Personal Jurisdiction and the Internet--Proposed Limits on State Jurisdiction over Data Communications in Tort Cases

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# Personal Jurisdiction and the Internet—Proposed Limits on State Jurisdiction over Data Communications in Tort Cases

**BY DAVID WILLE***

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I. INTRODUCTION

Each communications medium has unique attributes, and the Internet is no exception. Although other communications media may offer some of the characteristics of the Internet, none offers them all. The Internet allows communication between parties in remote parts of the world, often in a matter of seconds.\(^1\) The Internet permits communications with many people simultaneously and inexpensively. If a communication would be interesting to others, the recipient can inexpensively generate as many copies of the communication as desired and send that communication all over the world.\(^2\) The Internet allows its users to locate information quickly and at a low cost by using the text searching capabilities available on the World Wide Web.\(^3\) Such information is available to the seeker of that information twenty-four hours per day. Additionally, where computers controlling other machines or devices are connected to the Internet, an Internet user may control those devices from thousands of miles away.


\(^2\) See generally Barry, supra note 1, at 85.

These unique characteristics have led various commentators to question whether legal rules adopted for other methods of communication make sense and should be applied in the context of the Internet.\textsuperscript{4} Rules that are perfectly logical and operate smoothly with other rules when applied to one communications medium may not make sense when applied to a new communications medium. To answer questions regarding the wisdom of applying old substantive rules in the context of this new medium, however, one should consider the policy justifications for the underlying rules. If rules of law are divorced from their underlying policy justifications, then errors and unfavorable outcomes are likely to result when those rules are applied to situations that were not contemplated when the rules were made. Thus, by considering policy goals, legal rules can be more logically adapted to new situations.

In the area of personal jurisdiction, commentators have begun to explore the applicability of the minimum contacts test to the Internet.\textsuperscript{5}


\textsuperscript{5} See generally Dan L. Burk, \textit{Jurisdiction in a World Without Borders}, 1 VA. J. L. & TECH. 3 (Spring 1997) \texttt{<http://www.student.Virginia.EDU/~vjolt/graphics/vol1/home_art3.html>} (arguing that the enforcement of current laws to the Internet should be carefully examined); Counts & Martin, \textit{supra} note 4; Henry H. Perritt, Jr., \textit{Jurisdiction in Cyberspace}, 41 VILL. L. REV. 1 (1996) (arguing that an evolution of conventional jurisdictional doctrines is necessary for Internet disputes); Corey B. Ackerman, Note, World-Wide Volkswagen, \textit{Meet The World Wide Web: An Examination of Personal Jurisdiction Applied to a New World}, 71 ST. JOHN'S L. REV. 403 (1997) (applying the purposeful availment approach to the
Many have attempted to apply existing personal jurisdiction doctrine to the Internet without stopping to consider whether existing rules make sense in that context. Because the Supreme Court has not clearly delineated the policy justifications for imposing limits on state jurisdiction, that inquiry is a difficult one. Unlike many substantive doctrines where at least some overarching policy justifications are evident, the Court continues to search for key principles in the area of personal jurisdiction. Thus, when considering the question of personal jurisdiction in the context of the Internet, one should stop to ask whether the existing rules make sense, both generally and in the specific context of the Internet. If the rules generally draw improper boundaries, then they probably do likewise in the specific context of the Internet. To answer the question of whether existing rules make sense generally, however, one must identify the proper theoretical foundation for limitations on personal jurisdiction of the states.

This Article considers the problem of personal jurisdiction from the standpoint of allocating jurisdictional power between the different states. Of course, the Internet is international in scope and questions of personal jurisdiction are likely to be even more problematic when countries with heterogeneous legal systems and jurisdictional approaches are thrown into the mix. Jurisdiction in that context also raises problems in foreign relations. Litigation over personal jurisdiction problems concerning data communications has thus far focused primarily on domestic disputes.

See infra notes 75-82 and accompanying text.
Before international cases begin to proliferate, the United States first needs to adopt a coherent approach to domestic jurisdictional problems. This Article proposes such an approach.

Specifically, this Article proposes some general rules that should apply in tort cases involving data communications. As will become apparent, the proposed jurisdictional rules follow from limits on state regulatory power, which constrain a state's sovereign power to regulate persons, property, and conduct within its territory. In tort cases, a state should be able to exercise jurisdiction in cases arising out of data communications originated by a resident of the state, received within the state, or processed by a computer within the state, if the communication comprises an event upon which the defendant's liability allegedly depends. In addition, a state should have the power to exercise jurisdiction in cases where data communications proximately cause substantial effects within the state. In the case of an omission, a state should have the power to regulate that omission if the act likely would have been performed in the state or if the omission proximately causes effects within the state. In other words, states should have the power to exercise personal jurisdiction in cases involving allegedly tortious conduct that occurs within the state or tortious conduct that occurs outside the state and proximately causes effects within the state.

The proposed rules would resolve a split of authority that has developed in data communications cases, particularly in cases involving World

Wide Web sites. That split is discussed in Part II. The split arises mainly due to the shortcomings of the minimum contacts test—a test that should not be applied in its current form to issues of personal jurisdiction involving data communications. Instead, when faced with an appropriate case, the Supreme Court should modify the minimum contacts test as described in the previous paragraph and in Part III.

To understand why, however, one must focus on the proper policy justifications for limits on state jurisdiction. That focus invites three inquiries—(1) an identification of the proper policy basis for restricting state exercises of personal jurisdiction and an examination of whether the minimum contacts test is consistent with that policy basis; (2) an examination of whether personal jurisdiction should be restricted by the Due Process Clause; and (3) an examination of whether the proposed rules are consistent with historical jurisdictional doctrine. This Article addresses each of these questions.

First, the Court has struggled to identify a theory underlying the doctrine of personal jurisdiction. However, that theory must be identified to allow difficult questions to be resolved. Cases involving data communications fit the description—they are difficult to resolve. The theoretical basis for jurisdictional restrictions is addressed in Part IV. This Article contends that the scope of sovereign regulatory power should be and has been the theoretical basis for restricting personal jurisdiction. These limits stem from Lockean notions of consent— one who has not consented to the power of a sovereign, either expressly or tacitly, is not subject to its jurisdiction. Tacit consent results from a defendant’s conduct which is within the scope of a state’s regulatory power.

Defining personal jurisdiction limits to be consistent with the scope of state regulatory power is justified for several reasons. In addition to the judicial function, courts also perform a regulatory function. Thus, regulatory jurisdictional limits should also apply to courts. In addition, other exercises of judicial jurisdiction and other exercises of sovereign authority generally are similarly limited. For practical purposes, a state’s regulatory jurisdiction is only meaningful if its laws are enforced through exercises of judicial jurisdiction. Even if a state would choose to apply another state’s law, the first state still has an interest in exercising judicial jurisdiction. The modern minimum contacts test should evolve consistently with the above theory. The test is currently underinclusive.

Second, commentators have sometimes criticized the applicability of the Due Process Clause to the personal jurisdiction inquiry. Because this

9 See infra note 90 and accompanying text.
Article proposes a step beyond the minimum contacts test, one should consider whether such a step is necessary—i.e., whether due process should restrict state jurisdiction at all. This Article contends in Part V that personal jurisdiction is properly restricted as a matter of substantive due process.

Third, it is helpful to consider whether the proposed rules and their theoretical underpinnings are consistent with the historical treatment of personal jurisdiction. If the Supreme Court chooses to reexamine the minimum contacts test, it will likely choose to adopt a test that is as consistent as possible with past cases. Thus, Part VI reviews the historical treatment of personal jurisdiction in light of the theoretical justification for jurisdictional restrictions. This Article views the history of personal jurisdiction as evolving from a view of territorial sovereignty that gave states power over persons and property within their borders to a view that gave states power over persons, property, and certain conduct within their borders. Territorial sovereignty, however, has been the thread which links seemingly competing views throughout history. To summarize briefly, one of the earliest Supreme Court cases dealing with personal jurisdiction, *Pennoyer v. Neff*, 95 U.S. 714 (1877), is based upon a view of consent that requires physical presence of one's person or property within the territorial boundaries of the sovereign. However, modern cases recognize that defendants may tacitly consent to sovereign authority through their conduct.

In Part VII, the proposed rules are applied to a number of factual scenarios which have arisen or are likely to arise in the context of litigation over data communications. For the benefit of those not acquainted with various terminology related to data communications and the Internet, an Appendix is provided describing such terminology.

II. THE SPLIT OF AUTHORITY REGARDING PERSONAL JURISDICTION IN INTERNET CASES

As data communications have become more prevalent and more widely used by a greater number of people, litigation centering around such communications has increased. Several recent cases have struggled with the issue of whether certain data communications are sufficient to subject the party responsible for those communications to personal jurisdiction. Specifically, disputes involving World Wide Web sites have produced several decisions on the issue. Recent case law addressing the issue of whether a Web site operator can be sued in any state for trademark

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11 *See supra* note 8.
infringement occurring on a Web page illustrates the confusing and unpredictable application of the existing minimum contacts rule to data communications. A comparison of the approaches taken in these cases reveals the shortcomings of the minimum contacts test in a world where increasingly powerful methods of communication allow communications that cause potentially widespread effects far from their source. Attempts to apply the minimum contacts test to Internet communications have resulted in a split of authority with fairly solid reasoning to support each side. Because the minimum contacts test lacks a clear policy foundation, one cannot easily predict how the Supreme Court might resolve the split. Unfortunately, more difficult Internet jurisdiction questions are lurking while recent decisions portend more uncertainty in attempting to answer those questions. This Part will address the split of authority and the reasoning on each side of the divide.

As noted above, World Wide Web sites raise a controversial jurisdictional question. Courts are split as to whether the operation of a World Wide Web server is enough to subject a defendant to personal jurisdiction in certain instances. The competing views will now be

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13 See supra note 5 and accompanying text.

14 Compare Hasbro, Inc. v. Clue Computing, Inc., 994 F. Supp. 34 (D. Mass. 1997) (finding jurisdiction because the defendant availed itself of benefits in the forum state through purposefully directing its advertising at all states and did not avoid advertising in the forum state); Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1328 (E.D. Mo. 1996) (finding jurisdiction because defendant transmitted advertising information to all Internet users, knowing the information would be distributed globally and because forum residents had accessed the Web site over 100 times); Panavision Int’l v. Toeppen, 938 F. Supp. 616 (C.D. Cal. 1996) (finding jurisdiction because of the establishment of a Web site intended to interfere with plaintiff’s business by an unauthorized use of plaintiff’s trademark), aff’d, 141 F.3d 1316 (9th Cir. 1998); and Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161 (D. Conn. 1996) (finding jurisdiction because the defendant directed its advertising at all states and because the Internet is designed to communicate with people in every state at all times during the day or night); with Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414 (9th Cir. 1997) (denying
discussed, beginning with the view which holds that the operation of a Web server can subject a defendant to personal jurisdiction.

Several courts have applied the purposeful availment test to find personal jurisdiction in trademark infringement cases involving allegedly improper uses of trademarks on a Web page. In *Inset Systems, Inc. v. Instruction Set, Inc.*, the defendant, a Massachusetts corporation, established a Web page using an Internet domain name that allegedly infringed upon the plaintiff's trademark. Purposeful availment was the focus of the court's personal jurisdiction analysis. In finding the exercise of personal jurisdiction to be proper, the court found that the defendant directed its advertising activities at all states, including the forum state. Because the Internet is designed to communicate with people in every state and Internet advertising is available twenty-four hours per day, the court found that the defendant purposefully availed itself of the privilege of doing business in Connecticut.

Similarly, in *Maritz v. Cybergold, Inc.*, the court found personal jurisdiction appropriate due merely to the maintenance of a Web site.

jurisdiction because the operation of a passive Web site did not amount to purposeful availment); *Transcraft Corp. v. Doonan Trailer Corp.*, 45 U.S.P.Q.2d 1097 (N.D. Ill. 1997) (denying jurisdiction because the communications involved were not found to be the type and quality of communications required by courts as the basis for personal jurisdiction); *Hearst Corp. v. Goldberger*, No. 96 Civ. 3620, 1997 WL 97097 (S.D.N.Y. Feb. 26, 1997) (denying jurisdiction on the basis of the analogy that advertising in a national magazine is not targeted at any particular state); and *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996) (denying jurisdiction because merely creating a Web site does not amount to the purposeful availment of the benefits of any particular state), aff'd, 126 F.3d 25 (2d Cir. 1997).


16 A domain name is an alphanumeric address assigned to computers which are connected to the Internet. The purpose of a domain name is to allow humans to remember Internet addresses without having to memorize purely numeric addresses. See ANDREW R. BASILE, JR. ET AL., ONLINE LAW: THE SPA'S LEGAL GUIDE TO DOING BUSINESS ON THE INTERNET 229 (Thomas J. Smedinghoff ed., 1996).


18 See id. at 164-65.

19 See id. at 165.

20 *Maritz v. Cybergold, Inc.*, 947 F. Supp. 1328 (E.D. Mo. 1996); see also *Pavasen Int'l v. Toeppep*, 938 F. Supp. 616, 621 (C.D. Cal. 1996) (finding personal jurisdiction under the *Calder* effects test due to purposeful establishment of a Web site with an intent to interfere with the plaintiff's business by using its trademark), aff'd, 141 F.3d 1316 (9th Cir. 1998).
Rejecting the contention that Cybergold maintained a "passive website," the court held that Cybergold consciously decided to transmit advertising information to all Internet users, knowing that the information would be transmitted globally. In finding the exercise of personal jurisdiction proper, the court determined that forum residents had accessed the Web site over one hundred times. In disputes such as trademark infringement cases, where Web site accesses affect third parties, such evidence of local access may be required to allow a court to exercise jurisdiction. If no state residents have accessed a Web page, then arguably no damage to the plaintiff's intangible interests has occurred in the state.

