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PURPOSEFUL AVAILMENT

MARK C. WEBER*

The minority portion of Justice O'Connor's opinion in *Asahi Metal Industry Co. v. Superior Court*[1] begins with a recitation of the purposeful availment requirement: the minimum contacts sufficient to permit a court to exercise jurisdiction over a foreign defendant must be those the defendant has purposefully established. Under the purposeful availment requirement, the relevant contacts are those related to the defendant's activities within the forum state that might be viewed as invoking the benefits and protections of the state's laws.[2] Justice Brennan's

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I thank my colleagues Bruce Ottley and Vincent Vitullo for their comments on an early draft. I also thank my research assistants, Stephen Chan and James Holden, who played an invaluable role in assemblying and analyzing the cases found in sections I-B-2-4 and I-C-2.

1. ___U.S.___, 107 S. Ct. 1026 (1987). The case arose out of a motorcycle accident in California. Plaintiff claimed that a blowout in the rear tire of his motorcycle made him lose control and collide with a tractor. He was severely injured; his wife, a passenger, was killed. Plaintiff sued the manufacturer of the tire tube, Cheng Shin Rubber Industrial Company, which cross-complained for indemnity from the other defendants and from Asahi Metal Industry Company, the manufacturer of the tire tube's valve assembly. Plaintiff settled with Cheng Shin and the other defendants, leaving only Cheng Shin's indemnity claim against Asahi. The California Supreme Court approved the exercise of jurisdiction by reversing the state court of appeals' entry of a writ of mandate commanding the superior court to grant the motion quashing the summons. *Id.* at 1029-30.

2. Justice O'Connor articulated the minimum contacts test as follows:

> The Due Process Clause of the Fourteenth Amendment limits the power of a state court to exert personal jurisdiction over a nonresident defendant. "[T]he constitutional touchstone" of the determination whether an exercise of personal jurisdiction comports with due process "remains whether the defendant *purposefully established* 'minimum contacts' in the forum State." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474, 105 S. Ct. 2174, 2183, 85 L. Ed.2d 528 (1985), quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L. Ed.2d 195 (1945). Most recently, we have reaffirmed the oft-quoted reasoning of *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S. Ct. 1228, 1239, 2 L. Ed.2d 1283 (1958), that minimum contacts must have a basis in "some act by which the defendant *purposefully avails* itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Burger King*, 471 U.S. at 475, 105 S. Ct. at 2183. "Jurisdiction is proper . . . where the contacts proximately result from actions by the defend-

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concurrence also endorsed this requirement,[3] while Justice Stevens's concurrence did not take issue with it.[4] Despite this seeming unanimity, the central dispute in *Asahi* may be described as a dispute over purposeful availment. The faction of the Court led by Justice O'Connor believed that putting a consumer product in the stream of commerce, without more, did not constitute purposeful availment of the benefits of the states that the product entered.[5] On the other hand, the faction led by Justice Brennan believed that the purposeful availment test was met in *Asahi*.[6]

While the Court has had many disagreements over the proper scope of territorial jurisdiction,[7] and scholars have criticized both the minimum contacts test in general and many aspects of its application,[8] neither the Court nor the scholars have

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ant *himself* that create a 'substantial connection' with the forum State." *Ibid.*, quoting *McGee v. International Life Insurance Co.*, 355 U.S. 220, 223, 78 S. Ct. 199, 201, 2 L. Ed.2d 225 (1957) (emphasis in original).

107 S. Ct. at 1031 (emphasis added). Thus, the purposeful availment requirement is that the defendant to whom the minimum contacts test is to be applied will not be vulnerable to suit unless it has deliberately established contacts with the state that has given it some benefit from activities that have taken place within the state. *See Hanson*, 357 U.S. at 253.

3. 107 S. Ct. at 1035 (Brennan, J., concurring). The Brennan opinion garnered three other votes (Justices Marshall, White, and Blackmun), while the minority portion of the O'Connor opinion also had four votes (Justices O'Connor, Rehnquist, Powell, and Scalia). A separate concurrence by Justice Stevens also attracted the votes of Justices White and Blackmun.

4. *Id.* at 1038 (Stevens, J., concurring).

5. *Id.* at 1033.

6. *Id.* at 1035 (Brennan, J., concurring). The concurrence stated, nevertheless, that the forum state, California, could not properly assert territorial jurisdiction because of considerations other than the test of purposefully created minimum contacts.

7. *See, e.g.*, Asahi Metal Indus. Co. v. Superior Court, ___ U.S. ___, 107 S. Ct. 1026 (1987); Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984).

8. A few of the most recent articles on territorial jurisdiction in general and minimum contacts in particular are Brilmayer & Paisley, *Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency*, 74 CALIF. L. REV. 1 (1986); Hay, *Refining Personal Jurisdiction in the United States*, 35 INT'L & COMP. L.Q. 32 (1986); Perdue, *Sin, Scandal and Substantive Due Process: Personal Jurisdiction and* Pennoyer *Reconsidered*, 62 WASH. L. REV. 479 (1987); Perschbacher, *Minimum Contacts Reapplied: Mr. Justice Brennan Has It His Way* in Burger King Corp. v. Rudzwicz, 1986 ARIZ. ST. L.J. 585; Sonenshein, *The Error of a Balancing Approach to the Due Process Determination of Jurisdiction Over the Person*, 59 TEMP. L.Q. 47 (1986); Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689 (1987); Weintraub, *Asahi Sends Personal Jurisdiction Down the Tubes*, 23 TEX. INT'L L.J. 55 (1988). Two scholars have recently engaged in a debate over the

given close critical attention to the purposeful availment aspect of the minimum contacts test. The time is ripe for an evaluation of purposeful availment.

Although the requirement is in no danger from the current Court,[9] significant developments in territorial jurisdiction doctrine over recent years suggest that perhaps it ought to be. The most important of these developments has been the Court's retreat from concepts of federalism and state territorial sovereignty in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*[10] and *Burger King Corp. v. Rudzewicz*.[11] In *Hanson v. Denckla*,[12] which originated the purposeful availment requirement, the Court reasoned that territorial limits on the sovereignty of the states restrict the otherwise all reaching power of the forum over every case in which litigation was not inconvenient or overly distant.[13] If sovereignty is no longer a proper concern in territorial jurisdiction disputes, then a purposeful

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scope of "general" and "specific" jurisdiction based on minimum contacts. Professor Twitchell opened with *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610 (1988). Professor Brilmayer responded in *Related Contacts and Personal Jurisdiction*, 101 HARV. L. REV. 1444 (1988), and Professor Twitchell replied in *A Rejoinder to Professor Brilmayer*, 101 HARV. L. REV. 1465 (1988).

9. *See supra* notes 2-4 and accompanying text.

10. 456 U.S. 694, 702 n.10 (1982).

11. 471 U.S. 462, 472 n.13 (1985).

12. 357 U.S. 235 (1958).

13. *Id.* at 251. Of course, *Hanson* places its exposition of the limits on state territorial sovereignty before its recitation of the minimum contacts requirement, suggesting that minimum contacts itself is a doctrine tied to state sovereignty ideas. The Court's meaning, however, appears to have been somewhat more restrictive. It viewed state sovereignty ideas as a further limit on jurisdiction when the proper tests would otherwise be only convenience and distance. In International Shoe Co. v. Washington, 326 U.S. 310 (1945), which originated the minimum contacts test, the Court placed distance and convenience factors within the minimum contacts inquiry:

> Those demands [of due process in the exercise of jurisdiction] may be met by such contacts of the [defendant] corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there. An "estimate of the inconveniences" which would result to the corporation from a trial away from its "home" or principal place of business is relevant in this connection.

Id. at 317 (quoting Hutchinson v. Chase & Gilbert, 45 F.2d 139, 141 (2d Cir. 1930)). Thus, the Court in *Hanson* seemed to find a second strand within minimum contacts, separating the ideas of distance and convenience from those of state territorial sovereignty. The state sovereignty ideas became the basis of the requirement that the minimum contacts (the test of distance and convenience) be purposefully created by the defendant (the test of state territorial sovereignty).

availment analysis may not be proper either.

This Article examines the purposeful availment requirement and questions whether it is consistent with sound judicial reasoning, particularly in light of the developments in other aspects of territorial jurisdiction doctrine. Part One describes the origins and history of purposeful availment. Part Two examines the doctrine's theoretical basis and the development that has taken place around it. Part Three evaluates purposeful availment in light of theoretical developments. This Article concludes with suggestions for a change in the application of the purposeful availment requirement.

I. THE HISTORY OF PURPOSEFUL AVAILMENT

A. Hanson v. Denckla

The purposeful availment requirement originated in *Hanson v. Denckla*.[14] In *Hanson* the Court considered a Florida judgment that had invalidated appointments from a trust whose trustee was in Delaware.[15] The settlor created the trust in Delaware while she was a Pennsylvania resident. She then moved to Florida, and five years later appointed $200,000 from the Delaware trust to each of two previously established trusts whose trustee was also in Delaware.[16] The settlor also corresponded with the trustee of the Delaware trust to change the trust advisor's compensation and to revoke the trust in the amount of $75,000 for an eight-month period.[17] When the settlor died, two legatees under the residuary clause of her will, who had already received $500,000 each, petitioned a Florida chancery court for a declaratory judgment that the funds from the Delaware trust passed under the residuary clause and that the previous appointments to the two trusts were, therefore, invalid.[18]

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14. 357 U.S. 235 (1958).

15. *Id.* at 238.

16. *Id.* at 239.

17. *Id.* at 252 n.24.

18. *Id.* at 240. The plaintiffs sued and personally served the executrix of the will, the beneficiaries, and all but one of the potential beneficiaries of the trusts. Other defendants, not residents of Florida and not personally served (but nevertheless notified of the action), included the Delaware trust companies that were the trustees of the main trust, the two trusts that received the appointment, several individual appointees whose appointments were made at the same time as those to the two trusts, and various potential

The beneficiaries of the trusts to which the appointments were made contended that the suit had to be dismissed because the Delaware trustees were indispensable parties to litigation over the validity of the trust and were outside the territorial jurisdiction of Florida. The trial court dismissed the action against the trust companies, but held that it retained the ability to adjudicate the case. The court concluded that the appointments were invalid because they were testamentary. Reversing the dismissal of the trust companies, the Florida Supreme Court ruled that the Florida courts had jurisdiction over the trust companies and other absent defendants. The court, however, affirmed the trial court's decision that the trust was invalid and the appointments ineffective because the settlor retained too much control over the trustee and corpus.[19]

While the Florida litigation was pending in the trial court, the executrix of the will began a declaratory judgment action in Delaware against the Florida plaintiffs and the trust companies. The Florida court enjoined the executrix's action. The beneficiaries of the two trusts to which the appointments were made, however, pursued the matter and obtained a judgment that the trust and appointments were valid, despite the contention that the Florida decree, which by then had been entered, was res judicata. The Florida Supreme Court was not persuaded by the executrix's argument that she was bound by the Delaware decree. Although the executrix contended in rehearing that the Florida court was bound by the full faith and credit clause, the court denied rehearing on November 28, 1956. The Florida plaintiffs were equally unsuccessful in their argument that the Delaware courts had to accord full faith and credit to the decisions of the Florida courts. The Delaware Supreme Court affirmed the Delaware chancellor's decision on January 14, 1957.[20]

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successors to the plaintiffs' interest. Only two of the nonresident defendants appeared, and they were potential successors to the plaintiffs. *Id.* at 241.

19. *Id.* at 238-39. The trust was composed of securities. The settlor had reserved the income from the securities for life. The remainder of this income was to be paid to the persons she was to appoint by inter vivos or testamentary means. The settlor had retained a great deal of control. She could change the trustee and amend or revoke the agreement at any time. Moreover, the trustee could sell assets; make investments; and participate in plans, proceedings, reorganizations, and mergers involving securities in the trust only with the consent of a "trust advisor" appointed by the settlor. *Id.* at 238-39.

20. *Id.* at 242-43. The United States Supreme Court refused to consider whether the Florida court erred in refusing to give full faith and credit to the Delaware trial court

The United States Supreme Court affirmed the Delaware court and reversed the Florida court. Chief Justice Warren's opinion began by disposing of the contention that the Florida court had in rem jurisdiction over the proceeding.[21] Warren next distinguished the latest territorial jurisdiction pronouncement of the Court, *McGee v. International Life Insurance Co.*,[22] on the ground that the cause of action in *McGee* arose out of conduct in the forum state.[23] The Court then announced a new version of the minimum contacts test of *International Shoe Co. v. Washington*:[24]

> The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will

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judgment because the question was not presented to the Florida Supreme Court until the motion for rehearing. *Id.* at 244 & n.4.

21. *Id.* at 246-50. The Court held that the mere probating of a will in Florida did not give rise to jurisdiction over disputes regarding inter vivos transfers of property that would otherwise pass under the will. "If such a basis of jurisdiction were sustained, probate courts would enjoy nationwide service of process to adjudicate interests in property with which neither the State nor the decedent could claim any affiliation." *Id.* at 248-49. The Court also held that the presence of the original owner of the property, the decedent, in the jurisdiction did not confer in rem jurisdiction under traditional doctrine. *Id.* at 249. Finally, the Court held that improper assertion of extraterritorial in rem jurisdiction, like improper assertion of extraterritorial in personam jurisdiction, violates due process. *Id.* at 250.

22. 355 U.S. 220 (1957). *McGee* was decided in the same Term as *Hanson*. In *McGee* plaintiff sued in California over a life insurance policy that had been reissued by a Texas insurance company that had taken over the business of an Arizona company, the issuer of the original policy. *Id.* at 221. The Supreme Court held that California could assert jurisdiction, even though the Texas company did no business there except obtaining the premiums on that single policy. The Court applied the reasoning of International Shoe Co. v. Washington, 326 U.S. 310 (1945) and concluded that the insurance contract and the performance under it were sufficient relations with the forum to uphold jurisdiction. 355 U.S. at 223. The Court further noted that California had an obvious interest in protecting its residents, and while the defendant was inconvenienced, the inconvenience did not amount to a due process denial. *Id.* at 223-24. By contrast, a beneficiary with a small or moderate claim would not be able to afford to litigate elsewhere. *Id.* at 223.

23. 357 U.S. at 251-52.

24. 326 U.S. 310 (1945). *International Shoe* concerned contributions to an unemployment insurance fund of the State of Washington. The company employed salesmen in Washington, but had no permanent office there. Contracts were approved and goods shipped elsewhere. The Court held that in personam jurisdiction existed in Washington on the theory that the company had minimum contacts with the state. The Court articulated the minimum contacts test without overruling earlier territorial jurisdiction cases, which had relied on Pennoyer v. Neff, 95 U.S. 714 (1877), and rules derived from it. *See infra* text accompanying notes 31-42.

> vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.[25]

If the issue had been simply the validity of the appointments, then the execution of the power of the appointment under which the appointees were claiming rights might have been an adequate contact.[26] The validity of the trust agreement, however, was the real issue: the argument was that the trust was testamentary, not that the appointment had been improper under the terms of the trust. The exercise of the power of appointment did not relate to the real controversy.[27] Thus, the defendant trustee did not purposefully create contact with Florida, and hence the Florida court had improperly exercised jurisdiction.[28]

The Court ruled that jurisdiction over the trustee was crucial to the validity of the Florida judgment. Although the various appointees and beneficiaries who lived in Florida conceded jurisdiction, Florida adhered to the rule that the trustee is an indispensable party in actions regarding the validity of trusts,[29] so the action fell. The Court declared that even though all of the interested claimants were domiciled in Florida, the court still lacked jurisdiction over the trustee:

> As we understand [Florida's] law, the trustee is an indispensable party over whom the court must acquire jurisdiction before it is empowered to enter judgment in a proceeding affecting the validity of a trust. It does not acquire that jurisdiction by being the "center of gravity" of the controversy, or the most convenient location for litigation. The issue is personal jurisdiction,

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25. 357 U.S. at 253.

26. *Id.*

27. *Id.* at 253-54. Although Justice Black and two other dissenters disputed this point, *see id.* at 256 n.1 (Black, J., dissenting), the Florida Supreme Court's language supports Justice Warren's interpretation. Hanson v. Denckla, 100 So. 2d 378, 383-85 (Fla. 1956), *rev'd*, 357 U.S. 235 (1958); *see* Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569, 620 n.273 (1958).

28. 357 U.S. at 253-54.

