AN END TO JUDICIAL OVERREACHING IN NATIONWIDE SERVICE OF PROCESS CASES: STATUTORY AUTHORIZATION TO BRING SUPPLEMENTAL PERSONAL JURISDICTION WITHIN FEDERAL COURTS' POWERS

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Supplemental jurisdiction is a concept usually associated with federal subject matter jurisdiction. When federal courts are presented with claims for which Congress has granted nationwide service of process, they often take the opportunity to exert supplemental personal jurisdiction as well. The Supreme Court, however, has never decided whether this practice is constitutional.

This note will assess the cogency of using personal jurisdiction, created by nationwide service of process, to support supplemental personal jurisdiction. Additionally, this note will analyze the concerns that result from the granting of supplemental personal jurisdiction without congressional authorization. The author will examine nationwide service of process from a historical point of view and delineate Congress's response to this evolving history through legislation. Finally, this note will explore due process implications along with the question of whether statutory authority exists to support supplemental personal jurisdiction. The author will arrive at the conclusion that the power to create supplemental personal jurisdiction belongs only to Congress and should not be exercised by courts.

I. INTRODUCTION

At first glance, the idea of supplemental personal jurisdiction[1] seems odd, mainly because supplemental jurisdiction generally deals with federal subject matter jurisdiction, not personal jurisdiction.[2] In situa-

1. The phrase "supplemental personal jurisdiction," as used in this note, refers to a court maintaining personal jurisdiction over a defendant on state-law claims after personal jurisdiction is already satisfied as to transactionally related federal claims. Supplemental personal jurisdiction is not meant to refer to a situation where a court exercises supplemental personal jurisdiction over a pendent party after personal jurisdiction is already obtained as to a separate party, similar to pendent-party jurisdiction. *See* Robert C. Casad, *Personal Jurisdiction in Federal Question Cases*, 70 TEX. L. REV. 1589, 1610 (1992). In addition, this note refers to the concept as supplemental personal jurisdiction and not pendent personal jurisdiction, as some courts do. *See, e.g.*, ESAB Group, Inc. v. Centricut Inc., 126 F.3d 617, 628 (4th Cir. 1997).

2. *See, e.g.*, 28 U.S.C. § 1367 (1994); Finley v. United States, 490 U.S. 545, 548 (1989); Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 370–71 (1978); United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 725 (1966).

tions where personal jurisdiction could not otherwise be obtained, however, courts have maintained jurisdiction over defendants on state claims only because valid personal jurisdiction exists as to separate, but transactionally related, federal claims.[3] One such situation occurs when Congress gives nationwide service of process over federal claims, but related state-law claims remain.[4] The situation has also arisen where personal jurisdiction is exempted on grounds such as the fiduciary shield,[5] but a claim is asserted outside the exempted ground.[6]

Consider the following illustration: a New Hampshire plaintiff brings a claim against a South Carolina defendant under the private action provision of the Racketeer Influenced and Corrupt Organizations Act[7] (RICO) along with state-law claims such as conspiracy or intentional interference with economic relations.[8] Because RICO allows nationwide service of process, the plaintiff can serve the defendant in the defendant's home state of South Carolina, thereby not having to worry about personal jurisdiction in New Hampshire, which would be unattainable.[9] What is the court to do with the state-law claims, for which no independent grounds for personal jurisdiction exist? Is personal jurisdiction over some claims sufficient for a court to obtain personal jurisdiction over other claims?

The Supreme Court has never ruled on the constitutionality of maintaining supplemental personal jurisdiction[10] but, as illustrated above, circuit courts have found few problems in applying it. Whether or not this is a proper approach is unclear. For example, the maintenance of supplemental personal jurisdiction does not appear to be statutorily authorized. Also, concerns over the constitutionality of the practice exist,

3. *See, e.g.*, *ESAB Group*, 126 F.3d at 628; IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1056–57 (2d Cir. 1993); Hargrave v. Oki Nursery, Inc., 646 F.2d 716, 719 (2d Cir. 1980); Int'l Controls Corp. v. Vesco, 593 F.2d 166, 175 n.5 (2d Cir. 1979); Oetiker v. Jurid Werke, 556 F.2d 1, 4–5 (D.C. Cir. 1977); Mates v. N. Am. Vaccine, Inc., 53 F. Supp. 2d 814, 821 (D. Md. 1999); United States v. Grewell, No. 97-170C, 1997 U.S. Dist. LEXIS 8957, at *14–15 (E.D. La. June 23, 1997); Stetson Assocs. v. Bennington Iron Works, Inc., No. 86-3061-Y, 1987 U.S. Dist. LEXIS 15346, at *6 (D. Mass. Aug. 2, 1987).

4. *See ESAB Group*, 126 F.3d at 627–28.

5. The fiduciary shield "denies personal jurisdiction over an individual whose presence and activity in the state in which the suit is brought were solely on behalf of his employer or other principal." Rice v. Nova Biomedical Corp., 38 F.3d 909, 912 (7th Cir. 1994); *see also* People *ex rel.* Hartigan v. Kennedy, 576 N.E.2d 107, 114–15 (Ill. 1991); Rollins v. Ellwood, 565 N.E.2d 1302, 1313–18 (Ill. 1990). The doctrine is not recognized by all courts, and is often criticized. *See, e.g.*, Columbia Briargate Co. v. First Nat'l Bank, 713 F.2d 1052, 1055–57 (4th Cir. 1983); Robert A. Koenig, Note, *Personal Jurisdiction and the Corporate Employee: Minimum Contacts Meet the Fiduciary Shield*, 38 STAN. L. REV. 813, 838–39 (1986).

6. *See Rice*, 38 F.3d at 913 (allowing "pendent personal jurisdiction" because a defamation claim was an intentional tort for which the fiduciary shield did not apply). When the fiduciary shield is pierced, other claims which would normally be disallowed under the fiduciary shield are allowed as supplemental to the defamation claim.

7. 18 U.S.C. §§ 1961–1968 (1994).

8. *See ESAB Group*, 126 F.3d at 627–28.

9. *See id.* at 625–27.

10. JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 3.18, at 168 (3d ed. 1999).

based on grounds established in *International Shoe Co. v. Washington*.[11] Due process implications may be present in maintaining personal jurisdiction over a defendant on state claims when personal jurisdiction is satisfied only as to the federal claim. Courts continue to analogize supplemental subject matter jurisdiction when exercising supplemental personal jurisdiction. In doing so, however, they ignore many of the required features of supplemental subject matter jurisdiction that should also apply to supplemental personal jurisdiction.

This note will examine the validity of maintaining supplemental personal jurisdiction over state claims when personal jurisdiction is established as to federal claims by nationwide service of process. The intent of this note is to illustrate the problems that arise by the continued exercise of supplemental personal jurisdiction without necessary congressional authorization. Part II will examine the issues surrounding nationwide service of process and show how both early and modern cases have handled the issue. Part II will also illustrate how Congress has responded to the call for congressional authorization in the area of supplemental subject matter jurisdiction by the passage of 28 U.S.C. § 1367.[12] Part III will critically examine the issue of statutory authority for supplemental personal jurisdiction. In addition, Part III will discuss due process implications. Part IV will assert that supplemental personal jurisdiction makes sense, and that courts should have the discretion to exercise it in certain circumstances. Part IV will conclude, however, that this power should come from Congress and cannot be exercised by courts based on their own views of the practice.

