) (reasoning "that the defendant has 'purposefully availed' itself of the protection of the federal law," and therefore, has "fair warning that he might be haled into [federal] court there").

[58] *See* Peay v. BellSouth Med. Assistance Plan, 205 F.3d 1206, 1210 (10th Cir. 2000); *Panama*, 119 F.3d at 945; Harman Auto., Inc. v. Barrincorp Indus., Inc. (*In re* Harvard Indus., Inc.), 173 B.R. 82, 90 (Bankr. D. Del. 1994); *see also* E.S.A.B. Group v. Centricut, Inc., 126 F.3d 617, 627 (4th Cir. 1997) (holding there was jurisdiction over defendants because there were sufficient contacts within court's jurisdiction and there was no unfair burden or inconvenience).

[59] *See Panama*, 119 F.3d at 946; Carr v. Pouilloux, S.A., 947 F. Supp. 393, 395 (D. Ill. 1996) (noting defendant must prove "that his liberty interests actually have been infringed"). In *Peay* the court refined the Fourteenth Amendment test to reflect the unique aspects of the Fifth Amendment inquiry. *Peay*, 205 F.3d at 1212. The Tenth Circuit instructed courts to consider the following factors:

> (1) the extent of the defendant's contacts with the place where the action was filed; (2) the inconvenience to the defendant of having to defend in the jurisdiction other than that of his residence of place of business, including (a) the nature and extent and interstate character of the defendant's business, (b) defendant's access to counsel, and (c) the distance from the defendant to the place where the action was brought; (3) judicial economy; (4) the probable situs of discovery proceedings and the extent to which the discovery proceedings will take place outside the state of the defendant's residence or place of business; and (5) the nature of the regulated activity in question and the extent of impact that the defendant's activities have beyond the borders of his state of residence or business." *Id.* Despite the more refined analysis, the *Peay* court went on to note that it will only be in the "highly unusual cases that inconvenience will rise to a level of constitutional concern.

Id.

[60] *See* Bd. of Trs., Sheet Metal Workers' Nat'l Pension Fund v. Elite Erectors, Inc. 212 F.3d 1031, 1037 (7th Cir. 2000) (noting because of "[e]asy air transportation, the rapid transmission of documents, and the abundance of law firms with nationwide practices," it is easier for defendants to litigate across the country);

Regardless of the reasoning employed, the courts all return either implicitly or explicitly to the sovereignty theory of personal jurisdiction, relying on the sovereign's power to assert jurisdiction over individuals within its boundaries.[61] Even courts that acknowledge that the due process clause is intended to protect individual liberty interests suggest that the constitutional balance must be struck differently under the Fifth Amendment.[62] According to these courts, the federal government's interests must be accorded extra weight when it is exercising its sovereign power.[63] Thus, courts presume that Congress has the authority to require a domestic defendant to litigate an action anywhere in the United States and that the exercise of that authority is not limited by the due process clause.

Under the current analysis, the Fifth Amendment does not act as an impediment to the assertion of personal jurisdiction over a defendant based on nationwide service of process. Courts rest the presumption of constitutionality on the assumption that the rights and liabilities of the parties are being decided under a national uniform law and thus national interests are paramount. The federal interests promoted through the assertion of personal jurisdiction appear to unquestioningly outweigh the defendant's due process rights (to the extent such rights exist within the nation's borders).[64]

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see also Hallwood Realty Partners, L.P. v. Gotham Partners, L.P., 104 F. Supp. 2d 279, 286–87 (S.D.N.Y. 2000) ("In the last analysis, the question is whether the burden on PMG of litigating this case in New York is so severe that the exercise of personal jurisdiction over it is arbitrary, shocks the conscience, or offends fundamental principles of ordered liberty . . . ."); Defrancesco v. First Horizon Home Loan Corp., No. 06-0058-DRH, 2006 U.S. Dist. LEXIS 80718, at *5 (D. Ill. 2006) (noting that today it is easier for defendants to litigate across country).

[61] *See* Warfield v. K.R. Ent. (*In re* Fed. Fountain), 165 F.3d 600, 602 (8th Cir. 1999) ("We note, too, that the vindication of federal law principles in a federal court would seemingly always be sufficient to carry the day in favor of the exercise of federal jurisdiction, even if we felt obliged to engage in a balancing enterprise, which, in fact, we do not."); L.D. Brinkman Corp. v. Anderco Carpet Co. (*In re* Brinkman Holdings, Inc.), 310 B.R. 686, 689 (N.D. Tex. 2004) ("Given that the relevant sovereign is the United States, it does not offend traditional notions of fair play and substantial justice to exercise personal jurisdiction over [Anderco], a defendant residing within the United States."); *see also Hallwood Realty*, 104 F. Supp. 2d at 285–86

> [T]he obligation of a citizen served with federal process to the issuing authority, the United States of America, is qualitatively different than that of a person served with process of a state of which that person is not a citizen or resident. Hence, the balance between individual and governmental concerns necessarily differs in this context.

[62] *See Panama*, 119 F.3d at 946 ("[T]he due process concerns of the fifth and fourteenth amendments are not precisely parallel." (quoting Nordberg v. Granfinanciera, S.A. (*In re* Chase & Sanborn Corp.), 835 F.2d 1341, 1345 n.9 (1988))); *Hallwood Realty*, 104 F. Supp. at 286 ("Nationwide service of process provisions in federal statutes reflect Congress' determination that the carrying out of the policies those statutes implement is served by facilitating enforcement without regard to state boundaries.").

[63] *See* E.S.A.B., 126 F.3d at 627 (finding in personam jurisdiction was proper where defendant served under federal statute and where, absent extreme unfairness or inconvenience, jurisdiction comported with Fifth Amendment); Hogue v. Milodon Eng'g, Inc., 736 F.2d 989, 991 (4th Cir. 1984); *see also* Time, Inc. v. Manning, 366 F.2d 690, 694 (5th Cir. 1966) (noting constitutional limitations on federal jurisdiction are not "tested by the same yardstick" as limitations on service of process from state court).

[64] *See* Celotex Corp. v. Rapid Am. Corp. (*In re* Celotex Corp.), 124 F.3d 619, 630 (4th Cir. 1997) (holding where Bankruptcy Rule section 7004 establishes personal jurisdiction over defendant in cases "related to"

II. PERSONAL JURISDICTION IN BANKRUPTCY

But the sovereignty theory of personal jurisdiction does not transfer easily to the bankruptcy context. While bankruptcy law is technically federal law it acts in conjunction with state law. A bankruptcy court will often need to look to state law to define the rights and responsibilities of the debtor and creditors as well as third parties.[65] Moreover, the bankruptcy court's expansive jurisdiction and liberal venue provision allows it to hear disputes that, in the absence of the bankruptcy, could never be heard in a federal court. Given these distinctive features, the current Fifth Amendment due process analysis is ill-suited to protect individual liberty interests in every bankruptcy proceeding.

A. State Law and Bankruptcy Jurisdiction

1. Jurisdictional Framework

To grasp the complexities of the personal jurisdiction question in the context of bankruptcy, it is important to understand the reach of the bankruptcy courts' jurisdiction and the source of the substantive rights encompassed within that jurisdiction. Unlike jurisdiction predicated on a single federal right, the Bankruptcy Code incorporates both federal and state substantive law.[66] In the context of the underlying bankruptcy, courts are able to litigate state law claims that have no foundation in the substantive law of the Bankruptcy Code.[67] Indeed, bankruptcy

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Bankruptcy Code applies, issue of constitutional requirement of minimum contacts with forum state is irrelevant because United States, not state, is exercising its authority); Diamond Mort. Corp. of Ill. v. Sugar, 913 F.2d 1233, 1244 (7th Cir. 1990) (holding as long as nationwide service is established under Bankruptcy Code, constitutional limits of minimum contacts were irrelevant, where sovereign exercising authority over parties was not state, but United States); Michaelesco v. Richard (*In re* Michaelesco), 288 B.R. 646, 652 (D. Conn. 2003) (stating courts have explicitly stated that "'congressional power to authorize nationwide service of process in cases involving the enforcement of federal law is beyond question'" with respect to U.S. residents (quoting Mariash v. Morrill, 496 F.2d 1138, 1143 n.6 (2d Cir. 1974))).

[65] *See* Raleigh v. Ill. Dep't of Revenue, 530 U.S. 15, 20 (2000) (applying federal rule in bankruptcy where state law governs substance of claims to find bankruptcy estate's obligation to state revenue department established under state Code); Butner v. United States, 440 U.S. 48, 54 (1979) (stating general rule is "Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law"); Stellwagen v. Clum, 245 U.S. 605, 613 (1918) (asserting state laws are only preempted where they conflict with federal Bankruptcy Act, finding bankruptcy acts recognize state laws "in certain particulars"); *In re* Roach, 824 F.2d 1370, 1374 (3d Cir. 1987) (noting Bankruptcy Code was drafted to be applied under state law and federal courts cannot disregard interests under state law).

[66] *See, e.g.*, Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co., 127 S.Ct. 1199, 1205 (2007) (recognizing state law often governs substance of claims, thus Congress generally leaves determination of property rights to state law); Citizen's Bank of Md. v. Strumpf, 516 U.S. 16, 19 (1995) (explaining set-off under section 362(a)(7) is question of federal law); *Raleigh*, 530 U.S. at 20 (noting creditors' rights in bankruptcy case arose, substantively, from state law).