On the other hand, some courts have found that the operation of a Web site which allegedly infringes a trademark does not amount to purposeful availment, making the exercise of personal jurisdiction inappropriate. In *Cybersell, Inc. v. Cybersell, Inc.*, the United States Court of Appeals for the Ninth Circuit, in a somewhat mixed-up opinion, rejected the exercise of personal jurisdiction because there was no purposeful availment by the defendant. The Florida defendant was accused of service mark infringement by an Arizona plaintiff due to the use of the service mark on the defendant's Web page. The court relied upon the passive nature of the Web page and the fact that no evidence showed that the Web site had been accessed from Arizona, save for one or more accesses by the plaintiff. In addition, the court held that setting up a Web site with the knowledge that

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21 See *Maritz*, 947 F. Supp. at 1333.
22 See id.
23 See also *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir. 1997) (noting that number of "hits," or visits, to a Web site from the forum may be significant).
24 See infra note 351 and accompanying text. Cases finding personal jurisdiction appropriate in the state of the plaintiff's residence in libel cases have reasoned that libel causes economic harm to the plaintiff which is suffered in her home state. See *EDIAS Software Int'l v. Basis Int'l Ltd.*, 947 F. Supp. 413, 420 (D. Ariz. 1996); *California Software Inc. v. Reliability Research, Inc.*, 631 F. Supp. 1356, 1361 (C.D. Cal. 1986). Such reasoning is flawed. Almost any tort causes some economic damage to the plaintiff. In most cases, economic damage is not an event upon which the defendant's liability depends. See *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295, 300 (S.D.N.Y. 1996) (finding indirect financial loss irrelevant to jurisdictional questions), aff'd, 126 F.3d 25 (2d Cir. 1997). Like intellectual property interests, a person can be deemed to have a reputation everywhere and that intangible interest is harmed wherever a libel is published.
25 *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir. 1997).
26 See id. at 415.
it is accessible everywhere cannot constitute purposeful availment. "While there is no question that anyone, anywhere could access that home page and thereby learn about the services offered, we cannot see how from that fact alone it can be inferred that Cybersell FL deliberately directed its merchandising efforts toward Arizona residents." The court was troubled by the implications of a contrary decision: "Otherwise, every complaint arising out of alleged trademark infringement on the Internet would automatically result in personal jurisdiction wherever the plaintiff's principal place of business is located. That would not comport with traditional notions of what qualifies as purposeful activity invoking the benefits and protections of the forum state."27

The Ninth Circuit proceeded to observe that Cybersell did nothing to encourage access to its Web site in Arizona. Furthermore, there was no evidence that any Arizona resident in fact purchased services from Cybersell due to the Web page. "[Cybersell] entered into no contracts in Arizona, made no sales in Arizona, received no telephone calls from Arizona, earned no income from Arizona, and sent no messages over the Internet to Arizona."29 The court also observed that no money was transferred using the Web site and that the interactivity of the Web page was limited.30 All of these factors are, at best, marginally relevant to the jurisdictional issue. The cause of action at issue in Cybersell was service mark infringement. Thus, the relevant contacts for a specific jurisdiction analysis were those specifically relating to the cause of action. Typical of many decisions under the minimum contacts test, the Ninth Circuit felt obliged to analyze numerous other factors to justify its decision even though such factors had little relevance to the jurisdictional inquiry. Because these contacts are more appropriately relevant to a general jurisdiction inquiry, it is understandable that the Ninth Circuit focused little upon the nature of the cause of action at issue and the link between the analyzed contacts and the resulting cause of action.

In Bensusan Restaurant Corp. v. King,31 the court rejected the exercise of personal jurisdiction, finding no purposeful availment. The court reasoned that any confusion resulting from the Web page access occurs

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27 Id. at 419.
28 Id. at 420.
29 Id. at 419.
30 See id.
where the Web page is located. Perhaps this reasoning is based upon the
court’s erroneous view that any information on the Web page is viewed
where the Web site is located. No purposeful availment occurred because
the defendant simply created a Web site, allowing access to anyone who
could locate it. Applying a stream of commerce analysis, the court reasoned
that the defendant had done nothing special to target consumers in the
forum state.

Similarly, in *Hearst Corp. v. Goldberger*, the court held that personal
jurisdiction could not be exercised in a trademark infringement case where
the infringement allegedly occurred due to the Internet domain name.
Drawing an analogy to advertising in a national magazine, the court found
that a Web site, although it can be viewed in all fifty states, is not targeted
at any particular state. The court cited *Bensusan* with approval, agreeing
that creating a Web site is not an act purposefully directed towards the
forum state. Because a finding of jurisdiction could subject a defendant
to nationwide jurisdiction, exercising jurisdiction would be inappropriate
as it could have a “devastating impact” on users of the World Wide Web.

The analysis of courts on both sides of the issue can be criticized. Those finding jurisdiction have concluded that purposeful availment is
demonstrated merely by establishing a Web site that can be accessed
anywhere in the world. This common thread runs through the decisions
discussed above. Under existing case law, one might reasonably conclude
that the Web site owner has purposefully established contact with every
state in which the message communicated by the Web page is received.
Purposeful availment analysis may thus result in a conclusion that a Web
site operator has reached out to all states and can reasonably expect to
answer in the courts of any state for the harm their message proximately
causes in that state.

32 See id. at 299.
33 See id.
34 See id. at 301.
35 *Hearst Corp. v. Goldberger*, No. 96 Civ. 3620, 1997 WL 97097 (S.D.N.Y.
Feb. 26, 1997).
36 See id. at *31.
37 See id. at *51.
38 Id. at *64-65.
1996).
40 See Maritz, 947 F. Supp. at 1328 (holding that a Web site operator con-
sciously decides to transmit information to any Internet user accessing its Web
However, these cases have failed to explain why such availment is any more purposeful than advertising directed to all fifty states. In the latter context, some courts have held that such advertising does not constitute purposeful availment. In the case of a Web site, the operator does not know the exact locations from which the Web site will be accessed, while an advertiser normally knows where the advertisement will be circulated. In some ways, then, operation of a Web site is less purposeful than advertising. Similarly, personal jurisdiction normally depends upon the action of the defendant, rather than the actions of third parties. Although the defendant may set up the Web site, it is then accessed by third parties, raising the issue of why the number of “hits” on the Web site is relevant.

The reasoning of those courts and several commentators who view a Web site as insufficient to establish jurisdiction is even less convincing. This view sees a Web server as passive. In other words, the Web site owner places a Web server on a computer connected to the Internet and it remains there passively until outsiders come to visit that site. According to this view, purposeful availment cannot occur because the Internet does not allow one to determine the geographical location of the visitor to the Web

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Note: The page contains a list of legal citations for further reading, which are not included in the natural text above.
page. Finally, due process prevents the exercise of jurisdiction over Web site operators in states where the Web site is accessed because such Web site owners should be allowed to structure their conduct with a reasonable assurance as to where that conduct will subject them to suit.

Initially, one might criticize the focus on the accessor of the Web page as well as the level of analysis used to approach the question of personal jurisdiction. Those finding jurisdiction lacking because the Web site operator has not purposefully established a relationship with the state from which the Web site is accessed seem to focus on the conduct of the accessor rather than the Web site operator. True, the accessor takes affirmative steps to access a Web page and the Web page essentially cannot determine the geographical location of the accessor. Still, the Web site operator did take affirmative steps to be able to communicate with the accessor. By programming the computer that contains the Web site server, the Web site operator has set up an automated method to communicate with accessors, no matter where located, by using the Internet. A Web site operator commonly intends to enable accessors all over the United States to access its Web server and expects such access. On most Web sites, the Web site operator has chosen to communicate with anyone who is willing to listen, no matter where they are located. One should certainly consider the relevant conduct of the Web site operator when analyzing the jurisdictional question.

See Burk, supra note 5, ¶ 45. This is not entirely true as many Internet uniform resource locators outside of the United States indicate the country in which the computer is located. However, because Telnet access might allow someone in China to use a computer in Great Britain to access another computer in Texas, filtering access based upon one's Internet domain name would likely not allow complete control over what country's citizens access a Web page. Still, some control is possible.

Of course, this principle is just as circular and unenlightening in the computer context as it is in any context. Assurances as to where a Web site owner will be subjected to jurisdiction cannot be established until the jurisdictional rules creating those assurances are agreed upon.

See Bensusan Restaurant Corp. v. King, 937 F. Supp. 295, 299 (S.D.N.Y. 1996) (analyzing personal jurisdiction involving a Web page and finding that a Web page's information is viewed where the Web site is located and that any act of trademark infringement occurs where the Web site is located), aff'd, 126 F.3d 25 (2d Cir. 1997).


In addition, a jurisdictional analysis addressing personal jurisdiction over Web site operators should involve a lower level of analysis. To understand the jurisdictional question better, one should also focus on the communication between the accessor's computer and the Web site operator's computer. The nature of Web access lends itself to viewing such access to be similar to a visit by the accessor to the Web site operator, but this view is not consistent with how the Web really works. Suppose that a Web site is in Maine and the accessor is in Texas. Those rejecting purposeful availment tend to view a Web site access in such circumstances as analogous to a visit by the accessor to Maine to pick up a newspaper published by the Web site operator that is available only in Maine, followed by the accessor returning to Texas and reading the paper there. This is certainly one possible view when employing a high level of analysis, divorced from the lower level data communications taking place.

When an accessor "visits" a Web site, however, the accessor does not make a visit analogous to a physical visit. A Web site access involves a two-way data communication in a request/response protocol. The accessor's computer sends a request to the Web site operator's computer, and the Web server, in response to the request, sends a copy of the Web page to the accessor's computer. If one is intent upon using analogies to address the jurisdictional question, a more appropriate one can be chosen than the one discussed above. A Web site access is analogous to the Texas accessor sending a post card to Maine requesting a free copy of a newspaper published by the Web site operator, followed by the sending of the newspaper from Maine to Texas. Of course, in reality, the Maine Web site operator does not know exactly where the newspaper is being sent; the Web site operator has instead employed automated equipment for the distribution.

Depending upon one's view of just how purposeful an availment must be, one might find jurisdiction under the purposeful availment test when the actual technical details of a Web site access are considered. If the purposeful availment test means that defendants have to know they are

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51 See Kalow, supra note 5, at 2247 (referring to Internet users “traveling” to Web sites).
52 See Bensusan Restaurant Corp., 937 F. Supp. at 299 (analyzing personal jurisdiction involving a Web page and finding that a Web page's information is viewed where the Web site is located and that any act of trademark infringement occurs where the Web site is located), aff'd, 126 F.3d 25 (2d Cir. 1997).
53 See infra note 450 and accompanying text.
54 See infra note 453 and accompanying text.
creating a connection with a forum state, then jurisdiction is more questionable.\textsuperscript{55} If the purposeful availment test means that defendants need only commit a purposeful act that has reasonably foreseeable effects in other states, then one might well find personal jurisdiction appropriate in any state in which a Web page is accessed and causes tortious injury.\textsuperscript{56} Thus, when the technical details, as discussed above, of Internet communications are considered, the jurisdictional analysis is not quite as straightforward under the minimum contacts test as some courts and commentators argue.

In fact, the question is a difficult one that illustrates some of the problems raised by looking to seemingly analogous cases. When courts choose the wrong analogy, erroneous conclusions are likely to result in close cases such as those involving Internet communications. Courts should address such issues by applying high-level jurisdictional principles to new circumstances and by resisting the temptation to use too many analogies. The World Wide Web scenario also illustrates the inappropriateness of the purposeful availment test in the context of the Internet. Purposeful availment makes little sense where parties can engage in so much useful interaction without knowledge of, or concern about, geographical location.\textsuperscript{57}

Uncertainty reigns. Where the content of a Web page gives rise to a cause of action, such as trademark infringement, some courts view the establishment of a Web site as purposeful availment of the protections and power of the laws of all fifty states.\textsuperscript{58} However, other courts apparently view the setting up of a Web site as establishing no purposeful connection with any state.\textsuperscript{59} Unfortunately, under existing precedent, one cannot

\textsuperscript{55} One might be able to show that the contents of a Web page were particularly targeted at consumers in certain states, subjecting the defendant to liability in those states, even though the defendant had no idea of the actual geographical location of those accessing its Web site. See Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 112 (1987) (O'Connor, J., plurality opinion) (referring to actions specifically targeting a particular state).

\textsuperscript{56} See Calder v. Jones, 465 U.S. 783 (1984) (finding jurisdiction, at least partially, because “the brunt of the harm” was suffered in the forum state). But see Burk, supra note 5, ¶ 56.

\textsuperscript{57} See Burk, supra note 5, ¶ 44; Thatch, supra note 5, at 152-53.


\textsuperscript{59} See Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414 (9th Cir. 1997); Transcraft Corp. v. Doonan Trailer Corp., 45 U.S.P.Q.2d 1097 (N.D. Ill. 1997);
determine which courts are right. Because the Supreme Court has never clearly explained the policy behind the purposeful availment requirement, one cannot analyze the results of these cases in light of the purposes of the rule. Instead, such cases provide little basis for their conclusions leading to more jurisdictional uncertainty. In addition, some judges have been swayed by policy considerations concerning how Web use might be affected by their decisions with little empirical evidence proving whether their concerns are justified.

In other words, uncertainty reigns because of the Supreme Court's failure to adequately explain the policies that underlie its test for personal jurisdiction. Perhaps cases involving the Internet, such as the World Wide Web cases discussed above, will cause the Supreme Court to offer a policy basis for the personal jurisdiction doctrine and to refine the minimum contacts test to reflect the proper policy concerns. Such refinement is overdue, because the current minimum contacts test is underinclusive, difficult to apply, and uncertain in predicting results in many cases. The present cases are only the tip of the iceberg. Rogue applets, negligent use of cookies, push technology, and future Internet enhancements will complicate jurisdictional analysis further. Whatever test is chosen should allow the flexibility to adapt to such new problems in reliance upon the policy basis for the test.