II. BACKGROUND

A. Nationwide Service of Process and Venue Provisions

Federal courts are courts of limited jurisdiction. A federal court only gains subject matter jurisdiction over a case if a federal question is involved[13] or if there is diversity of citizenship between the parties.[14] Under certain circumstances, a federal court can gain supplemental jurisdiction over state claims when original jurisdiction is initially established on other grounds. For a court to maintain supplemental jurisdiction over a state-law claim, "[t]he state and federal claims must derive from a common nucleus of operative fact."[15]

Once a federal court obtains subject matter jurisdiction over the claims at issue, it must then establish personal jurisdiction over the parties. For a court to maintain personal jurisdiction, the parties must have

11. 326 U.S. 310, 316 (1945).
12. 28 U.S.C. § 1367 (1994).
13. *See id.* § 1331.
14. *See id.* § 1332.
15. United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 725 (1966).

"minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[16]

Congress has, in some circumstances, allowed nationwide service of process for certain federal claims, thereby eliminating the need for a party to be located in a specific state.[17] Nationwide service of process, however, remains the exception. Normally, a federal court can only serve process based on limitations contained in the long-arm statute of the state in which the federal court sits.[18] Federal Rule of Civil Procedure 4(k) explains that "[s]ervice of a summons . . . is effective to establish jurisdiction over the person of a defendant . . . who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located."[19] Thus, federal courts sitting in California would be subject to the California long-arm statute. California's long-arm statute allows any exercise of process so long as it does not violate due process of law.[20] Therefore, a federal court sitting in California would apply the *International Shoe* minimum contacts test to determine whether the defendant's contacts with the state are sufficient for the state to maintain personal jurisdiction over him. In circumstances where federal courts have congressional authorization for nationwide service of process, however, Rule 4(k)(1)(D) allows for service of a summons to establish personal jurisdiction "when authorized by a statute of the United States."[21]

This nationwide service of process is significant because it circumvents the state long-arm statute limitation. For example, with congressional authorization, a district court located in California can serve process on a resident of Kansas without worrying about whether the California long-arm statute authorizes jurisdiction over the Kansas inhabitant.[22] In this regard, personal jurisdiction extends throughout the nation, alleviating a plaintiff's concern about exercising personal jurisdiction over a defendant.

Congress has authorized nationwide service of process in several settings. Prevalent examples of such provisions include those contained

16. *Int'l Shoe Co.*, 326 U.S. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 462 (1940)).

17. *E.g.*, 15 U.S.C. § 22 (1994); 18 U.S.C. § 1965 (1994); 29 U.S.C. § 1132(e)(2) (1994).

18. *See* CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS § 65 (5th ed. 1994).

19. FED. R. CIV. P. 4(k)(1).

20. CAL. CIV. PROC. CODE § 410.10 (West 2001) ("A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.").

21. FED. R. CIV. P. 4(k)(1).

22. For descriptions of nationwide service of process and its relation to personal jurisdiction, see generally A. Darby Dickerson, *Curtailing Civil RICO's Long Reach: Establishing New Boundaries for Venue and Personal Jurisdiction Under 18 U.S.C. § 1965*, 75 NEB. L. REV. 476 (1996); Maryellen Fullerton, *Constitutional Limits on Nationwide Personal Jurisdiction in the Federal Courts*, 79 NW. U. L. REV. 1 (1984); Robert A. Lusardi, *Nationwide Service of Process: Due Process Limitations on the Power of the Sovereign*, 33 VILL. L. REV. 1 (1998); David Carlebach, Note, *Nationwide Service of Process in State Courts*, 13 CARDOZO L. REV. 223 (1991).

in RICO,[23] the Clayton Act,[24] the Securities Exchange Act of 1934,[25] and the Employee Retirement Income Security Act of 1974 (ERISA).[26] The Clayton Act, which contains language similar to that contained in the other statutes mentioned, provides:

> Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; *and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.*[27]

Just because nationwide service of process is allowed for certain claims, however, does not mean that no restrictions apply as to where suit may be brought. Venue provisions within nationwide service of process statutes generally create such restrictions.[28] For example, the venue provision contained in the Securities Exchange Act of 1934 states that a suit may be brought "in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business."[29] Initially, these venue provisions would appear to alleviate any concerns regarding supplemental personal jurisdiction, mainly because they seemingly ensure that suit could be brought only where personal jurisdiction can be independently obtained, i.e., where the defendant is found or transacts business. Commentators have noted, however, that the venue provisions do not provide sufficient safeguards to ensure that personal jurisdiction can be independently obtained.[30]

First, the venue standards only require the defendant to "do or transact business affairs where the suits are brought."[31] This may, however, consist of fewer contacts than would be required by the *International Shoe* minimum contacts test.[32] Second, some courts believe the "venue provisions of the nationwide service of process statutes merely supplement the general venue statute[33] for federal courts."[34] Thus, these

23. 18 U.S.C. § 1965 (1994).
24. 15 U.S.C. § 22 (1994).
25. *Id*. § 78aa.
26. 29 U.S.C. § 1132(e)(2) (1994).
27. 15 U.S.C. § 22 (emphasis added).
28. *E.g.*, sources cited *supra* notes 23–26.
29. 15 U.S.C. § 78aa.
30. Jon Heller, Note, *Pendent Personal Jurisdiction and Nationwide Service of Process*, 64 N.Y.U. L. REV. 113, 120–22 (1989).
31. *See id.* at 121.
32. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).
33. 28 U.S.C. § 1391 (1994).
34. *See* Heller, *supra* note 30, at 121; *see also* Go-Video, Inc. v. Akai Elec. Co., 885 F.2d 1406, 1413 (9th Cir. 1989) ("[W]e conclude that process may be served on an antitrust defendant pursuant to 15 U.S.C. § 22 in cases where venue is not established under that section but lies properly under 28 U.S.C. § 1391(d)."); Stetson Assocs., Inc. v. Bennington Iron Works, Inc., No. 86-3061-Y, 1987 U.S. Dist. LEXIS 15346, at *7 (D. Mass. Aug. 20, 1987) ("However, § 1965(a) is not intended to be exclusive, but is to be read to liberalize existing venue provisions. Therefore, where venue is improper under § 1965(a), it is proper to inquire whether the action can be maintained under 28 U.S.C. § 1391."

courts hold that the general venue statute may be utilized when venue is not proper under the venue provisions of nationwide service of process claims.[35] The general federal venue statute allows for suit to be brought in a judicial district where "a substantial part of the events or omissions giving rise to the claim occurred."[36] Once again, a defendant may be insufficiently protected because a substantial part of the events giving rise to the claim occurred outside any area in which the defendant has minimum contacts.[37] The grand effect is that, despite the presence of venue provisions, actions may still be brought under nationwide service of process statutes in districts where the minimum contacts test for personal jurisdiction would not be met.[38] This leads to the main controversy that courts have dealt with since the implementation of nationwide service of process statutes: what is a court to do with state-law claims for which there is no independent basis for personal jurisdiction?

B. Judicial Applications of Supplemental Personal Jurisdiction

1. Early Cases

Early cases dealing with supplemental personal jurisdiction failed to provide consistent application of the doctrine.[39] Courts had different views concerning the validity of the process.[40] Three general themes supporting supplemental personal jurisdiction overlapped in early cases: (1) analogizing supplemental personal jurisdiction with supplemental subject matter jurisdiction; (2) considering judicial economy, fairness,

(citations omitted)). *But see* GTE New Media Servs., Inc. v. Bellsouth Corp., 199 F.3d 1343, 1351 (D.C. Cir. 2000). The court ruled:

> A party seeking to take advantage of [the Clayton Act's] liberalized service provisions must follow the dictates of both of its clauses. To read the statute otherwise would be to ignore its plain meaning. Thus, because GTE has not shown that the defendants were inhabitants of, may be found in, or transacted business in the District . . . it cannot avail itself of [the Clayton Act's nationwide service of process provision].

Id.; see also Sanderson v. Spectrum Labs, Inc., No. 00-1872, 2000 WL 1909678, at *3 (7th Cir. Dec. 29, 2000) (recognizing a split in the circuits regarding scope of venue provisions in nationwide service of process statutes but refusing to address the split because the issue was not fully briefed).