29. *Id.* at 245. There was some disagreement over this issue in the Black dissent as well. Black found evidence in the Florida caselaw that held adherence to the rule was not absolute and stated that the action should have been remanded to the Florida Supreme Court to see whether it would have applied the rule. *Id.* at 261-62 (Black, J., dissenting).

> not choice of law. It is resolved in this case by considering the acts of the trustee. As we have indicated, they are insufficient to sustain jurisdiction.[30]

Thus, the Court created and applied the purposeful availment test and rejected the competing idea of comparing jurisdiction to choice of law and adopting tests based solely on convenience or interests in the litigation.

B. Origins of Purposeful Availment

1. International Shoe Co. v. Washington

Although an explicit purposeful availment requirement suddenly sprang into being in one Supreme Court decision, the Court believed that it was merely filling in the details of the minimum contacts test of *International Shoe Co. v. Washington.*[31] In fact *International Shoe* was the only case the Court cited in its two paragraphs on the purposeful availment requirement.[32] *International Shoe*, however, neither explained nor in any clear way applied the language on which *Hanson* relied:

> [T]o the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.[33]

This language suggests a number of different ideas, any combination of which might fairly be taken as the antecedent of the purposeful availment requirement. One idea is fairness in the sense of reciprocity: the defendant has availed itself of benefits and protections afforded by the state's law and, therefore, it is a reasonable quid pro quo for the defendant to be subject to jurisdiction in the courts in which the state enforces its law. This idea is intuitively appealing; consistent with the functional,

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30. *Id.* at 254 (majority opinion) (footnotes omitted).
31. 326 U.S. 310 (1945).
32. 357 U.S. at 253-54.
33. 326 U.S. at 319.

fairness-oriented spirit of *International Shoe*; and directly applicable to *International Shoe*'s facts. In that case, the defendant company's salesmen lived in Washington state and carried on business activities they could hardly have executed without the protection of the state's laws and law enforcement agencies. Moreover, if the company laid off any salesmen, the salesmen could receive state unemployment compensation benefits, which were the purpose of the tax that the state was attempting to enforce. Although the unemployment compensation ran to the employee, the benefits' availability aided the company by eliminating the need to establish a guaranteed wage or severance system, or to increase wages to make up for the lack of such a system.

Nevertheless, *International Shoe*'s hint that the fairness of reciprocity is the source of a purposeful availment test is inconsistent with the application of the purposeful availment requirement in *Hanson v. Denckla*. As Justice Douglas pointed out in dissent, the trustee in *Hanson* was a mere stakeholder.[34] The trustee could not use the trust proceeds for its own benefit. The court was not imposing on the trustee any liability beyond the trust proceeds. When an entity has no real interest in a controversy, deciding the dispute in its absence is perfectly fair. The trustee may have gained little from Florida's laws, but it was not losing anything by the exercise of Florida's jurisdiction. Although Florida retained the old equity rule of requiring the presence of the trustee in any action concerning the validity of a trust, the Court never doubted that Florida could have dispensed with the rule.[35] The Court never suggested that its decision upheld any tangible fairness interest of the trustee.

The fairness of reciprocity is thus an incomplete source for the purposeful availment requirement. In the case that originated the requirement, no apparent reciprocity existed, but there was no apparent unfairness to the absent defendant. The

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34. Justice Douglas stated:

> So far as the present controversy is concerned the trustee was purely and simply a stakeholder or an agent holding assets of the settlor to dispose of as she designated. . . . We must remember this is not a suit to impose liability on the Delaware trustee or on any other absent person. It is merely a suit to determine interests in those intangibles.

357 U.S. at 263 (Douglas, J., dissenting).

35. *See id.* at 245 (majority opinion), 262 (Black, J., dissenting).

source of the rule must be sought at a deeper level.

The part of *International Shoe* cited by the *Hanson* Court relied on several authorities.[36] As Professor Kurland has pointed out, the caselaw from the period between *Pennoyer v. Neff*[37] and *International Shoe* that expanded in personam jurisdiction over corporations (the immediate subject of *International Shoe*) falls into two categories: cases that applied a fiction of constructive consent by the defendant to the assertion of jurisdiction, and cases that applied a fiction of presence within the jurisdiction by the defendant.[38] The authorities cited in *International Shoe* fall into both categories,[39] thus suggesting that purposeful availment's antecedents are both the doctrine of constructive presence and of constructive consent. Under constructive consent, the defendant's purposeful availment of the benefits and protections of the forum's laws would be an indication of its consent to the exercise of the forum's jurisdiction. Similarly, under constructive presence, the defendant's purposeful availment of the benefits and protections of the forum's laws would be an indication that the defendant was actually, though not physically, present in the forum.

The return to these fictions is consistent with *Hanson*'s idea of inherent territorial restrictions on the power of the states.[40] In *Hanson* the Court believed that this sovereignty concept was the

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36. The passage from *International Shoe*, quoted *supra* text accompanying note 33, concludes:

> Compare *International Harvester Co. v. Kentucky*, [234 U.S. 579 (1914),] with *Green v. Chicago, B. & Q. R. Co.*, [205 U.S. 530 (1907),] and *People's Tobacco Co. v. American Tobacco Co.* [,246 U.S. 79 (1918)]. Compare *Connecticut Mutual Co. v. Spratley*, [172 U.S. 602, 619-20 (1899),] and *Commercial Mutual Co. v. Davis*, [213 U.S. 245 (1909),] with *Old Wayne Life Assn. v. McDonough* [,204 U.S. 8 (1907)]. See [Note, *What Constitutes Doing Business by a Foreign Corporation for Purposes of Jurisdiction?*,] 29 Columbia Law Review, 187-95 [(1929)].

326 U.S. at 319.

37. 95 U.S. 714 (1877).

38. Kurland, *supra* note 27, at 578.

39. The following cases applied constructive presence: People's Tobacco Co. v. American Tobacco Co., 246 U.S. 79 (1918); International Harvester Co. v. Kentucky, 234 U.S. 579 (1914); Green v. Chicago, Burlington & Quincy Ry., 205 U.S. 530 (1907). These cases applied constructive consent: Commercial Mut. Accident Co. v. Davis, 213 U.S. 245 (1909); Old Wayne Mut. Life Ins. Ass'n v. McDonough, 204 U.S. 8 (1907); Connecticut Mut. Life Ins. Co. v. Spratley, 172 U.S. 602 (1899).

40. A return was necessary because recent caselaw had not applied sovereignty ideas. *See infra* note 160 and accompanying text.

basis of the minimum contacts requirement and was the reason that the requirement applies even when the burden of defending in a distant forum is minimal.[41] The Supreme Court cases after *International Shoe* had conspicuously ignored this idea of state territorial sovereignty.[42]

2. *The Consent Cases*

To find the origin of purposeful availment in the old constructive consent doctrine seems logical.[43] The whole idea of

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41. *Hanson* stated:

> [I]t is a mistake to assume that [the recent] trend [towards flexible jurisdictional standards] heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the "minimal contacts" with that State that are a prerequisite to its exercise of power over him.

357 U.S. at 251 (citation omitted).

42. *See infra* note 160.

43. In *Shaffer v. Heitner* the Court analyzed purposeful availment in terms of jurisdiction by consent:

> [Plaintiff's] line of reasoning . . . does not demonstrate that appellants have "purposefully avail[ed themselves] of the privilege of conducting activities within the forum State," Hanson v. Denckla, [357 U.S. 235,] 253 [(1958),] in a way that would justify bringing them before [the forum state's] tribunal. Appellants have simply had nothing to do with the State . . . . Moreover, appellants had no reason to expect to be haled before [the forum state's] court. [The forum state], unlike some States, has not enacted a statute that treats acceptance of a directorship as *consent* to jurisdiction in the State. And "[i]t strains reason . . . to suggest that anyone buying securities in a corporation formed [there] '*impliedly consents*' to subject himself to [the state's] . . . jurisdiction on any cause of action." Folk & Moyer, [*Sequestration in Delaware: A Constitutional Analysis*, 73 COLUM. L. REV. 749,] 785 [(1973)].

433 U.S. 186, 216 (1977) (footnote omitted) (emphasis added). Likewise, Professor Kurland, writing shortly after the *Hanson* decision, analyzed *Hanson's* revision of the minimum contacts test, particularly its distinction of McGee v. International Life Ins. Co., 355 U.S. 220 (1957), in constructive consent terms. He stated that the opinion might mean a return to the jurisdictional standards that Professor Austin Scott criticized in his early articles on constructive consent, Scott, *Jurisdiction over Non-resident Motorists*, 39 HARV. L. REV. 563 (1926), and Scott, *Jurisdiction over Nonresidents Doing Business within a State*, 32 HARV. L. REV. 871 (1919). Kurland, *supra* note 27, at 622. Also pertinent is the statement of Professor Stein: "The Court in *Hanson* developed modern doctrine, which . . . insists upon consensual affiliation by the defendant with the forum." Stein, *supra* note 8, at 717 (1987); *see also* Brilmayer, Jurisdictional *Due Process and Political Theory*, 39 U. Fla. L. Rev. 293, 306 (1987) (tying purposeful availment to consent).

consent implies purposeful action that is undertaken for some gain or other rational reason. If no jurisdiction existed over the out-of-state defendant without that defendant's consent, the question would focus on what conduct manifests the consent. The likely answer would be that consent may be inferred from conduct undertaken deliberately for the defendant's own gain. Purposeful availment of the benefits and protections of the forum's laws is prototypical constructive consent. Stated alternatively, a court analyzing whether a defendant consents to jurisdiction might ask if the defendant purposefully availed itself of the benefits and protections of the forum's laws.

The doctrine of constructive consent to personal jurisdiction began in the era of strict territorial limits on in personam jurisdiction, when courts examined whether anything in defendant's conduct justified an exception to these limits.[44] The Court in *Lafayette Insurance Co. v. French*[45] used language similar to language in *International Shoe* and *Hanson* analyzing the contacts that justified the assertion of jurisdiction over the out-of-state defendant. In *Lafayette* the Court held: "when this corporation sent its agent into Ohio, with authority to make contracts of insurance, the corporation must be taken to assent to the condition . . . that an agent, to make contracts, should also be the agent of the corporation to receive service of process in suits on such contracts."[46] *Lafayette* assumed that, because the state possessed the right to exclude the foreign corporation, the corporation could not do business within a state unless the state consented to the corporation's actions.[47] The Court held that the

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44. Before passage of the fourteenth amendment to the United States Constitution, courts applying these restrictions viewed them as a common law-based exception to the full faith and credit clause of the Constitution, art. IV, § 1, cl. 4. *See* Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404 (1855).

45. *Id.*

46. *Id.* at 408.

47. The Court in *Layfayette* stated:

> A corporation created by Indiana can transact business in Ohio only with the consent, express or implied, of the latter state. . . . This consent may be accompanied by such conditions as Ohio may think fit to impose; and these conditions must be deemed valid and effectual by other States, and by this court, provided they are not repugnant to the constitution of laws of the United States. . . .
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> . . . .
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> . . . Now, when this corporation sent its agent into Ohio, with authority to make contracts of insurance there, the corporation must be taken to assent to

forum state could condition admittance into the state upon the corporation's consent to be sued in the forum state on related causes of action.[48]

In 1882 the Court greatly expanded the *Lafayette* approach of determining when a foreign corporation consents to jurisdiction. In *St. Clair v. Cox*[49] the Court focused not on whether the corporation sent its agent into the state, but on whether the corporation transacted business within the forum state.[50] Doing business in a forum state was presumed to be assent to the conditions of the laws of the state, including the applicability of jurisdiction.[51] In the absence of express consent, implied consent to accept state court jurisdiction was inferred from the corporation's doing business within the forum state.

By 1895, the Court acknowledged that "doing business" was the consenting corporate conduct minimally required to subject a corporation to jurisdiction.[52] Doing business became a measure by which courts determined whether a corporation's voluntary activities were sufficient to subject the corporation to jurisdiction.[53] As in *Connecticut Mutual Life Insurance Co. v. Spratley*,[54] this implied consent continued even after the foreign corporation retracted its agents from the forum state. Having taken on the risks in the issuance of insurance policies, the corporation did not cease doing business by refusing to take on new risks while keeping the original policies in force.[55]

> the condition . . . that an agent, to make contracts, should also be the agent of the corporation to receive service of process in suits on such contracts. . . .

Id. at 407-08.

48. *Id.*

49. 106 U.S. 350 (1882).

50. "[I]t is essential, in order to support the jurisdiction of the court to render a personal judgment, that it should appear . . . that the corporation was engaged in business in the State. . . [that] would. . . be sufficient prima facie evidence that the agent represented the company in the business." *Id.* at 359.

51. *See, e.g., Ex Parte* Schollenberger, 96 U.S. 369, 376 (1877) ("[The foreign corporation] had in effect consented to be sued there, in consideration of its being permitted by Congress to exercise therein its corporate powers and privileges.").

52. Goldey v. Morning News, 156 U.S. 518, 519-20 (1895).

53. St. Louis S.W. Ry. v. Alexander, 227 U.S. 218, 227 (1913) ("[T]he business must be such in character and extent as to warrant the inference that the corporation has subjected itself to the jurisdiction and laws of the district.").

54. 172 U.S. 602 (1899).

55. The Court wrote:

> Continuing to do business, the company impliedly assented to the terms of that statute, at least to the extent of consenting to the service of process upon

The express consent to jurisdiction pursuant to a state statute could confer personal jurisdiction even for suits unrelated to the foreign corporation's business in the forum state. In *Pennsylvania Fire Insurance Co. v. Gold Issue Mining Co.*[56] a state statute requiring the corporation's filing of the power of attorney could have been construed to confer additional jurisdictional power to the state over all suits against the corporation. The Court suggested that a corporation was held to have impliedly consented to appointment to accept service not because of presence or of actual consent, but because the corporation had done business voluntarily.[57]

In *Flexner v. Farson*[58] the Court acknowledged in dicta that the implied consent found in corporation cases was a mere fiction. The Court had to recognize that a state was limited in its power to exclude foreign corporations. If a corporation could engage in business without the state's permission, the corporation had no obligation to submit to conditions on entry into the state. In addition, a foreign corporation refusing to comply with a state's corporation laws would be better protected than a compliant corporation if the state could acquire personal jurisdiction over the compliant corporations regarding unrelated causes of

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an agent so far representative in character that the law would imply authority on his part to receive such service within the state.

Id. at 619. The defendant life insurance company, which incorporated and had its principal office in Connecticut, had complied with foreign corporation laws in Tennessee, but later ceased issuing new policies, withdrew its agents, and notified the state insurance commission of its withdrawal. The company, however, continued receiving premium payments on outstanding policies. *Id.* at 607. In general, the implied consent allowed continuing jurisdiction over related causes of action although a foreign corporation had left. The Court used implied consent to find jurisdiction for causes of action arising from past activities in the forum state when the corporation no longer did business there. Washington *ex rel.* Bond & Goodwin & Tucker, Inc. v. Superior Court, 289 U.S. 361 (1933).

56. 243 U.S. 93, 96 (1917) ("[W]hen a power actually is conferred by a document, the party executing it takes the risk of the interpretation that may be put upon it by the courts. The execution was the defendant's voluntary act."). The insurance company appointed an agent in language that was held to authorize acceptance of service.

57. Smolik v. Reading Coal & Iron Co., 222 F. 148, 151 (S.D.N.Y. 1915) (L. Hand, J.) ("The court, in the interests of justice, imputes results to the voluntary act of doing business within the foreign state, quite independently of any intent.") (cited with approval in Pennsylvania Fire Ins. Co. v. Gold Issue Mining Co., 243 U.S. 93, 95 (1917)).

58. 248 U.S. 289, 293 (1919) ("[T]he consent that is said to be implied in such [corporation] cases is a mere fiction, founded upon the accepted doctrine that the States could exclude foreign corporations altogether, and therefore could establish this obligation as a condition to letting them in.").

action. Ultimately, the general rule emerged that a state could assert jurisdiction over corporate (and noncorporate) defendants participating in activities subject to state regulatory interests.[59] Occasionally, the courts still employed the language of consent.[60]

3. *The Presence Cases*

Prior to the development of a flexible theory based on states' interests in regulation, the evolution of implied consent based upon a corporation's doing business in the forum state reached major obstacles when a corporation expressly refused to consent to personal jurisdiction or when the court reasoned that a state could not exclude a corporation engaged solely in interstate commerce. The Supreme Court overcame these difficulties in *International Harvester v. Kentucky*[61] through the development of the principle that a corporation is actually present wherever it engages in business. The Court placed no significance on International Harvester's revocation of the agency of appointment filed with the forum state after it previously had engaged in business within the state.[62] The new test required the foreign corporation to carry on a continuous course of business within the state at the time of service; a single transaction would not invoke jurisdiction.[63] In the succeeding years numerous cases

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59. Henry L. Doherty & Co. v. Goodman, 294 U.S. 623 (1935).