III. PROPOSED LIMITS ON STATE EXERCISES OF PERSONAL JURISDICTION

Several commentators have proposed approaches to personal jurisdiction in the context of the Internet. Unfortunately, these approaches generally rely upon existing precedent and merely attempt to apply it to the Internet. These commentators necessarily assume that the minimum


60 See Stein, supra note 7, at 700.
61 See supra note 38 and accompanying text.
62 See infra notes 460-68 and accompanying text.
63 See infra notes 474-80 and accompanying text.
64 See infra notes 490-95 and accompanying text.
65 See generally Burk, supra note 5, ¶¶ 40-52; Counts & Martin, supra note 4, at 1126-30; Perritt, supra note 5, at 13; Ackerman, supra note 5, at 425-32; Zembek, supra note 5, at 367-80.
66 See Burk, supra note 5, ¶¶ 44-52 (applying purposeful availment, stream of commerce, and Calder in the context of the Internet); Counts & Martin, supra note
contacts approach as currently applied by the Supreme Court correctly defines the legitimate scope of state power to adjudicate. As explained above, however, the minimum contacts test as applied is underinclusive and improperly restricts state judicial power. Concepts such as purposeful availment and a reasonable expectation of being haled into court make little sense in the context of the Internet. Yet, commentators use these concepts to draw lines as to the proper scope of personal jurisdiction. Purposeful availment and reasonable expectations are poor enough measures of jurisdiction in other contexts, but they become even clumsier in the context of the Internet.

Some commentators apply prior personal jurisdiction decisions to Internet disputes by analogizing them to cases involving telephone communications or the distribution of publications. Although the temptation to resort to such analogies is strong, they should not be used to address questions of jurisdiction involving data communications. Data communications present unique problems of their own, especially in the context of the Internet. Moreover, commentators necessarily assume, without explanation, that the decisions applied by analogy are correct. In a way, such analysis suffers from the same problems as current minimum contacts doctrine. Application of existing case law in the absence of an inquiry as to whether that case law sets the proper jurisdictional boundaries

4, at 1126–30 (addressing purposeful availment, the Calder effects test, and stream of commerce in the context of libel); Perritt, supra note 5, at 20–24 (referring to Hansen v. Denckla, World-Wide Volkswagen, and Asahi in the context of jurisdiction in Internet cases); Ackerman, supra note 5, at 425–32 (applying purposeful availment in the context of the Internet); Kalow, supra note 5, at 2269–74 (applying purposeful availment to issues of personal jurisdiction and the Internet); Thatch, supra note 5, at 169–76 (applying several Supreme Court cases to the Internet); Zembek, supra note 5, at 367–80 (addressing personal jurisdiction over the Internet using analogous situations).

67 See Burk, supra note 5, ¶¶ 44–59; Counts & Martin, supra note 4, at 1126–30; Ackerman, supra note 5, at 425–32.

68 See Perritt, supra note 5, at 17–19 (applying print publication decisions to the Internet); Ackerman, supra note 5, at 426–28 (applying national advertising cases to Internet); Zembek, supra note 5, at 358–59, 367–80 (arguing that courts should use analogous technological developments and legal paradigms to approach personal jurisdiction issues on the Internet); see also Hearst Corp. v. Goldberger, No. 96 Civ. 3620, 1997 WL 97097 (S.D.N.Y. Feb. 26, 1997).

69 See Burk, supra note 5, ¶ 14 (noting that rules for on-line commerce should be different than other rules because data communications over the Internet are indifferent to physical location).
may improperly establish new boundaries without considering the policy basis for jurisdictional tests.

Several commentators have expressed judgments as to which exercises of jurisdiction are fair. Unfortunately, they offer no measure to determine what is fair. The same criticisms made below as to fairness as a jurisdictional measure are equally applicable here. Fairness offers no clear lines to determine which exercises of jurisdiction are proper. Similarly, fears over crippling the World Wide Web due to expansive exercises of personal jurisdiction are unfounded. Jurisdictional considerations are more properly based upon measures of state authority than policy considerations of the effect that jurisdiction will have on particular actors. These concerns are better addressed by doctrines such as forum non conveniens.

The time has come to lay the current version of the minimum contacts test to rest and establish new jurisdictional boundaries based upon the proper scope of a state’s sovereignty. Rather than attempting to establish a one-size-fits-all test, boundaries should be established by a higher level inquiry. Jurisdictional inquiries should center on the issue of whether a particular exercise of jurisdiction falls within the scope of a state’s sovereign authority. One might contend that a more abstract inquiry is likely to lead to more litigation over jurisdictional questions and increase uncertainty. Although such concerns are valid, the minimum contacts test has neither decreased jurisdictional challenges nor decreased uncertainty. In addition, courts have had little difficulty applying similarly abstract jurisdictional tests in the area of tax jurisdiction, criminal jurisdiction, and eminent domain jurisdiction. Borderline cases will always present difficulty no matter what test is applied. A higher level inquiry which addresses the policy concerns underlying jurisdiction is more likely to produce better outcomes in borderline cases than a more well-defined test that fits some situations well, but is awkward to apply in others. In the context of data communications, the minimum contacts test is awkward to apply because bright-line tests, such as purposeful availment, simply do not fit the world of computer networks.

Because of the unique nature of data communications, the personal jurisdictional inquiry needs to be freed from the bondage of the current minimum contacts test. Data communications, particularly those over the

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70 See Counts & Martin, supra note 4, at 1132; Ackerman, supra note 5, at 425.

71 Commentators have expressed that fear. See Burk, supra note 5, ¶ 60; Ackerman, supra note 5, at 428.
global Internet, are primarily indifferent to geographic boundaries. To place proper limits on state jurisdiction in the context of data communications, the inquiry should properly focus on whether a state has the sovereign power to regulate the persons, property, or conduct at issue in the case. States should plainly maintain their traditional jurisdiction over their citizens and persons or property within their boundaries, but jurisdiction over conduct should be more expansive. Thus, I propose a broader view of what contacts amount to minimum contacts.

In tort cases, a state should have power over conduct within its borders as well as conduct proximately causing significant effects within the state. Such a test is consistent with the scope of a state’s regulatory power and with the scope of its criminal jurisdiction. Thus, such conduct amounts to minimum contacts. In the context of data communications, a state should have the power to regulate and exercise jurisdiction over data communications originated by a resident of the state, received within the state, or processed by a computer in the state. In addition, a state should have the power to regulate data communications which proximately cause substantial effects within the state. In the case of an omission, states should have the power to regulate and exercise jurisdiction over that omission if the undone act likely would have been performed in the state or if the omission proximately causes effects within the state.

As discussed below, the proposed test marks a logical next step in the evolution of personal jurisdiction doctrine, especially considering the policy basis for restrictions on state court jurisdiction. Still, if the Supreme Court is to adopt this proposal, any new test for personal jurisdiction should be as consistent as possible with the historical treatment of jurisdiction and with prior cases under the minimum contacts test. In addition, the proposed test must be reconciled with the criticisms of some commentators that

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72 See Burk, supra note 5, ¶¶ 14-20; Perritt, supra note 5, at 2; Matthew Burnstein, Note, Conflicts on the Net: Choice of Law in Transnational Cyberspace, 29 VAND. J. TRANSNAT’L L. 75, 81 (1996); Zembek, supra note 5, at 348.

73 See Burnstein, supra note 72, at 82.

74 See Arthur Weisburd, Territorial Authority and Personal Jurisdiction, 63 WASH. U. L.Q. 377, 404-05 (1985) (arguing that to assert personal jurisdiction over a nonresident, some act giving rise to a tort must occur in the state in question).
personal jurisdiction should not be a concern of due process at all. Before applying the proposed test to various factual scenarios involving data communications, the following three Parts will demonstrate (1) that personal jurisdiction limits should be congruent with regulatory jurisdictional limits and other limits on state sovereign power; (2) that personal jurisdiction is properly restricted as a matter of substantive due process; and (3) that the proposed test marks another logical step in the historical evolution of the personal jurisdiction doctrine.

IV. THE SEARCH FOR LIMITS ON STATE EXERCISES OF PERSONAL JURISDICTION

Radner: “New Shimmer is a floor wax.”
Akroyd: “No, new Shimmer is a dessert topping.”
Radner: “It’s a floor wax.”
Akroyd: “It’s a dessert topping.”

. . . .

Chase: “Hey, hey, calm down you two, new Shimmer’s a floor wax and a dessert topping.”

Personal jurisdiction doctrine seeks to prevent overreaching by sovereign states. Personal jurisdiction seeks to protect individual liberty interests. Personal jurisdiction seeks to prevent overreaching by sovereign states and protect individual liberty interests.

The Supreme Court has vacillated over the question of whether the due process requirements for personal jurisdiction result from limits on sovereign power or concerns for fairness to the individual. Commentators

75 THE NOT READY FOR PRIME TIME PLAYERS, Shimmer, on SATURDAY NIGHT LIVE (Arista Records 1976).

76 See Pennoyer v. Neff, 95 U.S. 714, 722 (1877); see also John Drobak, The Federalism Theme in Personal Jurisdiction, 68 IOWA L. REV. 1015, 1028 (1983) (arguing that Pennoyer is the case best representing a jurisdictional doctrine based on sovereignty).


79 See Stein, supra note 7, at 689. Others view the Court as simply combining contradictory aspects of various jurisdictional theories rather than vacillating over the question. See Stewart Jay, “Minimum Contacts” as a Unified Theory of
come out on both sides of the fence. Some see personal jurisdiction limits as stemming from limits on state sovereignty. Others see these personal jurisdiction limits as derived from a concern over fairness to the individual. Unfortunately, no one really knows what theory in fact limits state exercises of personal jurisdiction because the Supreme Court has never clearly explained the basis for the doctrine. Modern personal jurisdiction cases establish some generalized tests for testing jurisdiction, but these tests do not constitute a theory of jurisdiction. Tests serve as proxies for other values, but those values remain a mystery. The Court’s failure to identify a jurisdictional theory has led to unprincipled decision-making and left lesser courts with little guidance as to how to resolve new problems such as those presented by cases involving data communications.

When addressing novel jurisdictional issues, consideration of the theoretical basis for jurisdictional rules is particularly important. Jurisdictional boundaries, if they are to be properly established, should be drawn with some guidance as to why they are being drawn as opposed to merely providing a method of how to draw them. Data communications, in particular communications over the Internet, present novel jurisdictional issues as illustrated in Part II. Unfortunately, commentators addressing the issues thus far have constrained themselves to the application of the modern manifestation of the minimum contacts test, necessarily assuming that this test properly defines the boundaries of jurisdiction. Little or no attention has been paid to the theoretical basis for jurisdictional tests.

Like many tests, the minimum contacts test has become increasingly difficult to apply due to dramatic changes in our country since its creation. Given the unique nature of data communications, particularly the new types of communication made possible by the Internet, the time may be ripe for the development of a new test. Specifically, the Supreme Court may wish


See Stein, supra note 7, at 689; Weisburd, supra note 74, at 379.


to respond to these new jurisdictional challenges and establish a new test for determining the scope of personal jurisdiction, or at least modify the current test. That test should be based upon general theoretical principles limiting the jurisdiction of states. This Article contends that the modern manifestation of the minimum contacts test is ill-suited to address problems of personal jurisdiction involving data communications. Instead, a new minimum contacts test should be established, based upon theoretical principles that logically establish the boundaries of state jurisdic- 

tional power.

Should the Court choose to use a case involving data communications to revamp the minimum contacts test, it is obviously unrealistic to expect the Court simply to discard the minimum contacts test and start over. Historical practice has been an important factor in the Court’s personal jurisdiction doctrine. In addition, the Court normally tries to adopt a test consistent with many of its past cases but more adaptable to future cases. This Article proposes a modification to the minimum contacts test that is sensitive to both of these concerns. Even if the Court were to write on a blank slate, however, it should adopt a test similar to that proposed here.

This Part considers what principles should limit state exercises of personal jurisdiction. In making this inquiry, however, one might ask why state court jurisdiction should be limited at all. After all, no explicit provision of the Constitution limits state court jurisdiction. Thus, in establishing limits on personal jurisdiction, the question that must be addressed is why a state should be prevented from exercising jurisdiction, not why the state should be allowed to exercise jurisdiction. Still, positive justifications as to why a state should be able to exercise jurisdiction may strengthen the justifications for preventing a state from exercising jurisdiction. This Part contends that territorial sovereignty should impose limits on state exercises of jurisdiction and, conversely, that sovereign regulatory interests justify state exercises of jurisdiction. Then, it addresses

83 Some have suggested discarding the minimum contacts test entirely and focusing on a variety of factors to determine whether personal jurisdiction is proper. See, e.g., Redish, supra note 81, at 1137-42.
86 See Harold Lewis, Jr., The “Forum State Interest” Factor in Personal Jurisdiction Adjudication: Home-Court Horses Hauling Constitutional Carts, 33 MERCER L. REV. 769, 817 (1982); Redish, supra note 81, at 1134.
the shortcomings of the purposeful availment and "fairness" aspects of the current minimum contacts test.

A. Territorial Sovereignty Should Impose Limits on State Exercises of Jurisdiction

It is unremarkable to suggest that territorial boundaries should impose limits on state exercises of jurisdiction. Few would dispute that the courts of one state should be denied the power to force a defendant to litigate a case in that state involving a transaction completely internal to another state. Otherwise, states would have the power to hear any lawsuit between any two parties and force any defendant to appear in their courts. Thus, there would be no meaningful limitation on a state’s sovereign power to try cases in its courts. All fifty states could claim jurisdiction over every cause of action.