35. *See Stetson Assocs.*, 1987 U.S. Dist. LEXIS 15346, at *7.

36. 28 U.S.C. § 1391(a)(2) (1994).

37. *See, e.g.*, *Stetson Assocs.*, 1987 U.S. Dist. LEXIS 15346, at *7; Heller, *supra* note 30, at 121–22.

38. Heller, *supra* note 30, at 116.

39. *See, e.g.*, Hargrave v. Oki Nursery, Inc., 646 F.2d 716, 719–21 (2d Cir. 1980); Int'l Controls Corp. v. Vesco, 593 F.2d 166, 175 n.5 (2d Cir. 1979); Oetiker v. Jurid Werke, 556 F.2d 1, 4–5 (D.C. Cir. 1977); Robinson v. Penn Cent. Co., 484 F.2d 553, 555–56 (3d Cir. 1973); Travis v. Anthes Imperial Ltd., 473 F.2d 515, 529–30 (8th Cir. 1973); Schwartz v. Eaton, 264 F.2d 195, 198 (2d Cir. 1959); McDaniel v. Compania Minera Mar de Cortes, Sociedad Anonimo, Inc., 528 F. Supp. 152, 155 (D. Ariz. 1981); United States Dental Inst. v. Am. Ass'n of Orthodontists, 396 F. Supp. 565, 574–76 (N.D. Ill. 1975); Behlke v. Metalmeccanica Plast, S.P.A., 365 F. Supp. 272, 276–77 (E.D. Mich. 1973); Getter v. R.G. Dickinson & Co., 366 F. Supp. 559, 566–67 (S.D. Iowa 1973).

40. *See* cases cited *supra* note 39.

and convenience; and (3) implicitly authorizing supplemental personal jurisdiction in federal nationwide service of process statutes.[41]

Courts that analogized supplemental personal jurisdiction with supplemental subject matter jurisdiction maintained that to emphasize differences between the two would be to "arbitrarily distinguish between subject matter jurisdiction and *in personam* jurisdiction for purposes of applying the 'pendent jurisdiction' doctrine."[42] In addition, courts cited *United Mine Workers of America v. Gibbs*[43] heavily.[44] *Gibbs* was the landmark case where the Supreme Court recognized supplemental subject matter jurisdiction, albeit in the limited form of pendent-claim jurisdiction.[45] Courts maintained that supplemental personal jurisdiction presented similar considerations to those addressed in *Gibbs*, and upheld the process with little regard for any possible differences.[46] Some courts found these two types of supplemental jurisdiction to be nearly identical and upheld supplemental personal jurisdiction without a second thought because it was so closely related to the issue of supplemental subject matter jurisdiction.[47]

Courts also approved of supplemental personal jurisdiction due to judicial economy, fairness, and convenience concerns. Much emphasis was placed on the fact that the federal government has a policy interest in "having the whole case tried at one time."[48] Also, courts were persuaded to favor supplemental personal jurisdiction because defendants were already before the court pursuant to nationwide service of process, which meant no additional burdens were placed on the defendants.[49] Thus, judicial economy and fairness play a major role in a court's analysis of this issue.

Early cases supporting the concept of supplemental personal jurisdiction also seemed to uphold the notion that nationwide service of process statutes gave courts an implied right to assert supplemental personal jurisdiction over state-law claims.[50] Courts maintained that statutes such as the Securities Exchange Act of 1934 "bestowed upon the United States District Courts the power to extend their writ extraterritorially so

41. *See* cases cited *supra* note 39.

42. *United States Dental Inst.*, 396 F. Supp. at 575.

43. 383 U.S. 715 (1966).

44. *Hargrave*, 646 F.2d at 719; *Oetiker*, 556 F.2d at 4; *Robinson*, 484 F.2d at 555–56; *United States Dental Inst.*, 396 F. Supp. at 576.

45. United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 725 (1966).

46. *See* cases cited *supra* note 44.

47. *See* Travis v. Anthes Imperial Ltd., 473 F.2d 515, 529–30 (8th Cir. 1973) (deciding issue in favor of supplemental personal jurisdiction because it "is so closely related to the question of subject matter jurisdiction"); McDaniel v. Compania Minera Mar de Cortes, Sociedad Anonimo, Inc., 528 F. Supp. 152, 155 (D. Ariz. 1981) (upholding supplemental personal jurisdiction with no discussion other than stating that "[t]his Court has pendent jurisdiction to determine the state law claims").

48. *Hargrave*, 646 F.2d at 720.

49. *Robinson*, 484 F.2d at 555–56; *United States Dental Inst.*, 396 F. Supp. at 575.

50. *See* cases cited *supra* note 39.

as to compel a personal appearance before them."[51] Based on this power, "it matters little . . . that [a party] has become subject to the court's ultimate judgment as a result of territorial or extraterritorial process."[52] Further, the fact that supplemental personal jurisdiction is "helpful in achieving the purposes" of nationwide service of process statutes supports this implicit power.[53] These courts see the right as implicit because, otherwise, the overall purposes of nationwide service of process statutes themselves would be compromised due to a court's inability to bring before it other claims transactionally related to the anchor claim.[54] Therefore, as these courts see it, the right must exist, even if not explicitly.

While courts that accepted the concept of supplemental personal jurisdiction relied on issues like fairness, supplemental subject matter jurisdiction, and implicit authorization, these considerations did not impress all courts.[55] Courts rejecting the application of supplemental personal jurisdiction expressed concerns over the differences between supplemental personal jurisdiction and supplemental subject matter jurisdiction, and protested that, without express congressional authorization, supplemental personal jurisdiction is beyond the statutory power given to courts.[56]

Courts focusing on the differences between supplemental personal jurisdiction and supplemental subject matter jurisdiction have proclaimed that in "*United Mine Workers of America v. Gibbs* . . . the Supreme Court did not intend to extend pendent jurisdiction beyond the limits of the service of process relied upon to originally obtain jurisdiction over a defendant."[57] The general theme running through this line of cases is that "*Gibbs* . . . does not stand for the proposition that service of process to obtain personal jurisdiction can be bootstrapped."[58] These courts are concerned, not necessarily that supplemental personal jurisdiction is somehow improper or unfair, but that any attempt to justify it using the supplemental subject matter jurisdiction grounds established in *Gibbs* is a misapplication of Supreme Court precedent.[59]

51. *Robinson*, 484 F.2d at 555.

52. *Id.*

53. Oetiker v. Jurid Werke, 556 F.2d 1, 5 (D.C. Cir. 1977).

54. *See id.*; *see also* Heller, *supra* note 30, at 131–33; Steven Michael Witzel, *Removing the Cloak of Personal Jurisdiction From Choice of Law Analysis: Pendent Jurisdiction and Nationwide Service of Process*, 51 FORDHAM L. REV. 127, 137 (1982).

55. *See, e.g.*, Ratner v. Scientific Res. Corp., 53 F.R.D. 325, 328 (S.D. Fla. 1971); Scovill Mfg. Co. v. Elec. Co., Ltd., 319 F. Supp. 772, 777 (N.D. Ill. 1970); Olympic Capital Corp. v. Newman, 276 F. Supp. 646, 659 (C.D. Cal. 1967); Levin v. Great W. Sugar Co., 274 F. Supp. 974, 980 (D.N.J. 1967); Trussell v. United Underwriters, Ltd., 236 F. Supp. 801, 804 (D. Colo. 1964); Wilensky v. Standard Beryllium Corp., 228 F. Supp. 703, 705 (D. Mass. 1964); Lasch v. Antkies, 161 F. Supp. 851, 852 (E.D. Penn. 1958).

56. *See* cases cited *supra* note 55.

57. *Scovill Mfg. Co.*, 319 F. Supp. at 777 (italics added).