[67] *See supra* note 21 and accompanying text; *see also* Lindsey v. Travelers Indem. Co., No. CV 06-609, 2007 WL 841411, at *4–5 (holding bankruptcy court properly exercised jurisdiction over state law breach of contract claim as "related to" bankruptcy case); *Diamond Mort.*, 913 F.2d at 1243 (asserting Bankruptcy

courts have the authority to hear state law claims that may have only a tangential relationship with the bankruptcy.[68] Yet bankruptcy courts have used the nationwide service of process provisions to assert personal jurisdiction over all parties in a bankruptcy proceeding regardless of the source of the substantive right or its relation to the underlying bankruptcy.[69]

The bankruptcy court's authority to hear both state and federal claims is directly linked to its broad subject matter jurisdiction. The federal courts have original and exclusive jurisdiction over all bankruptcy cases.[70] 28 U.S.C. section 1334 provides that "the district courts shall have original and exclusive jurisdiction of all cases under [the Bankruptcy Code]" and that they "shall have original but not exclusive jurisdiction of all civil proceeding arising under [the Bankruptcy Code], or arising in or related to cases under [the Bankruptcy Code]."[71] Congress has authorized the district courts to refer all bankruptcy cases and the underlying proceedings to the bankruptcy courts.[72]

This structure provides the basic framework for the court's jurisdiction over the debtor and its financial affairs.[73] A debtor may commence a bankruptcy case by filing a bankruptcy petition,[74] but the "case," standing alone, is not an adversarial proceeding. Once a bankruptcy petition has been filed, however, parties in interests may invoke the jurisdiction of the bankruptcy court to litigate disputed issues within

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Rules granting nationwide jurisdiction are applied uniformly to bankruptcy and "non-core" proceedings); GEX Ky. Inc. v. Wolf Creek Collieries Co. (*In re* GEX Ky. Inc.), 85 B.R. 431, 434 (Bankr. N.D. Ohio 1987) ("Nowhere does Rule 7004 make a distinction among the classifications of adversary proceedings. Proceedings arising under, arising in or related to a case under Title 11, core and non-core, are all adversary proceedings that received the same treatment under Rule 7004.").

[68] *See* 28 U.S.C. § 1334(b) (2005) ("[D]istrict courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11."); Celotex Corp. v. Edwards, 514 U.S. 300, 307–09 (1995) (pointing to congressional intent to grant bankruptcy court broad jurisdiction through section 1334); Sheridan v. Michels (*In re* Sheridan) 362 F.3d 96, 99 (1st Cir. 2004) (noting broad discretion of district courts to adjudicate proceedings related to bankruptcy cases, and bankruptcy courts' authority to hear all "related-to" proceedings referred to it by district court).

[69] *See Diamond Mort.*, 913 F.2d at 1243 (reading bankruptcy court's exercise of in personam jurisdiction over adversary proceedings to include non-core proceedings along with core proceedings, and recognizing amended bankruptcy jurisdiction rules did not differentiate between them); J.T. Moran Fin. Corp. v. Am. Consol. Fin. Corp. (*In re* J.T. Moran), 124 B.R. 931, 942 (S.D.N.Y. 1991) (stressing nationwide service of process under Bankruptcy Rule 7004(d) pertains to bankruptcy cases and proceedings not arising out of bankruptcy matters); *In re GEX Kentucky, Inc.*, 85 B.R. at 434 (stating "related to" under section1334 be broadly interpreted, and asserting "[p]roceedings arising under, arising in or related to a case under Title 11, core and non-core, are all adversary proceedings that receive the same treatment").

[70] *See* 28 U.S.C. § 1334(a) ("[D]istrict courts shall have original and exclusive jurisdiction of all cases under title 11.").

[71] 28 U.S.C. § 1334(a), (b).

[72] *See* 28 U.S.C. § 157(a) (2005).

[73] *See Edwards*, 514 U.S. at 308 (noting Congress granted jurisdiction to bankruptcy courts on issues connected with bankruptcy estate); *In re* Combustion Engineering, Inc., 391 F.3d 190, 225 (3d Cir. 2004) (discussing Congress' broad jurisdictional grant to bankruptcy court to deal with bankruptcy matters); Marine Iron & Shipbuilding Co. v. City of Duluth (*In re* Marine Iron & Shipbuilding Co.), 104 B.R. 976, 980 (D. Minn. 1989) (stating section 1334 provides court's jurisdictional structure).

[74] *See* 11 U.S.C. § 301(a) (2000).

the bankruptcy case. These proceedings are essentially the equivalent of civil litigation in a non-bankruptcy forum.[75]

Within a bankruptcy case, the courts "have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11."[76] Generally, a proceeding "arising under" title 11 involves a cause of action created or determined by a statutory provision of the Bankruptcy Code.[77] A civil proceeding "arising in" a case under title 11 is one "that [is] 'not based on any right expressly created by Title 11, but nevertheless, would have no existence outside of the bankruptcy.'"[78] When the court's jurisdiction is based on one of these provisions it mimics federal question jurisdiction, allowing a court to adjudicate what are essentially federally created rights.

In contrast to the limitations inherent in a court's "arising under" and "arising in" jurisdiction, courts have broadly defined their "related to" jurisdiction. In *Pacor, Inc. v. Higgins*,[79] the Third Circuit held that a civil proceeding is related to a bankruptcy case when:

> [T]he outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy . . . . An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankruptcy estate.[80]

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[75] *See* FED. R. BANKR. P. 7001–87 (invoking and modifying Federal Rules of Civil Procedure for adversary proceedings); Gaslight Club, Inc. v. Official Creditors Committee, 46 B.R. 209, 211 (D.C. Ill. 1985) (noting bankruptcy courts may hear and determine all core proceedings referred to them or hear non-core proceedings, then submit proposed findings of fact and conclusions of law to district court); Firestone v. Dale Beggs & Assocs. (*In re* Northwest Cinema Corp.), 49 B.R. 479, 480 (D. Minn. 1985) (discussing district court's referral of bankruptcy adversary proceeding for bankruptcy judge to hear and determine); *In re Marine Iron & Shipbuilding Co.*, 104 B.R. at 980 ("These judicial proceedings have the attributes of various stages of civil litigation in nonbankruptcy forums.").

[76] 28 U.S.C. § 1334(b).

[77] *See* Banque Nationale de Paris v. Murad (*In re* Housecraft Indus. USA, Inc.), 310 F.3d 64, 70 (2d Cir. 2002) (holding plaintiff's claims made under sections 548 and 549 invoke substantive bankruptcy rights and therefore arise under title 11); Browning v. Levy, 283 F.3d 761, 772–73 (6th Cir. 2002) (finding claims of successor-in-interest to debtor against non-creditor third party are not "core" proceedings because they do not invoke substantive right created by bankruptcy); Wood v. Wood (*In re* Wood), 825 F.2d 90, 96 (5th Cir. 1987) (stating Congress used phrase "arising under title 11" to mean proceedings created by statutes in title 11).

[78] Valley Historic Ltd. P'ship v. Bank of N.Y., 486 F.3d 831, 835 (4th Cir. 2007) (quoting *Grausz v. Englander*, 321 F.3d 467, 471 (4th Cir.2003) (quoting *Bergstrom v. Dalkon Shield Claimants Trust* (*In re A.H. Robins Co.*), 86 F.3d 364, 372 (4th Cir.1996))). *See* U.S. Brass Corp. v. Travelers Ins. Group, Inc. (*In re* U.S. Brass Corp.), 301 F.3d 296, 306 (5th Cir. 2002) (holding appellants' motion for order pursuant to section 1142(b) constitutes core proceeding because it would not exist outside of bankruptcy arena); Ehrlich v. Am. Express Travel Related Servs. Co. (*In re* Guilmette), 202 B.R. 9, 12 (N.D.N.Y. 1996) (stating jurisdictional basis under "arising in" "includes proceedings existing only inside bankruptcy but which are based on rights not expressly created by title 11").

[79] 743 F.2d 984 (3d Cir. 1984).

[80] *Id.* at 994.

The *Pacor* test, which has been widely adopted,[81] requires neither a certain or likely alteration of the debtor's rights or liabilities; nor does it require a certain or likely impact upon the administration of the bankruptcy estate.[82] Indeed, the mere "possibility of such alteration or impact is sufficient to confer jurisdiction."[83] Under the Third Circuit's pronouncement, even a proceeding that has only a contingent or tangential effect on a debtor's estate will meet the requirements for "related to" jurisdiction.[84]

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[81] *See* Arnold v. Garlock, Inc. 278 F.3d 426, 434 (5th Cir. 2001) ("Within the Fifth Circuit, the test for whether a proceeding properly invokes federal bankruptcy jurisdiction is the same as the Third Circuit's *Pacor* test . . . ."); *see also* Mich. Employment Sec. Comm'n v. Wolverine Radio Co. (*In re* Wolverine Radio Co.), 930 F.2d 1132, 1142 (6th Cir. 1991) (stating *Pacor* test has been accepted); Gardner v. United States (*In re* Gardner), 913 F.2d 1515, 1518 (10th Cir. 1990); Miller v. Kemira, Inc. (*In re* Lemco Gypsum, Inc.), 910 F.2d 784, 789 (11th Cir. 1990); Kaonohi Ohana, Ltd. v. Sutherland, 873 F.2d 1302, 1306 (9th Cir. 1989); Nat'l City Bank v. Coopers & Lybrand, 802 F.2d 990, 994 (8th Cir. 1986) (adopting reasoning behind *Pacor* rationale).

[82] *See In re* Marcus Hook Dev. Park, Inc., 943 F.2d 261, 264 (3d Cir. 1991) (deciding key word of *Pacor* is "conceivable" meaning "[c]ertainty, or even likelihood, is not a requirement"); Hohl v. Bastian, 279 B.R. 165, 176 (W.D. Pa. 2002) (noting *Pacor* test does not require outcome of related to litigation to impact estate); Askanase v. Fatjo, No. H-91-3140, 1993 WL 208682, at *2 (S.D. Tex. Apr. 22, 1993) ("[A]lthough there is a possibility that this suit may ultimately have no effect on the bankruptcy, this court cannot conclude, on the facts before it, that it will have no *conceivable* effect.").

[83] Owens-Ill., Inc. v. Rapid Am. Corp. (*In re* Celotex Corp.), 124 F.3d 619, 626 (4th Cir. 1997).