Again, however, it must be asked why states should not be able to entertain a case involving a transaction completely internal to another state. Although one could offer several justifications, one reasonable justification stems from American understandings of the source of sovereign power. As explicitly stated in the Declaration of Independence, sovereign power is derived from the consent of the governed. Adjudicating a lawsuit is a sovereign act—a state is exercising its sovereign authority when it forces a defendant to appear in its courts and adjudicates a cause of action involving that defendant.

Thus, a state exceeds its sovereign authority when it attempts to assert personal jurisdiction over a nonresident defendant in a case involving a transaction completely internal to another state. Such a defendant has not consented to the forum state’s exercise of authority over him, either expressly or tacitly. Because a state only has sovereign power over those who consent to its authority, it may not exercise personal jurisdiction over a defendant having absolutely no connection with the forum state who does not otherwise consent to such jurisdiction. Such a defendant may rightfully claim that his lack of consent means that the forum state lacks any authority over him whatsoever.

[88] See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
[89] See supra note 87.
[90] In many ways, the state with no connection to a defendant is in the same position as a "counterfeit" tribunal in the state of residence of the defendant. A
Consent to sovereign authority may well be the measure of other state exercises of jurisdiction. States have traditionally had personal jurisdiction over their citizens and those present within the state. In the former case, the citizen has consented to the power of the sovereign simply by being a citizen. In the latter case, the citizen has tacitly consented to the power of the sovereign by entering into its territory.

The latter concept is important and may serve as a guiding principle for restricting state exercises of jurisdiction. A defendant may tacitly consent to jurisdiction through his conduct. The difficulty then becomes identifying what conduct amounts to tacit consent. Conduct that has absolutely no connection to a state, however, plainly cannot amount to tacit consent and thus limits state exercises of jurisdiction.

Such limits on state court jurisdiction are consistent with the view of interstate federalism implicit in the structure of the Constitution. Each state is sovereign, limited only by the Constitution and the supremacy of federal law. Yet, because each state is sovereign, the sovereignty of the counterfeit tribunal is one that is not created by the state. For example, citizens of a state could simply create their own tribunal as happened recently in Texas. See Peter C. Salaverry, Republic of Texas; Flawed Logic and the Wrong History, TEX. LAW., May 19, 1997, at 36. Such a tribunal would have no authority over a defendant because the defendant has not consented to the sovereign authority of that tribunal. In the words of Locke:

Whoever gets into the exercise of any part of the power by other ways than what the laws of the community have prescribed has no right to be obeyed though the form of the commonwealth be still preserved, since he is not the person the laws have appointed and, consequently, not the person the people have consented to.

JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT 73 (Lester Dekoster ed., William B. Eerdmans Publ’g Co. 1978) (1690) (commenting on usurpation). Thus, a foreign tribunal claiming authority over a defendant that has not consented to its authority is in the same position as a domestic tribunal that has usurped the power of the sovereign.

See LOCKE, supra note 90, at 54 (noting that citizens of a sovereign consent to the power of that sovereign and subject themselves to the laws of that sovereign).

See id. (stating that tacit consent to the power of the sovereign "reaches as far as the very being of anyone within the territories of that government").

See id.

See World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980); Lea Brilmayer, How Contacts Count: Due Process Limitations on State Court Jurisdiction, 1980 SUP. CT. REV. 77, 85; Weisburd, supra note 74, at 394, 420; see also Kogan, supra note 85, at 263.
other states is necessarily limited to their respective territorial boundaries. The framers imposed certain restrictions on state power designed to maintain harmony between the states. Thus, limits on state jurisdiction are justified in light of the general view of states as sovereign entities and the constitutional goal of maintaining harmony between them.

B. Regulatory Interests Should Allow a State to Exercise Personal Jurisdiction

As has just been observed, jurisdictional limits justifiably flow from limits on territorial sovereignty. To be subject to personal jurisdiction, the defendant must consent to the authority of the sovereign, either through his citizenship or through his conduct. Because a defendant may tacitly consent to the jurisdiction of a sovereign through his conduct, a state's ability to exercise jurisdiction over the defendant is measured by its sovereign power to regulate that conduct. That is, a defendant who engages in conduct that may be regulated by a sovereign has tacitly consented to the jurisdiction of that sovereign. This Article is, therefore, consistent with the arguments of some commentators that have suggested that legislative jurisdiction and judicial jurisdiction be measured either similarly or identically.

95 See World-Wide Volkswagen Corp., 444 U.S. at 293.
97 See LOCKE, supra note 90, at 54 (arguing that anyone that has “enjoyment of any part of the dominions of any government” tacitly consents to its jurisdiction).
98 See Stanley E. Cox, The Interrelationship of Personal Jurisdiction and Choice of Law: Forging New Theory Through Asahi Metal Industry Co. v. Superior Court, 49 U. PITT. L. REV. 189, 190 (1987) (arguing that the first stage of the minimum contacts test for specific personal jurisdiction, in which the Supreme Court examines whether the defendant’s forum state contacts are related to the litigation, is identical to the test for determining whether a forum state is entitled to apply its own law); Alfred Hill, Choice of Law and Jurisdiction in the Supreme Court, 81 COLUM. L. REV. 960, 986 (1981) (suggesting that in the ordinary sense, the power of a forum state to apply its own law and the power to assert long-arm jurisdiction should coexist, as they both are supported by the same contacts); James Martin, Personal Jurisdiction and Choice of Law, 78 MICH. L. REV. 872 (1980) (arguing that the constitutionality of choice of law should be governed by the minimum contacts test); Willis L.M. Reese, Legislative Jurisdiction, 78 COLUM. L. REV. 1587, 1592 (1978) (arguing that the same basic principles underlie both personal jurisdiction and choice of law); Stephens, supra note 82, at 106.
Defining personal jurisdictional limits to match regulatory (legislative) jurisdictional limits makes sense. First, courts often perform a regulatory function in civil cases. Thus, personal jurisdictional limits may be viewed as regulatory jurisdictional limits. Second, personal jurisdictional limits should be consistent with other judicial jurisdictional limits, such as criminal jurisdictional limits. Third, because an exercise of personal jurisdiction is a sovereign act, such jurisdictional limits should be consistent with other limits on state sovereignty. A lack of consistency on either ground creates categorization problems and encourages state governments to recharacterize state action and reorganize government to take advantage of broader sovereignty limits. Fourth, personal jurisdictional limits should be congruent to legislative jurisdictional limits because a state’s regulatory power is only meaningful to the extent that the state can enforce its legislation through judicial action. Fifth, a state having a regulatory interest in a matter also has an interest in exercising personal jurisdiction in the matter.

Turning to the first justification, the Supreme Court has often drawn a distinction between legislative jurisdiction and personal jurisdiction. This distinction is somewhat artificial, because it assumes that there is no overlap between legislative action and judicial action. In fact, this is not the case. Courts do exercise regulatory power, albeit not in the same way that the legislature does. Cases must be brought before a court before it may exercise its regulatory power, but when it has a case before it, the court has the power to regulate.

More specifically, courts make law when they decide cases. When a court crafts a new common law principle or further defines a common law principle by applying it to new facts, the court is regulating. If this did not constitute regulation, then there would be no differences in the common law applied in the several states and there would be no need for the Erie doctrine. As Professor Kogan has observed, Erie Railroad Co. v. Tompkins and its progeny are based upon a view of courts as lawmakers. Rather than simply applying existing norms, judges were seen as active creators of those norms. Federal courts must yield to norms created by state courts in passing on issues of state law because

100 Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).
101 See Kogan, supra note 85, at 348.
102 See id.
those state courts are granted the power to regulate on such issues. Similarly, when a state court chooses among competing interpretations of a statute or when a court determines whether certain conduct falls within the boundaries of a statute, it establishes a new rule to govern future conduct.

Commentators critical of the characterization of personal jurisdiction as a due process issue sometimes point to due process limits as limits on legislative power rather than judicial power. Choice of law questions may involve a question of legislative jurisdiction, which are sometimes viewed as different from the question of judicial jurisdiction. As has just been observed, courts do exercise regulatory jurisdiction. However, the converse is also true—legislatures sometimes exercise their power in a way that might be viewed as judicial. Questions of judicial jurisdiction and legislative jurisdiction should be treated similarly.

Although the core of legislative action may differ substantially in character from the core of judicial action, legislative acts and judicial acts overlap in certain respects. Courts sometimes exercise legislative-like power and legislatures sometimes exercise judicial-like power. One could attempt to identify the many characteristics of legislative action and judicial action, but two major generalizations stand out. Legislatures establish general rules that govern the actions of many while courts apply rules to the actions of the specific parties before them. Legislatures take actions which govern conduct in the future while courts address the past conduct of the parties before them.

Although these generalizations might hold true as to the majority of legislative and judicial actions, they do not always hold true. Obviously,

\[103\] See id.
\[104\] See Whitten, supra note 81, at 793.
\[106\] See von Mehren, supra note 7, at 282 (noting that traditional functions may be treated differently in different states, sometimes as a legislative function, sometimes as a judicial function).
\[107\] See Kogan, supra note 85, at 326 (noting that Thomas Cooley recognized that due process restricts both legislative and judicial power); Maier & McCoy, supra note 105, at 251; Rheinstein, supra note 96, at 810 (stating that Justice Story recognized limits on the legislative jurisdiction of the states); Stein, supra note 7, at 745; Weisburd, supra note 74, at 385.
\[108\] See 2 RONALD ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 17.8, at 646 (2d ed. 1992) (noting that the line between administrative rulemaking and adjudication is not a clear one).
\[109\] See Maier & McCoy, supra note 105, at 254.
courts also make general rules. When courts decide cases before them, their opinions may establish rules that henceforth will govern the conduct of many parties other than those before them. Although a court may be deciding the specific case before it, general rules of law established in the case may transcend the specific case. Similarly, the focus on the number of people affected by a specific act is also misplaced. In a class action, a court may make rules that govern the conduct of many parties at once. Judicial action does not only govern past conduct. A court may issue injunctions that govern future conduct. In certain cases, such as where a court takes control of a prison or school system, the court may make general prospective rules that govern the future conduct of many.

The legislature sometimes takes actions that could be characterized as judicial. Legislatures sometimes adopt narrow rules designed only to affect a limited number of parties. Special taxation laws provide one example of this type of legislation. Congress often extends special tax exemptions to the politically influential. President Clinton used his line-item veto power to veto some of these exemptions in the 1997 budget bill. Another example of judicial-like acts by a legislature is the changing of a law during a pending case because the legislature wishes to influence the outcome of that case. There, the legislature is entering into a dispute between a limited number of parties. Similarly, legislatures do not always pass prospective rules. Legislation is frequently retroactive, provided that retroactivity meets the requirements of due process.

Overall, this brief discussion of legislative and judicial action suggests that the two types of action overlap. Because actions by courts and by legislatures can be similar in effect, drawing a distinction between the two for jurisdictional purposes is artificial. Such actions can be both similar in character and in effect, justifying parallel treatment of jurisdictional questions.

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110 See John Harris, Clinton Set to Use New Veto Power; Line-item Cuts to Target Pork-Barrel Spending, THE DALLAS MORNING NEWS, Aug. 11, 1997, at 1A (noting that a tax shelter in the 1997 budget bill could potentially have helped billionaire Harold Simmons); President and Congress Line-item Laughs, ECONOMIST, Aug. 16, 1997, at 22 (noting that a tax shelter in the 1997 budget bill could potentially have helped billionaire Harold Simmons).

111 See Harris, supra note 110, at 1A.

112 The Supreme Court has held that Congress may change the law during a pending case provided it does not dictate a rule of decision in the case. See Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 438-41 (1992); Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421 (1856); United States v. The Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801).
Turning to the second justification for treating personal jurisdiction limits as regulatory limits, such limits logically should be congruent to other judicial jurisdictional limits. In the criminal context, judicial jurisdiction has been circumscribed by regulatory jurisdictional limits. Those limits will be briefly explored.

In the criminal context, [t]he jurisdiction of a court necessarily is constrained by limitations upon the reach of the legislative enactments that the court enforces. If a political entity lacks the legislative authority to govern behavior outside a certain geographical area, its judiciary will be said to lack “jurisdiction” to apply its criminal laws to such behavior.\textsuperscript{113}

These limits stem from territorial limits of sovereign power, and “states have power to make conduct a crime only if that conduct takes place, or its results occur, within the state’s territorial borders.”\textsuperscript{114}

Although these general principles are logical, difficult cases may arise in the criminal realm. The treatment of crimes occurring in multiple states provides valuable insights into how personal jurisdiction should be treated in cases with multistate elements. At common law, most crimes were deemed to occur at a single location.\textsuperscript{115} For example, the common law provided a straightforward resolution to the classic hypothetical where a person standing in one state shoots a person standing in a different state.\textsuperscript{116} Because a murder occurred “where the fatal force struck the victim,”\textsuperscript{117} this hypothetical was not so interesting under common law rules.\textsuperscript{118} Exceptions to these common law rules were continuing crimes, such as kidnapping, which could be prosecuted in more than one state.\textsuperscript{119}

Like personal jurisdiction doctrine, however, modern rules recognize that a crime may not have a single situs. Accordingly, crimes may occur

\begin{footnotes}
\footnote{\textsuperscript{113} WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 737 (2d ed. 1992).}
\footnote{\textsuperscript{114} Id. The decisions in this area do not clarify whether territorial limits stem from limits as to sovereignty alone or whether due process would be violated by an \textit{ultra vires} assertion of criminal jurisdiction. See Weisburd, \textit{supra} note 74, at 396-98. States rarely attempt to extend their criminal power, so case law in this area is limited. See \textit{id.} at 398.}
\footnote{\textsuperscript{115} See \textit{LAFAVE & ISRAEL, supra} note 113, at 738.}
\footnote{\textsuperscript{116} See Weisburd, \textit{supra} note 74, at 401.}
\footnote{\textsuperscript{117} \textit{LAFAVE & ISRAEL, supra} note 113, at 738.}
\footnote{\textsuperscript{118} See \textit{id.}}
\footnote{\textsuperscript{119} See \textit{id.}}
\end{footnotes}
partly within a number of states and each of those states may legitimately claim jurisdiction over such a crime.\textsuperscript{120} Thus, the classic hypothetical to which the previous paragraph referred would be resolved by allowing both states to exercise jurisdiction.