58. *Olympic Capital Corp.*, 276 F. Supp. at 659.

59. *See, e.g.*, *Scovill Mfg. Co.*, 319 F. Supp. at 777.

The second theme running through opinions that disallowed supplemental personal jurisdiction in this era was lack of congressional authorization for the practice.[60] According to these courts, supplemental personal jurisdiction impermissibly extended their powers.[61] Courts expressed concern that "Congress has not provided explicitly for such service, neither by the statute here in question . . . nor has it done so by rule."[62] Further reservations were expressed about the implicit authorization of the practice, with courts acknowledging that the right could conceivably be implicit,[63] but stating that authorization should "be done expressly, and such an intent is not to be read into a statute by implication."[64] The courts' concerns were not necessarily related to the constitutionality of the practice, but rather to the fact that Congress had never given the power to the federal courts expressly.[65] Courts acknowledged that "it clearly would be within the competence of Congress in cases involving pendent claims to allow the process of the district court to run into every part of the United States,"[66] but Congress simply had failed to make such an allowance with regard to federal nationwide service of process issues.[67]

Early supplemental personal jurisdiction cases presented a split of authority concerning whether the practice was legitimate.[68] Courts upholding the process emphasized issues such as judicial economy and argued that the process could easily be maintained by analogy to supplemental subject matter jurisdiction or by implicit congressional authorization.[69] These cases served important precedential value for modern cases applying supplemental personal jurisdiction. Opponents of supplemental personal jurisdiction expressed reservations about the lack of congressional authorization, despite Congress's obvious power to provide for supplemental personal jurisdiction over state claims.[70] These views did not have great precedential effect in modern cases.

2. Modern Cases

While early cases were divided, modern cases applying the doctrine of supplemental personal jurisdiction appear straightforward. Generally speaking, modern courts overwhelmingly side with the early courts that

60. *See, e.g.*, *Wilensky*, 228 F. Supp. at 705.
61. *See id.*
62. Trussell v. United Underwriters, Ltd., 236 F. Supp. 801, 804 (D. Colo. 1964).
63. *Id.*
64. *Wilensky*, 228 F. Supp. at 705.
65. *Id.*; *see also Trussell*, 236 F. Supp. at 804.
66. *Wilensky*, 228 F. Supp. at 705.
67. *Id.*
68. *See supra* notes 39–41 and accompanying text.
69. *See* cases cited *supra* note 39.
70. *See, e.g.*, *Trussell*, 236 F. Supp. at 804; *Wilensky*, 228 F. Supp. at 705.

supported the practice.[71] In fact, one is hard pressed to find any modern cases that disallow the practice. Modern courts rely on early cases as precedent and appear unwilling to fully analyze the issue of supplemental personal jurisdiction, expressing their reliance on the determination of issues in those cases.[72] In addition, the courts' analyses are weak. A standard modern analysis simply mentions supplemental personal jurisdiction, compares it with supplemental subject matter jurisdiction, and ends with a conclusory statement such as "we can find little reason not to authorize the court to adjudicate a state claim."[73]

Several reasons exist for the dramatic shift towards resolving the conflict surrounding supplemental personal jurisdiction. First, from the courts' standpoint, this process is fair and efficient.[74] Therefore, when a court is confronted with the issue, its natural inkling is to grant supplemental personal jurisdiction, both because of efficiency and a lack of unfairness to the defendant already brought before the court.[75] Because of this natural tendency, courts are willing to rely on past precedent allowing the practice.[76] In essence, they base their footing on the foundation of past precedent, without really looking at its sturdiness. Due to the fact that courts favor supplemental personal jurisdiction, no concern is given to early cases disallowing the practice.

Secondly, early cases that ruled in favor of congressional authorization were not applied to the issue of supplemental subject matter jurisdiction for quite some time.[77] When most of the early—and some of the more modern—cases were decided, courts were not required to have congressional authorization to assert subject matter jurisdiction over transactionally related state-law claims.[78] Even when this change was formulated, courts that compared supplemental subject matter jurisdiction to supplemental personal jurisdiction neither considered this impor-

71. *See, e.g.*, ESAB Group, Inc. v. Centricut, Inc., 126 F.3d 617, 628 (4th Cir. 1997); Rice v. Nova Biomedical Corp., 38 F.3d 909, 913 (7th Cir. 1994); IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1056–57 (2d Cir. 1993); Mates v. North Am. Vaccine, Inc., 53 F. Supp. 2d 814, 821 (D. Md. 1999); United States v. Grewell, No. 97-170C, 1997 U.S. Dist. LEXIS 8957, at *14–15 (E.D. La. Sept. 24, 1997); Stetson Assocs. v. Bennington Iron Works, Inc., No. 86-3061-Y, 1987 U.S. Dist. LEXIS 15346, at *6 (D. Mass. Aug. 20, 1987).

72. *See* cases cited *supra* note 71.

73. *ESAB Group, Inc.*, 126 F.3d at 628.

74. *See, e.g.*, *id.*

75. *See, e.g.*, Robinson v. Penn Cent. Co., 484 F.2d 553, 555–56 (3d Cir. 1973).

76. *See* cases cited *supra* note 71.

77. *Finley v. United States*, 490 U.S. 545, 556 (1989), was the first U.S. Supreme Court case to mandate congressional authorization for supplemental subject matter jurisdiction. *Finley* was decided eight years after the last of the early cases. *See* cases cited *supra* note 39.

78. *See, e.g.*, United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 725 (1966) (recognizing the concept of supplemental subject matter jurisdiction, even though no statute existed at the time to authorize it); Nanavati v. Burdette Tomlin Mem'l Hosp., 857 F.2d 96, 105 (3d Cir. 1988) (walking through the supplemental subject matter jurisdiction analysis with no mention of federal statutory authorization); Travis v. Anthes Imperial Ltd., 473 F.2d 515, 528 (8th Cir. 1973) (exerting supplemental subject matter jurisdiction over state-law claims with no mention of statutory authorization).

tant point nor took into account the significance of the passage of 28 U.S.C. § 1367.[79]

C. 28 U.S.C. § 1367

Prior to the passage of 28 U.S.C. § 1367 in 1990, supplemental subject matter jurisdiction seemed on precarious footing. The Supreme Court had severely limited its applicability without express congressional authorization.[80] Congress's response to the Supreme Court's request for statutory authorization was the passage of Section 1367. The statute had two explicit goals: first, it intended to codify supplemental subject matter jurisdiction as expressed in *Gibbs*;[81] and second, it intended to overrule Supreme Court precedent disallowing pendent-party jurisdiction.[82]

Section 1367(a) states in pertinent part that "[t]he 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."[83] Part (a) also specifically allows for additional parties once the court's original jurisdiction is satisfied by stating that "[s]uch supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties."[84]

Section 1367(b) alleviates concerns about supplemental jurisdiction destroying federal courts' diversity of citizenship requirements. It disallows supplemental jurisdiction over claims under (1) Federal Rules of Civil Procedure 14, 19, 20, or 24, or (2) persons to be joined as plaintiffs under Rule 19 "when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332."[85]

Section (c) provides district courts with discretion to decline supplemental claims based on certain factors.[86] These factors include the novelty or complexity of the state-law claim,[87] whether the state claim predominates over the federal claim,[88] whether the federal question remains or has been dismissed,[89] and other "compelling reasons."[90]

79. *Finley*, 490 U.S. at 549–51.

80. *See id.* at 556.

81. H.R. REP. NO. 101-734, at 29 n.15 (1990).

82. *Id.* at 28–29. Pendent-party jurisdiction refers to a situation where plaintiffs use supplemental jurisdiction to bring state-law claims against parties that are not before the court within its original jurisdiction. *See* RICHARD L. MARCUS ET AL., CIVIL PROCEDURE 879, 889 (3d ed. 2000).