60. *Id.* at 627 (discussing "implied consent to be sued").

61. 234 U.S. 579 (1914). Under this case, a state may not exclude a business wishing to transact interstate business, but the state may impose conditions upon admission. A state may not forbid a foreign corporation from engaging in interstate commerce in the state under the Constitution and the laws of the United States; however, a foreign corporation doing business within the state subjects itself to the jurisdiction of the state as to causes of action arising out of that business.

62. The corporation expressed aversion to consent to suit by instructing its agents in the following manner:

> The company's transactions hereafter with the people of Kentucky must be on a strictly interstate commerce basis. . . . Anything that is done that placed the company . . . as having done business in Kentucky will not only make the man . . . liable to a fine . . . but it will make the company liable for doing business in the state without complying with the requirements of the laws of the state.

Id. at 584-85.

63. *Id.* at 589. Presence of the foreign corporation thus required a higher standard of doing business than that of mere presence. "A foreign corporation is amenable to process to enforce a personal liability, in the absence of consent, only if it is doing business within the state in such manner and to such extent as to warrant the inference that it is present there." Philadelphia & R. R.R. Co. v. McKibbin, 243 U.S. 264, 265 (1917). In

provided ample opportunity for the Supreme Court to apply the idea of presence. The Court's inability to develop a precise and comprehensive definition of presence resulted in a number of rules of thumb based on the facts of each case. A corporation without representative agents in a forum state could be found not present despite doing a large amount of business in the state.[64] Visits by corporate agents to make business purchases, even at regular intervals, did not warrant the inference that the corporation was present within the jurisdiction of the state.[65] Under the presence theory, once a corporation left a state, the corporation could no longer be sued for claims arising directly out of its business transactions that occurred while the corporation was in the state.[66] Even if continuously doing business in the state, the corporation might avoid jurisdiction on claims unrelated to the in-state business.[67]

McKibbin, a Pennnsylvania railroad sent loaded freight cars shipped by others to New York, which were returned, but this was not enough to find that the corporation was doing business. In denying jurisdiction the Supreme Court noted that the railroad company had no dock, no freight, no passenger ticket office, no agent, and no property in New York. In Tauza v. Susquehanna Coal Co., 220 N.Y. 259, 115 N.E. 915 (1917), the New York court ruled that the weight of the facts supported state jurisdiction when: (i) the Pennsylvania corporate defendant had a branch office in New York where a sales agent supervised eight salesmen; (ii) the company systematically and regularly obtained orders; and (iii) the firm made shipments from Pennsylvania to New York, although all New York sales were subject to Philadelphia confirmation. "We are to say, not whether the business is such that the corporation may be prevented from being here, but whether its business is such that it is here. . . . [I]f it is here, . . . not occasionally or casually, but with a fair measure of permanence and continuity, then, . . . it is within the jurisdiction of our courts." *Id.* at 267, 115 N.E. at 917.

64. The Court affirmed the lack of jurisdiction when in Bank of Am. v. Whitney Cent. Nat'l Bank, 261 U.S. 171 (1923), the Whitney Bank had varied, important, and extensive New York business transactions, but no New York place of business. Correspondent banks, comparable to factors acting for an absent principal, transacted Whitney's regular New York business. *Id.* at 172-73.

65. In Rosenberg Bros. & Co. v. Curtis Brown Co., 260 U.S. 516 (1923), although the president of a corporate defendant received service while on a regular purchasing trip in New York for his Oklahoma store, the Court affirmed the motion to quash because the retailer never applied for a license to do business in New York, never authorized suit against it, and owned no New York property.

66. "[I]t seems impossible to impute the idea of locality to a corporation except by virtue of those acts which realize its purposes. . . . If we are to attribute locality to it at all, it must be equally present wherever any part of its work goes on, as much in the little as in the great." Hutchinson v. Chase & Gilbert, 45 F.2d 139, 141 (2d Cir. 1930).

67. In Davis v. Farmers Co-op. Equip. Co., 262 U.S. 312 (1923), decided under the interstate commerce clause, U.S. CONST. art. I, § 8, cl. 3, a Minnesota statute compelled every foreign interstate carrier to submit to suit as a condition of maintaining a soliciting

The following activities did not suffice to establish presence: sending railroad cars shipped by others;[68] having numerous transactions through a large number of correspondent banks without setting up an office;[69] only purchasing supplies, even if on a regular basis;[70] and leasing an office for infrequent use and negotiating within the forum state the purchase of an independent, nonoperating subsidiary.[71]

The following situations did suffice to establish a corporation's presence: solicitating business and shipping equipment;[72] maintaining a corporate office and having regular meetings;[73] maintaining an office and agents with apparent negotiating authority;[74] and making systematic and regular orders and shipments.[75]

4. Noncorporate Consent

The initial cases sustaining in personam jurisdiction over individual nonresidents relied on state statutes imposing jurisdictional requirements upon a nonresident automobile owner for the operation of the automobile within the forum state. The precursor to these cases was *Kane v. New Jersey*,[76] in which a New York resident was arrested in New Jersey when he failed to register his vehicle as required by New Jersey law. Although it acknowledged that the state could not exclude the individual from entering the state, the Supreme Court upheld the statute. [77]

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agent within the state. Jurisdiction was not limited to suits arising out of business transacted within the forum state and was not limited to causes of action arising in the forum state. The plaintiff corporation was not and had never been a resident of the state. Because the statute was too broad, the judgment was void. 262 U.S. at 317.

68. Philadelphia & R. R.R. v. McKibbin, 243 U.S. 264 (1917).

69. Bank of Am. v. Whitney Cent. Nat'l Bank, 261 U.S. 171 (1923).

70. Rosenberg Bros. & Co. v. Curtis Brown Co., 260 U.S. 516 (1923).

71. Hutchinson v. Chase & Gilbert, 45 F.2d 139 (2d Cir. 1930).

72. International Harvester Co. v. Kentucky, 234 U.S. 579 (1914).

73. Baltic Mining Co. v. Massachusetts, 231 U.S. 68 (1913).

74. St. Louis S.W. Ry. v. Alexander, 227 U.S. 218 (1912).

75. Tauza v. Susquehanna Coal Co., 220 N.Y. 259, 115 N.E. 915 (1917).

76. 242 U.S. 160 (1916).

77. The New Jersey statute required that an entering nonresident motorist stop at the state border and obtain permission to enter. Justice Brandeis noted that the New Jersey nonresident motorist statute placed nonresidents on an equal footing with resident owners. *Id.* at 168.

The Massachusetts law in *Palowski v. Hess*[78] attempted to provide a remedy for injuries caused by nonresident motorists driving in the state. The statute allowed nonresident drivers to enter the state provided that the drivers subject themselves to the jurisdiction of the state's courts. The motorists' use of state highways was the conduct on which the state could place responsibility on nonresident defendants.[79]

The Supreme Court later clarified that a state's jurisdiction over a motor vehicle's owner did not rest on consent, but rather on the state's interest in regulating to protect against the inherent dangers of operating a motor vehicle on the state's highways.[80]

5. *Relationship to Purposeful Availment*

The doctrines of consent and presence bear an antecedent relationship to purposeful availment. As noted, consent relates directly to purposeful availment: both are intentional activities that indicate voluntary submission to the power of the sovereign, and thus permit the exercise of the sovereign's power.[81] The relationship between presence and purposeful availment is less direct. If a court cannot locate a defendant save by the defendant's activities, as in the case of a corporation or other entity that has no physical existence, then the court looks at the activities to locate the defendant. Purposeful availment is intentional activity in which the defendant itself engages. Therefore, it is a manifestation of presence.

Of course, by the time of *Hanson*, both consent and pres-

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78. 274 U.S. 352 (1927).

79. *Id.* at 356 ("The measure . . . operates to require a nonresident to answer for his conduct. . . . [T]he implied consent is limited to proceedings growing out of accidents or collisions on a highway in which the non-resident may be involved.").

80. The Court stated:

> [T]here has been some fictive talk to the effect that the reason why a nonresident can be subjected to a state's jurisdiction is that the non-resident has "impliedly" consented to be sued there. In point of fact, however, jurisdiction in these cases does not rest on consent at all. The defendant may protest to high heaven his unwillingness to be sued and it avails him not. The liability rests on the inroad which the automobile has made on the decision of Pennoyer v. Neff, 95 U.S. 714 [(1877)], as it has on so many aspects of our social scene.

Olberding v. Illinois Cent. R.R., 346 U.S. 338, 341 (1953) (citation omitted).

81. *See supra* note 43 and accompanying text.

ence were viewed as fictions.[82] A state had no clear basis to keep a foreign corporation or motorist from doing the conduct upon which the demand for consent to jurisdiction was conditioned; therefore, consent covered far less than what the courts felt was appropriate jurisdiction. On the other hand, the presence justification covered almost every case and had to be restricted in ways that seemed irrational and unjustified by the theoretical basis of the presence doctrine. The difficulties with these doctrines were part of the pressure that made the Court in *International Shoe* downplay the entire idea of sovereignty in favor of concepts tied more closely to fairness.[83] When sovereignty made its rebound in *Hanson*, however, it was to be expected that some of the ideas that had grown up around sovereignty would return too. They did, in the form of purposeful availment.

C. *Purposeful Availment After* Hanson

1. *The Supreme Court*

Chronologically, *National Equipment Rental, Ltd. v. Szukhent*[84] followed *Hanson*. The case is sometimes not even thought of as a territorial jurisdiction case because the Court treated as established the proposition that, if a contracting party agrees to a forum selection clause, the designated forum has jurisdiction over the party. Although four dissenting justices wished to scrutinize the waiver,[85] the Court ignored questions of voluntariness. The Court merely decided that Federal Rule of Civil Procedure 4(d)(1) permitted service on defendant's agent, who was a nominee of the plaintiff and who had been appointed in the form contract that the plaintiff drafted.[86] Because the propriety of the forum depended on jurisdiction by consent (the forum selection clause in the contract), *National Equipment Rental* provided an opportunity to clarify the relationship between purposeful availment as a form of constructive consent and the consent doctrine

82. *See supra* note 58 and 80 and accompanying text.

83. *See* Carrington & Martin, *Substantive Interests and the Jurisdiction of the State Courts*, 66 MICH. L. REV. 227, 227-30 (1967).

84. 375 U.S. 311 (1964).

85. *Id.* at 318 (Black, J., dissenting), 334 (Brennan, J., dissenting).

86. *Id.* at 313. Apparently, she was the wife of one of the plaintiff's officers. *Id.* at 319 (Black, J., dissenting).

in general. The opportunity passed.[87]

Shaffer v. Heitner[88] extended the minimum contacts test to in rem jurisdiction. Equally notable is the Court's application of the *Hanson v. Denckla* purposeful availment requirement.[89] The *Shaffer* Court, however, did make some changes in the requirement's surroundings. The Court did not mention state sovereignty. Instead, the Court began its application of the minimum contacts test by discussing Delaware's interest in its corporate directors' conduct, an interest the Court dismissed because Delaware had no statute asserting it.[90] The Court followed this discussion by noting that even if the state had an important interest, the forum still had to be "fair."[91] It then recited the purposeful availment requirement, separating the interests that would support application of the forum's law to the dispute from the requirements for jurisdiction.[92] Finally, the Court rejected the idea that the defendants' acceptance of the directorships constituted purposeful availment. In doing so, the Court emended the purposeful availment standard by adding an idea of foreseeability: the purposeful availment requirement was not met because the directors had no reason to expect that the acceptance of the directorships, their sole purposeful conduct related to Delaware, would constitute consent to jurisdiction.[93]

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87. In Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972), the Court went beyond *National Equip. Rental* and directly upheld a forum selection clause when Rule 4(d)(1) was not at issue. The Court thus had an even more direct opportunity to discuss the theoretical basis of jurisdiction by consent. It again treated the jurisdictional theory as a given, however, and focused instead only on the voluntariness of the contractual undertaking, the supposed benefits to United States foreign trade if international contracts are enforced, and the absence of a showing of impossibility of defending in the forum.

88. 433 U.S. 186 (1977). The case was a shareholder's derivative suit filed in Delaware against, among others, the directors of a Delaware corporation. Plaintiff initiated the action by sequestering the stock that the directors held, the situs of which, according to Delaware law, was Delaware. Although the plaintiff contended that the sequestration established quasi in rem jurisdiction without any need for minimum contacts, the Court held that the minimum contacts test had to be satisfied in all exercises of jurisdiction, including in rem proceedings.

89. *Id.* at 215-16.

90. *Id.* at 214-15.

91. *Id.* at 215.

92. *Id.*

93. *Id.* at 216. In his concurrence Justice Stevens elaborated on this idea. He wrote that foreseeability of suit in the jurisdiction constituted "fair warning" for an individual contemplating activities in a given state. If this warning is missing, it is a violation of the due process clause's requirement that there be notice before a binding judgment is en-

Like *Shaffer*, *Kulko v. California Superior Court*[94] did not mention state sovereignty, but still made the *Hanson* purposeful availment inquiry. In this action for child support, the Court rejected California's attempt to exercise jurisdiction over a New York father when the mother moved to California after living with the family in New York for eleven years. The father sent his daughter, at her request, to California to live with her mother during the school year. The Court found this one contact with California insufficient to support jurisdiction. Applying the purposeful availment requirement, the Court reasoned that the father did not purposefully derive any benefit from activities relating to the State of California. The father simply reduced his household expenses related to his daughter.[95] In the remainder of the opinion, the Court discussed and rejected considerations of reasonability, distinguishing the case from one in which physical injury is caused in the forum state;[96] fairness, distinguishing the case from one in which the parent might have done an act that would create a reasonable anticipation of vulnerability to jurisdiction, such as continuously living in the forum state before separation;[97] and the state's interest, distinguishing the case from one in which a particularized state statute might assert an interest and no other possible remedy might exist for the parents within its jurisdiction.[98]

World-Wide Volkswagen Corp. v. Woodson[99] further developed the foreseeability theme in finding no jurisdiction for a products liability action against an out-of-state car distributor and dealer whose sales activities did not extend to the forum state. Applying ideas of sovereignty and federalism, the Court emphasized that an out-of-state defendant would not be subject to jurisdiction unless it had minimum contacts with the forum.[100] The Court said that the foreseeability relevant to

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tered. *Id.* at 217-18.

94. 436 U.S. 84 (1978).

95. *Id.* at 94-96.

96. *Id.* at 96-98.

97. *Id.* at 97-98.

98. *Id.* at 98-100. The Court relied on California's and New York's adoption of the Uniform Reciprocal Enforcement of Support Act, UNIF. ADOPTION ACT § 1-43, 9B U.L.A. 381 (1987).

99. 444 U.S. 286 (1980). The facts of the case are further discussed *infra* notes 174 & 198-207 and accompanying text.

100. *Id.* at 293-94.

whether the defendant had purposefully availed itself of the benefits of the forum state was the foreseeability of being haled into the forum state's courts.[101] The foreseeable activity of customers driving their cars into out-of-state forums, in the Court's view, was mere "unilateral activity" of a person other than the defendant, which did not amount to purposeful availment under *Hanson*.[102]

In *Rush v. Savchuk*[103] the Court, without elaborating on the purposeful availment requirement, applied it to forbid jurisdiction in Minnesota over a resident of Indiana in an automobile accident negligence action. Jurisdiction was based on the attachment of a national insurance company's obligation to indemnify the Indiana resident. The accident took place in Indiana. Although the insurer had ample contacts with Minnesota, the Court insisted that the purposeful availment test be applied to the named defendant, not the entity that the plaintiff maintained had its real interests at stake.[104] In applying the purposeful availment requirement to the named defendant, the Court noted that the defendant would not have reasonably expected to be subjecting himself to an out-of-state suit by buying insurance and driving in Indiana. Thus, the defendant had not engaged in any purposeful activity related to the forum state.[105] To the extent that the Court provided any rationale for the purposeful availment requirement, it stated that purposeful activity renders the exercise of jurisdiction "fair, just or reasonable."[106] The Court made no mention of sovereignty or federalism.