As to crimes committed by a state’s citizens, the criminal jurisdictional rules are again similar to those applicable to personal jurisdiction. Because a state has the power to regulate the conduct of its citizens, a state can punish one of its citizens for acts occurring outside of its territorial boundaries.\textsuperscript{121} One example of this power is the federal prohibition against the bribing of foreign officials by U.S. citizens.\textsuperscript{122}

The Supreme Court has faced the issue of a state’s power to punish criminal acts by its own citizens. In \textit{Skiriotes v. Florida},\textsuperscript{123} the Court held that Florida had the power to punish its citizen for harvesting sea sponges in the Gulf of Mexico despite the possibility that the citizen did the harvesting in waters outside of Florida’s territorial boundaries.\textsuperscript{124} The Court viewed the issue of Florida’s territorial boundaries in the Gulf of Mexico as irrelevant.\textsuperscript{125} Florida retained the right of a sovereign state except for powers granted to the federal government.\textsuperscript{126} “There is nothing novel in the doctrine that a State may exercise its authority over its citizens on the high seas.”\textsuperscript{127}

\textit{Skiriotes} rests upon the notion that states are treated as sovereign entities with the exception of those powers granted to the federal government by the United States Constitution. Thus, as long as the state’s regulation of its citizens’ conduct does not conflict with that of the federal government, the state has sovereign authority for such regulation.\textsuperscript{128} This view of states as sovereign entities, except as limited by the Constitution, is consistent with the treatment of states in personal jurisdiction cases.

\textsuperscript{120} See \textit{id.}; see also Perritt, \textit{supra} note 5, at 51-52; Weisburd, \textit{supra} note 74, at 401.

\textsuperscript{121} See \textit{LAFAVE & ISRAEL, supra} note 113, at 737; Perritt, \textit{supra} note 5, at 51-52. Likewise, parents often claim the power to punish their children for acts committed outside of their jurisdiction. See \textit{LOCKE, supra} note 90, at 31 (discussing jurisdiction of parents over children).


\textsuperscript{123} \textit{Skiriotes v. Florida}, 313 U.S. 69 (1941).

\textsuperscript{124} See \textit{id.} at 76-77.

\textsuperscript{125} See \textit{id.} at 77.

\textsuperscript{126} See \textit{id.}

\textsuperscript{127} \textit{id.}

\textsuperscript{128} See \textit{id.} at 78-79.
Overall, criminal jurisdiction and personal jurisdiction limits stem from limits on territorial sovereignty. In both instances, a state has the power to exercise jurisdiction over conduct occurring within its boundaries, regardless of whether all the relevant events occur within the state. Similarly, multiple states may have power to prosecute a single crime just as multiple states may have personal jurisdiction in a civil suit. Finally, as in civil cases, a state’s sovereign power extends to allow the state to exercise criminal jurisdiction over its citizens without regard to where the criminal acts occurred. A state may prosecute its citizens for criminal acts committed abroad just as a state may exercise personal jurisdiction over its citizens for civil violations committed abroad. Because of these similarities, the boundaries of criminal jurisdiction and personal jurisdiction should be the same.

Turning to the third justification, because an exercise of personal jurisdiction is a sovereign act, that sovereign act should be circumscribed by jurisdictional rules that parallel those restricting other exercises of sovereign authority. The Supreme Court has recognized other limits on state power. Tax jurisdiction provides an example of how the Court has restricted state power as a matter of due process. As to property, a state has jurisdiction to tax only (1) real property within the state and tangible personal property located within the state and (2) intangible or movable tangible personal property owned by a person domiciled within the state or protected in some other way by that state’s law. These limits are substantive due process limits. As to personal income, a state may tax the income of (1) individuals domiciled therein and (2) individuals generating income from their occupation, business, or property located within the state. Similar rules apply to taxation of corporations. These limits are also substantive due process limits.

Prior to the passage of the Due Process Clause, state jurisdiction to tax was likewise limited in the ways noted above. Tax on out-of-state property was deemed to be improper because it was beyond a state’s jurisdiction.

130 See id.
131 See id. § 13.4, at 183-84.
132 See id. § 13.4, at 185.
133 See id. § 13.4, at 183-85.
134 See Weisburd, supra note 74, at 394-95 (citing St. Louis v. Wiggins Ferry Co., 78 U.S. (11 Wall.) 423 (1871); Railroad Co. v. Jackson, 74 U.S. (7 Wall.) 262 (1868); Hays v. Pacific Steamship Co., 58 U.S. (17 How.) 596 (1854)).
An attempt to tax property of another state was viewed as *ultra vires* and void. The Court was quite explicit on this point:

> Where there is jurisdiction neither as to person nor property, the imposition of a tax would be *ultra vires* and void. If the legislature of a State should enact that the citizens or property of another State or country should be taxed in the same manner as the persons and property within its own limits and subject to its authority, or in any manner whatsoever, such a law would be as much a nullity as if in conflict with the most explicit constitutional inhibition. Jurisdiction is as necessary to valid legislative as to valid judicial action.

Given this analysis, it is not surprising that the Court later found due process to prevent taxation of property outside of the state. Because substantive due process is based upon protecting individuals from *ultra vires* acts by the state, the applicability of due process is obvious due to the Court’s prior acknowledgment that the taxation of out-of-state property constitutes an *ultra vires* act. Like an improper exercise of personal jurisdiction, an improper exercise of taxing authority by a state results in the state exercising authority where it has none, thus violating the due process rights of those individuals subjected to such false authority.

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135 See Wiggins Ferry Co., 78 U.S. (11 Wall.) at 430.

136 Id.

137 See Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194, 204 (1905). Although due process prevents a state from taxing in an *ultra vires* manner, the boundaries of a state’s power arise out of its sovereign character. Like personal jurisdiction limits, tax jurisdiction limits may be deemed implicit in the constitutional structure. See Weisburd, *supra* note 74, at 394.

138 See Weisburd, *supra* note 74, at 395-96 (citing Rheinstein, *supra* note 96, at 791-92). Professor Redish has argued that tax jurisdiction cases are distinguishable because they are based upon a concern for protecting the defendant from a deprivation of property, a concern which is protected by due process. Tax jurisdiction relates to specific concerns about the relationship between state and citizen. Professor Redish argues that in personal jurisdiction cases, on the other hand, there is no harm to the individual. Thus, courts are only concerned about federalism, which is not a due process concern. See Redish, *supra* note 81, at 1128-29. This view misunderstands the personal jurisdiction due process inquiry. Personal jurisdiction is also a substantive due process concern. See infra notes 200-33 and accompanying text. The concern is the same—protecting individuals from *ultra vires* acts by state governments. In the case of personal jurisdiction, the substantive due process concern is protecting the defendant from a deprivation of
Tax jurisdiction has many parallels to personal jurisdiction. States may tax property in the state and the income of those domiciled in the state. A state may not tax property located in another state. These rules are similar to the rules stated in *Pennoyer* that a state has exclusive jurisdiction over property and persons within the state but no jurisdiction over property and persons outside the state. In another parallel to personal jurisdiction doctrine, the Court has also recognized the ability of a state to tax conduct occurring within the state (income from an occupation, business, or property within the state), even if the person taxed is not a resident. Because taxation, like judicial jurisdiction, is an act of a sovereign state, these parallels make sense.

Eminent domain jurisdiction has been treated similarly to tax jurisdiction. The Constitution does not grant states the power of eminent domain. Instead, the power is implied as it constitutes an attribute of sovereignty. Accordingly, states are treated as sovereign entities for this purpose as well. True, their power of eminent domain is limited by other constitutional provisions which limit their sovereignty. Such limits are no different than liberty (and arguably property) by a court without power over the defendant. See Wendy Collins Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and Pennoyer Reconsidered*, 62 WASH. L. REV. 479, 508 n.183 (1987).

139 See Johnson Oil Ref. Co. v. Oklahoma ex rel. Mitchell, 290 U.S. 158, 161 (1933); *Union Refrigerator Transit Co.*, 199 U.S. at 204.


141 See Georgia v. Chattanooga, 264 U.S. 472, 480 (1924). The Court stated: The power of eminent domain is an attribute of sovereignty and inheres in every independent state. . . . The taking of private property for public use upon just compensation is so often necessary for the proper performance of governmental functions that the power is deemed to be essential to the life of the State. *Id.*; see also Cincinnati v. Louisville & Nashville R.R. Co., 223 U.S. 390, 394 (1912) (stating that each state has an inherent right of eminent domain). The power of eminent domain is sometimes justified on grounds of consent, demonstrating the influence of Locke once again. Those who consent to be governed also consent to the fact that private property must give way to achieve a public purpose. See Michael H. Schill, *Intergovernmental Takings and Just Compensation: A Question of Federalism*, 137 U. PA. L. REV. 829, 833-34 (1989).

142 See West v. Kansas Natural Gas Co., 221 U.S. 229 (1911) (holding that a state may not discriminate against interstate commerce in exercising its power of eminent domain); Green St. Ass'n v. Daley, 373 F.2d 1, 7 (7th Cir. 1967) (explaining that federal courts may intervene where exercise of eminent domain
those applying in the context of taxation and criminal jurisdiction. Like taxation and criminal jurisdiction, eminent domain is also limited by the boundaries of the state. State territorial boundaries thus provide a measure of all of these fundamental aspects of sovereignty.

In the eminent domain context, a state’s power is limited to real property within its territorial limits. That much is accepted. Logically, personal property that is permanently fixed in a state is most likely subject to that state’s eminent domain power as was the case in the tax context. This proposition has apparently not been tested. Mobile personal property and intangible property present additional problems. Courts have not developed a theory to address these types of property. Based upon the overall territorial limits on the power to exercise eminent domain and the difficulties that would arise if multiple states tried to lay claim to the same

violates constitutional rights).

143 See Georgia v. Chattanooga, 264 U.S. at 480 (eminent domain extends to all property within the jurisdiction of the state which is all lands within the state); JULIUS L. SACKMAN, 1 NICHOLS’ THE LAW OF EMINENT DOMAIN § 2.12, at 2-32 (1981); Ellen Mufson, Note, Jurisdictional Limitations on Intangible Property in Eminent Domain: Focus on the Indianapolis Colts, 60 IND. L.J. 389, 390 (1985).

144 See Georgia v. Chattanooga, 264 U.S. at 480; SACKMAN, supra note 143, § 2.12, at 2-32. The Nichols treatise contends that this limitation does not depend upon any particular constitutional provision. Apparently, Nichols would argue that these limits are inherent in the nature of eminent domain because the power derives from sovereignty itself. Thus, even if the power of eminent domain is inherently limited, attempts to exceed the rightful scope of power would be considered ultra vires acts. A court may likely find that a state exceeding the scope of its eminent domain power violated substantive due process rights of the property owner. As noted above, substantive due process protects the owner from ultra vires acts of the state. Even if the scope of state power is not defined by the Constitution, an ultra vires act may still violate due process.

The rules regarding eminent domain over real property are consistent with the local action rule. This rule limits the jurisdiction of a state to directly affect title to real property solely within the boundaries of the state. See Weisburd, supra note 74, at 386. Sovereignty also gives a state exclusive jurisdiction over the land within its borders. See id. at 387.

145 See SACKMAN, supra note 143, § 2.12[4], at 2-38 (“It is safe to assume that in such a case all the modern modifications of the doctrine that mobilia sequenter personam would be held applicable, and property permanently kept in one state would be held to be within the jurisdiction of such state and of no other.”).

146 See id.; Mufson, supra note 143, at 390. Note that, in West River Bridge Co. v. Dix, 47 U.S. (6 How.) 507 (1848), the Supreme Court held that intangibles are subject to eminent domain. See id. at 534-36.
property, it is likely that courts would give a state jurisdiction over the personal and intangible property of its citizens. Although courts have not addressed all relevant jurisdictional issues, those that have been addressed measure eminent domain jurisdiction based upon territorial sovereignty. Because eminent domain is considered to be a legislative act, such limitations may be viewed as limitations on legislative power.

Thus, many types of judicial jurisdiction are limited by a state’s sovereign regulatory power as are other sovereign acts. Of course, constitutional limits on choice of law limit a state’s sovereign regulatory power directly. There are at least two reasons why all of these questions should be treated similarly, if not identically. First, classification problems may result otherwise. All of these jurisdictional limits purport to limit state power in some way. If different rules apply to different types of state action, one must first classify the state action to determine which rule to apply. As stated above, state action is not so easily characterized as judicial or legislative. Similarly, within the judicial area itself, criminal and civil penalties may be hard to distinguish at the margin. Second, differing rules invite gamesmanship on the part of states. For example, if criminal jurisdiction offers more expansive limits than civil jurisdiction, a state may choose to reclassify certain conduct as criminal in order to take advantage of jurisdictional rules. States may also choose to give responsibility for certain actions to other branches of state government in order to take advantage of broader jurisdictional rules.