[84] *See* Sheridan v. Michels (*In re* Sheridan), 362 F.3d 96, 99 (1st Cir. 2004) (discussing broad jurisdiction of federal courts to "adjudicate all proceedings which even tangentially 'aris[e] under,' or are 'related to,' a bankruptcy case . . . ."); Nat'l Union Fire Ins. Co. v. Titan Energy, Inc. (*In re* Titan Energy), 837 F.2d 325, 330 (8th Cir. 1988) ("[E]ven a proceeding which portends a mere contingent or tangential effect on a debtor's estate meets the broad jurisdictional test articulated in *Pacor*."); Griffen v. Rolan, Inc. (*In re* Griffin Services, Inc.), No. B-01-52373C-7W, 2002 WL 31051042, at *3 (Bankr. M.D.N.C. Aug. 29, 2002) (stating federal courts have broadly interpreted "related to" jurisdiction to include contingent and tangential matters). In practice, bankruptcy courts use "related to" jurisdiction to hear "(1) causes of action owned by the debtor which become property of the bankruptcy estate pursuant to 11 U.S.C.A. § 541(a) and (2); and suits between third parties which have an effect on the bankruptcy estate." Celotex Corp. v. Edwards, 514 U.S. 300, 307 n.5 (1995). Examples of the former would include common state-law claims that a debtor has against a third party. *See, e.g.*, N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 56 (1982) (discussing debtor filing state action to recover contract damages for estate); Vacation Vill., Inc. v. Clark County, Nev., 497 F.3d 902, 911–12 (9th Cir. 2007) (stating debtors seek to recover on state law inverse condemnation claims, which was listed property of the estate); Cooper v. Coronet Ins. Co. (*In re* Boughton), 49 B.R. 312, 315 (Bankr. N.D. Ill. 1985) (declaring debtor's cause of action arose prior to bankruptcy and therefore became property of estate). An example of the latter would be a suit by a creditor against a guarantor who would have a right of contribution or indemnity against the debtor. *See, e.g.*, *In re* Kaonohi, 873 F.2d at 1307 (upholding "related to" jurisdiction over third-party action because specific performance remedy in third-party action would reduce damages in breach of contract claim against bankruptcy estate); *In re* Titan, 837 F.2d at 329–30 (holding nondebtor claims against third-party insurance company "related to" bankruptcy under *Pacor* because recovery would reduce liabilities of the estate); Nat'l City Bank of Minneapolis v. Lapides (*In re* Transcolor Corp.), 296 B.R. 343 (Bankr. D. Md. 2003) (stating complaint filed was "third party" claim which bankruptcy court had subject matter jurisdiction because it was "related to" debtor's bankruptcy). As one commentator noted, "[w]hile the basis for subject matter jurisdiction can be quite solid when claims and causes of action that are property of the bankruptcy estate are asserted, the jurisdictional thread can become infinitesimally thin when the nexus to the bankruptcy estate is a potential or 'conceivable' contribution right by a third party against the debtor." Daniel C. Burton, *Related To "Related To" Jurisdiction—The Exercise of Supplemental Jurisdiction By Bankruptcy Courts*, 2006 NORTON ANN. SURV. OF BANKR LAW PART I § 13 (Sept. 2006).

To add an additional wrinkle, some bankruptcy courts have retained their "related to" jurisdiction after the plan of reorganization has been confirmed and, in certain cases, even after the bankruptcy case has been dismissed.[85] Courts have acknowledged, however, that their "related to" jurisdiction is more limited in these circumstances.[86] Nonetheless, it is entirely possible for a bankruptcy court, in the absence of an underlying case, to assert subject matter over a claim and personal jurisdiction over a defendant using nationwide service of process.

Recently, the Ninth Circuit further expanded bankruptcy court jurisdiction to include supplemental jurisdiction.[87] In *Pegasus Gold*, the Ninth Circuit was asked to consider the extent of a bankruptcy courts jurisdiction in disputes that arose post-confirmation between the debtor and the State of Montana, a creditor in the underlying bankruptcy.[88] The bankruptcy trustee and the debtor brought a number of state law contract and tort claims against Montana and Spectrum Engineering Inc., a third party involved solely in the post-confirmation transactions.[89] The State and Spectrum moved to dismiss the complaint alleging that the bankruptcy court lacked jurisdiction[90]

While the Ninth Circuit acknowledged that a bankruptcy courts post-confirmation jurisdiction was necessarily more limited than its pre-confirmation jurisdiction, it nonetheless found that the disputes between the debtor and the State were within its jurisdictional confines.[91] Once the court established that it could exercise its "related to" jurisdiction over the debtor's claims against the State, it

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[85] *See* United States Brass Corp. v. Travelers Ins. Group, Inc. (*In re* U.S. Brass Corp.), 301 F.3d 296, 304 (5th Cir. 2002) (stating Fifth Circuit follows "more exacting" theory, which limits bankruptcy courts' post-confirmation jurisdiction to matters pertaining to implementation or execution of plan); Gordon Sel-Way, Inc. v. United States (*In re* Gordon Sel-Way, Inc.), 270 F.3d 280, 288–89 (6th Cir. 2001) (noting disagreement among courts about scope of bankruptcy courts' post-confirmation jurisdiction). *Compare* Bass v. Denney (*In re* Bass), 171 F.3d 1016, 1025–26 (5th Cir. 1999) (holding bankruptcy court has no jurisdiction after closing of case under 28 U.S.C. § 1334(b), even if one category of 28 U.S.C. § 157(b)(2) is met), *with* Smith v. Commercial Banking Corp. (*In re* Smith), 866 F.2d 576, 580 (3d Cir. 1989) (finding exception to general rule that dismissal of bankruptcy case terminates all adversary proceedings when demanded by fairness and no undue inconvenience involved) *and* Leon v. Couri, No. 98-CV-5028, 1999 WL 1427724 at *3–5 (S.D.N.Y. 1999) (discussing case law supporting existence of jurisdiction after dismissal of bankruptcy case, but noting bankruptcy court declined to exercise jurisdiction). For circumstances in which the court has retained jurisdiction after dismissal, see *Boca Enter., Inc. v. Saastopankkien Keskus-Osake-Pankki (In re Boco Enter.)*, 204 B.R. 407, 412 (Bankr. S.D.N.Y. 1997), *In re Davison*, 186 B.R. 741, 742 (Bankr. N.D. Fla. 1995), and *Winston & Strawn v. Kelly (In re Churchfield Mgmt & Inv. Corp.)*, 122 B.R. 76, 81 n.2 (Bankr. N.D. Ill. 1990).

[86] *See* Binder v. Price Waterhouse & Co., LLP (*In re* Resort Int'l, Inc.), 372 F.3d 154, 165 (3d Cir. 2004) ("[The] scope of bankruptcy court jurisdiction diminishes with plan confirmation . . . ."); *see also* Boston Reg'l Med. Ctr., Inc. v. Reynolds (*In re* Boston Med. Ctr., Inc.) 410 F.3d 100, 107 (1st Cir. 2005); Luan Inv. S.E. v. Franklin 145 Corp. (*In re* Petrie Retail, Inc.), 304 F.3d 223, 229 (2d Cir. 2002); Linkway Inv. Co., Inc. v. Olsen (*In re* Casamont Investors, Ltd.), 196 B.R. 517, 522 (9th Cir. B.A.P. 1996); Porges v. Gruntal & Co., Inc. (*In re* Porges), 44 F.3d 159, 163 (2d Cir. 1995); CIT Comm. Fin. Corp. v. Level 3 Comm., LLC, 483 F. Supp. 2d 380, 386 (D. Del. 2007).

[87] *See* Montana v. Goldin (*In re* Pegasus Gold), 394 F.3d 1189 (9th Cir. 2005).

[88] *Id.* at 1193.

[89] *See id.* at 1192.

[90] *See id.* at 1193.

[91] *See id.* at 1194.

employed pendent party jurisdiction to establish jurisdiction over the debtor's claims against Spectrum.[92] Unlike the State, Spectrum did not participate in the underlying bankruptcy and thus had never been subject to the jurisdiction of the court.[93] While the court admitted that the claims against Spectrum had "a much more tangential relationship to the underlying bankruptcy proceeding," it concluded that the bankruptcy court could exercise supplemental jurisdiction over them.[94]

The Ninth Circuit's decision is troubling in several respects. First, it completely ignores the language of 28 U.S.C. section 1367, which extends supplemental jurisdiction to the district courts alone.[95] Those courts that have rejected the Ninth Circuit's reasoning have recognized that bankruptcy court jurisdiction is a creature of congressional enactments and not judicial fiat.[96] Second, the decision greatly expands the bankruptcy court's jurisdiction. The Ninth Circuit has, in effect, authorized bankruptcy courts to exercise jurisdiction over claims that may have no conceivable relation to the bankruptcy case or even the administration of the estate. In an odd twist, the decision essentially allows courts to exercise jurisdiction over claims that are related to claims that are within the court's "related to" jurisdiction.[97]

What is perhaps most troubling about the Ninth Circuit's decision is its affect on the due process fate of parties, like Spectrum, subject to the bankruptcy court's assertion of supplemental jurisdiction. The bankruptcy courts ability to assert subject matter jurisdiction over a claim is accompanied by its capacity to similarly assert personal jurisdiction over the defendant based on the nationwide service of process provision. Up to this point, bankruptcy courts have employed the same Fifth Amendment analysis regardless of the source of their jurisdiction. As a result, under the current jurisdictional framework, it is conceivable that a bankruptcy court in the Ninth Circuit could obtain personal jurisdiction over a defendant in a state law dispute with no factual or legal connection to the bankruptcy case or to the

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[92] *Id.* at 1194–95.
[93] *Id.* at 1195 n.2.
[94] *Id.* at 1194–95.
[95] *See* 28 U.S.C. § 1367(a) (2005)

> [I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

see also In re Pegasus Gold, 394 F.3d at 1195 (recognizing district courts have supplemental jurisdiction under section 1367 of title 28).