In 1984 the Court applied the purposeful availment requirement in three cases. Two were libel cases. *Keeton v. Hustler Magazine, Inc.*[107] established that, when purposefully created minimum contacts exist in the form of magazine sales that range

101. *Id.* at 297. This position would, of course, be circular if the anticipation of being haled into court depended simply on the rule being adopted in the case. But the Court, in line with earlier articulations of foreseeability ideas, seemed to want to incorporate traditional jurisdictional tests (presumably from pre-minimum contacts days) as the basis of the expectations, thus giving the idea some content, whatever the merit of the content might be. *See infra* text accompanying notes 269-71.

102. 444 U.S. at 298.

103. 444 U.S. 320 (1980).

104. *Id.* at 330-31.

105. *Id.* at 329.

106. *Id.*

107. 465 U.S. 770 (1984).

from 10,000 to 15,000 copies per month, jurisdiction exists even though damages could be calculated based on injury throughout the nation and the forum had an unusually long statute of limitations. The Court found the forum's interest to be substantial[108] and held that the choice of law issue regarding the statute of limitations would not affect the jurisdiction of the court.[109] The Court found the absence of plaintiff's contacts with the forum insignificant.[110] The Court's application of the purposeful availment requirement was just one paragraph in length and held that a magazine publisher's continuous and deliberate exploitation of a market gives rise to a reasonable anticipation of being haled into court on a libel action over the magazine's contents.[111] The Court also stated that the scope of the action was not unfair because the magazine publisher had to be charged with knowledge of the rule that one forum in a libel action may award damages for injury nationwide.[112]

Calder v. Jones[113] established that libel defendants have no greater protection from long arm jurisdiction than other defendants. In the absence of enhanced protection, the defendant reporter and editor were subject to jurisdiction, for they knew their article would reach the forum state, where it would have its most devastating impact. The publication had its largest circulation in that state, and the plaintiff both resided and based her career there.[114] Thus, the reporter and editor had to have anticipated being haled into the forum state's courts to answer a suit over the article's contents.[115] No further explanation of the purposeful availment requirement or the requirement's rationale were given in the opinion.

In *Helicopteros Nacionales de Colombia v. Hall*[116] the Court held that a Colombian transportation company's acceptance of checks drawn on a Texas bank was not sufficient purposeful availment to justify jurisdiction in Texas for an action to

108. *Id.* at 776-78.
109. *Id.* at 778-79.
110. *Id.* at 779.
111. *Id.* at 781.
112. *Id.*
113. 465 U.S. 783 (1984).
114. *Id.* at 785, 788-89.
115. *Id.* at 790.
116. 466 U.S. 408 (1984).

recover for the death of Americans in a helicopter accident in Peru. The Court rejected these actions as "unilateral activity of another party," insufficient under *Hanson* and *Kulko* to support jurisdiction.[117] Apparently employing the same standard, the Court also found that trips to Texas to make purchases and train pilots on purchased aircraft were insufficient to support jurisdiction.[118]

The next case to apply the purposeful availment requirement,[119] *Burger King Corp. v. Rudzewicz*,[120] upheld jurisdiction in Florida over a Michigan franchisee when the franchiser, a Florida resident, sued to enforce the franchise agreement. Using a rationale that relied on fairness concepts,[121] the Court applied the purposeful availment requirement and held that the requirement was satisfied when the defendant made a long-term franchise agreement with a Florida corporation knowing that he would derive benefits from a "structured 20-year relationship that envisioned continuing and wide-reaching contacts with [the plaintiff] in Florida."[122] The Court also found that the clause in

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117. *Id.* at 416-17.

118. *Id.* at 417-18. *See generally infra* note 234 (further description of the *Helicopteros Nacionales*' reasoning regarding the purchases in the forum state).

119. In Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985), with language that adverted solely to fairness of litigation burdens, the Court sustained the jurisdiction of a Kansas court over absent, out-of-state plaintiff class members in an action to recover for withheld mineral rights lease royalties. The Court permitted the defendant to challenge jurisdiction, just as it had permitted the Florida defendants to challenge jurisdiction over the Delaware trustees in *Hanson v. Denckla*. *Id.* at 805-06. The Court accepted the idea that the absent plaintiffs had the same due process rights as defendants, but noted that the burdens on class members were all but nonexistent, while the burdens on an out-of-state defendant could be substantial. *Id.* at 808-09. The Court also stressed due process protections afforded the class members such as notice, the right to opt out of the action, and court approval of the representative party. *Id.* at 809-11. Although the Court sustained the Kansas court's jurisdiction over the case, it rejected the application of forum state law. *Id.* at 816-23. The case is significant for its total reliance on fairness considerations, including its statement that the minimum contacts test protects defendants from "the travail of defending in a distant forum, unless the defendant's contacts with the forum make it just to force him to defend there." *Id.* at 807. It is equally significant for its assimilation of territorial jurisdiction into ordinary procedural due process, with the implication that other procedural protections may compensate for weaker territorial jurisdiction restrictions. *Id.* at 811-12. *See infra* text accompanying notes 251-57. The Court, however, did not discuss or apply the purposeful availment test beyond the language just quoted; it found no need even to apply minimum contacts reasoning. *Id.* at 806-07.

120. 471 U.S. 462 (1985).

121. *Id.* at 471-76.

122. *Id.* at 480.

the contract providing for application of Florida law should have warned the defendant of the likelihood of litigation in Florida and made defendant's conduct more deliberate.[123]

Asahi Metal Industry Co. v. Superior Court[124] is the Court's latest territorial jurisdiction case. All the Justices but Justice Scalia agreed that considerations other than purposeful availment required the rejection of California's assertion of jurisdiction. Other factors considered included: the forum state's interest, the defendant's burden, and the plaintiff's interest in having the forum adjudicate the case. With respect to the purposeful availment requirement, however, the Court split. The four-justice plurality found the purposeful availment requirement was not met when a Japanese manufacturer of motorcycle tire valve assemblies sold the valves to a Taiwanese tire manufacturer, with the knowledge that some tire value assemblies would ultimately be used California. Justice O'Connor stated: "The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State."[125] She distinguished the case from instances in which a hypothetical defendant might design a product for a market in the forum, advertise in the forum, create channels to provide advice to customers in the forum, or market the product through a sales agent in the forum.[126] She concluded that mere knowledge that the product will eventually be used in the forum state does not suffice.[127]

In his concurring opinion, Justice Brennan argued that placing a product in the stream of commerce with the knowledge that it will be swept into the forum is sufficient to satisfy the

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123. The Court stated:

> Nothing in our cases, however, suggests that a choice-of-law provision should be ignored in considering whether a defendant has "purposefully invoked the benefits and protections of a State's laws" for jurisdictional purposes. Although such a provision standing alone would be insufficient to confer jurisdiction, we believe that, when combined with the 20-year interdependent relationship Rudzewicz established with [plaintiff's] Miami headquarters, it reinforced his deliberate affiliation with the forum State and the reasonable foreseeability of possible litigation there.

Id. at 482.

124. ___ U.S. ___, 107 S. Ct. 1026 (1987).

125. *Id.* at 1033.

126. *Id.*

127. *Id.*

purposeful availment requirement.[128] No other conduct ought to be necessary.[129] He stated that a "regular and anticipated flow of products from manufacture to distribution to retail sale" provides adequate notice of the possibility of a lawsuit in the state in which the final product is marketed.[130] Thus, the foreseeability component of purposeful availment was met. Justice Brennan also stressed that the manufacturer received a significant financial benefit by placing the product in the stream of commerce, which allowed the product to reach markets in distant places. In part the profits accrue from the state's laws regulating and facilitating commerce.[131] Justice Stevens joined neither the plurality nor the Brennan expositions of purposeful availment. Stevens said in concurrence that the plurality opinion was wrong in drawing "an unwavering line . . . between 'mere awareness' that a component will find its way into the forum State and 'purposeful availment' of the forum's market."[132] Justice Stevens did not reach a definite conclusion because he believed that, since the Court agreed jurisdiction was inappropriate for other reasons, it should not adjudicate the purposeful availment issue.[133] Stevens, said, however, that, based on the volume, value, and hazardous character of the products Asahi sold, he "would be inclined to conclude" that Asahi's conduct constituted purposeful availment.[134]

Thus, a majority of the Court[135] holds the opinion that placing products in the stream of commerce, without more, may satisfy the purposeful availment requirement. Apart from stream of commerce cases, it is difficult to see whether *Asahi* changed the purposeful availment doctrine significantly.[136] If the activity in

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128. *Id.* at 1035 (Brennan, J., concurring).

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 1038 (Stevens, J., concurring).

133. *Id.*

134. *Id.*

135. Justice Powell, who resigned at the end of the 1986-87 Term, was in the minority.

136. Even with respect to stream of commerce cases, the position of the majority of the Court was not significantly different from prior Supreme Court views. In dicta, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297-98 (1980), endorsed Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961), which held that jurisdiction existed for a products liability cause of action under facts similar to those in *Asahi*. The Court declared that "[t]he forum State does not exceed its

the forum state is conducted by others who are not the defendant's agents and the benefits to the defendant are small, uncertain, or remote, it appears that the requirement may not be met even though the defendant both foresees being haled into Court and actually profits from the activity. Applying "traditional notions" of jurisdiction such as state sovereignty and the "presence" concept, *Asahi* would have likely come out the same way.[137]

2. *The Lower Courts*

The lower courts are probably best approached on a topical rather than a chronological basis. The differing formulations of purposeful availment in the Supreme Court's opinions (especially in light of the nineteen-year gap from *Hanson* to *Shaffer*) have had little significance on the outcome of lower court cases applying the purposeful availment requirement.

As the Court stated in *Hanson*, the decision whether purposeful availment is present must be made on a case-by-case basis.[138] As a result, federal and state courts have been forced to treat each jurisdictional dispute individually to determine whether a party has "purposefully avail[ed] itself of the privilege of conducting activities within the forum State."[139] Although this approach invites widespread disparity in outcome, the resulting decisions have been surprisingly uniform when applied to similarly situated parties.

Generally, courts have been more reluctant to assert in personam jurisdiction over individual defendants than corporate defendants.[140] Many of the cases that have found jurisdiction lacking would have had opposite results if a corporation had been challenging the authority of the court.[141] Thus, the require-

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powers under the Due Process Clause if 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." 444 U.S. at 297-98.

137. *See* Bank of Am. v. Whitney Cent. Nat'l Bank, 261 U.S. 171 (1923) (jurisdiction not permitted when defendant had extensive business in the forum, but no office or employees).

138. 357 U.S. at 253.

139. *Id.*

140. *See infra* notes 149-52 and accompanying text.

141. For example, telephone conversations are usually not evidence of purposeful availment allowed with respect to individuals. Telephone communications, however, are

ments or standards for purposeful availment have become more stringent with respect to individuals.[142]

An example of the disparate standards can be found in viewing results flowing from various actual physical contacts with forum states. Jurisdiction has been established over individuals based on prior vacations,[143] prior residence within the forum state, and prior use of a state's educational or legal institutions.[144] The opposite approach, however, has also been taken. Courts have ruled that the prior domicile of a party cannot serve as evidence of personal availment unless the prior domicile related to the lawsuit in question.[145]

Prior domicile or contact has been raised often in marital disputes. The courts, however, have been virtually uniform in rejecting such jurisdiction.[146] In most of these instances, the party seeking to invoke the court's power has come to the forum state on the strength of his or her own presence in the forum. The lower courts have followed *Kulko v. California Superior Court*,[147] and have rejected jurisdiction over the foreign state spouse for purposes of alimony or child support orders.[148]

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readily accepted as evidence of commercial purposeful availment. *See infra* notes 153-54 and accompanying text. In either case communication by mail or by telephone has come to play an increasingly significant role in determining the existence of jurisdiction. *See* Computac, Inc. v. Dixie News Co., 124 N.H. 350, 354, 469 A.2d 1345, 1347 (1983).

142. *Compare* Ealing Corp. v. Harrods, Ltd., 790 F.2d 978 (1st Cir. 1986) (telephone communication along with other acts sufficient to create purposeful availment) *with* Fox v. Boucher, 794 F.2d 34 (2d Cir. 1986) (telephone call insufficient basis for jurisdiction).

143. *See* Holt Oil & Gas Corp. v. Harvey, 801 F.2d 773 (5th Cir. 1986), *cert. denied*, ___ U.S. ___, 107 S. Ct. 1892 (1987) (prior vacation in forum supporting exercise of personal jurisdiction).

144. *See* Lake v. Lake, 817 F.2d 1416 (9th Cir. 1987) (jurisdiction supported because defendant sought assistance of state authorities in enforcing a court order). *But see* Burstein v. State Bar of Cal., 693 F.2d 511 (5th Cir. 1982) (jurisdiction not supported by residents of forum joining organization).

145. *See, e.g.*, Carrillo v. Carrillo, 523 A.2d 439 (R.I. 1987) (no jurisdiction in former state of domicile; first home state of married couple not permitted to exercise jurisdiction over divorce).

146. *E.g.*, Marbury v. Marbury, 256 Ga. 651, 352 S.E.2d 564 (1987) (no jurisdiction when defendant had not lived in forum for past 14 years); Crouch v. Crouch, 641 S.W.2d 86 (Mo. 1982) (en banc) (brief stay in forum while married not sufficient to support jurisdiction). *But see* Brislawn v. Brislawn, 443 So. 2d 32 (Ala. 1983), *cert. denied*, 464 U.S. 1040 (1984) (jurisdiction supported by 10-day stay in forum for marriage).

147. 436 U.S. 84 (1978).

148. *See, e.g.*, Morton v. United States, 708 F.2d 680 (Fed. Cir. 1983) (wife and children moving to forum not supportive of jurisdiction over father), *rev'd on other grounds*, 467 U.S. 822 (1984).

The standards for individuals also differ when communication with a forum is asserted as the basis for jurisdiction. For example, postal communications with parties located within the forum state generally have been found to be insufficient to establish jurisdiction.[149] Likewise, telephone calls have not been enough to warrant the exercise of jurisdiction over an individual absent other evidence of contact with the forum.[150]

When applied to commercial interests, however, the use of communication with a forum state as a basis for jurisdiction has received more favorable attention. Correspondence between commercial parties has constituted purposeful availment and, therefore, served as a basis for jurisdiction.[151] In addition, the use of advertising has gained acceptance as evidence of purposeful availment. When directed at residents of the forum state, advertising is an attempt to solicit business there. Thus, the advertiser has availed itself of the privileges of the forum and is subject to jurisdiction.[152]

Telephone and telex communications have been found sufficient to warrant jurisdiction, especially when evidence shows an intent to create a continuing relationship with the forum state.[153] Communication that is evidence of intent to maintain a

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149. *See, e.g.*, Beacon Enter. v. Menzies, 715 F.2d 757 (2d Cir. 1983) (cease and desist letter not basis for jurisdiction); *see also* Altshuler Genealogical Service v. Farris, 128 N.H. 98, 508 A.2d 1091 (1986) (signing and returning a letter of solicitation not purposeful availment); Morrill v. Tong, 390 Mass. 120, 453 N.E.2d 1221 (1983) (letter to attorney not purposeful availment).

150. Fox v. Boucher, 794 F.2d 34 (2d Cir. 1986) (telephone call alone insufficient to support jurisdiction); Valley Wide Health Servs., Inc. v. Graham, 738 P.2d 1316 (N.M. 1987) (returning a telephone call to a New Mexico number not purposeful availment).

151. *See* Computac, Inc. v. Dixie News Co., 124 N.H. 350, 469 A.2d 1345 (1983) (correspondence between parties sufficient for purposeful availment). *But see* Customwood Mfg., v. Downey Constr. Co., 102 N.M. 56, 691 P.2d 57 (1984) (mailing of purchase order not purposeful availment).

152. *See* Pedelahore v. Astropark, Inc., 745 F.2d 346 (5th Cir. 1984) (heavy advertisement in Louisiana media constituted purposeful availment); *see also* Hall's Specialties, Inc. v. Schupbach, 758 F.2d 214 (7th Cir. 1985) (Flaum, J., dissenting) (advertisement and solicitation in forum constituted purposeful availment); Meyers v. Hamilton Corp., 143 Ariz. 249, 693 P.2d 904 (1984) (advertising and sale of tickets within forum supportive of jurisdiction). *But see* Wines v. Lake Havasu Boat Mfg., Inc., 846 F.2d 40, 43 (6th Cir. 1988) (no purposeful availment despite some advertising).