Turning to the fourth justification for treating personal jurisdiction congruently with limits on state regulatory power, laws are only meaningful to the extent that they can be enforced. As a practical matter, a forum most often applies its own law when faced with a choice of law question. Thus, a state’s legislative jurisdiction to regulate conduct is only meaningful if it can exercise judicial jurisdiction to enforce the laws governing that conduct. Where jurisdictional questions arise in the context of data communications, this limit may be amplified. For example, suppose that a Web site operator resides and operates the Web site in State A and something about the Web site or something caused by the Web site violates the law of State B. If the Web site operator cannot be sued for effects

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147 See Georgia v. Chattanooga, 264 U.S. at 483 ("The taking is a legislative and not a judicial function . . .").
148 See infra note 377 and accompanying text.
proximately caused by the operator’s Web site in State B and if State A would choose to apply its own law that legalizes the Web site operator’s conduct, then the law of State B may be effectively unenforceable. State B’s law might purposefully be avoided by simply operating the Web site in a different state.

Even if another state chose to apply the law of the state in which the effects are felt (the regulating state), the policies of that law may not be enforced in the same way. Unfamiliarity with the law of the regulating state may cause the forum state to apply the law incorrectly. Local bias towards the forum state’s view of the propriety of the conduct may cause the regulatory state’s law to be applied in a different way than it would have been applied in the regulating state. Finally, the forum state may choose to craft an exception to a statute on equitable principles that the regulatory state would not recognize (or the forum state would not recognize an exception where one would otherwise be recognized).

Fifth, choice of law limits require a state to have an interest in regulating the conduct at issue. If a state has such an interest, it also has an interest in exercising judicial jurisdiction over that conduct. The deterrence value of laws just described is one interest. In addition, if the regulating state is not able to exercise jurisdiction, it is deprived of the ability to issue a judgment having a stare decisis effect. Because the conduct of parties not before the court may be affected due to stare decisis, a state with a regulatory interest in applying its law loses this ability to affect conduct when it cannot exercise jurisdiction. Of course, a decision of another state on the matter is only persuasive authority and is less likely to affect the conduct of others. The effect of a decision on the conduct of others is likely to be strengthened where the case is tried in the regulating state, as publicity surrounding the case may provide for increased public awareness.

C. Reasonable Expectations Are a Flawed Basis to Restrict Jurisdiction

In Hanson v. Denckla, the Supreme Court attempted to find some test by which courts could decide easily whether a state’s authority extended to a particular controversy. The Court had consistently limited personal jurisdiction based upon state sovereign power, but for some reason did not want to extend jurisdictional authority to the states’ “legitimate regulatory” sphere. Rather than deciding the case based upon the policies underlying the personal jurisdiction doctrine, the Court did what courts often try to

151 See Stein, supra note 7, at 717.
do—develop a test that is more concrete, easier to apply, and protects the values underlying the doctrine to which the test is directed. Rather than acknowledge the reality that the evolution of the personal jurisdiction doctrine stemmed from the realization that sovereign authority was broader than the limits established in Pennoyer, the Court returned to a quite limited view of Lockeian notions of consent to the power of the sovereign.

The test in Denckla established purposeful availment as the rationale for jurisdiction—the defendant purposefully establishes some relationship with the state and thereby achieves some benefits from state law. The Court stated:

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 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.

This test imposes a significant limit on state power—a state cannot take jurisdiction unless the defendant voluntarily consents to some relationship with the forum. Subsequent cases have relied on this same rationale.

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152 See Jay, supra note 79, at 463 (“Whenever a court employs words as shorthand substitutes for explanation, there inevitably arises a host of finely distinguished cases that display an escalating tendency to become removed from the issues lying behind the original words.”).

153 See Stein, supra note 7, at 718.

154 Hanson, 357 U.S. at 253 (citations omitted).

155 See Stein, supra note 7, at 719.

156 See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 487 (1985); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297-98 (1980). In later cases, the Court has added the comment that the purposeful connection must be such that the defendant must reasonably anticipate being haled into court there. See id. at 297. Commentators have observed, quite correctly, that this is a circular conclusion. See Jay, supra note 79, at 443; Stein, supra note 7, at 701-02. Expectations about where one is subject to suit are only developed due to prior case law addressing jurisdiction. Thus, adherence to the rule might freeze or slow development of jurisdictional doctrine for if the rule is followed strictly, “a reviewing court . . . should deny jurisdiction whenever the prior cases do not point precisely toward liability to suit in the forum.” Jay, supra note 79, at 443. Thus, the
As a jurisdictional test, purposeful availment is a poor proxy for trying to measure when a state acts outside of its jurisdictional authority. The rule is underinclusive. There are many acts that cause significant effects within a state that implicate the state’s regulatory authority, yet these acts are not the result of a purposeful connection with the state.\(^7\) Examples include chemical plant leaks, such as the Bhopal disaster, or radiation leaks, such as occurred in the Chernobyl disaster. In such cases, the defendant’s negligence may cause far-reaching effects outside of the jurisdiction of the plant, and these effects certainly are not the result of some purposeful relationship between the defendant and the forum. Another example is where a product is shipped through a distribution chain to a particular forum. If the manufacturer has no control over product distribution, then the manufacturer has not established a purposeful relationship. Although a state may have a legitimate regulatory interest in such cases, it may not be able to obtain personal jurisdiction over the defendant.\(^8\) The rule is thus underinclusive—it prevents a state from exercising jurisdiction to regulate conduct with which it has a legitimate concern due to proximate effects caused within the jurisdiction. Purposeful availment is even harder to unify with the doctrine of specific jurisdiction, which recognizes jurisdiction based upon regulatory power.\(^9\)

These problems are magnified in the context of data communications. Internet users often send e-mail to people without knowing where they are located. Because particular users can access their e-mail account from

rule might in effect be applied similarly to the rule of qualified immunity, where a state official is immune from suit unless the official acts in a way that has been clearly established in prior decisions as a constitutional violation. See Harlow v. Fitzgerald, 457 U.S. 800, 817 (1982); Erwin Chemerinsky, Federal Jurisdiction § 8.6.3, at 416 (1989).

\(^{157}\) In Kulko v. Superior Court, 436 U.S. 84 (1978), the Court rejected the proposition that a defendant causing effects within the state was subject to jurisdiction. See Luther L. McDougal III, Judicial Jurisdiction: From a Contacts to an Interest Analysis, 35 Vand. L. Rev. 1, 5 (1982); see also Weisburd, supra note 74, at 379 (arguing that the purposeful availment test does not follow from the premise that territorial sovereignty limits jurisdiction).

\(^{158}\) This issue is still uncertain in light of the Court’s decision in Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102 (1987). It provides an example of a jurisdictional question that should be easy to resolve, but has bothered the Court due to its focus on purposeful availment.

\(^{159}\) See Stein, supra note 7, at 700-01 (arguing that “a court’s stronger jurisdictional claim when specific jurisdiction is present cannot be explained solely by the exchange rationale”); infra note 335 and accompanying text.
different states, one cannot easily identify exactly where an e-mail is
targeted. The computer where the e-mail is stored may be in a different
state than the person reading the e-mail. Operators of World Wide Web
sites, as a general rule, do not determine the geographic location of those
accessing the Web site. Internet users often conceal their identities. With
an anonymous user, it is even more difficult to say that someone purpose-
fully targeted their communications at a particular state. A communication
may be targeted at a particular anonymous Internet identity, rather than at
a particular person in a particular place. Accordingly, the underinclusive-
ness of the purposeful availment rule becomes especially problematic in the
world of data communications.

In addition, the Court has held that limits on personal jurisdiction due
to a lack of purposeful availment remain even if the state could constitu-
tionally apply its own law to the case. This calls into question the
legitimacy of the theory behind the rule. Acknowledging that a state may
apply its law to a controversy admits that the state has a legitimate
regulatory stake in the controversy. As described in Section B, given the
parallel treatment of other forms of jurisdiction, if a state has an interest in
allowing the application of its own law, it should also have jurisdiction
over the defendant.

Georgia recently enacted a criminal statute prohibiting Internet transmissions
which falsely identify the sender or which use trade names or logos which would
falsely imply that the sender is authorized to use them. See GA. CODE ANN. § 16-9-
93.1 (1997 Supp.). This law was struck down in ACLU v. Miller, 977 F. Supp. 1228
(N.D. Ga. 1997), as an unconstitutional restriction on free speech.

See Hanson v. Denckla, 357 U.S. 235, 254 (1958); Stein, supra note 7, at
718.

See Hill, supra note 98, at 986; Reese, supra note 98, at 1592; Linda J.
(1978); cf. Cox, supra note 98, at 191 (arguing that “the forum state should apply
its own law to most situations in which it is capable of taking jurisdiction”); Maier
& McCoy, supra note 105, at 256 (arguing that “if the forum does not have a
sufficient relationship to the parties and the cause of action to make it not unfair for
the forum to determine the policies that will inform the decision in the case”
exercising jurisdiction violates due process). Note that this does not mean that a
state should always apply its own law when it has personal jurisdiction over the
defendant. Many states may have the right to exercise jurisdiction over the
defendant due to the multistate nature of the controversy. However, a court
ordinarily chooses to apply one state’s law to a controversy. Thus, even if a state
has legislative jurisdiction, it might still choose to apply another state’s law when
exercising judicial jurisdiction. Similarly, more than one state may exercise
personal jurisdiction. Some have suggested that a single state should have personal
Another problem with the rule is that it stems from a limited view of consent. Recall that consent was one of the fictions used to justify certain exercises of jurisdiction under the *Pennoyer* rule. Now, the Court has implicitly made a special kind of consent a jurisdictional requirement. This requirement apparently stems from the Lockean notion that government derives its powers from the consent of the governed.\(^6\) But purposeful availment apparently requires some type of express consent on the part of the defendant—the defendant must actually intend to create a connection with the forum state. Locke's theory of consent is not so limited. Locke believed that individuals could tacitly consent to state jurisdiction through their conduct. All that was required was that the individual enjoy any of the dominions of that government.\(^6\) But purposeful availment apparently requires some type of express consent on the part of the defendant—the defendant must actually intend to create a connection with the forum state. Locke’s theory of consent is not so limited. Locke believed that individuals could tacitly consent to state jurisdiction through their conduct. All that was required was that the individual enjoy any of the dominions of that government.\(^6\) Put another way, whenever a defendant enjoys the protection of state laws, i.e., his conduct is subject to a state’s laws, he tacitly consents to that state’s jurisdiction. States do not need explicit permission to regulate conduct that is legitimately within their jurisdiction to regulate.\(^6\) Thus, the intent of the defendant to create a jurisdiction, just as a single state’s law is applied. See Albert A. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289, 292 (1956); McDougal, *supra* note 157, at 15; Stein, *supra* note 7, at 758-59. This view would result in an underinclusive jurisdictional test. Just as many states may constitutionally apply their own law to some controversies, many states may also legitimately exercise personal jurisdiction in certain cases. Thus, if a cause of action requires several different elements, then any state in which one of those elements occurred should be able to resolve the dispute.

\(^{163}\) Professor Stein views the purposeful availment test as based upon contractual notions of an exchange of burdens for benefits. See Stein, *supra* note 7, at 691-92. He views *Pennoyer* as based more upon tort-like justifications. See *id.* at 691. Later, however, he equates *Pennoyer*’s consent rationale with his contractual analysis. See *id.* at 696. Ultimately, then, the contractual exchange depends upon consent as a justification. See *id.* “[A] defendant can waive her due process rights by consenting to the judicial authority of a state that otherwise would not have jurisdiction—usually in exchange for some privilege bestowed by the state.” *Id.*

\(^{164}\) See *LOCKE, supra* note 90, at 54 (arguing that anyone that has “enjoyment of any part of the dominions of any government” tacitly consents to its jurisdiction).

\(^{165}\) The Supreme Court has held that consent is immaterial in the context of auto accident cases. See Olberding v. Illinois Cent. R.R. Co., 346 U.S. 338, 341 (1953). This case also notes that the defendant never really consents to be sued. See *id.* Commentators have questioned the reasoning of jurisdiction based upon implied consent. See Philip Kurland, *The Supreme Court, the Due Process Clause and the
connection with a particular state should be irrelevant. Planning and reliance should yield to a state's need for regulation.

The previous paragraph is in some sense speculation. The Court has never adequately explained the justification for the purposeful availment requirement or the jurisdictional premises on which it is based. The failure to adequately establish the reasoning for the rule has led to unprincipled decisions by the lower courts. A jurisdictional inquiry in a typical case under this rule tends to look at various factors and then decide in a conclusory fashion that sufficient or insufficient contacts have been shown. Such decisions create uncertainty and generate litigation over such issues.

The purposeful availment requirement stems from the notion that defendants should be able to plan their conduct knowing where that conduct will subject them to jurisdiction. But such a principle has been debunked as circular. Defendants only have reasonable expectations about where they will be haled into court because courts have created such expectations. Planning and reliance thus result in an empty principle to define the boundaries of jurisdiction. Once a court changes those boundaries, expectations change. Thus, reasonable expectations are not useful in defining boundaries—only in maintaining the status quo. Carried to its extreme, a reasonable expectations principle would operate similarly to qualified immunity—no jurisdiction would exist over a defendant unless his or her actions established jurisdiction under clearly established doctrine. Even if reasonable expectations were a useful concept, the Court could certainly establish that the violation of a state's laws creates a reasonable expectation that the defendant could be brought into court in that state.

D. Fairness Concerns Are a Flawed Basis to Restrict Jurisdiction

Several commentators have expressed a view of personal jurisdiction that would base jurisdictional decisions on questions of fairness to one or both parties. Fairness considerations could be viewed as descending from

In Personam Jurisdiction of State Courts, From Pennoyer to Denckla: A Review, 25 U. Chi. L. Rev. 569, 576 (1958); Stein, supra note 7, at 738 (arguing that a state need not ask an individual's permission to act as sovereign and need not pay compensation for the burdens of citizenship).