[96] *See* Walker v. Cadle Co. (*In re* Walker), 51 F.3d 562, 570–71 (5th Cir. 1995) (holding bankruptcy courts do not have supplemental jurisdiction); Singer v. Adamson (*In re* Adamson), 334 B.R. 1, 11 (Bankr. D. Mass. 2005) ("[T]he supplementary jurisdiction statute in favor of the district court does not, by its very terms, purport to alter the scope of bankruptcy jurisdiction under section 1334 or the power to refer matters found in section 157(a)."); Minn. Pollution Control Agency v. Gouveia (*In re* Globe Bldg. Materials, Inc.), 345 B.R. 619, 638 (Bankr. N.D. Ind. 2006) ("[F]ederal bankruptcy courts do not derive the underpinning of their existence and jurisdiction from the United States Constitution, but rather derive their powers solely from legislation of the United States Congress which defines the scope of their authority.").

[97] *See* Burton, *supra* note 84.

administration of the estate. Surely the Fifth Amendment must provide *some* protection to the parties subject to the court's ever-growing jurisdictional reach.

2. Choice of Law

It is often overlooked that the effect of the nationwide service of process provision is not limited to the debtor's ability to force the defendant to litigate the suit in a distant location. The debtor's choice of forum will also dictate the choice of law rule applied in the proceeding and concomitantly the substantive law as well.[98] Thus, under the current Fifth Amendment analysis, a party can not only be haled into a state to which it has no connection but it can also be subject to that state's choice of law rule as well as any public policy exceptions to that rule.

The Supreme Court has recognized the pivotal relationship between choice of law and the parties' substantive rights. In *Klaxon Co. v. Stentor Electric Manufacturing Co.*, [99] the Court held that a federal court sitting in diversity must apply the forum state's choice of law rules to prevent the "accident of diversity" from disturbing the "equal administration of justice in coordinate state and federal courts sitting side by side."[100] In the lexicon of the *Erie* doctrine, the Court recognized that the state choice of law rules were so intimately connected to the parties' substantive rights and reasonable expectations that federal courts were mandated to apply them.[101]

While it remains an open question whether *Klaxon* applies in bankruptcy proceedings, bankruptcy courts often employ the choice of law rule of the state in which they are sitting.[102] In many instances the application may have a negligible affect on the outcome. Nonetheless, there are circumstances in which the state's choice of law rule could have a significant substantive impact on the parties' fortunes, especially when the circumstances of the case implicate the state's public

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[98] *See* Allen v. Lloyd's of London, 94 F.3d 923, 928 (4th Cir.1996) (recognizing Supreme Court has constantly viewed choice of forum provisions as presumptively valid). *See generally* Jackie Gardina, *The Perfect Storm: Bankruptcy, Choice of Law, and Same-Sex Marriage*, 86 B.U. L. REV. 881, 884 (2006) (discussing choice of law in bankruptcy courts).

[99] 313 U.S. 487 (1941).

[100] *Id.* at 496.

[101] *See id.* (recognizing if state laws were not applied it would "do violence to the principle of uniformity within a state, upon which" the *Erie* decision was based); Erie R.R. Co. 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."); Compliance Marine Inc. v. Campbell (*In re* Merritt Dredging Comp. Inc.), 839 F.2d 203, 205 (4th Cir. 1988) (noting bankruptcy courts must apply forum state's choice of law principles when parties' substantive rights under the Code are function of state law).

[102] *See* FDIC v. Lattimore Land Corp., 656 F.2d 139, 148–49 n.16 (5th Cir. 1981) (holding, under normal choice of law rules, forum state's usury laws should apply); Abe Shinichiro, *Recent Developments of Insolvency Laws and Cross-Border Practices in the U. S. and Japan*, 10 AM. BANKR. INST. L. REV. 47, 79–80 (2002) ("[C]onventional view is that Bankruptcy Courts will ordinary apply the choice of law rules of the state in which the Bankruptcy Court is located."); Gardina, *supra* note 98, at 910 n.212–214 (outlining various choice of law analyses used by bankruptcy courts).

policy exception.[103] Courts, for example, have invalidated contractual choice of law provisions as violating the public policy of the forum state[104] and in the context of spendthrift trusts, several courts have relied on the forum state's public policy to refuse to apply the law designated by the trust documents.[105] In both instances, a court's application of the forum's choice of law rules upset the expectations of the parties and affected the outcome of the litigation.

The choice of law issue adds an additional layer of complexity to the defendant's interests, yet is has been entirely ignored in the due process calculus. Courts have failed to acknowledge, let alone consider, the affect of "choice of law" rules on the underlying fairness question. But it is clear that nationwide service of process affects both where the case is heard and what law is applied.

B. Bankruptcy Venue

Some courts and commentators have argued that the appropriate antidote to nationwide service of process provisions is not the due process clause but the venue statutes.[106] On the surface, the courts reliance on venue provisions appears appropriate. In theory, venue limits the range of forums in which a plaintiff can

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[103] *See In re* Fraden, 317 B.R. 24, 34 (Bankr. D. Mass. 2004) (concluding Massachusetts law was most appropriate because underlying security agreement touched upon important issues of Massachusetts's legislative policies); Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L. J. 1965, 1972 (1997) (mentioning courts can use public policy doctrine to make exception and refuse to apply undesirable law); Gardina, *supra* note 98, at 918–19 (describing affect of application of "public policy" exception in bankruptcy).

[104] *See, e.g.*, Sattin v. B.V. Brooks (*In re* Brooks), 217 B.R. 98, 101–02 (Bankr. D. Conn. 1998) (applying Connecticut law although documents called for application of Bermuda and Channel Islands law); Marine Midland Bank v. Portnoy (*In re* Portnoy), 201 B.R. 685, 698 (Bankr. S.D.N.Y. 1996) (noting court may refuse to apply foreign law when designated law "offends a fundamental policy of that dominant state"); McCorhill Publ'g, Inc. v. Greater N.Y. Sav. Bank (*In re* McCorhill Publ'g, Inc.), 86 B.R. 783, 794 (Bankr. S.D.N.Y. 1988) (applying New York law because interest rate was usurious and violated New York public policy).

[105] *See In re Brooks*, 217 B.R. at 101–02 (applying Connecticut law to trust because of public policy considerations); Goldberg v. Lawrence (*In re* Lawrence), 227 B.R. 907, 917 (Bankr. S.D. Fla. 1998) (deciding Florida and federal bankruptcy law had overriding interest in the trust); *In re Portnoy*, 201 B.R. at 700 (using New York law and public policy to prohibit debtor from shielding assets in self-settled trust from creditors).

[106] *See* Bd. of Trs., Sheet Metal Workers' Nat'l Pension Fund v. Elite Erectors, Inc., 212 F.3d 1031, 1036 (7th Cir. 2000) ("Congress has not sought to throw litigants' convenience to the winds or use transportation costs to resolve small-stakes cases by default. Venue under 28 U.S.C. § 1391 usually respects defendants' interests."); Warfield v. KR Entm't, Inc. (*In re* Fed. Fountain), 165 F.3d 600, 602 (8th Cir. 1999) ("The inconvenience associated with a particular forum, moreover, can always be brought to the district court's attention by means of a motion under 28 U.S.C. § 1404(a), which provides for transfer of venue . . . ."); Howard M. Erichson, *Nationwide Personal Jurisdiction in All Federal Question Cases: A New Rule 4*, 64 N.Y.U. L. REV. 1117, 1151–52 (1989) (suggesting using venue principles to correct any unfairness left by due process clause).

bring a suit, often tying the appropriate venue to the defendant's residence or the place in which the actions giving rise to the claim occurred.[107]

Whatever limited virtue venue may hold in federal question cases, it is absent in the bankruptcy context. The Bankruptcy Code supplies its own venue provisions, ones that, for the most part, focus on the *debtor's* relationship with the forum and which are intimately tied to where the debtor filed the original bankruptcy petition.[108] A bankruptcy case can be filed in the district court for the district in which the debtor is domiciled, has a residence, principal place of business, principal assets or where there is a pending bankruptcy case of an affiliate, general partner, or partnership.[109] With narrow exceptions,[110] once a bankruptcy case has been filed, that court also is the appropriate venue to hear "a proceeding under title 11 or arising in or related to a case under title 11."[111] Unlike under the general venue statute, bankruptcy venue is completely divorced from the defendant's relationship with the forum.[112]

Moreover, the defendant's ability to seek a transfer of venue does not nullify the due process questions raised by the nationwide service of process provision. In practice it is true that the defendant can seek a transfer of venue, but it is in the

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[107] *See* 28 U.S.C. § 1391(a) & (b) (2005); Willis v. Caterpillar Inc., 199 F.3d 902, 905 (7th Cir. 1999) (asserting section 1391(a)(2) does not limit proper venue of corporation debtor to one place); Rodriguez v. Dixie S. Indus., Inc., 113 F. Supp. 2d 242 (D.P.R. 2000).

[108] *See* 29 U.S.C. §§ 1408 & 1409 (2005); *In re* Henderson, 197 B.R. 147, 151 (Bankr. N.D. Ala. 1996) (explaining 29 U.S.C. § 1408 prevents forum shopping); *In re* Segno Commc'ns., Inc., 264 B.R. 501, 506 (Bankr. N.D. Ill. 2001) ("The 'domicile' of corporate debtors may be a proper venue for a case under Code. 28 U.S.C. § 1408(1).").

[109] *See* 28 U.S.C. § 1408; *In re* Willows Ltd. P'ship, 87 B.R. 684, 685 (Bankr. S.D. Ala. 1988) (concluding "cases under Title 11 may be commenced in the district where the debtor is domiciled, resides, has its principal place of business or has its principal assets"); *Segno Communs.*, 264 B.R. at 506 (stating that proper venue may be domicile of corporate debtor).