153. *See Computac*, 124 N.H. 350, 469 A.2d 1345 (continuing communication supportive of jurisdiction); *cf.* Brown v. Flower's Indus., Inc., 688 F.2d 328 (5th Cir. 1982) (long-distance call that constituted intentional tort supportive of jurisdiction). *But see* Institutional Food Mktg. Ass'n v. Golden State Strawberries, Inc., 747 F.2d 448 (8th Cir. 1984) (telephone and mail contacts alone were insufficient to establish jurisdiction).

relationship has allowed the forum state to preside over any dispute between the parties.[154]

Many courts have required evidence of an ongoing relationship to establish purposeful availment. Even though the defendant might have purposeful contacts with the forum, courts have declined to assert jurisdiction because of the absence of intent to create an ongoing relationship.[155]

The use of agents by corporate and business interests has further complicated the application of the purposeful availment requirement. Agents who have contact with a forum and are under substantial corporate direction and control, even though technically independent workers, have served as evidence of purposeful availment, and their activities have been grounds for jurisdiction.[156] The presence of agents under little or no control by the corporate defendant, however, has not sustained jurisdiction.[157]

Corporate and commercial parties have become subject to jurisdiction based on delivery provisions in contracts. This type of connection with a forum, however, has not always been sufficient to support jurisdiction. While federal courts have allowed location of delivery sites in the forum state to constitute purposeful availment,[158] New Hampshire, for example, has rejected that position and required other evidence to support the exercise of jurisdiction.[159]

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154. 124 N.H. 350, 469 A.2d 1345. The court in *Computac* did not focus on the purposeful availment analysis. Instead, it noted the long-term relationship between the parties and upheld jurisdiction accordingly. *Id.* at 353-54, 467 A.2d at 1347.

155. *E.g.*, Sea Lift, Inc. v. Refinadora Costarricense de Petroleo, S.A., 792 F.2d 989 (11th Cir. 1986).

156. *See* Mason v. F. Lli Luigi & Franco Dal Maschio, 832 F.2d 383, 386 (7th Cir. 1988) (activities of employee and export managing firm supportive of jurisdiction); Gehling v. St. George's School of Medicine, Ltd., 773 F.2d 539 (3d Cir. 1985) (establishment of purposeful availment by agent who solicited students within the forum state); Sales Serv., Inc. v. Daewoo Int'l (America) Corp., 719 F.2d 971 (8th Cir. 1983) (agent soliciting business in the forum, constituted purposeful availment of the forum's benefits); Peanut Corp. of Am. v. Hollywood Brands, Inc., 696 F.2d 311 (4th Cir. 1982) (soliciting business through agents constituted purposeful availment). *But see* Dalmau Rodriquez v. Hughes Aircraft Co., 781 F.2d 9 (1st Cir. 1986) (single visit by sales representative not purposeful availment).

157. Smith v. Jenkins, 452 A.2d 333 (D.C. 1982) (no purposeful availment if principal has no control over agent).

158. *See* Afram Export Corp. v. Metallurgiki Halyps, S.A., 772 F.2d 1358 (7th Cir. 1985) (delivery of material in the forum state a factor supporting personal jurisdiction).

159. Weld Power Indus. v. C.S.I. Technologies, Inc., 124 N.H. 121, 467 A.2d 568

II. THE THEORETICAL BASES OF PURPOSEFUL AVAILMENT

A. State Sovereignty

The doctrines of constructive consent and presence would have been unnecessary had it not been for the fundamental doctrine of sovereignty-based limits on the exercise of jurisdiction, and purposeful availment would not have been necessary if all restrictions on state jurisdiction were abolished. As noted above, *Hanson v. Denckla* revived the sovereignty theory of the limits on state jurisdiction[160] and at the same time originated the pur-

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(1983) (when the sole contact with forum was the site for the transfer of contract goods, no purposeful availment occurred). Not only has the delivery site of a movable object been used to support jurisdiction, but some courts have also used the transportation of an object through a forum to support the exercise of jurisdiction. *See* Myers v. John Deere, Ltd., 683 F.2d 270 (8th Cir. 1982) (material being shipped through forum state supportive of personal jurisdiction). Courts have assimilated this into the much larger stream of commerce theory behind the exercise of personal jurisdiction. By allowing goods to be marketed, sold, or transported with the knowledge that they will come into contact with the forum, commercial parties have availed themselves of the benefits of the forum's laws. Accordingly, in personam jurisdiction can be exercised over that party. *See* Petroleum Helicopters, Inc. v. Avco Corp., 804 F.2d 1367 (5th Cir. 1986) (selling helicopter parts destined for forum state supportive of jurisdiction); *see also* Raffaele v. Compagnie Generale Maritime, S.A., 707 F.2d 395 (9th Cir. 1983) (shipping goods knowing they were going to forum state supportive of personal jurisdiction); Noel v. S.S. Kresge Co., 669 F.2d 1150 (6th Cir. 1982) (trading company on notice that product would come into contact with forum state); *cf.* State *ex rel.* Hydraulic Servocontrols Corp. v. Dale, 294 Or. 381, 657 P.2d 211 (1982) (selling parts or machinery that go to forum state supportive of jurisdiction).

160. Without mentioning sovereignty, inherent limits on state territorial power, or other such terms, the Court in McGee v. International Life Ins. Co., 355 U.S. 220 (1957), upheld California's jurisdiction over an out-of-state insurance company that did no business in the state save re-issuing one contract and accepting premiums on it. The Court, however, did discuss the general minimum contacts test, the forum state's interest, and the risk of serious inconvenience to the defendant. *Id.* at 222-24. Vanderbilt v. Vanderbilt, 354 U.S. 416, 418 n.6 (1957), did cite Pennoyer v. Neff, 95 U.S. 714 (1877), in resolving a conflict between a Nevada divorce decree and a New York judgment for separation and alimony. In analyzing the matter as one touching the full faith and credit clause, U.S. CONST. art. IV, § 1, however, the Court relied on the fact that the Nevada courts did not even arguably have any jurisdiction over the spouse who obtained the New York judgment, while the New York court apparently had jurisdiction over the spouse who sued in Nevada. 354 U.S. at 418-19. Thus, neither sovereignty nor fairness had to be addressed in any detail. The Court in Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 444-45 (1952), responded to defendant's arguments, which sounded in territorial sovereignty, with an assertion that the exercise of jurisdiction was fair, and without any discussion of sovereignty concepts. Travelers Health Ass'n v. Virginia *ex rel.* State Corp. Comm'n, 339 U.S. 643, 649 (1950), contained no explicit discussion of sovereignty ideas, and drew a comparison between *International Shoe's* jurisdictional considerations and

poseful availment requirement.[161]

The audacity with which the Court did the former is remarkable. Without any explanation of why it had not mentioned state territorial sovereignty in any of the six major personal jurisdiction cases[162] since *International Shoe*, the Court simply asserted that restrictions on the personal jurisdiction of state courts "are a consequence of territorial limitations on the power of the respective states."[163] Thus, territorial restrictions operate to forbid the assertion of jurisdiction despite the absence of inconvenience[164] or the presence within the forum of the case's "center of gravity" (where the parties with concrete interests are located, or where litigation is the most convenient for all).[165] The only cases that the Court cited in support of these territorial restrictions were *International Shoe* and *Vanderbilt v. Vanderbilt*.[166] *Vanderbilt* addressed a conflict between the decrees of two divorce courts, one or the other of which had no jurisdiction over the spouse it was attempting to bind.[167] The Court resolved the issue under the full faith and credit clause of the Constitution[168] without mentioning state sovereignty. *International Shoe* reread old precedents that relied on sovereignty along the lines of the minimum contacts test without saying whether the test

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the considerations relevant to forum non conveniens doctrine, a topic to which sovereignty is irrelevant and convenience paramount. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), mentioned neither territorial sovereignty nor convenience in upholding a statutory procedure that foreclosed the monetary claims of out-of-state beneficiaries of a common trust fund. The Court, without citation of authority, relied simply on the fact that the practice of periodically closing trusts was "rooted in custom." *Id.* at 313. Olberding v. Illinois Cent. R.R., 346 U.S. 338, 340-41 (1953), a dispute over the application of the federal venue statute, included extensive dicta concerning the fictive nature of motorist consent statutes, but did not once refer to state sovereignty. It may be of significance that Justice Black, who dissented in *Hanson v. Denckla*, was the author of *Vanderbilt*, *McGee*, and *Travelers Health Ass'n.*

161. *See supra* text accompanying note 14.

162. *See supra* note 160.

163. Hanson v. Denckla, 357 U.S. 235, 251 (1958).

164. *Id.*

165. *Id.* at 254.

166. 354 U.S. 416 (1957). The Court did take up McGee v. International Life Ins. Co., 355 U.S. 220 (1957), but only to distinguish it. The Court mentioned Travelers Health Ass'n v. Virginia *ex rel.* State Corp. Comm'n, 339 U.S. 643 (1950); Henry L. Doherty & Co. v. Goodman, 294 U.S. 623 (1935); and Hess v. Pawloski, 274 U.S. 352 (1927); but only to aid in distinguishing *McGee*. 357 U.S. at 252-53.

167. 354 U.S. at 419.

168. U.S. CONST. art. IV, § 1.

manifested the sovereignty idea, the idea of fairness apart from sovereignty, or both.[169] In *Hanson* the discussion of purposeful availment followed the discussion of sovereignty by just two pages.[170] Nothing in the opinion, however, related the ideas of sovereignty and purposeful availment to each other. Nothing spelled out that the basis of the purposeful availment requirement is the concept of state sovereignty.

Ideas of state territorial sovereignty furnish a theoretical basis for the purposeful availment requirement in the same manner in which they furnished a basis for constructive consent. Taking these sovereignty ideas in their classic form, in *Pennoyer v. Neff*, they posit that every state has exclusive jurisdiction over persons and property within its boundaries, and no state may exercise jurisdiction over persons and property outside its boundaries.[171] Either purposeful availment of the benefits and protections of the laws of the state is the knowing waiver of the defense that the state lacks jurisdiction, or it is the conduct of a corporation or other intangible being that manifests the presence of the entity within the borders of the state.

Purposeful availment acts as a waiver of an objection to jurisdiction exercised outside the borders of the state. Like other waivers of constitutional objections to adverse state action,

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169. 326 U.S. 310, 316-20 (1945). The Court's reliance on "traditional notions of fair play and substantial justice" embodies the fairness-sovereignty ambiguity. The language is a quotation from Milliken v. Meyer, 311 U.S. 457, 463 (1940), which was premised on sovereignty reasoning, but it obviously speaks of subjective fairness to the parties. The Court reinforced the fairness idea with its statement that an "estimate of the inconveniences" is relevant, even though that phrase also is taken from a case decided against a background of sovereignty ideas, Hutchinson v. Chase & Gilbert, Inc., 45 F.2d 139, 141 (2d Cir. 1930). The Court's treatment of Pennoyer v. Neff, 95 U.S. 714 (1877) as a historical artifact also highlighted the importance of fairness apart from territorial sovereignty. 326 U.S. at 316. Supporting the territorial sovereignty idea, however, is the Court's refusal to overrule any of the earlier opinions, even *Pennoyer*, and the possible inclusion within "traditional notions" of those expectations built up from years of strict territorial sovereignty reasoning. *See* Kurland, *supra* note 27, at 590 (1958). *See generally* Greenstein, *The Nature of Legal Argument: The Personal Jurisdiction Paradigm*, 38 HASTINGS L.J. 855, 866 (1987) ("*International Shoe* presents the state sovereignty theme through the very concept of 'minimum contacts.' "); Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U.L. REV. 1112, 1117-18 (1981) (arguing that *International Shoe* left the sovereignty framework intact).

170. 357 U.S. at 251-53. The two pages contain the Court's efforts at distinguishing McGee v. International Life Ins. Co., 355 U.S. 220 (1957).

171. 95 U.S. 714 (1877).

waiver by purposeful availment is knowing[172] because it contains a foreseeability component. From *International Shoe*'s proviso that exercise of jurisdiction not offend "traditional" notions,[173] to *World-Wide's* clarification that the relevant expectation for establishing jurisdiction is the expectation of suit, not of injury,[174] to *Asahi*'s repetition of *World-Wide*'s expectations language,[175] the Court has worked hard to eliminate any possibility that a defendant will be taken by surprise by a state's assertion of jurisdiction.[176] Moreover, the waiver is voluntary,[177] because it is based on intentional conduct, rather than unilateral action by other parties.[178]

Waiver of jurisdictional objections is a well-established basis for assertion of jurisdiction even under the most rigid sovereignty-bound system. Under such a pre-minimum contacts system, not only can the defendant explicitly waive an objection, in which case the action goes on to an enforceable judgment,[179] but the defendant can also involuntarily waive an objection by fail-

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172. *See* Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (waiver defined as "intentional relinquishment . . . of a known right").

173. 326 U.S. at 316.

174. 444 U.S. 286, 297-99 (1980). The Court in *World-Wide* confronted an automobile accident case in which plaintiffs bought a car in New York, then had an accident in Oklahoma while moving to Arizona. The Court found that the Oklahoma court in which plaintiffs sued on a products liability theory had no jurisdiction over the local New York car dealer and the tri-state (New York, New Jersey and Connecticut) distributor. The Court applied the minimum contacts test, with a strong emphasis on the purposeful availment standard and the foreseeability of suit in the distant forum. The Court stressed that the relevant foreseeability was not of injury in the forum, a test that would be met with any mobile product. Instead, the relevant test was whether "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *Id.* at 297. As additional support for its test, the Court stated that the federal system of government, with the sovereignty of states limiting the sovereignty of sister states, supported territorial jurisdiction restrictions. *Id.* at 293.

175. Asahi Metal Indus. Co. v. Superior Court, ___ U.S. ___, 107 S. Ct. 1026, 1031-32 (1987).

176. The exception to this statement, of course, is "tag" jurisdiction, in which the defendant is temporarily in the state but otherwise has no contacts with it, and is served while there. *Cf.* Grace v. MacArthur, 170 F. Supp. 442 (E.D. Ark. 1959) (defendant served in airplane flying over a corner of the state). Many commentators have predicted that the Court would not now uphold the exercise of such jurisdiction. *E.g.*, Posnak, *A Uniform Approach to Judicial Jurisdiction After* World-Wide *and the Abolition of the "Gotcha" Theory*, 30 EMORY L.J. 729 (1981).

177. *See* Johnson v. Zerbst, 304 U.S. 458, 464.

178. 107 S. Ct. at 1031, 1033.

179. Gilbert v. Burnstine, 255 N.Y. 348, 174 N.E. 706 (1931).

ing to take an appeal once a special appearance has been entered to contest jurisdiction.[180] Most significantly, the defendant can waive by asserting a counterclaim in the action in which jurisdiction is contested.[181] Indeed, the assertion of the counterclaim is an example of purposeful availment: the defendant is seeking out and obtaining the benefits and protections of the laws of the forum state.

Purposeful availment also manifests presence. An intangible entity can only establish presence by conduct, and the conduct that constitutes purposeful availment is visible, voluntary, and benefits the entity. Thus, those cases in which the defendant has purposefully availed itself of the benefits and protections of the forum state's laws might be considered the easy cases for jurisdiction under a presence test.

These two ideas appear to exhaust the usefulness of purposeful availment within a sovereignty framework. To the extent it relates to waiver, the purposeful availment requirement provides an exception for what would otherwise be a prohibited assertion of extraterritorial state power. To the extent it relates to presence, the requirement is a fact that places an entity within the state's jurisdiction.

B. Fairness

As noted above, purposeful availment has a fairness justification for it embodies an idea of reciprocity between the defendant and the forum state.[182] The defendant has obtained benefits from the forum and now has to pay by being subject to its jurisdiction. Of course, as *Hanson* itself shows, the idea does not apply to every case in which the purposeful availment requirement operates to deny jurisdiction.[183] More generally, the reciprocity idea seems to be a better reason to uphold jurisdiction, as in *International Shoe*, than to defeat it, as in *Hanson*. When a defendant receives benefits from the laws of the state, it seems natural to expect the defendant to be subject to the legal au-

180. Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522 (1931).