83. 28 U.S.C. § 1367(a) (1994).

84. *Id.*

85. *Id.* § 1367(b).

86. *Id.* § 1367(c).

87. *Id.* § 1367(c)(1).

88. *Id.* § 1367(c)(2).

89. *Id.* § 1367(c)(3).

90. *Id.* § 1367(c)(4). The four factors articulated in *United Mine Workers of America v. Gibbs*—judicial economy, convenience, fairness to the parties, and whether all claims should be tried to-

The implementation of 28 U.S.C. § 1367 and the policies behind it should have had major effects in the area of supplemental personal jurisdiction. While the statute seems likely to apply to supplemental personal jurisdiction, courts instead have continued in the view that no congressional authorization is required to maintain supplemental personal jurisdiction.[91] This note examines the rationales behind supplemental subject matter jurisdiction so often used by courts in upholding supplemental personal jurisdiction and determines whether these rationales should require statutory authorization for supplemental personal jurisdiction.

III. ANALYSIS

A. Statutory Authorization

In exercising supplemental personal jurisdiction, many courts have analogized the practice to the more traditional form of supplemental subject matter jurisdiction.[92] When closely examined, however, this analogy presents problems in the exercise of supplemental personal jurisdiction—namely, that without express congressional authorization, courts must analyze the issue the way they did before the passage of Section 1367. Prior to the passage of this statute, the Supreme Court severely limited the applicability of supplemental subject matter jurisdiction in *Finley v. United States*.[93] The Court ruled in *Finley* that the power to add new parties through pendent-party jurisdiction must come from jurisdictional statutes themselves and cannot be created by courts.[94] The statute in *Finley* granted jurisdiction over "civil actions on claims against the United States,"[95] making no mention of adding additional parties under pendent-party jurisdiction.[96] With no statutory grant of pendent jurisdiction over parties, such maintenance of jurisdiction was declared improper.[97]

While the *Finley* Court attempted to limit its holding to pendent party jurisdiction,[98] commentators noted that there was "no principled basis for holding the line here."[99] If congressional authorization applies

gether—have continued to be used as additional factors considered by circuit courts when determining whether the state claim should be dismissed after one of the discretionary factors of part (c) has been met. Palmer v. Hosp. Auth. of Randolph County, 22 F.3d 1559, 1569 (11th Cir. 1994) ("[W]hen one or more of these factors is present, the additional *Gibbs* considerations may, by their presence or absence, influence the court in its decision concerning the exercise of such discretion.").

91. *See* cases cited *supra* note 71.

92. *See, e.g.*, ESAB Group, Inc. v. Centricut, Inc., 126 F.3d 617, 628 (4th Cir. 1997).

93. 490 U.S. 545 (1989).

94. *Id.* at 555–56.

95. *See id.* at 552 (citing 28 U.S.C. § 1346(b) (1994)).

96. *See id.*

97. *See id.* at 556.

98. *See id.*

99. Thomas M. Mengler, *The Demise of Pendent and Ancillary Jurisdiction*, 1990 BYU L. REV. 247, 259.

to pendent-party jurisdiction, so too will it apply to other forms of supplemental subject matter jurisdiction.[100] These problems facilitated the passage of 28 U.S.C. § 1367.[101] Cases such as *Finley* emphasized that supplemental subject matter jurisdiction was an extension of courts' powers, and that express congressional authorization was required.[102]

On these same grounds, no reason exists why supplemental personal jurisdiction should be treated differently. If congressional authorization is required for pendent-party jurisdiction, and ultimately for all other forms of supplemental subject matter jurisdiction, it should also be required for the exercise of supplemental personal jurisdiction.

In supplemental subject matter jurisdiction, a court has subject matter jurisdiction over one claim or one party presently before the court. Because of fairness and efficiency considerations, the court is also allowed to exercise supplemental subject matter jurisdiction over additional claims or parties. In the context of supplemental personal jurisdiction, a court would already have subject matter jurisdiction and personal jurisdiction over a specific claim. Presumably because of efficiency or fairness considerations, however, the court exercises supplemental personal jurisdiction over a claim upon which it would not ordinarily have personal jurisdiction.

Any analogy between supplemental subject matter jurisdiction and supplemental personal jurisdiction is not perfect. The two have different foundations and limitations. Subject matter jurisdiction deals with the jurisdictional limits contained in Article III of the Constitution, while personal jurisdiction deals with due process.[103] Thus, prior to 28 U.S.C. § 1367, a court exercising supplemental subject matter jurisdiction exceeded the limits of its Article III powers, while supplemental personal jurisdiction would not implicate these same concerns.[104]

Just because Article III powers are not involved in supplemental personal jurisdiction cases does not mean that only due process concerns are present.[105] The Supreme Court has addressed the issue and ruled that, beyond issues of due process, a court must also fulfill the require-

100. *Id.* As Dean Mengler explains:

> If adjudicating a jurisdictionally insufficient claim against a new party is unlawful, so is adjudicating a jurisdictionally insufficient claim against a party already in the suit. Both adjudicate a state-law matter that is beyond the limit of federal court subject matter jurisdiction. Therefore, because they exceed our state-federal balance in the same measure, both should rise and fall together.

Id.

101. *See* WRIGHT, *supra* note 18, at 120 ("[The] purpose [of 28 U.S.C. § 1367] was to overrule *Finley* and it has done that."); *see also* Herman v. Wolfe, No. 96C4801, 1998 WL 30706, at *3 (N.D. Ill. Jan. 26, 1998); Hollman v. United States, 783 F. Supp. 221, 222–23 (M.D. Penn. 1992); McCray v. Holt, 777 F. Supp. 945, 948 (S.D. Fla. 1991); American Pfauter, Ltd. v. Freeman Decorating Co., 772 F. Supp. 1071, 1073 (N.D. Ill. 1991).

102. *Finley*, 490 U.S. at 555–56.

103. *See* Omni Capital Int'l Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 104 (1987).

104. *See id.*

105. *See id.*

ments of Federal Rule of Civil Procedure 4 for proper service of process.[106] Rule 4(k)(1) presents four situations in which a court can serve a summons, and thereby gain personal jurisdiction.[107] None of these, however, appear to authorize the service of a summons regarding claims that are not given nationwide service of process or are unable to be reached using the state's long-arm statute.[108]

Thus, while subject matter and personal jurisdiction are completely different concepts, the two supplemental jurisdiction scenarios present similar situations of expanded judicial powers. It does not make sense to require congressional authorization for supplemental subject matter jurisdiction but not for supplemental personal jurisdiction. The lesson to be taken from *Finley* is that express congressional authorization should be required for any kind of supplemental jurisdiction that broadens a court's powers, whether it be supplemental subject matter jurisdiction or supplemental personal jurisdiction.

This logically leads to the next question—namely, is there some sort of congressional authorization for supplemental personal jurisdiction? This could conceivably come from three sources: (1) 28 U.S.C. § 1367; (2) Federal Rule of Civil Procedure 4; or (3) statutes that authorize nationwide service of process for certain federal claims.

1. 28 U.S.C. § 1367

An examination of the plain language and legislative history of Section 1367 leads to the inevitable conclusion that the statute speaks to supplemental subject matter jurisdiction, not supplemental personal jurisdiction. Section 1367(a) states that "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."[109]

This language clearly supports the notion that it is subject matter jurisdiction and not personal jurisdiction to which the statute refers. For example, the statute gives a court subject matter jurisdiction over a claim that it would not normally have, but does not give the court any form of personal jurisdiction over any of the claims.[110] A court must have both subject matter jurisdiction and personal jurisdiction for a judgment to be valid.[111] Section 1367 allows a court to take subject matter jurisdiction over a claim, but the court still must gain personal jurisdiction over the defendant.[112]

106. *See id.* at 104–05.
107. FED. R. CIV. P. 4(k)(1)(A)–(D).
108. *See id.*
109. 28 U.S.C. § 1367(a) (1994).
110. *See id.*
111. *See, e.g.*, FRIEDENTHAL, *supra* note 10, at 96.
112. *See id.*; *see also* 28 U.S.C. § 1367(a).