[110] Section 1409 provides certain exceptions to the general bankruptcy provision based on the amount of the claim, or the timing of the proceeding. *See* 28 U.S.C. § 1409(b), (d) & (e); *see also In re* Bailey & Assocs., 224 B.R. 734, 737 (Bankr. E.D. Mo. 1998) (explaining based on 28 U.S.C. §1409(b) venue lies in district court where defendant resides when amount sought is less than $5,000); Windsor Commc'n Group v. Five Towns Stationery, Inc. (*In re* Windsor Commc'n Group, Inc.), 53 B.R. 293, 296 (Bankr. E.D. Pa. 1985) (holding proper jurisdiction because "proceeding was commenced for the purpose of collecting a money judgment or property worth more than $1,000.00, and the claim arose prior to the filing of petition"). If anything, these exceptions provide further evidence of the *lack* of protection provided by venue provisions. Congress chose to protect only a small subset of those affected by bankruptcy filing, leaving other parties subject to the more liberal venue provisions thus making the due process analysis the sole source of protection for defendants. *See* 28 U.S.C. § 1409(b) & (d) (providing narrow exceptions to law stating proper venue is in court where bankruptcy petition is filed); *In re* Windsor Commc'n Group, Inc., 53 B.R. at 295 (noting subsection (b) and (d) only provide "certain exceptions"); Ehrlich v. Am. Express Travel Related Servs. Co. (*In re* Guilmette), 202 B.R. 9, 11 (Bankr. N.D.N.Y. 1996) (analyzing narrow components of subsection (b)).

[111] 28 U.S.C. § 1409(a) ("[A] proceeding arising under Title 11 or arising in or related to a case under Title 11 may be commenced in a the district court in which such is pending.").

[112] *See, e.g.*, Van Huffel Tube Corp. v. A & G Indus. (*In re* Van Huffel Tube Corp.), 71 B.R. 155, 156 (Bankr. D. Ohio 1987) (discussing narrow exceptions where subsection (a) won't apply). *Compare* 28 U.S.C. § 1391(a) & (b) *with* 28 U.S.C. § 1409.

court's discretion to grant the motion.[113] In a survey of cases from January 2000 to December 2007 that dealt with motions to transfer venue of "related to" claims from the bankruptcy court to another venue, denials outpaced grants by almost two-to-one.[114] In direct contrast, federal district courts granted transfer of venue motions *to* bankruptcy courts for "related to" claims by a two-to-one margin.[115] Additionally,

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[113] *See, e.g.*, Whitaker v. Kendall Co. (*In re* Olympia Holding Corp.), 230 B.R. 629, 633 (Bankr. M.D. Fla. 1999) (holding despite claim for less than $1,000, proper venue is in court's district). *But see* Gentry Steel Fabrication, Inc. v. Howard S. Wright Constr. Co. (*In re* Gentry Steel Fabrication, Inc.), 325 B.R. 311, 318 (Bankr. D. Ala. 2005)

> In the instant case, the court is doubtful that due process over the defendant comports with notions of fairness and reasonableness under the Fifth Amendment . . . . However, whether or not the court has personal jurisdiction over the defendants in this adversary proceeding, the court concludes that the interest of justice or the convenience of the parties militates the transfer of this proceeding . . . .

[114] *Compare* Weiss *ex rel.* Fibercore, Inc. v. OFS Fitel, LLC, 361 B.R. 315, 318 (D. Mass. 2007) (granting transfer to Western District of North America for potential consolidation with ongoing patent infringement action); MC Asset Recovery, LLC v. S. Co., 339 B.R. 380, 385 (N.D. Tex. 2006) (granting motion to transfer to Northern District of Georgia); Saltire Indus. v. Waller Lansden Dortch & Davis, PLLC, 331 B.R. 101, 107 (S.D.N.Y. 2005) (granting motion to transfer venue to Tennessee since only reason claim was in New York was due to bankruptcy filing); Son v. Coal Equity, Inc. (*In re* Centennial Coal, Inc.), 282 B.R. 140, 148 (Bankr. D. Del. 2002) (granting motion to transfer after liquidation plan is put in place); Enron Corp. v. Dynegy Inc. (*In re* Enron Corp.), No. 01-16034, 2002 WL 32153911, at *9 (Bankr. S.D.N.Y., Apr. 12, 2002) (granting transfer for administrative and judicial economy reasons) *with* Cruickshank v. Clean Seas Co., 402 F. Supp. 2d 328, 343 (D. Mass. 2005) (denying transfer and consolidating the case with ongoing bankruptcy proceeding); Statutory Comm. of Unsecured Creditors v. Motorola, Inc. (*In re* Iridium Operating LLC), 285 B.R. 822, 837 (S.D.N.Y. 2002) (denying transfer in favor of keeping all of "core" and "non-core" claims in bankruptcy court); Official Comm. of Unsecured Creditors v. McConnell (*In re* Grumman Olson Indus., Inc.), 329 B.R. 411, 438 (Bankr. S.D.N.Y. 2005); HLI Creditor Trust v. Keller Rigging Constr., Inc. (*In re* Hayes Lemmerz Intern. Inc.), 312 B.R. 44, 48 (Bankr. D. Del. 2004) (denying transfer due to the defendant failing to meet burden); Hechinger Liquidation Trust v. Fox (*In re* Hechinger Inv. Co. of Del.), 296 B.R. 323, 327 (Bankr. D. Del. 2003) (denying transfer due to defendant's failure to show by a preponderance of evidence that it was warranted); Stone & Webster, Inc. v. Couts Heating & Cooling, Inc. (*In re* Stone & Webster, Inc.), No. 00-2142, 2003 WL 21356088, at *3 (Bankr. D. Del., June 10, 2003); Goodman v. Phoenix Container, Inc. (*In re* DeMert & Dougherty, Inc.), 271 B.R. 821, 854 (Bankr. N.D. Ill. 2001) (denying transfer).

[115] *Compare* Integrated Health Servs. of Cliff Manor, Inc. v. THCI Co., 417 F.3d 953, 958 (8th Cir. 2005) (holding lower court did not abuse its discretion in granting transfer of venue to district where underlying bankruptcy claim was proceeding); Lindsey v. Travelers Indem. Co., No. CV 06-609, 2007 WL 841411, at *5, (D. Ariz., Mar. 16, 2007) (granting referral to bankruptcy court in Arizona district since reorganization plan of bankruptcy court retained jurisdiction over "related to" state law claims, while denying motion of transfer of venue to different district); Toth v. Bodyonics, Ltd., No. 06-1617, 2007 WL 792172, at *2–3 (E.D. Pa. Mar. 15, 2007) (granting transfer noting "the district where the bankruptcy is pending is the appropriate venue for all related proceedings"); Quick v. Vizigor Solutions, Inc., No. 4:06CV637, 2007 WL 494924, at *3, 5 (E.D. Mo. Feb. 12, 2007) (finding action is "related to" ongoing bankruptcy case in Delaware and grants transfer to that district in interest of justice); Nature Coast Collections, Inc. v. Consortium Serv. Mgmt. Group, Inc., No. C-06-273, 2006 WL 3741930, at *8 (S.D. Tex. Dec. 18, 2006) (finding both public and private factors weigh heavily in favor of transfer of venue); LSF4 Loan Invs. I, LLC v. Weingart, No. 3:06-CV-0419, 2006 WL 2370803, at *6 (N.D. Tex. Aug. 15, 2006) (granting transfer but without ever stating that claim in question was "related to" existing bankruptcy case in transferred-to venue); Marquette Transp. Co. v. Trinity Marine Prods., Inc., No. 06-0826, 2006 WL 2349461, at *6 (E.D. La. Aug. 11, 2006) (finding "it is in the interest of justice and the convenience of the parties" to grant transfer to

because of the Supreme Court's mandate that the original forum's choice of law rule transfers with the case, the choice of law issue discussed above remains.[116] Thus, as