181. Adam v. Saenger, 303 U.S. 59 (1938). *But see* Gates Learjet Corp. v. Jensen, 743 F.2d 1325, 1330 n.1 (9th Cir. 1984), *cert. denied*, 471 U.S. 1066 (1985).

182. *See supra* text accompanying notes 33-34.

183. *See supra* text accompanying note 33.

thority of the sovereign that provides and enforces the laws.[184] The converse proposition, however, is not necessarily true. Requiring a defendant to appear in court in a state from which it has not received benefits and protections does not seem unfair as long as the forum is convenient and has just procedures for adjudicating the case. Moreover, the appearance of fairness is enhanced if judicial economy and the convenience of other parties are served by adjudicating the case in the forum. Thus, reciprocity makes sense as a basis to find that jurisdiction exists over the defendant, but by itself, reciprocity makes no sense as a reason for denying jurisdiction. In fact, reciprocity may run counter to intuitive ideas of fairness when it operates to prevent jurisdiction.

Apart from reciprocity, other fairness rationales might underlie the purposeful availment requirement. As just suggested, one aspect of fairness is convenience: the closer the forum, the cheaper and easier it will be to litigate. The probability of an unfair result increases when the costs of litigation impair the defendant's ability to defend itself. These costs give rise to subjective feelings of unfairness. Purposeful availment is a proxy measure, albeit a rough one, for the convenience of litigation. To the extent that the defendant has engaged in activity in the forum that is beneficial, voluntary, and of such a character as to trigger expectations of suit under traditional jurisdictional tests, it is reasonable to infer that the cost of litigation there will not be prohibitive,[185] at least compared to the cost in a different forum that might also have jurisdiction.

Like reciprocity, however, this factor makes more sense as a basis for granting jurisdiction than for forbidding it. It is an example of the converse proposition fallacy to reason that, because

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184. Of course, quarrels might arise over what constitutes receiving a benefit. *See* Asahi Metal Indus. Co. v. Superior Court, ___ U.S. ___, 107 S. Ct. 1026, 1035 (Brennan, J., concurring). In a recent article, Professor Brilmayer and her co-authors emphasize the importance of reciprocity of benefits and duties as a ground for treating domicile as a basis for general jurisdiction in a sovereignty-oriented system. Brilmayer, Haverkamp, Logan, Lynch, Neuworth & O'Brien, *A General Look at General Jurisdiction*, 66 Tex. L. Rev. 721, 732 (1988). But her analysis stresses the right to vote and participate in other political activities. *Id.* at 733. The political considerations would appear to be most relevant regarding choice of law, which governs substantive responsibilities rather than territorial jurisdiction, and the article suggests higher standards for choice of law determinations. *Id.* at 779.

185. McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957).

the forum would be convenient if purposeful availment applies, then the forum will be inconvenient if purposeful availment does not apply. The forum may be very convenient if the state line is only blocks away, even if the defendant has not availed itself of any benefits from the forum. Factors such as distance and the nature of the defendant's enterprise are the real determinants of convenience. Purposeful availment is merely a possible positive indicator.

C. *Theoretical Developments That Bear on Purposeful Availment*

It is no secret that the theoretical foundations of purposeful availment have developed in the thirty years since the purposeful availment requirement appeared.

1. *Developments Pertaining to State Sovereignty Theory*

A change—either transparently profound or profoundly transparent—has taken place with respect to the sovereignty doctrine. The major aspects of this development are the application of a minimum contacts test to assertions of in rem jurisdiction in *Shaffer v. Heitner*,[186] the integration of sovereignty theory into the idea of federalism in *World-Wide Volkswagen Corp. v Woodson*,[187] and the rejection of federalism as a permissible jurisdictional consideration in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*.[188]

Shaffer v. Heitner did some violence to *Pennoyer v. Neff*'s first principle of state sovereignty. The Court held that minimum contacts must exist between the defendants and the forum state in an action against directors of a corporation begun by attachment of certificates of stock they owned.[189] The law of the forum state, Delaware, provided that Delaware was the situs of all stock issued by companies incorporated there.[190] Therefore, the plaintiffs initiated a derivative action against the corporation's directors by sequestering the directors' stock and awaiting

186. 433 U.S. 186 (1977).
187. 444 U.S. 286 (1980).
188. 456 U.S. 694 (1982).
189. 433 U.S. at 212.
190. *Id.* at 192.

their appearance or default.[191] The Court, however, ruled that *Pennoyer*'s first principle, that the forum has unquestionable authority over all persons and things within its territorial boundaries, was undercut by subsequent decisions requiring the forum to give reasonable notice to the persons and the owners of property in question.[192] *Shaffer* also held that when a state exercises jurisdiction over property it is actually exercising jurisdiction over the interests of the property owner, and therefore, the proper test for the permissible exercise of jurisdiction was the minimum contacts test.[193] *Shaffer* overruled *Pennoyer* and its progeny to the extent they were inconsistent with these ideas.[194]

International Shoe, of course, had overruled no cases. Its minimum contacts test, as suggested above, relates to state sovereignty doctrine and to fairness ideas. *Shaffer* eradicated the first *Pennoyer* principle. By placing all exercise of extraterritorial jurisdiction under the minimum contacts test, however, it may have been reinforcing the second *Pennoyer* principle, that no state may exercise jurisdiction beyond its borders.[195] *International Shoe*, while not destroying sovereignty doctrine, reread the doctrine as imposing fairness and convenience requirements. If these requirements are read to supersede sovereignty ideas, *Shaffer* might be viewed as imposing universal requirements of fairness and convenience, but doing nothing more.[196]

Just as *Hanson* punctured this fairness-only idea thirteen years after *International Shoe*,[197] *World-Wide* did so again, just

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191. *Id.*

192. *Id.* at 206. The Court relied on Schroeder v. City of New York, 371 U.S. 208 (1962), Walker v. City of Hutchinson, 352 U.S. 112 (1956), and Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

193. 433 U.S. at 207.

194. *Id.* at 212 n.39.

195. *See* Jay, *"Minimum Contacts" As a Unified Theory of Personal Jurisdiction: A Reappraisal*, 59 N.C.L. REV. 429, 466-67 (1981) ("*Shaffer* is a disappointing reminder of the hold *Pennoyer* still exerts."); *cf.* Silberman, Shaffer v. Heitner: *The End of an Era*, 53 N.Y.U.L. REV. 33, 75-76 (1978) (questioning the extent of *Shaffer*'s eradication of the physical power basis of jurisdiction).

196. *See* Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts*, 66 CORNELL L. REV. 411, 420-21 (1981) (contending that *Shaffer* imposed "reasonableness" test and rejected mere "power" test). The *Shaffer* Court trivialized *Hanson* by relegating it to the end of a long footnote otherwise concerned with establishing the identity of power over property and power over owners of property. This treatment provides further support for this interpretation.

197. *See supra* text accompanying notes 162-69.

three years after *Shaffer*. *World-Wide* made clear that: "[e]ven if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State . . ., the Due Process Clause, acting as an instrument of *interstate federalism*, may sometimes act to divest the State of its power to render a valid judgment."[198] Although *Hanson* placed its emphasis on "territorial limitations on the power" of states,[199]—language that evokes the old image of sovereignty—*World-Wide* cited *Hanson* for "the principles of interstate federalism embodied in the Constitution."[200] The Court, however, did not shy away from using the word "sovereignty": it repeatedly used sovereignty to explain that in the system of interstate federalism the authority of each state limits the authority of all the other states.[201] The Court made clear that it intended to return to the principles embodied in the *Hanson* opinion,[202] principles derived from traditional sovereignty reasoning.[203] The Court gave a federalism rationale to sovereignty. The traditional sovereignty ideas, if not the "the first principles of justice,"[204] nevertheless were said to promote "the orderly ad-

198. 444 U.S. at 294 (citing Hanson v. Denckla, 357 U.S. 235, 254 (1958)) (emphasis added).

199. 357 U.S. at 251; *see id.* at 254.

200. 444 U.S. at 293.

201. The Court stated:

> [T]he Framers . . . intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment.

Id. at 293.

The Court distinguished this idea from the comparable idea of territorial limits on sovereign power in *Pennoyer v. Neff*, but did so in a backhanded way that suggested the same results might obtain if *Pennoyer* were applied:

> Hence, even while abandoning the shibboleth that "[t]he authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established," we emphasized that the reasonableness of asserting jurisdiction over the defendant must be assessed "in the context of our federal system of government," and stressed that the Due Process Clause ensures not only fairness, but also the "orderly administration of the laws."

Id. at 293-94 (quoting Pennoyer v. Neff, 95 U.S. 714, 720 (1877) and International Shoe Co. v. Washington, 326 U.S. 310, 317 (1945), respectively) (citations omitted).

202. *See id.* at 294 (quoting extensively from *Hanson*).

203. *See supra* text accompanying notes 171-81.

204. 95 U.S. at 732.

ministration of the laws"[205] by preventing the states from interfering with each others' prerogatives to assert their own sovereign power to adjudicate cases. One might question whether the states, in these days of overcrowded dockets, really want to hear all the cases they might have a claim to.[206] One might also wonder whether the Court's reasoning implies that each case has some correct forum,[207] rather than any forum that the plaintiff chooses where all defendants have minimum contacts. Because of the next development in the theory, however, these questions need not be answered.

Only two years after coronating the federalism-sovereignty concept, the Court dealt the concept a "[s]ummary [e]xecution[] by [f]ootnote."[208] In *Insurance Corp. of Ireland* the Court stated that federalism does not restrict the territorial jurisdiction of the states.[209] Restrictions on state jurisdiction are "not . . . a matter of sovereignty," but "ultimately [are] a function of the individual liberty interest preserved by the Due Process Clause."[210] The

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205. 444 U.S. at 294 (quoting *International Shoe*, 326 U.S. at 319).

206. *See* Weinberg, *The Helicopter Case and the Jurisprudence of Jurisdiction*, 58 S. CAL. L. REV. 913, 924 (1985).

207. A correct forum would be one in which adjudication causes the least violence to the respective claims of the various states that might have jurisdiction to assert power over it. This notion is totally contrary to the ordinary way of evaluating jurisdictional objections, which seeks not to identify some optimal forum, but rather to determine whether the forum that the plaintiff has chosen satisfies some minimum due process test. After *International Shoe* the applicable test has been minimum contacts. To the extent that this emanation of *World-Wide* undermines the Court's prior position, so do the arguments of some critics that the Court ignored the interests of Oklahoma in providing a forum for enforcement of its safety laws. *Cf.* McDougal, *Judicial Jurisdiction: From a Contacts to an Interest Analysis*, 35 VAND. L. REV. 1, 55 (1982) (listing interests of Oklahoma in the litigation); Weintraub, *Due Process Limitations on the Personal Jurisdiction of the State Courts: Time for a Change*, 63 OR. L. REV. 485, 505 (1984) (also listing interests of Oklahoma). If Oklahoma's interests are defeated by the Court's ruling, they would have been equally defeated by the plaintiffs' decision, for their own convenience or other reasons, to sue in another forum that meets the minimum jurisdictional standards. Unless one eliminates the rule of plaintiff's choice within minimum jurisdictional standards, no interests can be guaranteed except those of the parties and those that overlap perfectly with them. So far, no one has proposed elimination of the rule of plaintiff's choice of forum.

208. Lewis, *The Three Deaths of "State Sovereignty" and the Curse of Abstraction in the Jurisprudence of Personal Jurisdiction*, 58 NOTRE DAME L. REV. 699, 709 (1983).

209. 456 U.S. at 702-03 & n.10.

210. *Id.* at 702-03. This idea has received its fullest expression in Phillips Petroleum Co. v. Shutts, 472 U.S. 709, 806-08 (1985), which, in considering the territorial jurisdiction considerations applicable to plaintiff class members involuntarily present in a class action, equates the due process rights to which plaintiff class members are entitled with

Court affirmed a lower court order that had found the defendant foreign insurance companies subject to personal jurisdiction as a sanction for their failure to respond to discovery regarding their contacts with the forum. The Court stressed that personal jurisdiction objections may be waived. Although defendants made jurisdictional defenses in the district court, the Court found the failure to obey the legitimate orders of the court under the discovery rules constituted a waiver of these objections.

The idea of the defendants' waiver of jurisdictional objections gave the Court pause about federalism. The Court felt that if federalism were the basis for restrictions on territorial jurisdiction, a defendant would not be able to waive the objection. The defendant would be giving up a protection that runs in favor of the state, not merely in favor of itself. Persuaded by the due process clause's[211] failure to mention federalism concerns, the Court avoided the waiver problem by holding that individual liberty, not federalism, was at issue in personal jurisdiction matters.[212]

Most commentators have viewed this ruling as sweeping away all vestiges of both sovereignty and federalism theory.[213] Although they may be correct, there are still reasons to doubt this view. Federalism and sovereignty will continue to exert a practical influence because of the Court's insistence that there remains a requirement that "the maintenance of the suit . . . not offend 'traditional notions of fair play and substantial jus-

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the procedural due process rights which apply to any adjudication. One recent article, without discussing *Shutts*, contends that the due process at issue in territorial jurisdiction disputes is substantive, rather than procedural. Perdue, *supra* note 8, at 508 & n.183. This contention is based partially on the idea that the mere assertion of jurisdiction is not a deprivation of life, liberty, or property sufficient to bring procedural due process into play. The Supreme Court, however, has made clear that procedural due process operates to *prevent* final deprivations of due process: the interest of the protected person need not be terminated before the Court will impose procedural due process protections. *See* Logan v. Zimmerman Brush Co., 455 U.S. 422, 435-37 (1982) (predeprivation remedy ordered in appeal of writ of prohibition whose operation deprived person of protected interest); *see also Shutts*, 472 U.S. at 806-08 (reviewing procedural due process claim without reference to final disposition of case).

211. U.S. CONST. amend. XIV, § 1. *Pennoyer v. Neff* held that the due process clause was the ultimate authority on which the Court restricts the personal jurisdiction of the states. 95 U.S. 714, 733 (1877).

212. 456 U.S. at 702-03 & n.10.

213. *See, e.g.*, Lewis, *supra* note 208, at 726; Weintraub, *supra* note 207, at 504-05.

tice.' "[214] Sovereignty and to some degree federalism have determined the expectations of being subject to suit that form the "traditional notions" the Court wants to apply.[215] Thus, the courts will continue to apply sovereignty principles whether they admit it or not.[216]

On a more theoretical level, sovereignty need not be equated with federalism despite *World-Wide*'s reasoning and the sweeping language of *Insurance Corp. of Ireland.* Although the Court correctly noted that an individual is unable to waive the nonforum states' federalism interests,[217] a different waiver rule may apply to the nonforum state's sovereignty interests. Sovereignty interests might be tied to protection of the state's citizens.[218] It would be a violation of the nonforum state's sovereignty when another state asserts jurisdiction over its citizens, but only if the citizens did not consent to the assertion. Sovereignty also might be more closely tied to a legitimate exercise of authority.[219] The nonforum state's authority is offended only if its citizens have done nothing to subject themselves to the authority of the forum state. To the extent that the word sovereignty applies to these interests, a system that upholds these interests can properly apply a waiver rule.

Buttressing this position are consent theories—those based

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214. 456 U.S. at 703 (quoting International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) and Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

215. *See supra* text accompanying note 169.

216. *See infra* text accompanying notes 269-71.

217. These interests would be either in trying the case or in preserving the interstate order by having the state with the best sovereignty claim try the case. 456 U.S. at 702 n.10.

218. One commentator argues that the state's interest in protecting its citizens overlaps totally with the interest of the citizens themselves. Thus, the sovereignty consideration is unnecessary, for citizens can avoid jurisdiction wherever it is proper by asserting their own liberty interests. Drobak, *The Federalism Theme in Personal Jurisdiction*, 69 IOWA L. REV. 1015, 1051 (1983). The validity of this argument depends on the content of the protections that the jurisdictional rules afford the citizens' liberty interests. It is conceivable that the state could be offended by an assertion of jurisdiction that offends its citizens, but is not so unfair as to amount to a violation of the citizens' due process rights. Moreover, even if the rights of the state and the citizen both originate in due process, due process may have different meanings for a state than it has for an individual. Therefore, the rights of the state and its citizens need not be coextensive. This latter argument would be even more persuasive if the state's interest has another source such as the full faith and credit clause.