166 See Stein, supra note 7, at 700.
167 See Jay, supra note 79, at 467; Stein, supra note 7, at 700.
168 See McDougal, supra note 157, at 10.
169 See CHEMERINSKY, supra note 156, § 8.6.3, at 414.
170 See Ehrenzweig, supra note 162, at 776; Maryellen Fullerton, Constitutional Limits on Nationwide Personal Jurisdiction in the Federal Courts, 79 NW. U. L.
notions of procedural due process—notice and an opportunity to be heard.\textsuperscript{171} Although a focus on fairness is not inconsistent with due process concerns, abstract fairness concerns may carry procedural due process too far. Traditionally, due process has required notice and an opportunity to be heard. One could argue that a meaningful opportunity to be heard demands that convenience be a part of that opportunity.\textsuperscript{172} Yet, it is unlikely that convenience was envisioned as a due process requirement.

Personal jurisdiction has evolved to allow more expansive exercises of jurisdiction by states as the costs of transportation have decreased and the ease of communications has increased. Increasing the role of convenience in the jurisdictional calculus would run counter to this trend. Convenience has historically not been a focus of procedural due process.\textsuperscript{173} If convenience becomes the sole focus of personal jurisdiction, it would make ease of litigation the determinant of jurisdiction at a time when these considerations are becoming less relevant due to modern technology and less expensive transportation costs.

More fundamentally, a jurisdictional test based upon fairness would interfere with a state’s regulatory authority. Under a test based upon territorial sovereignty, a state that is prevented from exercising jurisdiction is denied that opportunity because it has no legitimate claim to regulate the conduct in question. Under tests based upon fairness, the state may be prevented from exercising jurisdiction because the forum is just not convenient for the parties, even though the state has a legitimate claim to regulate the conduct in question. Friction between states would likely result under such circumstances as a state may resent being denied the opportunity to regulate a controversy with which it is concerned due to nebulous fairness concerns. Fairness could also be used as a mechanism to deny a state the power to exercise jurisdiction in a particularly controversial case. Because of the danger of causing friction between states, the concerns of fairness are better addressed in a discretionary doctrine like \textit{forum non conveniens}.

\textsuperscript{171} See Whitten, \textit{supra} note 81, at 837.

\textsuperscript{172} See id.

\textsuperscript{173} See id. Although modern Supreme Court decisions pay lip service to convenience and fairness, these factors have played only a peripheral role in the development of the doctrine, never affecting the outcome of a case. See Stein, \textit{supra} note 7, at 704-05.
Forum non conveniens also provides a better mechanism to deal with convenience because establishing boundaries for a convenience test is extremely difficult. Too many variables affect convenience to establish general rules. Instead, the balancing approach of the forum non conveniens doctrine allows better adaptation to varying circumstances. Each state should develop its own concept of fairness in this context because convenience may mean different things to different states.

Another objection to a constitutional test based upon fairness is that when a state is acting within its legitimate sphere of regulatory authority, fairness should not be a consideration in the jurisdictional calculus. A sovereign state does not need to ask permission to regulate within its sphere of authority. Nor does the state have to choose a convenient mechanism to carry out its authority. States are not required to take the convenience of the defendant into account in exercising their criminal jurisdiction. Exercises of criminal jurisdiction impose great inconvenience on defendants as they may be subject to incarceration during the pretrial process. The Court apparently has not considered such inconvenience to be a due process concern.

State regulatory authority does not diminish in importance simply because it chooses to label some acts as criminal and other acts as violating civil norms. Litigation is always somewhat inconvenient—no one views litigation as an insignificant interference. The inconvenience and expense of litigation may provide an additional incentive to avoid coming close to violating the regulatory policies of the state. If a defendant does cross the line, the inconvenience of litigation can be viewed as just another consequence of the defendant’s illegal act. However, at the jurisdictional stage, one does not know if the defendant has crossed the line. States can protect defendants from inconvenience in clearly frivolous cases, as many do, by providing for the shifting of fees and costs. In other cases where the defendant ultimately prevails, the defendant may have gotten close to the line such that the state is justified in exercising jurisdiction to better define the line.

Fairness is also a vague concept, which is reminiscent of the circular concept of having a reasonable expectation of being haled into court. The concept of fairness does not provide a test to determine when certain exercises of jurisdiction are actually fair and when they are not. Some

174 See Stein, supra note 7, at 760; see also Brilmayer, supra note 94, at 85–86 (stating that a state’s regulation of activities within a state is the most convincing justification for jurisdiction).

175 See McDougal, supra note 157, at 10–11.

176 See id.
proposed tests would base fairness, in part, on a state’s regulatory interest.\textsuperscript{177} Once regulatory interests become a factor, however, circularity reigns—the test for jurisdiction is fairness and jurisdiction is fair because of some other justification for jurisdiction. Future measures of jurisdiction depend upon past exercises of jurisdiction. Thus, one cannot easily identify what factors should properly be considered in a fairness consideration.\textsuperscript{178} Even if one could identify these factors, application to specific cases is difficult. One has enough difficulty defining what factors should enter into a fairness determination, let alone trying to develop a formula for how these considerations should interact with one another.\textsuperscript{179}

Finally, measuring a state’s jurisdiction to adjudicate based upon the monetary burdens it imposes provides a dangerous justification to restrict other exercises of state jurisdiction. Legislative acts certainly impose monetary burdens as well as behavioral burdens on state residents. Defendants could legitimately contend that a state’s safety regulations violated their due process rights because compliance with those regulations is too inconvenient and expensive. State taxation also imposes the burden of keeping accurate records for tax purposes and imposes the monetary burden of the tax itself. While states are not required as a matter of due process to make taxation convenient, neither are citizens relieved from paying taxes because of the inconvenience or monetary burdens. Those burdens could be relevant under a view of due process that makes them relevant.

Overall, fairness and convenience are not a proper focus of the jurisdictional inquiry. Essentially, these concepts provide a reason to abstain from exercising jurisdiction when jurisdiction is otherwise proper. Because convenience and monetary burdens are not and should not be due process concerns, these concepts are better addressed to the common law doctrine of \textit{forum non conveniens}.

V. SUBSTANTIVE DUE PROCESS—A PROPER RESTRICTION ON PERSONAL JURISDICTION

The jurisdictional rules proposed in this Article would continue to make personal jurisdiction limits a matter of federal due process. Some have argued that the Due Process Clause should not restrict state exercises of personal jurisdiction. This Part addresses those arguments. It begins by

\textsuperscript{177} See, e.g., Redish, \textit{supra} note 81, at 1138-39.

\textsuperscript{178} See McDougal, \textit{supra} note 157, at 10-11.

\textsuperscript{179} See \textit{id.} at 11.
summarizing *Pennoyer v. Neff*,180 the first Supreme Court decision restricting state exercises of personal jurisdiction pursuant to the Due Process Clause. Then, Section B responds to the critics who contend that due process is inapplicable to personal jurisdiction. This Part concludes that personal jurisdiction is justifiably restricted by the Due Process Clause and should remain so restricted.

A. *Pennoyer v. Neff and Due Process*

Most commentators agree that the Supreme Court first established sovereign power as the focus of the personal jurisdiction inquiry in *Pennoyer v. Neff*.181 Commentators have criticized this decision for two major reasons. First, they argue that the *Pennoyer* Court wrongly focused on sovereign power as the factor which defines the limits of personal jurisdiction.182 Second, they argue that the *Pennoyer* Court wrongly restricted personal jurisdiction of the state courts by making personal jurisdiction a constitutional requirement pursuant to the Due Process Clause.183 As set forth above, this Article contends that sovereign regulatory power should be used to establish limits on personal jurisdiction. Part VI, below, will argue that sovereign regulatory power has driven the evolution of the personal jurisdiction doctrine. This Part contends that personal jurisdiction is properly limited as a matter of substantive due process. Here, for completeness, a brief summary of *Pennoyer* is provided.

Marcus Neff failed to pay his attorney J.H. Mitchell for legal services, causing Mitchell to bring suit against Neff in Oregon, where Neff owned some land.184 Neff, a nonresident of Oregon, was not personally served with process and failed to appear in the action. After constructive service of summons by publication, the Oregon court entered a default judgment against Neff.185 The local sheriff sold Neff's land to Mitchell in execution

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184 *See* *Pennoyer*, 95 U.S. at 719-20.
185 *See id.* at 720.
of the default judgment, who in turn conveyed the land to Pennoyer. Neff sued Pennoyer to recover possession of the land. The Supreme Court held the default judgment void, reasoning that the Oregon court had no personal jurisdiction over Neff.

Justice Field’s majority opinion first stated three international jurisdictional principles, calling them “principles of public law.” The three principles are:

[1] that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory.

[2] that no State can exercise direct jurisdiction and authority over persons or property without its territory.

[3] that the laws of one State have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions.

Justice Field drew these principles from Joseph Story’s treatise on the conflict of laws.

Justice Field does not clearly demonstrate why he chose to adopt these principles. Previous Supreme Court decisions under the Full Faith and Credit Clause rejected the application of international principles in the context of the recognition of judgments. Moreover, even Justice Field

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186 See Perdue, supra note 138, at 486.
187 See Pennoyer, 95 U.S. at 719.
188 See id. at 734.
189 Id. at 722.
190 Id.

191 JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS (6th ed. 1865). Story based his writings, in large part, on the work of the Dutch jurist Huber. See Drobak, supra note 76, at 1027 n.60; Hazard, supra note 182, at 258. However, because Story significantly distorted Huber’s original work, Story is mainly responsible for applying these principles to a federal union. See Hazard, supra note 182, at 258–60.

192 See Mills v. Duryee, 11 U.S. (7 Cranch) 481 (1813) (holding that states may be bound by judgments rendered by courts in another state under the Full Faith and Credit Clause); see also Bimeler v. Dawson, 5 Ill. (4 Scam.) 536, 541 (1843) (noting that Mills established that judgments of other states should be treated as domestic judgments, not foreign ones). But see D’Arcy v. Ketchum, 52 U.S. (11 How.) 165 (1850) (holding that some international principles are exceptions to the Full Faith and Credit Clause).
recognized that relations among a union of states differed from relations among independent sovereignties.\(^9\) In spite of these difficulties, the majority adopted the international principles. However, the opinion did not stop there. Rather than apply the international principles as common law doctrine, Justice Field proceeded to incorporate these principles into the Due Process Clause, thereby making them matters of constitutional law.

Apparently Justice Field decided \textit{sua sponte} to make personal jurisdiction a matter of constitutional law because the parties did not raise a due process argument either in the lower court or in the briefs before the Supreme Court.\(^9\) Nevertheless, Justice Field proclaimed:

\begin{quote}
Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law. Whatever difficulty may be experienced in giving to those terms a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt of their meaning when applied to judicial proceedings. They then mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance.\(^9\)
\end{quote}

\textit{Pennoyer} is thus recognized as the case establishing a constitutional jurisdictional theory based on sovereignty and power.\(^9\) Under this theory,

\begin{footnotes}
\footnote{See \textit{Pennoyer}, 95 U.S. at 722.}
\footnote{See \textit{Whitten}, supra note 81, at 821.}
\footnote{\textit{Pennoyer}, 95 U.S. at 733.}
\footnote{See Drobak, supra note 76, at 1028. Specifically, \textit{Pennoyer} is based upon the theory that a state has police power over persons and property within its borders. See \textit{Stein}, supra note 7, at 693. This is Justice Field's solution to the problem of restricting the power of the states to matters of proper local concern. See Hazard, \textit{supra} note 182, at 245.}
\end{footnotes}
a state could not serve process on a defendant except within its borders. In support of his theory, Justice Field cited only Cooley’s *A Treatise on the Constitutional Limitations*. Thus, Justice Field’s oft-criticized opinion established two important principles: (1) that territorial sovereignty is the measure of personal jurisdiction for states and (2) that a state violates due process when it exceeds its territorial authority. As discussed below, the case law predating *Pennoyer* in state courts provides more support for the *Pennoyer* decision than is commonly understood.

**B. Substantive Due Process and Personal Jurisdiction**

Justice Field’s opinion in *Pennoyer* has been widely criticized. Such criticisms are numerous and varied. The most common and perhaps the strongest criticism is that Justice Field had no authority for incorporating principles of federalism into the Due Process Clause of the Fourteenth Amendment. The argument has been summarized by Professor Redish as follows, “At no time prior to the Supreme Court’s unsupported decision in *Pennoyer* was there a connection between the development of the doctrine of due process and the limits imposed on personal jurisdiction based on federalism concerns.” By federalism, these critics apparently mean the division of power between the several states.

This Section takes issue with this contention in three ways. First, the methodology employed in launching this criticism is questionable. Essentially, these critics would judge the applicability of federalism to the Due Process Clause by analyzing both the previous decisions of state governments pursuant to state due process clauses and the identifiable purposes in framing the Due Process Clause of the Fourteenth Amendment. The analysis is too focused—it searches for precedent for the proposition that federalism was a due process concern and fails to address the more accepted general purposes of the Due Process Clause. The focus of an inquiry as to whether due process protects a given right should be on the

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197 *See* *Pennoyer*, 95 U.S. at 733.
198 *See id.* at 733-34 (citing THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* 405 (3d ed. 1874)).
199 *See infra* Part VI.B.
200 *See* Kogan, *supra* note 85, at 302-03 & n.191.
201 *See id.*
202 *See id.* at 302-03.
more general purposes of due process, not on whether the Due Process Clause was addressed to any particular action by a state government.\textsuperscript{204} Second, critics incorrectly assume that the due process limits on jurisdiction discussed in \textit{Pennoyer} flow from a concern over federalism and the avoidance of interstate friction. Instead, these limits flow from the principle that due process protects an individual from \textit{ultra vires} acts of state governments. Due process limits on personal jurisdiction thus have a substantive component as well as a procedural component. Third, viewed at this more general level, \textit{Pennoyer} did have ample authority from which to draw.