district where underlying bankruptcy case is being addressed); Selas Fluid Processing Corp. v. Spilman, No. 04-00591, 2006 WL 890818, at *5 (E.D. Pa. Apr. 3, 2006) (granting motion without confirming defendant's argument is "related to" bankruptcy proceeding in the transferred-to district); Dunlap v. Friedman's, Inc., 331 B.R. 674, 682 (S.D. W.Va. 2005) (granting transfer); AEP Energy Servs. Gas Holding Co. v. Bank of Am., N.A., No. 03-4973, 2004 WL 2278770, at *19 (S.D. Tex. Sept. 14, 2004) (severing five declaratory claims and transferring to Southern District of New York which has jurisdiction over underlying bankruptcy claims); Massey v. Conseco, Inc., No. 03-CV-1701, 2004 WL 828229, at *8 (S.D. Ind. Apr. 12, 2004) (granting although court refused to state whether matter was core or "related to", leaving decision to bankruptcy court); Certain Underwriters at Lloyd's, London v. ABB Lummus Global, Inc., No. 03 Civ. 7248, 2004 WL 224505, at *11 (S.D.N.Y. Feb. 5, 2004) (granting transfer); Liberal, Kan. v. Trailmobile Corp., 316 B.R. 358, 361 (D. Kan. 2004) (granting transfer for "convenience of parties and in the interests of justice"); Shared Network Users Group v. Worldcom Techs., Inc., 309 B.R. 446, 452 (E.D. Penn. 2004) (finding judicial economy is overwhelming factor in granting transfer); UOP LLC v. Orion Ref. Corp., No. 03-1385, 2003 WL 21913791, at *3 (E.D. La. Aug. 5, 2003) (finding convenience factors weigh in favor of transferring venue of all claims except for when contempt claim is stayed); Bayou Steel Corp. v. Boltex Mfg. Co., L.P., No. 03-1045, 2003 WL 21276338, at *1–2 (E.D. La., June 02, 2003) (finding transfer is appropriate due to presumption related claims ought to be heard by bankruptcy court, as well as convenience of parties also favors transfer); Renaissance Cosmetics, Inc. v. Dev. Specialists Inc., 277 B.R. 5, 19 (S.D.N.Y. 2002) (granting transfer for "convenience of the parties and witnesses, and ease of access to sources of proof") (red flagged on remand portion of the decision); Rumore v. Wamstad, No. 01-2997, 2001 WL 1426680, at *4 (E.D. La. Nov. 13, 2001); Kalamazoo Realty v. Blockbuster Entm't, 249 B.R. 879, 890 (N.D. Ill. 2000); Larami Ltd. v. Yes! Entm't Corp., 244 B.R. 56, 61 (D.N.J. 2000) (finding although most of transfer factors were neutral, practical consideration of expeditious trial weighed in favor of granting transfer), *with* Zomba Enters., Inc. v. Panorama Records, Inc., 491 F.3d 574, 589 (6th Cir. 2007) (finding district court did not abuse its discretion in denying motion to transfer to bankruptcy court); Capital Source Fin., LLC v. Delco Oil, Inc., No. 2006-2706, 2007 WL 3119775, at *13 (D. Md. Sept. 17, 2007) (denying transfer while noting bankruptcy court "determined that this action could proceed independent of [the defendant's] bankruptcy when it lifted the automatic stay"); E.I. DuPont De Nemours & Co. v. Neely, No. 04-2611, 2007 WL 1542026, at *2 (D. Minn. May 22, 2007) (denying transfer because bankruptcy court placed stay on current litigation); Hybrid Patents, Inc. v. Charter Commc'ns, Inc., No. 05-CV-436, 2007 WL 969591, at *6 (E.D. Tex. Mar. 28, 2007) (denying transfer based on failure of moving party to prove factors, beyond convenience of witnesses, weighs in their favor); Eftychiou v. Shell Oil Co. (*In re* Handex Group, Inc.), No. 05-5848, 2006 WL 1044466, at *3 (D.N.J. Apr. 17, 2006) (denying transfer motion while granting motion to remand); Moto Photo, Inc. v. K.J. Broadhurst Enters., Inc., No. 01-Cv-2282, 2003 WL 298799, at *6 (N.D. Tex. Feb. 10, 2003) (noting plaintiff failed to show transfer was warranted for either convenience or justice factors); Ret. Sys. of Ala. v. Merrill Lynch & Co., 209 F. Supp. 2d 1257, 1270 (M.D. Ala. 2002) (denying transfer while finding abstention and remand were more appropriate); Irwin v. Beloit Corp. (*In re* Harnischfeger Indus., Inc.), 246 B.R. 421, 442–44 (Bankr. N.D. Ala. 2000) (denying transfer to another bankruptcy court due to lack of showing of "in the interest of justice" and "convenience of the parties"); Tultex Corp. v. Freeze Kids, LLC, 252 B.R. 32, 41 (S.D.N.Y. 2000) (denying transfer under all transfer statutes).

[116] *See* Ferens v. John Deere Co., 494 U.S. 516, 523 (1990) (spelling out three reasons for keeping original forum's choice of law: to not deprive parties of state-law advantages that would exist absent diversity jurisdiction, to not increase opportunities for forum shopping, and to increase likelihood change of venue decisions be based on convenience and interest of justice and not prejudices resulting from change of law); Van Dusen v. Barrack, 376 U.S. 612, 635–36 (1964) (rejecting possibility that one gets change of law bonus by changing venue); Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945)

> [T]o insure 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.

a practical matter, the bankruptcy venue provisions provide no real relief to a defendant in a proceeding related to a pending bankruptcy.[117]

III. ADDRESSING DUE PROCESS IN BANKRUPTCY

The current Fifth Amendment due process analysis utilized in the bankruptcy courts is inadequate to protect the individual liberty interests of litigants. While Congress has the authority to both create uniform laws of bankruptcy[118] and to establish the scope of the federal courts' subject matter jurisdiction,[119] it does not have the unlimited power to establish personal jurisdiction based on nationwide service of process. The Fifth Amendment due process clause acts as an independent limitation on Congress' power.[120] The federal courts have a responsibility to monitor Congress' exercise of its authority.

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[117] *See Ferens*, 494 U.S. at 523 (stating applicable law in diversity case does not change upon defendant's change of venue); *Van Dusen*, 376 U.S. at 635–36 (rejecting possibility that one gets change of law bonus by changing venue); *Guaranty Trust Co*., 326 U.S. at 109 ("[T]he 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."). Even in the absence of the special concerns present in bankruptcy, venue provisions are of questionable value. First, venue statutes confer a privilege granted by Congress and as a result, unlike constitutional requirements, Congress is free to alter or eliminate venue restrictions that protect defendants from litigating in faraway locations. *See* 28 U.S.C. § 1404(a), (b), & (c) (2000) (allowing for transfer of venue, *sua sponte* or upon motion); Leroy v. Great W. United Corp., 443 U.S. 173, 183–84 (1979) ("In most instances, the purpose of statutorily specified venue is to protect the *defendant* against the risk that a plaintiff will select an unfair or inconvenient place of trial.") (emphasis in original); Union Planters Bank, N.A. v. EMC Mortgage Corp., 67 F. Supp. 2d 915, 917 (W.D. Tenn. 1999) ("Venue is a creature of statute."). Second, a defendant wanting to challenge venue must still travel to the distant forum to do so. And if a defendant defaults, she will be unable to object to the judgment based on improper venue because collateral attack is reserved for instances when a court has acted unconstitutionally. *See* Durfee v. Duke, 375 U.S. 106, 108–11 (1963) (discussing reasons for and against allowing collateral attacks; policy reasons against allowing such attacks include finality and full faith and credit to other courts); *see also* FED. R. CIV. P. 12(h)(1) (deeming defenses waived when not mentioned in specific motions); Norex Petroleum Ltd. v. Access Indus., Inc., 416 F.3d 146, 160–61 (2d Cir. 2005) (stating default judgment may be attacked collaterally by showing court lacked personal jurisdiction).

[118] *See* U.S. CONST. art. I, § 8, cl. 4 ("To establish . . . uniform laws on the subject of Bankruptcies throughout the United States."); *In re* Merced Irr. Dist., 25 F. Supp. 981, 987 (S.D. Cal. 1939) (describing scope of Congress's power to legislate bankruptcy laws); Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 13 (1995) (giving historical background behind framers' grant of power to legislate bankruptcy laws).

[119] *See* U.S. CONST. art. III, § 1 (providing basis for establishment of inferior courts); Bowles v. Russell, 127 U.S. 2360, 2366 (2007) ("Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider."); Kontrick v. Ryan, 540 U.S. 443, 452 (2004) ("Only Congress may determine a lower federal court's subject-matter jurisdiction.").

[120] *See* U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."); Solorio v. United States, 483 U.S. 435, 453 (1987) (Marshall, J. dissenting) (emphasizing constitutional restrictions on congressional action in regulating military jurisdiction under Fifth Amendment); Hampton v. Mow Sun Wong, 426 U.S. 88, 118 (1976) (highlighting due process limitation on congressional regulation of aliens in the United States); Wilson v. New, 243 U.S. 332, 365 (1917) ("The power to legislate, as well as other powers conferred by the Constitution upon the coordinate branches of the government, is limited by the provisions of the Fifth Amendment of the Constitution . . . .").

Federal courts need to reexamine the due process analysis employed in bankruptcy proceedings. Currently, the courts apply a one-size-fits all analysis, nominally weighing the various interests involved. But the analysis is weighted heavily in favor of the federal government. Courts presume there are few if any limits on Congress' power to require an individual to litigate in any federal court. When the defendant is a resident of the United States, the sovereign's interests trump an individual's liberty interests seemingly without exception.

The current approach assumes, however, that the source of the substantive right is federal law and that the basis of the court's subject matter jurisdiction is some form of federal question.[121] It fails to account for the idiosyncrasies of bankruptcy jurisdiction.[122] The federal interests are substantially weaker when the bankruptcy

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[121] *See* State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 531 (1967) ("[I]n a variety of contexts this Court and the lower courts have concluded that Article III poses no obstacle to the legislative extension of federal jurisdiction, founded on diversity, so long as any two adverse parties are not co-citizens."); *see also* Thomas D. Rowe, Jr. & Kenneth D. Sibley, *Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction*, 135 U. PA. L. REV. 7, 9–11 (1986–87) (arguing for Congressional broadening of federal subject matter jurisdiction in multiplurality, multiforum litigation, to allow for consolidation of scattered similar claims). The majority of statutes that contain a nationwide service of process provision involve a national uniform law. Congress has provided federal courts with nationwide service of process in federal securities laws, antitrust laws, and ERISA. *See* 15 U.S.C. § 5 (2000) (giving courts power to summons any required party in restraint of trade case, regardless of place of residence of parties); 15 U.S.C. § 78aa (2000) (granting exclusive jurisdiction, in securities exchange cases, to United States district courts and United States courts of any territory subject to United States jurisdiction); 29 U.S.C. § 1132(e)(2) (2000) (stating, in cases involving protection of employee benefit rights, "process may be served in any other district where a defendant resides or may be found"). Such process is also available in federal interpleader actions. *See* 28 U.S.C. § 2361 (2005) ("[A] district court may issue its process for all claimants and enter its order restraining them from instituting or prosecuting any proceeding in any State or United States court affecting the property, instrument or obligation involved in the interpleader action . . . ."); *see also* Metro. Life Ins. Co. v. Chase, 294 F.2d 500, 502 (3d Cir. 1961) (finding New Jersey district court had jurisdiction although litigation involving same subject matter was in district court in District of Columbia); Great Lakes Auto Ins. Group. v. Shepherd, 95 F. Supp. 1, 5 (W.D. Ark. 1951) (finding Arkansas district court acquired jurisdiction over defendants by virtue of serving them in Illinois under 28 U.S.C. § 2361). Like bankruptcy proceedings, interpleader actions may involve questions of state law. However, unlike in an adversary proceeding in bankruptcy, the interpleader action is not seeking to hold an absent party personally liable for a debt but rather adjudicate the ownership of multiple claimants to a single fund. *See* Commercial Union Ins. Co. v. United States, 999 F.2d 581, 583 (D.C. Cir. 1993) ("Interpleader allows a party exposed to multiple claims on a single obligation or property to settle the controversy and satisfy his obligation in one proceeding."); *State Farm Fire & Cas. Co.*, 386 U.S. at 531–32 ("We do not agree with the Court of Appeals that, in the absence of a state law of contractual provision for 'direct action' suits against the insurance company, the company must wait until persons asserting claims against its insured have reduced those claims to judgment before seeking to invoke the benefits of federal interpleader."); Zechariah Chafee, Jr., *The Federal Interpleader Act of 1936: I*, 45 YALE L.J. 963, 963 (1935–36) (setting out typical interpleader case where insurance company, bank, or other corporation admits liability, is anxious to pay, and is simply waiting for court to decide who should receive the property or money).