219. Hazard, *Revisiting the Second* Restatement of Judgments: *Issue Preclusion and Related Problems*, 66 CORNELL L. REV. 564, 569 (1981).

on prelitigation and litigation waivers of jurisdictional objections—which flourished at the same time that the sovereignty theory was at its height. If any inconsistency existed between upholding sovereignty and permitting the foreign defendant, by its conduct, to make itself subject to the court's sovereignty, neither *Connecticut Mutual Life Insurance Co. v. Spratley*[220] nor *Baldwin v. Iowa State Traveling Men's Association*[221] recognized it.

Nonetheless, the problem of the due process clause still exists. Just as it fails to mention federalism, it also fails to mention sovereignty.[222] One possible solution is to focus on the full faith and credit clause[223] and find in its terms or its application restrictions on personal jurisdiction that will preserve sovereignty interests. Before *Pennoyer*, courts imposing restrictions on territorial jurisdiction did so by refusing to afford full faith and credit to judgments obtained by overreaching state courts.[224] The full faith and credit clause relates to the ordering of relations among states. It would, therefore, seem natural to limit the clauses's application by the sovereignty principle, a principle that would uphold the "fair and orderly administration of the laws" by the states in the federal system. Indeed, Professor Rheinstein made just this argument in a 1955 article.[225]

Just as the due process clause makes no mention of sovereignty, however, neither does the full faith and credit clause list

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220. 172 U.S. 602 (1899).

221. 283 U.S. 522 (1931).

222. One commentator has taken issue with *Insurance Corp. of Ireland* and argues that a violation of state sovereignty does harm personal liberty interests protected by due process. He argues that due process protects a defendant's freedom from an unrelated sovereign. *See* Weisburd, *Territorial Authority and Personal Jurisdiction*, 63 WASH. U.L.Q. 377, 413-16 (1985); *cf.* Stein, *supra* note 8, at 748-50 (1987) (expressing the position that sovereignty was thought to limit jurisdiction at the time of the adoption of the due process clause and this ought to influence its interpretation). Due process, however, traditionally has not been thought to have such a content, and no such idea can be derived from any of the opinions in which the Court has expounded on the general meaning of the term. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 335 (1976). For a more detailed refutation of Professor Weisburd's supporting arguments, see Perdue, *supra* note 8, at 511 n.199.

223. "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. CONST. art. IV, § 1.

224. Rheinstein, *The Constitutional Bases of Jurisdiction*, 22 U. CHI. L. REV. 775, 793 & n.77 (1955) (collecting cases).

225. *Id.* at 795.

exceptions. If one adheres to the text of the Constitution, the basis for an exception to the full faith and credit obligation must be in the document. The due process clause is there, but state sovereignty is not.[226]

On a more mundane note, giving a different content to the requirements of territorial jurisdiction under due process (individual liberty interests of the defendant) from that given under full faith and credit (sovereignty interests of the nonforum states) means that some judgments upheld and enforced within the state of issuance would be denied enforcement by any other jurisdiction.[227] This result would greatly detract from the finality

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226. Rheinstein argues that sovereignty is not explicitly found in the Constitution because it is implicitly present:

> [A]t the time of the making of the Constitution . . . the idea obtained that there existed a *ius gentium* in the sense of a legal order common to all Christendom and that this order imposed on all member nations the duty so to confine their legislative, judicial and other activities that all nations could live together in an orderly community. . . . This notion has been made a part and parcel of the full faith and credit clause, which would be meaningless without it. It is in the full faith and credit clause that the Supreme Court is to find the constitutional directive and authorization in detail to determine the spatial confines by which the powers of the several states are delimited against each other. It is also by the incorporation of the idea of the existence of a *ius gentium* in the full faith and credit clause that the Court must implement it so that the several states can harmoniously live and operate together in the framework of the national union.

Id. at 816.

For all its rhetorical power, this argument lacks support in the constitutional text. There is a similar difficulty with Professor Weisburd's arguments that territorial sovereignty is so obvious in the structure of the Union that the written Constitution fails to mention it, and that the Constitution's main focus is the power and structure of the federal government, not the states. Weisburd, *supra* note 222, at 377. The document does address interstate relations in article IV. Article IV requires full faith and credit, imposes the duty to afford privileges and immunities, and requires extradition of criminal suspects and fugitive slaves. None of these matters was so obvious as to not make it into the Constitution. Professor Brilmayer contends that sovereignty is tied to political legitimacy and must exist independent of fairness concerns to limit jurisdiction. Brilmayer, *supra* note 43, at 296. Her analogy is to unconsented to arbitration, which, however fair, still offends. *Id.* at 297. To the extent that judicial decisionmaking is a component of the expectations that constitute subjectively fair treatment, however, such arbitration would be forbidden under fairness-oriented ideas of due process. *See infra* text accompanying notes 265-67. Her argument that either the full faith and credit clause or due process clause provides a basis for sovereignty ideas, Brilmayer, *supra* note 43 at 313 is vulnerable to the same critique as Rheinstein's and Weisburd's Theories. As a matter of stare decisis, her arguments are irrelevant by *Insurance Corp. of Ireland*, 456 U.S. at 702-03 & n.10, *Burger King*, 471 U.S. at 472 n.13 (1985), and *Shutts*, 472 U.S. at 809-11. Regarding the last of these cases, see *infra* text accompanying notes 250-56.

227. If this were not so, then the individual liberty and sovereignty tests really

of judgments, creating costly uncertainty over whether an assertion of jurisdiction that had been unsuccessfully resisted through various levels of appeal within the forum and up to the Supreme Court might nevertheless fail when enforcement of the judgment is sought elsewhere. By adding one more line of defense against assertions of jurisdiction, it might also encourage the expenditure of litigation resources that would be better spent, from the perspective of both the parties and the interested states, on the merits of the case.

2. *Developments Pertaining to Theories Based on Fairness and Convenience*

If it has taken place, the elimination of the sovereignty-federalism theory would leave only ideas of fairness and convenience guiding determinations of appropriate personal jurisdiction. If fairness in the sense of convenience is the only touchstone for jurisdiction, the potential for changes in current doctrine are tremendous. For one thing, state lines fade into irrelevance.[228] Available resources aside, distance determines the ease of litigation; it is far more convenient for a Manhattan resident to defend a suit in Newark than in Buffalo, even if the Manhattanite never even looked across the Hudson River before.[229] Apart from the fairness of reciprocity, the only reason the identity of the state might retain significance is if the fairness test looks to the interests of the forum state in adjudicating the litigation. Such an approach does not necessarily hinge on a

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would be unnecessary, and sovereignty would be redundant. Professor Rheinstein argues that the disparity in outcomes would take place, and appears to view it as an advantage, permitting migratory divorce decrees to be effective when they are harmless. Rheinstein, *supra* note 224, at 818.

228. *See, e.g.*, Perdue, *supra* note 8, at 510.

229. The Court misleads in its statement in McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957), and Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985), that "modern transportation and communications have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity." It may still be prohibitively costly for the small business in Georgia that has activities in Jacksonville, Florida, to defend in Miami, 400 miles farther to the south. It may not be unfair in the sense of reciprocity, but it is unfair in the sense of reasonable ability to defend. Under state venue rules this hypothetical does not occur very often, but restrictive state venue rules are not universal, nor are they generally recognized as required by the due process limits that control territorial jurisdiction. *See* Stein, *supra* note 8, at 705 n.76.

sovereignty theory. Even if sovereign power is not the issue, fairness might still require a particular state to assert its governmental interests in a given lawsuit. Although this approach has its difficulties,[230] the Supreme Court has recognized it,[231] and some distinguished commentators have incorporated it into their fairness theories.[232] The Court, however, has not said that fairness in the sense of convenience, reciprocity, or preservation of legitimate interests is all that is left to matters of territorial jurisdiction. Moreover, because the purposeful availment test and the concept of foreseeability linked to it both incorporate sovereignty considerations,[233] the results of these cases have not reflected any doctrinal revolution. The major cases decided after *Insurance Corp. of Ireland* demonstrate both the Court's refusal to rely overtly on sovereignty or federalism, and the Court's continued insistence on tests incorporating sovereignty ideas, albeit with an occasional attempt to explain these tests in fairness terms.[234]

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230. *See supra* note 207.

231. 471 U.S. at 473; McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957).

232. *E.g.*, McDougal, *supra* note 207, at 20 (1982); Redish, *supra* note 169, at 1139-41 (1981); Weintraub, *supra* note 207, at 524 (1984).

233. *See supra* text accompanying notes 160-71 (purposeful availment) and *infra* text accompanying notes 270-71 (foreseeability).

234. This analysis places to one side Calder v. Jones, 465 U.S. 783 (1984), and Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984). *Keeton* focused largely on the problem of personal jurisdiction over plaintiffs and did not develop new ideas on the appropriate test for defendants. Although *Calder* focused on defendants, it addressed the issue of defendants protected by the first amendment to the Constitution; it did little to develop the doctrine of personal jurisdiction over defendants in general. To the extent that these cases do apply the purposeful availment requirement, they are briefly summarized elsewhere in this Article. *See supra* text accompanying notes 107-115. Another arguably major case that nevertheless contributed little doctrinal development is Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984), which involved an action against a Colombian transportation company to recover for the death of American workers killed in a Peruvian helicopter accident. The Court stressed that the defendant lacked minimum contacts with the forum state and applied an apparently stricter standard than it might otherwise apply, on the ground that the cause of action was not alleged to have arisen out of contacts the defendant had with the forum. Comparing the defendant's contacts to those in Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952), an analogous case in which jurisdiction was found proper, and Rosenberg Bros. & Co. v. Curtis Brown Co., 260 U.S. 516 (1923), an analogous but pre-minimum contacts case in which jurisdiction was held improper, the Court found that *Rosenberg* was the closer comparison and denied jurisdiction. 466 U.S. at 418. The Court quoted the language "fair play and substantial justice," but without any exploration of the words beyond the minimum contacts test itself. *Id.* at 414 (quoting both International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) and Milliken v. Meyer, 311 U.S. 457, 463 (1940)). Like-

Burger King Corp. v. Rudzewicz[235] and *Asahi Metal Industry Co. v. Superior Court*[236] applied a two-part minimum contacts test in which purposeful availment and convenience are addressed separately. In *Burger King* the Court appeared to justify the purposeful availment requirement in terms of the fairness of reciprocity[237] and convenience, not sovereignty and federalism.[238] After establishing this fairness rationale, however, the Court appeared to set up the purposeful availment requirement as an absolute test. This barrier operates irrespective of the fairness considerations present in the particular case. "*Once it has been decided that a defendant purposefully established minimum contacts within the forum State*, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play

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wise, the Court stated that the relevant contacts could not be those created by the "unilateral activity" of another defendant or a third party, thus applying the purposeful availment standard and quoting Hanson v. Denckla, 357 U.S. 235 (1958). 466 U.S. at 417. The Court, however, gave no clue that it might consciously have been applying ideas of state sovereignty or federalism.

235. 471 U.S. 462 (1985). The case was an action by Burger King Corporation to enforce a franchise agreement with a Michigan franchisee. Burger King sued in federal court in Florida. The Supreme Court held that the Florida court had jurisdiction over the Michigan defendant because in his dealings with the franchise he purposefully established minimum contacts with Florida.

236. ___ U.S. ___, 107 S. Ct. 1026 (1987).

237. The Court stated:

> [W]here individuals "purposefully derive benefit" from their interstate activities, it may well be unfair to allow them to escape having to account in other States for consequences that may arise proximately from such activities. The Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed.

471 U.S. at 474 (citation omitted). *See generally supra* text accompanying notes 33-34 (discussing reciprocity theme in purposeful availment). It should be noted that Shaffer v. Heitner, 433 U.S. 186 (1977), foreshadowed establishment of this clear reciprocity rationale for purposeful availment. The plaintiff argued that the corporate director defendants had received the benefits of the Delaware corporate laws. Without mentioning sovereignty, the Court answered by saying that the directors had insufficient knowledge regarding vulnerability to jurisdiction to meet the purposeful availment requirement which would make the implication of consent to jurisdiction fair. *Id.* at 216.

238. The Court stated:

> [B]ecause "modern transportation and communications have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity," it usually will not be unfair to subject him to the burdens of litigating in another forum for disputes relating to such activity.

471 U.S. at 474 (citation omitted).

and substantial justice.' "[239] Convenience and the state's fairness interest in reciprocity are to be considered only at this second phase.

> Courts in appropriate cases may evaluate the burden on the defendant, . . . the forum State's interest in adjudicating the dispute, . . . the plaintiff's interest in obtaining convenient and effective relief, . . . the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.[240]

If these factors militate in favor of jurisdiction, however, a lesser showing of purposefully created contacts may sometimes suffice.[241] Similarly, the fact that the defendant has "purposefully directed his activities at forum residents" will suffice unless the defendant makes a showing that the exercise of jurisdiction is unreasonable and that rules such as choice of law and venue cannot be applied to make it reasonable.[242]

Thus, from a doctrinal viewpoint, as of 1985, fairness justified the imposition of the purposeful availment requirement, but the requirement would still bar jurisdiction in some cases in which convenience and other explicit fairness factors militated in favor of the forum state adjudicating the case.[243] Even though fairness considerations might be implicit in the purposeful availment requirement, these same considerations taken independently might still bar jurisdiction when purposeful availment is present.[244]

Asahi applied the purposeful availment test as a threshold requirement and then examined fairness in the sense of convenience for the defendant and the importance of the forum state's interest. In other words, *Asahi* used the same method as *Burger King*. The plurality opinion and Justice Brennan's concurrence differed on the outcome of the purposeful availment require-

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239. *Id.* at 476 (quoting International Shoe Co. v. Washington, 326 U.S. 310, 320 (1945)) (emphasis added).

240. *Id.* at 477 (quoting World-Wide Volkswagon Corp. v. Woodson, 444 U.S. 286, 292 (1980)).

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.* at 478.

ment.[245] Neither opinion, however, explored the doctrinal basis of purposeful availment. No reference was made to sovereignty, and the fairness rationale was not developed. The Court discussed—and disagreed about—the extent of purposeful activity, benefit received, and foreseeability of suit necessary to meet the requirement.[246] With respect to the independent requirement of fairness, or reasonableness, the majority opinion did little to elaborate on *Burger King*. Without repeating or even referring to the statements in *Burger King* establishing that a showing of purposeful availment supports jurisdiction unless the defendant makes a compelling case that jurisdiction is unfair, and that a strong showing of fairness might permit jurisdiction upon a lesser showing of purposefully created contacts, the Court listed the following reasonableness factors:

> A court must consider the burden on the defendant, the interests of the forum state, and the plaintiff's interest in obtaining relief. It must also weigh in its determination "the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies."[247]

As applied in *Asahi*, the factors included an assessment of the forum state's and the cross-plaintiff's interests in conducting the litigation in the forum.[248] These interests were minimal in light of the indemnity nature of the claim and the foreign nationality of both parties.[249] Doctrinally, the two step test reigned supreme, with purposeful availment—its rationale unexplained—as the threshold requirement before fairness considerations even enter the picture. The possibility of some balancing of the two parts of the test remains a line in the *Burger King* opinion.

One further case ought to be noted on this topic. In *Phillips*

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245. ___ U.S. ___, 107 S. Ct. 1026, 1031-33, 1035-37, 1038 (1987).

246. *Id. See generally supra* text accompanying notes 124-37 (discussing case).

247. 107 S. Ct. at 1034 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980)).

248. *Id.* at 1034.

249. *Id.* The foreign nationality of the parties, said the Court, called for an even more cautious approach to asserting jurisdiction than might be appropriate with domestic defendants, in light of possible interference with federal foreign policy interests. *Id.* at 1035.