The legislative history of Section 1367 also supports the notion that the statute was not meant to support supplemental personal jurisdiction. House Report 734 describes 28 U.S.C. § 1367 as authorizing district courts to "exercise supplemental jurisdiction over additional *claims*, including *claims* involving the joinder of additional parties."[113] However, it does not address the exercise of supplemental personal jurisdiction over a party for which personal jurisdiction has not already been obtained.[114] As illustrated, the language uses the term "claim" specifically,[115] thereby evincing Congress's intention that supplemental claims, not personal jurisdiction, be the focus of Section 1367. Because neither plain language nor the House Report supports the notion that Section 1367 authorizes supplemental personal jurisdiction, the search for congressional authorization must continue.

2. Rule 4(k)(1)(D)

Federal Rule of Civil Procedure 4 provides another possible source of congressional authorization for supplemental personal jurisdiction.[116] If supplemental personal jurisdiction was a process with which Congress was comfortable, however, Congress could explicitly state that supplemental personal jurisdiction could be maintained once personal jurisdiction was obtained through nationwide service of process.

Rule 4(k)(1)(D) in no way supports the notion that supplemental personal jurisdiction was Congress's intention. All that is authorized is "[s]ervice of a summons . . . effective to establish jurisdiction over the person . . . when authorized by a statute of the United States."[117] Rule 4(k)(1)(D) does not address the issue of authorizing service of a summons to establish supplemental personal jurisdiction over a defendant when personal jurisdiction is already established by nationwide service of process.[118] Thus, Rule 4 cannot serve as the authorization for supplemental personal jurisdiction.

3. RICO, the Clayton Act, the Securities Exchange Act, and ERISA

The final possibility for congressional authorization lies with the federal statutes that provide for nationwide service of process. Such statutes include RICO,[119] the Clayton Act,[120] the Securities Exchange Act,[121] and ERISA.[122] The language of RICO states that:

113. H.R. REP. NO. 101-734, at 28 (1990) (emphasis added).
114. *Id.* at 27–30.
115. *Id.* at 28.
116. FED. R. CIV. P. 4(k)(1)(D).
117. *Id.*
118. *See id.*
119. 18 U.S.C. § 1965 (1994).
120. 15 U.S.C. § 22 (1994).
121. *Id*. § 78aa.

> In any action . . . in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.[123]

The language of the Clayton Act provides for service of process "in the district of which [the defendant] is an inhabitant, or wherever [the defendant] may be found."[124] The Securities Exchange Act has similar language. It provides that "process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found."[125] Finally, ERISA explains that "process may be served in any other district where a defendant resides or may be found."[126]

No language in the above-cited statutes explicitly provides for supplemental personal jurisdiction over state-law claims. Yet courts and commentators have argued that this right is implicit in congressional authorization of nationwide service of process.[127] The problem with the notion of implicit congressional authorization, however, is that the idea was rejected with respect to subject matter jurisdiction in *Finley*.[128] Prior to *Finley*, the Supreme Court expressed the statutory test for supplemental subject matter jurisdiction as whether "Congress in the statutes conferring jurisdiction has not expressly or by implication negated its existence."[129] Thus, at this time, the Court saw fit to determine whether supplemental subject matter jurisdiction was disallowed, not whether it was allowed.

In *Finley*, however, the Court categorically rejected this approach to pendent-party jurisdiction and ruled that, for the practice to be allowed, explicit congressional authorization must be present.[130] As previously mentioned,[131] if explicit congressional authorization is mandated for pendent-party jurisdiction, no reason exists to treat other forms of supplemental subject matter jurisdiction[132] or supplemental personal jurisdiction differently. While supplemental personal jurisdiction and supplemental subject matter jurisdiction have fundamental differences,[133]

122. 29 U.S.C. § 1132(e)(2) (1994).
123. 18 U.S.C. § 1965(b) (1994).
124. 15 U.S.C. § 22 (1994).
125. *Id*. § 78aa.
126. 29 U.S.C. § 1132(e)(2).
127. *See* cases cited *supra* note 39; *see also* Heller, *supra* note 30, at 131 ("The converse proposition, that since the statutes do not explicitly authorize pendent process it must not be proper, does not necessarily follow."); Witzel, *supra* note 54, at 137.
128. Finley v. United States, 490 U.S. 545, 549 (1989).
129. Aldinger v. Howard, 427 U.S. 1, 18 (1976).
130. *Finley*, 490 U.S. at 549.
131. *See supra* notes 99–102 and accompanying text.
132. *See* Mengler, *supra* note 99, at 259.
133. *See supra* text accompanying notes 103–04.

it does not make sense to require explicit authorization for one form of supplemental jurisdiction and not for the other.

The concern with rejecting the notion of implicit congressional authorization is that the goals of nationwide service of process are not served without allowing supplemental personal jurisdiction over transactionally related state-law claims.[134] Of the interests served by nationwide service of process, as listed by Professor Maryellen Fullerton,[135] three have been used by commentators to advance supplemental personal jurisdiction.[136] Commentators identify as relevant:

> (1) the need to provide a forum for litigation to correct and control severe problems in the national economy that are likely to involve defendants across the nation acting in a concerted fashion;
>
> (2) the need to provide a forum for litigation involving defendants in different states that can only be completely resolved in one proceeding where no single state has the power to adjudicate;
>
> (3) the need to provide a forum for litigation to regulate securities problems affecting the national economy that are likely to involve defendants whose actions have affected many plaintiffs in distant locations.[137]

The single theme present in this list is the "provi[sion of] numerous convenient federal forums in which plaintiffs may bring certain statutory claims, thereby making it easier to bring those claims in federal court."[138]

The problem with this analysis, however, is that these concerns could have provided the basis for implicit authorization of supplemental subject matter jurisdiction, which the Supreme Court has rejected.[139] For example, prior to *Finley*, it could have been argued that if Congress did not allow for supplemental subject matter jurisdiction when it enacted a federal cause of action, plaintiffs would be discouraged from bringing claims in federal court due to the fear of not being able to adjudicate all claims together. It also could have been argued that supplemental subject matter jurisdiction was necessary because most plaintiffs cannot afford to litigate federal claims in federal court and state claims in state court. In spite of factors supporting the idea of implicitly authorized supplemental subject matter jurisdiction, the Court rejected this view in *Finley*.[140] If these factors are insufficient to convince the Court to authorize implicit supplemental subject matter jurisdiction, it seems logical that they should also be insufficient to authorize implicit supplemental personal jurisdiction.

134. Heller, *supra* note 30, at 131–32.
135. Fullerton, *supra* note 22, at 70–71.
136. Heller, *supra* note 30, at 132–33.
137. *Id.* (citing Fullerton, *supra* note 22, at 64–68).
138. *Id.* at 133.
139. *See* Finley v. United States, 490 U.S. 545, 549 (1989).
140. *Id.*

Finally, contrary to the belief of some courts and commentators that jurisdictional statutes should be read broadly,[141] the *Finley* Court said explicitly that "we will not assume that the full constitutional power has been congressionally authorized, and we will not read jurisdictional statutes broadly."[142] Therefore, any attempt to read the statutes conferring nationwide service of process broadly enough to give supplemental personal jurisdiction over related state-law claims would appear futile.