[122] *See* Diamond Mortgage Corp. v. Sugar, 913 F.2d 1233, 1243 (7th Cir. 1990) (rejecting argument that non-core bankruptcy claimants "should not be allowed to rely upon the broad jurisdictional reach of the Bankruptcy Rules to establish *in personam* jurisdiction"); J.T. Moran Fin. Corp. v. Am. Consol. Fin. Corp. (*In re* J.T. Moran Fin. Corp.), 124 B.R. 931, 942 (S.D.N.Y. 1991) (describing jurisdictional differences within federal court system between core and non-core bankruptcy cases, stating in any event "Congress gave the district courts, and the bankruptcy courts to which bankruptcy cases are uniformly referred, exclusive jurisdiction of all the property of the debtor and the estate, wherever located, as of the commencement of the case"); L.D. Brinkman Holdings, Inc. v. Anderco Carpet Co. (*In re* L.D. Brinkman

court is adjudicating state law claims, especially when it falls within their "related to" jurisdiction. To the extent it can be argued that the federal government's interest in asserting its sovereign power outweighs an individual's liberty interests when a federal court is enforcing federal law, the same argument holds less force when it is litigating a dispute under state law.

To be sure, Congress has an interest in the expeditious and timely adjudication of the debtor's estate.[123] The bankruptcy laws are intended to provide a single forum for the uniform and orderly administration of the debtor's assets.[124] Allowing a bankruptcy court to adjudicate all related interests greatly simplifies the process and reduces the transactional costs inherent in litigation. But the Supreme Court has been reluctant to allow simplicity to trump due process. In responding to concerns regarding the increased transactional costs inherent in a fluid personal jurisdiction analysis the Court in *Schaffer* stated: "when . . . the cost of simplifying litigation by avoiding the jurisdictional question may be the sacrifice of 'fair play and substantial justice.' That cost is too high."[125] Thus, Congress' interest in simplifying the bankruptcy process, while relevant, is not sufficient to make nationwide service of process in bankruptcy per se constitutional.

Moreover, the bankruptcy laws' goals of efficiency and the expeditious administration of the estate were never intended to supplant the legitimate rights and interests of affected parties.[126] Bankruptcy policies are grounded in the rights of the interested parties to the bankruptcy process rather than the rights of the sovereign.[127] Generally, bankruptcy places fairness above comity, individual rights

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Holdings, Inc.), 310 B.R. 686, 688 (Bankr. N.D. Tex. 2004) ("Even though the merits of the claim may be determined by the application of state law . . . the federal court has subject matter jurisdiction under the Bankruptcy Code.").

[123] *See* Celotex Corp. v. Edwards, 514 U.S. 300, 308 (1995) ("Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate" (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (1984))); Young v. Sultan Ltd. (*In re* Lucasa Int'l, Ltd.), 6 BR 717, 719 (Bankr. S.D.N.Y. 1980) (describing need for expediency and efficiency brought Congress to broaden bankruptcy courts' jurisdiction in 1978 statute).

[124] *See* Phillips v. Congelton, L.L.C. (*In re* White Mountain Mining Co.), 403 F.3d 164, 170 (4th Cir. 2005) (opining purpose of bankruptcy laws was to centralize disputes so reorganization could proceed efficiently); Publicker Indus. Inc. v. United States (*In re* Cuyahoga Equip. Corp.), 980 F.2d 110, 117 (2d Cir. 1992) (noting "strong Bankruptcy Code policy that favors centralized and efficient administration of all claims in the bankruptcy court . . ."); Shugrue v. Air Line Pilots Ass'n Int'l (*In re* Ionosphere Clubs, Inc.), 922 F.2d 984, 989 (2d Cir. 1990) (stating one principal purpose of Bankruptcy Code is "to centralize all disputes concerning property of the debtor's estate in the bankruptcy court so that reorganization can proceed efficiently, unimpeded by uncoordinated proceedings in other arenas").

[125] Shaffer v. Heitner, 433 U.S. 186, 211 (1977).

[126] *See In re* SGL Carbon Corp., 200 F.3d 154, 161 (3d Cir. 1999) (noting bankruptcy statutes may not be used to "destroy and undermine the legitimate rights and interests of those intended to benefit"); Little Creek Dev. Co. v. Commonwealth Mortgage Corp. (*In re* Little Creek Dev. Co.), 779 F.2d 1068, 1072 (2d Cir. 1986) ("Such a [good faith] standard furthers the balancing process between the interests of debtors and creditors which characterizes so many provisions of the bankruptcy laws and is necessary to legitimize the delay and costs imposed upon parties to a bankruptcy.").

[127] *See* Butner v. United States, 440 U.S. 48, 55, 57 (reasoning, since property interests are created by state law, bankruptcy proceedings must yield to state law in varying treatment of property to produce uniform treatment and reduce uncertainty in bankruptcy).

above sovereignty. So it is entirely consistent with bankruptcy principles for courts to recognize and give weight to the individual liberty interests at stake in bankruptcy proceedings.

In addition to efficiency concerns, there is an explicit federal interest in the uniform enforcement of the nation's bankruptcy laws. As the Supreme Court has recognized, the Bankruptcy Clause was enacted to ensure the promulgation of uniform laws on bankruptcy enforceable among the states.[128] The Clause was intended to promote interstate commercial transactions by creating a national system to address debt obligations.[129] But addressing the due process concerns at issue here does not undermine the objective of a national uniform law of bankruptcy. This is not a question of *whether* the debtor's or creditor's rights and obligations under the Bankruptcy Code are enforced but *where* they are enforced. To question whether a particular bankruptcy court can enter a binding judgment against a defendant is not to question the validity of the underlying substantive right or the even the legitimacy of the court's subject matter jurisdiction. It simply asks whether the defendant's liberty interests require the adjudication of the dispute in a different location.

Moreover, there is support in the Bankruptcy Code itself for the proposition that not all aspects of the bankruptcy need be litigated within a single bankruptcy court forum. Notably, the federal courts do not have exclusive jurisdiction over all bankruptcy matters.[130] And Congress has recognized that, at times, the bankruptcy court's jurisdiction must yield to federalism concerns. In defining the contours of bankruptcy jurisdiction, Congress mandated that bankruptcy courts abstain from hearing state law causes of action in certain circumstances and also provided the courts discretionary authority to abstain "in the interests of justice, or in the interests of comity with State courts or respect for State law."[131] Certainly if federalism

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[128] *See* Ry. Labor Executive's Ass'n v. Gibbons, 455 U.S. 457, 472 (1982) ("Bankruptcy Clause's uniformity requirement was drafted in order to prohibit Congress from enacting private bankruptcy laws."); *see also* United States v. Martignon, 492 F.3d 140, 148–49 (2d Cir. 2007) (noting Bankruptcy Clause imposes affirmative duty on Congress to create uniform bankruptcy laws); *In re* Marshall, 300 B.R. 507 (Bankr. C.D. Cal. 2003) (relying upon principle uniform bankruptcy laws lead to fraud prevention).

[129] *See* Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 384 (2006) (Thomas, J. dissenting) (recognizing Congress' Art. I powers provide for regulation of interstate commerce); Texas v. Soileau (*In re* Soileau), 488 F.3d 302, 307 (5th Cir. 2007) (noting ratification of Bankruptcy Clause by states caused subordination of certain state interests in bankruptcy courts); *see also* U.S. CONST. art. I, § 8 (stating Congress has power to "establish a uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States").

[130] *See* 28 U.S.C. § 1334(b) (2005) (providing district courts with original but not exclusive jurisdiction "of all civil proceedings arising under title 11, or arising in or related to a case under title 11"); United States v. Fleet Nat'l Bank (*In re* Calore Express Co.), 288 B.R. 167, 169 (D. Mass. 2002) ("[B]ankruptcy courts have no jurisdiction over proceedings that have no effect on the debtor."); Atkinson v. Kestell, 954 F. Supp. 14, 16 (D.D.C. 1997) (granting jurisdiction to bankruptcy courts over only "those civil proceedings in which 'the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy'" (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3rd Cir.1984))), *aff'd sub nom.* Atkinson v. Inter Am. Dev. Bank, 156 F.3d 1335 (D.C. Cir. 1998).

[131] 28 U.S.C. § 1334(c)(1) & (2). *See* 28 U.S.C. § 157(b)(5) (directing personal injury claims to be heard "in the district court in the district where the claim arose"). While it may be argued that abstention supplies a

interests can dictate a forum different from the bankruptcy court then it follows that individual liberty interests can mandate a different location as well.

Perhaps more importantly, the Supreme Court's link between an individual's due process rights and notice of suit in a particular forum is severely attenuated, if not broken, in certain bankruptcy proceedings. Under the Fourteenth Amendment, the Supreme Court's "minimum contacts" query is intended to determine whether the defendant, based on his contacts with the forum state, was on notice that he could be sued there.[132] In the Fifth Amendment context, federal courts appear to assume that an individual is on notice that he could be sued anywhere within the federal system based on his contacts with the United States. But that assumption is inapplicable in bankruptcy when defendants are haled into a bankruptcy forum to litigate a state law dispute. A California resident who negotiates and signs a contract in California, to be performed in California, is hardly on notice that he could be sued on that contract in a bankruptcy court in the Southern District of New York simply because he is a resident of the United States. Such a suggestion makes a mockery of the "fair warning" concept the Court finds so critical in the due process context.