Petroleum Co. v. Shutts,[250] a 1985 case, the Court upheld the jurisdiction of a Kansas court over out-of-state plaintiff class members in an action to recover unpaid mineral rights royalties. The Court accepted the idea that the absent plaintiffs had due process rights like those of defendants. The Court, however, pointed to the minimal risks and burdens of the class members, in contrast to the substantial burdens of expense and effort imposed on a nonresident defendant.[251] The Court also stressed the class members' due process protections such as notice, the right to opt out, and court scrutiny of the representative party.[252]

Thus, the Court considered the nonresident plaintiffs to be in the same situation as nonresident defendants with respect to their jurisdictional objection. In evaluating the objection, however, the Court applied a procedural due process analysis drawn from other areas of the law. The Court questioned whether a valuable property right was at stake,[253] assessed the detriment to the plaintiff's rights that would occur if adjudication took place in the challenged manner,[254] and questioned whether alternate safeguards afforded by the existing procedure satisfied fairness concerns, or whether additional safeguards needed to be added.[255] The Court, therefore, merged territorial jurisdiction doctrine with conventional due process, fair hearing doctrine.[256] Presumably, purposeful availment would have no place in such a regime except to the extent that it related to fairness ideas. Strangely, the *Shutts* opinion does not seem to have had much impact. *Burger King* and *Asahi* applied the conventional, sovereignty-based purposeful availment requirement.

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250. 472 U.S. 797 (1985). For a detailed description of the case, see *supra* note 119.

251. 472 U.S. at 808-09.

252. *Id.* at 809-11.

253. *Id.* at 807.

254. *Id.* at 809-10.

255. *Id.* at 810-14 (emphasizing rights of notice and opting out of the class, while rejecting as too inefficient a proposed requirement that the class members affirmatively opt into the class).

256. *Id.* at 807 (explaining minimum contacts test solely on the basis of fairness). Professor Brilmayer appears to disagree with this merger. Brilmayer, *supra* note 43, at 296. But her article does not discuss the point in the specific context of *Shutts*.

IV. AN EVALUATION OF PURPOSEFUL AVAILMENT

A. The Death of State Sovereignty

1. The Mortality of Consent

Sovereignty is indeed dead as an explicit basis for limiting state territorial jurisdiction.[257] Since its manifestation as federalism in 1980, sovereignty has not returned and its demise was confirmed in 1985.[258] With the end of the sovereignty doctrine, purposeful availment has been cut loose from its origins.[259] Consent, one idea on which purposeful availment is based, collapses when there is no ground to oppose jurisdiction. If there is no basis for resistance, there is no occasion for consent.[260] Thus, purposeful availment as a manifestation of consent seems irrelevant.

2. The Irrelevance of Presence

Presence, the other basis of purposeful availment, has also become obsolete. One need not ask whether the defendant is present in the borders of the jurisdiction anymore. The question is whether it is fair to require the defendant's presence in the action. Purposeful availment as proof of presence is beside the point. Reasons other than its relation to the original doctrine must be found to justify the purposeful availment requirement.

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257. *See* Lewis, *supra* note 208, at 699 (1983).

258. The Court stated: "Although this protection operates to restrict state power, it 'must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause' rather than as a function 'of federalism concerns.'" Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 n.13 (1985) (quoting Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 701-03 n.10 (1982)).

259. *See supra* text accompanying note 43.

260. The relation of purposeful availment to consent demonstrates the oddity of purposeful availment's current function in territorial jurisdiction disputes. If purposeful availment is a manifestation of consent, one would expect to see it embraced whenever jurisdiction is approved, but not necessarily mentioned when jurisdiction is denied. Even under the strictest sovereignty theory, the absence of purposeful availment, like the absence of consent, does not imply the absence of adequate grounds for jurisdiction. If sovereignty were to have another resurrection, either the nonsovereignty function of purposeful availment would justify its status as an absolute requirement, or purposeful availment would become solely a consideration for granting jurisdiction.

B. The Function of Purposeful Availment in the Absence of Sovereignty

1. Fairness to the Forum: Reciprocity

To the extent that purposeful availment serves a fairness role by imposing reciprocity, its use to deny jurisdiction is an example of the converse proposition fallacy.[261] If a defendant has deliberately benefited from the forum's laws, then the forum's exercise of jurisdiction may seem fair. The fact that the defendant has not benefited, however, does not make the exercise of jurisdiction unfair. It might be eminently fair, in the sense ordinary people view fairness, to force a defendant to cross a state line to appear in court, if the distance is close,[262] the stake in the lawsuit nominal,[263] or the fairness to others overwhelming. Indeed, in such a situation, in which fairness is the only concern, the presence of the state line is irrelevant.[264]

Arguably, assigning any relevance to state lines, even for the purpose of granting jurisdiction on a reciprocity theory, is an unconscious use of state sovereignty doctrine. If the state does not have sovereign authority that affects territorial jurisdiction disputes, how can relations with the sovereign authority create a reciprocal obligation that determines any particular dispute? Stated differently, the question is whether due process in the sense of fairness (rather than in the discredited sense of federalism or sovereignty) nevertheless embodies the idea of an obligation to a governmental authority based on voluntary conduct that accrues benefits from the law enforcement activity of that authority. With respect to the easiest cases, a consensus probably would be present that it does. Thus, if the plaintiff files suit in the forum and defendant asserts a counterclaim, consensus ideas of fairness would preclude the plaintiff from contending that the assertion of jurisdiction over the counterclaim is unfair.[265] Perhaps even this easiest case embodies sovereignty no-

261. *See generally supra* note 260 (making same argument with respect to use of purposeful availment as an indication of consent under a regime of state sovereignty).

262. *See supra* text accompanying note 185.

263. *See, e.g.*, Hanson v. Denckla, 357 U.S. 235, 263 (1958); *see also supra* text accompanying note 34.

264. *See supra* text accompanying notes 184-85.

265. *See* Adam v. Saenger, 303 U.S. 59 (1938). In that case the Court held:

tions, but to the extent it does, the prevailing subjective idea of fairness does as well. Therefore, even if fairness is defined as the imposition of procedures that are not "arbitrary or unreasonable," requiring a party to submit to a forum from which that party has demanded relief meets the test.[266] Obviously, one may postulate cases as difficult as *Asahi*, but it should be possible to extend the subjective fairness analysis to any of these, and the benefit the defendant derives from the laws and legal protections of the forum should retain some significance.[267]

2. *Fairness to the Defendant: Foreseeability*

The foreseeability criterion for territorial jurisdiction decisions is circular: whatever the jurisdictional rule is, the rule will trigger expectations that will then determine foreseeability.[268] Had *World-Wide* gone the other way, dealers and wholesalers of autos would expect to be subject to suit in any forum state into which their cars are driven.[269] The foreseeability on which the Court relied in *Shaffer v. Heitner*,[270] *World-Wide*, and the sub-

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> There is nothing in the Fourteenth Amendment to prevent a state from adopting a procedure by which a judgment in personam may be rendered in a cross-action against a plaintiff in its courts . . . . The plaintiff having, by his voluntary act in demanding justice from the defendant, submitted himself to the jurisdiction of the court, there is nothing arbitrary or unreasonable in treating him as being there for all purposes for which justice to the defendant requires his presence. *It is the price the state may exact as the condition of opening its courts to the plaintiff.*

Id. at 67-68 (emphasis added).

266. *See id.*

267. Another sense of fairness to the forum is the fairness of upholding the forum's interest in enforcing its law and providing an avenue of relief to its residents. Under present doctrine, however, these matters are considered in a second step of minimum contacts analysis conducted after purposeful availment has been met. To include them in the purposeful availment calculation would be double counting, at least if the purposeful availment requirement is rewritten as one that will support and not by itself forbid assertions of jurisdiction. *Cf.* Calder v. Jones, 465 U.S. 783, 790 (1984) (describing special jurisdictional protections for reporters in libel actions as a form of double counting when special protections exist on the determination of the merits).

268. *See, e.g.*, Jay, *supra* note 195, at 443 (1981); Stein, *supra* note 8, at 701 (1987).

269. The Court in *World-Wide* relied strongly on foreseeability of being haled into Court, separating the idea from foreseeability of injury. 444 U.S. 286, 295-98 (1980).

270. Shaffer v. Heitner, 433 U.S. 186, 216 (majority opinion), 217-19 (Stevens, J., concurring) was the first of the Court's cases to link purposeful availment with foreseeability in a clear fashion. *World-Wide* made the linkage even more explicit. 444 U.S. at 295-98.

sequent cases, however, is not just the foreseeability that the current rule will be applied. It is, instead, foreseeability based on the accretion of all the territorial jurisdiction decisions of the past, without regard to the rules that these cases employed.[271] This gives foreseeability some content besides its own circularity. That content, however, is necessarily the discredited notion of state sovereignty, the fundamental basis for territorial jurisdiction caselaw from *Pennoyer* to *International Shoe*, and its supplemental basis, intermittently, from *Hanson* to *Insurance Corp. of Ireland.* Using expectations formed in the era of sovereignty doctrine may have some validity under the fairness rationale underlying the current approach to territorial jurisdiction. Perhaps, like reciprocity, expectations formed by the old sovereignty cases have become so tied to subjective ideas of which procedures are fair that a significant departure from what was permissible under sovereignty doctrine would trigger modern outrage. Unlike reciprocity, expectations would, under this theory, be both a positive and a negative factor in the jurisdictional determination. Not only would one's vulnerability to an assertion of jurisdiction under the old rules make an assertion of jurisdiction now seem fair (because the old rules make it foreseeable), but also one's immunity from jurisdiction under old precedents might evoke a sense of unfairness if jurisdiction is asserted now (because the old rules make it unforseeable). This reasoning based on expectations will not be true in every case. Other factors such as distance or the poverty of the defendant might still make defense of the case so difficult that, whatever the defendant's reasonable expectations, it would appear unfair to make him or her litigate in the forum. In addition, a host of factors might make the assertion of jurisdiction seem fair whatever the defendant's expectations. Such factors might include convenience to the defendant, convenience to the other parties, judicial economy, absence of a significant stake in the suit, or great resources for defending.

3. Fairness to the Defendant: Convenience

Purposeful availment of the forum's benefits and protec-

271. *See supra* note 169 and accompanying text.

tions may indicate proximity or low cost in defending an action there. It is probably a better indicator than gross mileage. Once again, however, the converse proposition does not necessarily hold. Just because a person has not taken the benefits and protections of the forum's laws does not mean it is inconvenient for the person to defend there. If the forum is very close and getting there is inexpensive, the forum is convenient, period. Thus, purposeful availment works as a positive indicator of convenience, but should not be employed as a negative indicator.

Of course, even as a positive indicator, purposeful availment is far from perfect. The requirement necessarily focuses on the past, the ties and relations that have been created from which the defendant has derived benefit. But convenience looks to the present and the future. If the defendant has severed all the ties and abandoned all the relations that give rise to an inference of convenience, litigation now might be very difficult for reasons of distance and cost, despite the past benefits from the forum.[272]

4. General Observations on the Use of Fairness Rationales for Restriction of Territorial Jurisdiction

Due process doctrine has few absolute rules. Although "[t]he fundamental requisite of due process of law is the opportunity to be heard,"[273] the Supreme Court has tolerated procedures that make defense at the hearing extremely difficult. The Court has approved the imposition of filing fees in actions by indigents to appeal reductions of welfare benefits.[274] It has approved the denial of legal aid in custody determinations when the parents of the child could not afford a lawyer.[275] These cost barriers are much more likely to frustrate the right to be heard than imposing the cost of traveling to a distant jurisdiction on a defendant who has some financial resources.

With *Insurance Corp. of Ireland* and, to an even greater extent, *Phillips Petroleum Co. v. Shutts*, the Court has made clear that the territorial jurisdiction determination is just one more

272. *See* Perdue, *supra* note 8, at 510.

273. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (quoting Grannis v. Ordean, 234 U.S. 385, 394 (1914)).

274. Ortwein v. Schwab, 410 U.S. 656 (1973).

275. Lassiter v. Department of Soc. Servs., 452 U.S. 18 (1981).

aspect of procedural due process. But unlike other aspects of procedural due process in which the burden on the individual claiming greater rights to be heard is balanced against other interests, including those of the entity providing the hearing,[276] the territorial jurisdiction determination has one absolute: purposeful availment of the benefits and protections of the forum's laws must exist before a court will consider the forum's interest, the defendant's burden, and the other interests at stake. Although a purposeful availment inquiry has some justification in determining the fairness of a given assertion of jurisdiction, imposing an absolute requirement of purposeful availment does not appear to be justified.

C. Minimum Contacts with a Diminished Role for Purposeful Availment

Close study of purposeful availment, thus, supports a greatly diminished role for the requirement. Rather than standing as an absolute barrier to jurisdiction, a role that it would not occupy even in a system based on strict territorial sovereignty, purposeful availment should be only one of several factors going into a determination whether an assertion of jurisdiction comports with due process. The presence of purposeful availment should be of greater consequence than its absence, but in neither case should it be an absolute test. Purposefully created contacts, like other contacts, will generally count in favor of jurisdiction to the extent that they indicate convenience and any aspects of foreseeability of suit that are absolutely basic to generally held ideas of fairness. Purposefully created contacts will occupy a unique role by establishing reciprocity with the forum state, an aspect of fairness that is basic, but hardly absolute.

Of course, objections might be raised to such an approach.

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276. The Court stated:

> [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous determination of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural safeguards would entail.

Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976).

An absolute test is thought to be easy to apply. The purposeful availment requirement, however, has proven vexing in application when applied as an absolute. *Asahi* is as a key example. The Court stands split (four to one to four) over the requirement's application to the unadorned facts of placement into the stream of commerce of a mass produced item whose use gives rise to a products liability action. The other half of the minimum contacts test, that based on explicit consideration of convenience and the interests of the forum and the parties, yielded near unanimity. Doubtless, the current two hurdles for attempted exercises of jurisdiction—purposeful availment *and* fairness and convenience—mean that judges have a greater chance to reach the same of result on similar facts. But this is simply because the negative option gets two chances. The two chances, however, are not independently justified as absolute barriers to assertion of jurisdiction.

IV. CONCLUSION

Scholars have called for any number of reforms of personal jurisdiction. Some have called for a return to theories of state sovereignty,[277] some have called for the abolition of the minimum contacts test and the adoption of interest analysis[278] or something more vague,[279] and some have called for hybrid tests embodying both sovereignty and fairness considerations.[280]

The proposal here is much more modest. It is simply to depose purposeful availment from the position it now occupies as a threshold requirement for territorial jurisdiction. This approach is supported by the history of purposeful availment in consent doctrine, the history of sovereignty theory and its absence of textual grounding in the Constitution, and the functional role that purposeful availment might sensibly play in a regime based on fairness. Further support is found in *Shutts*'s equating of territorial due process with ordinary procedural due process. Perhaps this approach is also supported by Justice Brennan's dis-

277. Weisburd, *supra* note 222, at 377 (1985).

278. McDougal, supra note 207, at 1 (1982).

279. Greenstein, *supra* note 169, at 855 (1987) (idea of "themes"); Jay, *supra* note 195, at 429 (1981) (suggestion that coherent theory may not be possible).

280. Posnak, *supra* note 176, at 729 (1981).

cussion of territorial jurisdiction in his opinion for the Court in *Burger King*. In *Burger King* the Court reached the brink of balancing purposeful availment with other factors, and then stepped back. It stated that considerations of the forum state's interest, the plaintiff's interest, and the interstate judicial system's interest "sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of [purposefully created] minimum contacts than would otherwise be required."[281]

Had the Court's meaning permitted the omission of the "purposefully created" language from the quotation, the Court would have embraced the main idea of this Article. After all, it would be hard to imagine that the considerations the Court mentions would ever be present to a sufficient degree to satisfy legitimate fairness concerns if there were "no contacts, ties, or relations"[282] between the defendant and the state.[283] But they might well satisfy these concerns in situations like *Hanson* or *World-Wide*, which ignored them because of the threshold requirement of purposeful availment. To the extent that these cases relied explicitly on ideas of sovereignty, their authority might be questionable in any event.[284] At the very least, the sovereignty reasoning of these opinions ought to be acknowledged so that purposeful availment will no longer be a secret misapplication of concepts now discredited, but instead an effort in furtherance of legitimate fairness goals.

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281. 471 U.S. 462, 477 (1985).

282. International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).

283. For a more negative view of the value of minimum contacts in general, see Jay, *supra* note 195, at 475; McDougal, *supra* note 207, at 59-60. The approach suggested in this Article would conserve both purposeful availment and minimum contacts precisely to the extent that they serve legitimate fairness goals.

284. The Court, however, relied extensively on both cases in Burger King v. Rudzewicz, 444 U.S. 462, 472, 474-78, 480-81, 482 n.23, 486 & n.30 (1980) (majority opinion), and Asahi Metal Indus. Co. v. Superior Court, ___ U.S. ___, 107 S. Ct. 1026, 1031-32, 1034, 1036-38, (1987) (plurality and concurring opinions).