Courts have continued to exercise supplemental personal jurisdiction without official congressional authorization.[143] Some courts have even gone so far as to analogize supplemental personal jurisdiction and supplemental subject matter jurisdiction, without addressing the fact that congressional authorization should be present for both.[144] Even recent commentators mention only in passing that supplemental personal jurisdiction must be statutorily authorized and they have little trouble with the fact that courts continue the practice without any authorization.[145] It is apparent, however, that no congressional authorization exists for the practice, and courts exercising supplemental personal jurisdiction have overstepped their powers.

B. Due Process

It is clear that the continued exercise of supplemental personal jurisdiction is improper due to lack of congressional authorization. Even if the practice was authorized by statute, due process concerns would not necessarily be alleviated. Any due process analysis would center around the minimum contacts test established in *International Shoe*.[146]

141. *E.g.*, Heller, *supra* note 30, at 131 ("Such an inquiry is especially proper here because statutes that extend the jurisdiction of the courts, as nationwide service of process do [sic], are to be broadly construed.").

142. *Finley*, 490 U.S. at 549.

143. *See* cases cited *supra* note 71.

144. *See* ESAB Group, Inc. v. Centricut Inc., 126 F.3d 617, 627–28 (4th Cir. 1997).

145. Casad, *supra* note 1, at 1609–10 ("To relieve doubts about the propriety of pendent personal jurisdiction, the statute authorizing nationwide service of process in federal question cases should specifically authorize the assertion of pendent state law claims in the same action without the necessity of separate service of process under the state's long-arm statute."); Heller, *supra* note 30, at 131 ("For pendent process to be effective it must be statutorily authorized.").

146. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). In *International Shoe*, the Supreme Court promulgated the test for assessing the constitutionality of personal jurisdiction as whether the defendant has "minimum contacts [with the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Id.*

Further tests for determining the constitutionality of personal jurisdiction were established in *World Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980), and *Burger King v. Rudzewicz*, 471 U.S. 462 (1985). In *World Wide Volkswagen*, the Court explained that there must be evidence that "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." 444 U.S. at 297. In *Burger King*, the Court ruled that evidence of "purposeful availment" of the forum and the entering of a long-term relationship with the forum were sufficient to maintain personal jurisdiction. 471 U.S. at 483–87.

The minimum contacts test centers around fairness to the defendant.[147] For supplemental personal jurisdiction, fairness concerns could develop from forcing a defendant to anticipate defenses to various laws of several different states. But as noted by commentators, "[t]his assumes that the assertion of jurisdiction by a district court necessarily means that the law of the state in which the district is located will be applied to the pendent state claims."[148] It is possible that the law of the defendant's home state would be applied instead, thereby alleviating concerns related to use of various state laws. In any event, the choice of law would focus on contacts with the fora.[149] For example, a California defendant brought into court in Kansas would not necessarily have Kansas law applied to supplemental personal jurisdiction claims. Instead, Kansas choice-of-law provisions would decide which state law would be used based on the defendant's contacts. This could just as easily—and perhaps more than likely—be California law. This may not, however, guard against or provide protection for a state's unfair choice-of-law provisions.[150] For example, Kansas's choice-of-law provisions could conceivably be weighted towards applying Kansas law as opposed to California law.

Also important from the perspective of fairness is that the state claims would have to arise from the same transaction or occurrence as the federal claims,[151] similar to the approach taken with supplemental subject matter jurisdiction.[152] Therefore, the defendant will already be before the court in the federal claim's defense. While it is certainly true that, ordinarily, mere presence before a court does not confer personal jurisdiction for other claims,[153] the fact that federal and state claims would be transactionally related appears to alleviate fairness concerns.[154] Because of the transactional relation of the claims, the defendant would be prepared to defend the claims together.[155]

For other issues concerning fairness, the accepted test for application of the Fifth Amendment's[156] due process clause to nationwide ser-

147. Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites, 456 U.S. 694, 702 (1982) ("The personal jurisdiction requirement recognizes and protects an individual liberty interest.").

148. Heller, *supra* note 30, at 135.

149. *Id.*

150. Casad, *supra* note 1, at 1608; *see also* Witzel, *supra* note 54, at 167 ("The inherent forum bias of modern choice of law theories, when combined with the disparities among state law, results in varied adjudication due primarily to the federal forum.").

151. *See, e.g.*, United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 725 (1966).

152. 28 U.S.C. § 1367(a) (1994).

153. *See* WRIGHT, *supra* note 18, at 445.

154. *See* Heller, *supra* note 30, at 129–30.

155. *Id.*

156. *See, e.g.*, Peay v. Bellsouth Med. Assistance Plan, 205 F.3d 1206, 1210 (10th Cir. 2000) ("More specifically, in federal question cases, personal jurisdiction flows from the Due Process Clause of the Fifth Amendment."); Republic of Panama v. BCCI Holdings, 119 F.3d 935, 942 (11th Cir. 1997) ("It is well established that when, as here, a federal statute provides the basis for jurisdiction, the constitutional limits of due process derive from the Fifth, rather than the Fourteenth, Amendment.").

vice of process was established by the dissenting opinion in *Stafford v. Briggs*.[157] Justice Stewart remarked that, for nationwide service of process cases, minimum contacts with a particular state are not required.[158] Rather, "due process requires only certain minimum contacts between the defendant and the sovereign that has created the court."[159] In *Stafford*, suits were brought against a former U.S. Attorney and a former Assistant U.S. Attorney in federal court.[160] Because both defendants were U.S. residents and federal government employees, their contacts with the United States as a whole would be enough to maintain jurisdiction based on nationwide service of process.[161]

Justice Stewart's dissent has been accepted by nearly all circuits interpreting nationwide service of process statutes.[162] The extent of Fifth Amendment protection in nationwide service of process cases, however, is unclear.[163] Some circuits have ruled that "[a] defendant's 'minimum contacts' with the United States do not . . . automatically satisfy the due process requirements of the Fifth Amendment."[164] These cases emphasize that "[t]here are circumstances, although rare, in which a defendant may have sufficient contacts with the United States as a whole but still will be unduly burdened by the assertion of jurisdiction in a faraway and inconvenient forum."[165] The majority of circuits, however, hold that once a defendant's minimum contacts are satisfied—for example by mere resi-

157. 444 U.S. 527 (1980).

158. *Id.* at 553–54.

159. *Id.* at 554.

160. *Id.* at 530.

161. *Id.* at 554.

162. *See, e.g.*, United States SEC v. Carrillo, 115 F.3d 1540, 1543–44 (11th Cir. 1997); Busch v. Buchman, Buchman & O'Brien, 11 F.3d 1255, 1258 (5th Cir. 1994); United Liberty Life Ins. Co. v. Ryan, 985 F.2d 1320, 1330 (6th Cir. 1993); United Elec., Radio & Mach. Workers of Am. v. 163 Pleasant St. Corp., 960 F.2d 1080, 1085 (1st Cir. 1992); Go-Video, Inc. v. Akai Elec. Co., 885 F.2d 1406, 1414–16 (9th Cir. 1989); Lisak v. Mercantile Bancorp, Inc., 834 F.2d 668, 671–72 (7th Cir. 1987); Sec. Investor Prot. Corp. v. Vigman, 764 F.2d 1309, 1315–16 (9th Cir. 1985), *rev'd on other grounds sub nom.* Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258 (1992); Texas Trading & Milling Corp. v. Fed. Republic of Nigeria, 647 F.2d 300, 314–15 (2d Cir. 1981).