The absence of any true "fair warning" also implicates the Supreme Court's admonition that interested parties should be afforded in federal bankruptcy proceedings the same protection they would have had under state law if no bankruptcy had ensued.[133]

Butner v. United States[134] instructs bankruptcy courts to look to state law to determine the existence and scope of the debtor's interest in property, concluding that it would "reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving 'a windfall merely by reason of the happenstance of bankruptcy.'"[135] Courts have recognized that *Butner* stands for the broader proposition that, in bankruptcy proceedings, state law and the protections it affords

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ready solution to the problem presented here, it is lacking in several respects. A bankruptcy court is not mandated to abstain unless the cause of action could not have been commenced in federal court absent the bankruptcy and the case was filed in state court *before* the petition was filed. *See* 28 U.S.C. § 1334(c)(2). As a result of these limitations, mandatory abstention addresses just a small number of bankruptcy proceedings implicating state law. Perhaps more importantly, however, bankruptcy courts and state courts approach the adjudication of claims differently. A state court need only be concerned with the adjudication of the claim before it while a bankruptcy court hearing the same claim must also consider the other creditors and the affect of the litigation on the estate. *See In re* Becker, 136 B.R. 113, 119 (Bankr. D.N.J. 1992).

[132] *See supra* notes 29–40 and accompanying text.

[133] Butner v. United States, 440 U.S. 48, 55–56 (1979) (quoting Lewis v. Mfrs. Nat'l Bank, 364 U.S. 603, 609 (1961)). *See* Justice v. Valley Nat'l Bank, 849 F.2d 1078, 1084 (8th Cir. 1988) (stating absent any conflict with federal law or overriding federal interest, state law where property is located governs property rights in bankruptcy); Wolters Vill., Ltd. v. Vill. Props., Ltd (*In re* Vill. Props. Ltd.), 723 F.2d 441, 444 (5th Cir. 1984) (noting Congress' historical concern that "property rights usually should be controlled by state law instead of the 'mere happenstance' of bankruptcy").

[134] 440 U.S. 48 (1979).

[135] *Id.* at 55 (quoting *Lewis v. Mfrs. Nat'l Bank*, 364 U.S. 603, 609 (1961)).

should not be disregarded except when clearly required to affect a federal interest.[136]

The *Butner* Court's concerns become even more evident when the choice of law issue is added to the mix.[137] Given the vast territorial reach of the bankruptcy court and the availability of nationwide service of process, debtors could seek a forum with the most favorable choice of law rules. With this power in hand, debtors have the ability to alter the underlying substantive law applied and undermine the reasonable expectations of the parties to the original transaction.[138] This potential for abuse thwarts the important bankruptcy policy discussed in *Butner*—to ensure that the bankruptcy process does not unnecessarily alter the parties' rights and obligations.

When viewed through the *Butner* lens the bankruptcy courts' due process analysis raises an interesting question. Should a defendant be forced to litigate in a forum with which he has no contacts simply because of the "happenstance of bankruptcy?" Under the current analysis, a party can sue a defendant on a state law claim only tangentially related to the underlying bankruptcy (or, in the Ninth Circuit, related to the tangentially "related to" claim) and with the nationwide service of process provision hale the defendant into a forum with which he has no contacts or ties thereby subjecting the defendant to litigation in a distant forum *and* that forum's choice of law rules. Such a result would be completely prohibited under non-bankruptcy law. No court has adequately identified the federal interest that demands that a defendant's rights be so dramatically altered by the "happenstance of bankruptcy." At the very least *Butner* and the Supreme Court's due process jurisprudence require that the court more carefully examine and balance the federal interests and the individual interests involved.[139]

To address the significant issues raised above, a bankruptcy court adjudicating a state law dispute should modify the current Fifth Amendment due process analysis to better protect defendants' due process rights. The modified analysis must give greater weight to the liberty interests at stake while still recognizing the federal interests inherent in the bankruptcy process. This balance can be accomplished by paying closer attention to the "fair warning" concerns that animate the due process decisions while also providing a mechanism to vindicate Congress' authority to create uniform laws of bankruptcy.

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[136] *See* Integrated Solutions, Inc. v. Serv. Support Specialties, Inc., 124 F.3d 487, 492 (3d Cir. 1997) (pointing to conclusion of *Butner* that absent countervailing federal interest, state law governs); *In re* Roach, 824 F.2d 1370, 1374 (3d Cir. 1987) (recognizing Bankruptcy Code was written with expectation it would be applied in context of state law); *In re* KAR Dev. Assocs., L.P., 180 B.R. 597, 615 (Bankr. D. Kan. 1994) ("Thus, *Butner* permits federal courts to reject state law as the rule of decision when it conflicts with an 'identifiable federal interest' or 'Congressional command.'").

[137] *See supra* notes 91–98 and accompanying text.

[138] *See* Gardina, *supra* note 98, at 918–20 (describing effect of state's public policy exception on choice of law).

[139] *See Butner*, 440 U.S. at 55 (holding justifications of application of state law are not limited to ownership interests but apply also to security interests); *see also* Gardina, *supra* note 98, at 924 (positing appropriate law to be applied will depend on interests of parties rather than interests of forum state).

To start, bankruptcy courts should redefine the relevant forum. When the court is adjudicating state law disputes the appropriate forum should be the state in which the court is sitting. To maintain that the relevant forum is the United States simply because the claim is being litigated in the context of a bankruptcy is to deny the realities of the situation.[140] The court is not vindicating a federally created right in the traditional sense; it is litigating a state law claim in a federal forum. By defining the relevant forum as the state, courts can more accurately assess whether the defendant was on notice that he could be sued in this particular location. It also is a small step towards ensuring that the bankruptcy filing does not unnecessarily alter the rights and expectations that a party has under state law.

The party seeking to invoke the jurisdiction of the bankruptcy forum should have the burden to establish that the defendant had notice that it could be subject to suit in the forum. Notice might be established through the traditional query of whether the defendant had purposefully availed itself of the forum state. But it may also be shown through evidence that the defendant was aware of the debtor's precarious financial situation and the potential for bankruptcy. The latter showing ensures that defendants who purposefully engage in business with an insolvent debtor cannot avoid litigation associated with those transactions and allows parties "to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable."[141] It also incorporates the same assumption at work in the Fifth Amendment analysis—that a party who knowingly engages in activity subject to federal law oversight can be haled into any court in the United States. At the same time, it protects the unsuspecting litigant from distant litigation of which it had no notice.

In the absence of sufficient contacts or in situations in which the contacts are questionable, courts must examine the federal interests at stake and determine whether those interests can be adequately vindicated in another location. The federal interest most relevant here is the desire for an expeditious administration of the estate. The question then becomes whether the adjudication of the dispute in an alternate forum will significantly delay the administration or liquidation of the estate. Because of the absence of sufficient contacts, the burden remains on the plaintiff to establish that the claim cannot be timely adjudicated in an alternate forum, either federal or state. At this stage, courts should factor in the claims' degree of remoteness to the underlying bankruptcy case, recognizing that the more tangential the claim the weaker the federal interest.

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[140] The forum concept has been attacked in other ways as well. Professor Maryellen Fullerton in her oft-cited piece on the nationwide service of process questioned the importance of borders on the personal jurisdiction analysis in federal courts. *See* Fullerton, *supra* note 15, at 19. Regardless of the nature of the claim, Professor Fullerton challenged the analogy between the borders of the United States and the borders of the State, noting that such a simplistic approach ignored the Supreme Court's instructions that a court consider the fairness concerns inherent in distant litigation. *Id.* She also observed the vast size difference between the United States and a particular state, noting that it undermines the border analogy relied upon by courts. *Id.*

[141] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

If, however, the plaintiff can establish that the defendant had sufficient contacts with the relevant forum then the burden is on the defendant to demonstrate that, despite the contacts with the forum, the assertion of personal jurisdiction is an unconstitutional burden. In these circumstances, the analysis reverts back to the traditional query articulated under both the Fourteenth and Fifth Amendments.

This slight modification to the Fifth Amendment due process analysis responds to the unique nature and scope of bankruptcy court jurisdiction, and recognizes that, in certain circumstances, the due process clause acts as a limitation on federal power. It explicitly challenges the presumption that congressional power to authorize the assertion of personal jurisdiction through nationwide service of process is beyond question. In the bankruptcy context, courts must be conscious of the source of the substantive rights they are enforcing and the nature and prominence of the federal interest at stake. Ignoring either compromises a defendant's liberty interests and unnecessarily enhances the coercive power of the federal government.

CONCLUSION

The federal courts have created a Fifth Amendment analysis that largely ignores the individual liberty interests that the due process clause protects. The analysis is predicated on the unchallenged assumption that sovereign's interests are paramount. Based on this assumption, the courts have concluded that the Fifth Amendment does not act as a limitation on Congress' power to authorize the assertion of personal jurisdiction based on nationwide service of process. Thus, in the bankruptcy context, individuals and entities can be haled into a bankruptcy court where the original petition was filed to litigate a state law claim that arose as a result of purely local conduct far removed from the bankruptcy forum. Such a result appears to be in conflict both with the Supreme Court's jurisprudence under the due process clause as well as basic bankruptcy policies. In bankruptcy proceedings, courts should adopt a more nuanced approach to the Fifth Amendment analysis that challenges the assumption that the federal interests involved in any bankruptcy necessarily trumps the individual liberty interests at stake. A citizen's right to be free from government coercion should not disappear simply because Congress has authorized nationwide service of process for every bankruptcy proceeding.