163. *Compare* Peay v. Bellsouth Med. Assistance Plan, 205 F.3d 1206, 1212 (10th Cir. 2000) (ruling that "in a federal question case where jurisdiction is invoked based on nationwide service of process, the Fifth Amendment requires the plaintiff's choice of forum to be fair and reasonable to the defendant"), *and* Republic of Panama v. BCCI Holdings, 119 F.3d 935, 947 (11th Cir. 1997) (explaining that "even when a defendant resides within the United States, courts must ensure that requiring a defendant to litigate in plaintiff's chosen forum is not unconstitutionally burdensome"), *with Busch*, 11 F.3d at 1258 (ruling that "the court has personal jurisdiction over [the defendant] because [the defendant] has minimum contacts with the United States and resides herein"), *Go-Video*, 885 F.2d at 1417 ("[T]he district court appropriately chose to examine the appellants' national contacts, correctly determined that due process was not offended by this decision, and properly ruled jurisdiction to exist."), *and Lisak*, 834 F.2d at 671 ("[T]here is no constitutional obstacle to nationwide service of process in the federal courts in federal-question cases.").

164. *Republic of Panama*, 119 F.3d at 947.

165. *Id.*

dence in the United States—the Fifth Amendment's due process clause is satisfied.[166]

Analysis of due process problems concerning supplemental personal jurisdiction makes sense only when viewed in light of nationwide service of process. Problems with fairness appear to stem from nationwide service of process and not from supplemental personal jurisdiction. It is not realistic to hold that due process is violated only by maintaining a state-law claim that is transactionally related to a nationwide service of process claim. Rather, any due process implication would have to arise from the federal nationwide service of process claim. Thus, the problem is not with supplemental personal jurisdiction, but with nationwide service of process.

Nationwide service of process, however, has been held constitutional in numerous instances.[167] For example, in *Mississippi Publishing Corp. v. Murphree*,[168] the Supreme Court noted explicitly that "Congress could provide for service of process anywhere in the United States."[169] If it is constitutional for Congress to provide for nationwide service of process, it seems illogical to argue that issues of fairness should stop Congress from asserting process over transactionally related state-law claims. Due process concerns may still require additional factors to ensure fairness, but this would apply equally to the federal claims with which the state-law claims are transactionally related. Thus, due process concerns would appear to lie with nationwide service of process and not with supplemental personal jurisdiction.

Exercising supplemental personal jurisdiction over a transactionally related claim in which the defendant is already before the court does not appear to give rise to due process implications. As explained by one court exercising supplemental personal jurisdiction:

> Once the defendant is before the court, it matters little, from the point of view of procedural due process, that he has become subject to the court's ultimate judgment as a result of territorial or extraterritorial process. Looked at from this standpoint, the issue is not one of territorial in personam jurisdiction—that has already been answered by the statutes—but of subject matter jurisdiction. It is merely an aspect of the basic pendent jurisdiction problem.[170]

166. *See, e.g.*, *Busch*, 11 F.3d at 1258; *Go-Video*, 885 F.2d at 1416; *Lisak*, 834 F.2d at 671. *But see Busch*, 11 F.3d at 1259 (Garza, J., dissenting). In dissent, Judge Garza argued that

> the proper focus for a personal jurisdiction test should be on protecting an individual's liberty interest in avoiding the burdens of litigating in a distant or inconvenient forum. Requiring that the individual defendant in a national service of process case only reside somewhere in the United States does not protect this interest.

Id.

167. *See* Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 442 (1946); Robertson v. R.R. Labor Bd., 268 U.S. 619, 622 (1925).

168. 326 U.S. 438.

169. *Id.* at 442.

170. Robinson v. Penn Cent. Co., 484 F.2d 553, 555 (3d Cir. 1973).

Analysis of supplemental personal jurisdiction will eventually show that statutory authority is necessary. While supplemental personal jurisdiction raises issues different from those raised by supplemental subject matter jurisdiction, Supreme Court precedent has made clear that courts are required to have statutory authority to exert jurisdiction over parties. Furthermore, it remains clear that no statute authorizes supplemental personal jurisdiction expressly, and any implicit authorization is a further misapplication of Supreme Court precedent.[171] A supplemental personal jurisdiction statute, however, makes sense for concerns such as judicial economy and fairness. In addition, any due process concerns regarding supplemental personal jurisdiction appear incidental, with the problem likely stemming from nationwide service of process. Therefore, the proper solution is to find the right area and right circumstances for the necessary statutory authorization.

IV. RESOLUTION

An explicit statutory mandate authorizing supplemental personal jurisdiction is necessary for the doctrine to fully comply with applicable laws. For a variety of reasons expressed by courts, supplemental personal jurisdiction makes sense. First and foremost, concerns of judicial economy support the use of supplemental personal jurisdiction. Secondly, convenience issues support the notion that if the defendant is already before the court on one claim, personal jurisdiction should be established for other transactionally related claims. These issues themselves, however, are not compelling enough to allow the courts to extend their service of process powers.[172] Some sort of statutory mandate is necessary to bring supplemental personal jurisdiction within the district courts' powers.[173]

There are several ways to incorporate supplemental personal jurisdiction into statutory form. The simplest and most logical way would be to allow for supplemental personal jurisdiction in the congressional statutes that give courts nationwide service of process power over specific claims. For example, language at the end of the section of the Clayton Act[174] that allows for nationwide service of process could state: "Such service of process on a defendant is sufficient to establish *in personam* jurisdiction over claims that arise out of the same transaction or occurrence as the federal claim."

Statutory authorization could also come in the form of language added to 28 U.S.C. § 1367. That statute could be amended to specifically give courts the power to exercise supplemental personal jurisdiction over

171. *See supra* Part III.A.
172. *See supra* text accompanying notes 140–41.
173. *See supra* Part III.A.
174. *See supra* text accompanying note 27.

claims that are transactionally related to federal nationwide service of process claims. Similarly, Federal Rule of Civil Procedure 4(k)(1)(D) could provide courts with the power to exercise supplemental personal jurisdiction. The rule could be modified to state that personal jurisdiction is valid when authorized by a statute, not only for the federal claim, but also for state claims that arise out of the same transaction or occurrence. While either of these latter two options would achieve the necessary congressional authorization, the best alternative would be to modify the nationwide service of process statutes to clarify how far this jurisdictional power extends.

Regardless of which method is chosen, the necessary congressional authorization can be accompanied by discretionary factors similar to factors present in 28 U.S.C. § 1367(c).[175] These factors can serve the same goals they serve for supplemental subject matter jurisdiction—namely, to give courts discretion *not* to exercise supplemental jurisdiction when doing so would be particularly harsh or unfair. The statute could state that supplemental personal jurisdiction may be disallowed when "there are compelling reasons for declining jurisdiction." This discretionary power will help mitigate potential situations of extreme unfairness, such as unfair choice-of-law provisions.[176]

V. CONCLUSION

Two implications surface when dealing with service of process and personal jurisdiction situations. First, it must be ensured that a court fulfills the mandates of Federal Rule of Civil Procedure 4 in its service of process.[177] Second, the exercise of personal jurisdiction over the defendant must not violate due process.[178] In the supplemental personal jurisdiction context, courts have violated the first of these requirements. By establishing personal jurisdiction over federal claims through nationwide service of process, courts have established process in line with congressional directives. In maintaining personal jurisdiction over transactionally related state-law claims where personal jurisdiction could not otherwise be obtained, however, courts have acted without congressional guidance and have overstepped their bounds. They have reached farther than allowed by Federal Rule of Civil Procedure 4(k).

The solution is to give explicit congressional authorization for the exercise of supplemental personal jurisdiction. This could be accomplished most efficiently by adding the necessary language in the statutes that allow nationwide service of process. This situation would not give

175. 28 U.S.C. § 1367(c) (1994).

176. *See supra* note 151 and accompanying text.

177. *See* Omni Capital Int'l Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 104 (1987); *see also supra* text accompanying notes 104–09.

178. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

rise to due process concerns, mainly because a court's power to maintain personal jurisdiction over transactionally related claims is not problematic.

Concerns of efficiency and fairness support the notion of supplemental personal jurisdiction. But much like supplemental subject matter jurisdiction, these concerns are insufficient to allow courts to exercise this form of supplemental jurisdiction. Rather, Congress must explicitly give this power to federal courts.