The methodology of \textit{Pennoyer}'s major critics is similar. They attack "the relevance of federalism to a due process analysis."\textsuperscript{205} Due process protects the rights of individuals, not the rights of states.\textsuperscript{206} The language of the rule does not suggest any federalism component, nor does the policy or history of the concept.\textsuperscript{207} England's development of due process in the absence of geographical subsovereignties likewise does not address federalism concerns.\textsuperscript{208} State court decisions addressing personal jurisdiction prior to \textit{Pennoyer}, with the exception of a few aberrations, did not consider due process to be concerned with issues of federalism.\textsuperscript{209} Finally, the history of the framing of the Fourteenth Amendment did not raise federalism as one of the concerns of due process.\textsuperscript{210} The Fourteenth Amendment was concerned with the need to establish the federal government as supreme over the states, not in affecting relations among states.\textsuperscript{211}

\textsuperscript{204} \textit{See} Whitten, \textit{supra} note 81, at 735-36 (focusing on whether due process has a "substantive" component in the context of jurisdictional matters). \textit{But see id.} at 757 (arguing that due process was based on general principles and should be interpreted as such in the future).

\textsuperscript{205} Redish, \textit{supra} note 81, at 1120; \textit{see also} Fullerton, \textit{supra} note 170, at 8-9; Lewis, \textit{supra} note 86, at 809.

\textsuperscript{206} \textit{See} Redish, \textit{supra} note 81, at 1120.

\textsuperscript{207} \textit{See id.;} Whitten, \textit{supra} note 81, at 804-21.

\textsuperscript{208} \textit{See} Redish, \textit{supra} note 81, at 1122; \textit{see also} Whitten, \textit{supra} note 81, at 738-45.

\textsuperscript{209} \textit{See} Whitten, \textit{supra} note 81, at 795.

\textsuperscript{210} \textit{See} Redish, \textit{supra} note 81, at 1124-25; Whitten, \textit{supra} note 81, at 804-21.

\textsuperscript{211} \textit{See} Redish, \textit{supra} note 81, at 1125 (noting that \textit{World-Wide Volkswagen} makes clear that "concerns of interstate relations compel the sovereignty limitations" in personal jurisdiction doctrine). Thus, the Supreme Court has at times, perhaps, misunderstood the \textit{Pennoyer} reasoning as to why sovereignty concerns impose due process limits on exercises of personal jurisdiction by state governments.
This argument has several fundamental problems.\footnote{Although not entirely clear from their articles, one could possibly make another criticism of this style of argument. These critics would apparently reject due process protection against any state action that was not prohibited by the Due Process Clause prior to its enactment or that was noted as prohibited during the course of its enactment. If applied more broadly, this analysis would freeze the application of the Due Process Clause of the Fourteenth Amendment to those issues addressed prior to its enactment. Courts would have no ability to address new problems that arguably raised due process concerns. In addition to these problems, this form of analysis would create a practical problem for litigants—due process arguments would entail research of cases of over one hundred years ago which are not as well-indexed in digests or available through other sources as are modern cases.} The focus of the argument is somewhat narrow—was federalism a purpose of the Due Process Clause or not? After concluding that federalism really was not a purpose of the Due Process Clause of the Fourteenth Amendment, critics then reject \textit{Pennoyer} as wrongly decided. This limited focus would rule out a due process restriction on a particular state action based upon one arguable basis for restricting that action. Depending upon how one defines the basis for restricting the action, one might always be able to define that basis narrowly enough that there is no precedent for that basis. Critics would then reject the due process restriction as not grounded in precedent.

Instead, the focus should be on the more general purposes of the Due Process Clause. A critical examination of a due process restriction on state action should consider whether that restriction is consistent or inconsistent with such general purposes. There may be several possible reasons for a particular due process restriction. Those reasons should at least be compared with the general purposes for due process restrictions on state action. More appropriately, the analysis should focus on the restriction itself and whether that restriction is consistent with the purposes of the Due Process Clause, rather than focusing on the reasoning supporting the restriction.

One general purpose of due process restrictions on state action is to protect persons from \textit{ultra vires} acts by the state. Such restrictions are commonly referred to as substantive due process restrictions. Substantive due process is based upon the premise that there are certain actions which the state may not take, no matter how proper the procedures provided to take those actions.\footnote{\textit{See} Whitten, \textit{supra} note 81, at 793-94 (noting that due process sometimes limits the power of the legislature to accomplish its objective by any means).} Substantive due process began to develop as a legal
doctrine prior to the Civil War, making it a relevant point of discussion for analyzing Pennoyer.214

A brief review of substantive due process will prove helpful in looking at Pennoyer from a more general point of view. Lockean notions of natural rights had a strong influence on the development of American government, including Jefferson’s famous discussion of inalienable rights in the Declaration of Independence.215 Concerned about protecting these natural rights, theorists began to argue that “if a legislature passed any law which restricted vested rights or violated natural law, it exceeded all bounds of the social compact in restricting the freedom of some individuals.”216 By denying these individuals the “guarantees of the basic social compact,” the state had denied them due process of law.217 Even prior to the Civil War, the doctrine of substantive due process began to take hold in decisions of both state and federal courts.218

The most significant federal decision prior to the Civil War that adopted a theory of substantive due process219 was Dred Scott v. Sanford.220 In his opinion, Chief Justice Taney relied on a vested rights theory when stating that Congress had no power to pass the Missouri Compromise, thereby depriving slave owners of due process.221 Although this case gave the Court the first major opportunity to establish a theory of substantive due process under the Fourteenth Amendment, it failed to do so. Similarly, in the Slaughter-House Cases,222 the Court rejected the substantive due process theory over dissents by several Justices, including Justice Field.223 Influenced by the political situation at this time, however, Justice Field’s views of substantive due process were soon accepted by a majority of the Court.224 As has recently been observed by Professor Kogan, Field’s opinion in Pennoyer is consistent with Field’s general view of substantive due process—that the Due Process Clause prevents ultra vires acts by the

214 See 2 ROTUNDA & NOWAK, supra note 108, § 15.1, at 380 (citing E. CORWIN, LIBERTY AGAINST GOVERNMENT 58-115 (1948)).
215 See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
216 2 ROTUNDA & NOWAK, supra note 108, § 15.1, at 380.
217 Id.
218 See id.; Whitten, supra note 81, at 793-94 (observing that the Due Process Clause had been interpreted prior to Pennoyer to have substantive implications).
219 See 2 ROTUNDA & NOWAK, supra note 108, § 15.1, at 381.
220 Dred Scott v. Sanford, 60 U.S. 393 (1856).
221 See id.
222 The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).
224 See id. at 385.
Accordingly, critics of *Pennoyer* should have considered whether the decision was consistent with the general purpose behind the substantive aspect of due process.

This brief review of the doctrine of substantive due process raises the second and third objections to the analysis of the commentators that attack the theoretical basis for *Pennoyer*. The second objection is that commentators critical of *Pennoyer* assume that federalism concerns drove the decision in that case. This is simply not so—Justice Field relied upon his view of substantive due process. His focus was on the rights of individuals vis-a-vis the states, not on the rights of states vis-a-vis other states. The third objection is that these commentators find no support for *Pennoyer* because of their characterization of the type of support needed. When the focus is placed on one of the general purposes of due process—protecting citizens from *ultra vires* acts of the state—there is adequate support for the opinion.

Justice Field did not appeal to federalism as a reason for restricting the personal jurisdiction of state courts. Instead, his language was more consistent with his view of substantive due process. In the critical portion of the opinion, Justice Field stated:

> Whatever difficulty may be experienced in giving those terms a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt of their meaning when applied to judicial proceedings. They then mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights.  

This language does not appeal to concerns of federalism. Instead, it indicates Justice Field’s belief about substantive due process, though cautiously stated in general terms.

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226 See Perdue, *supra* note 138, at 508 & n.183 (noting that substantive due process was the basis for restricting personal jurisdiction and that the mere existence of a proceeding in an improper forum is a taking of liberty).

227 See Stein, *supra* note 7, at 711, 713.

228 *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877).
The critical language quoted above from *Pennoyer* refers to restrictions on exertions of state power that affect private rights and the difficulty of drawing lines as to what is forbidden and what is not. Justice Field’s concern appears to be addressed to protecting the rights of individuals against unauthorized exertions of state power, not to protecting states from other states due to concerns of federalism.229 The first clause quoted from the opinion probably represents a statement by Justice Field that the substantive due process debate had not yet been resolved due to difficulties in drawing proper lines. The “difficulties” to which he refers may possibly refer to the sharp division of the Court in the *Slaughter-House Cases*. After all, Justice Field did not abandon his theory of due process after his *Slaughter-House* dissent; he continued to press his view in dissents until it was adopted by the full Court.220 Given the Court’s unwillingness to accept Justice Field’s views at that time, the subtlety of the language in the excerpt quoted above is not surprising. Justice Field’s decision is at least arguably based, and probably is based, upon his view of substantive due process, not on any view of due process based upon federalism.

Viewed in this light, Justice Field had ample authority for his position in *Pennoyer* that due process limited state exercises of jurisdiction.231 As observed previously, Justice Field’s view of substantive due process had taken hold even before the Civil War and was even beginning to surface in the decisions of the Supreme Court. The case law discussed above provides further support for Justice Field’s view as at least ten states viewed the service of process outside of a state’s territorial boundaries as an *ultra vires* act by the state.232 Even critics of *Pennoyer* admit that at least some state decisions are consistent with *Pennoyer*.233 Thus, Justice Field did not just come up with the rule announced in *Pennoyer* on his own. When understood in light of Justice Field’s own views about due process, his opinion had adequate support.

The pre-*Pennoyer* authority is thus consistent with a view that personal jurisdiction is defied by territorial limits on sovereign power. Sovereignty limits the proper sphere of state action. Thus, a state which tries to reach beyond that sphere violates the Due Process Clause. These due process

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229 *See* Stein, *supra* note 7, at 693-94. Specifically, due process limits on personal jurisdiction restricted state police power to interfere with a person’s right to liberty. *See* Kogan, *supra* note 85, at 333-36.


231 *See* Hazard, *supra* note 182, at 270.

232 *See infra* note 282 and accompanying text.

233 *See* Whitten, *supra* note 81, at 817-18.
limits result from the need to protect individuals from *ultra vires* acts by states, including the exercise of jurisdiction over individuals not served with process in the state.

VI. THE EVOLUTION OF THE
DOCTRINE OF PERSONAL JURISDICTION

Personal jurisdiction doctrine is often considered to have been based upon different theories at different times in history. *Pennoyer* and *International Shoe Co. v. Washington,* are viewed as at odds with one another. This Article contends that personal jurisdiction doctrine instead evidences a historical evolution, based upon an overriding general limiting principle. The basic principle upon which personal jurisdiction doctrine is based, and should be based, is territorial limits on sovereign authority. Although the territorial view of personal jurisdiction is often associated with *Pennoyer,* territorial limits on state power provided a limiting principle before *Pennoyer* and continue to provide such a limiting principle today. Based upon this principle, personal jurisdiction doctrine has evolved from a view of sovereign power over persons and property to a view of sovereign power over persons, property, and conduct.

This Part explores the evolution of personal jurisdiction doctrine. As previously observed, the historical foundation of restrictions on state court jurisdiction is important as the Court has considered historical practice to be important in the context of jurisdiction. In addition, when the Court makes an improvement to the minimum contacts test such as that suggested here, it is likely to attempt to reconcile the new test with prior cases. Thus, it is useful to explore the history of personal jurisdiction and attempt to deduce some overriding principles.

Because this Article views territorial sovereignty as the principle limiting state exercises of personal jurisdiction, this Part first examines both English and American authority to determine whether sovereignty has historically limited personal jurisdiction. After an examination of this authority, it is apparent that Justice Field had more support for his position in *Pennoyer* than is commonly assumed. Next, this Part explores the evolution of the doctrine after *Pennoyer.* Over time, the Court has recognized that states may properly regulate conduct connected in some way with the state, as well as people and property within the state.

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236 See supra note 84 and accompanying text.

English limits on personal jurisdiction have evolved similarly to the way that such limits have evolved in the United States, especially during the eighteenth and nineteenth centuries. Most importantly, English authority prior to *Pennoyer* viewed territorial boundaries as imposing limits on personal jurisdiction. Because England had no geographical subsovereignities, its courts did not have to face some of the difficult jurisdictional issues faced by United States courts. Still, the English experience in many ways is relevant to that of the United States. United States judges looked, in part, to English law in analyzing jurisdictional problems prior to *Pennoyer*. Because the unique problems associated with a federation of independent states and various political forces served to affect the evolution of jurisdictional doctrine in the United States, the English evolution will only be summarized here.

Some have questioned the relevance of physical power over a defendant to the exercise of jurisdiction over that defendant in English common law courts. Jurisdiction over defendants under early case law, it is argued, depended upon either express or implied submission to the jurisdiction of the court. This view of English precedent has some appeal. Common law courts were initially unwilling to take jurisdiction over a defendant who, although personally summoned, did not appear before the court. As a general matter, the “English law of jurisdiction by the early nineteenth century was too ill-defined, too sparse, and too unsuited for a union of states to play a significant role in the development of the American doctrine of personal jurisdiction.” Drobak, *supra* note 76, at 1022 n.30. Still, English case law does offer some development of issues that U.S. courts would later confront. See *Hazard, supra* note 182, at 258.

See *Ehrenzweig, supra* note 162, at 297.

Professor Ehrenzweig contends that English concepts of personal jurisdiction depend upon allegiance or consent rather than physical power. See *id. at 297-98 & n.61*. The issue of consent is addressed in the text. Allegiance, however, is not inconsistent with a view of jurisdiction based upon sovereign power. Whether jurisdiction depends upon physical power over a person residing within the jurisdiction or upon the allegiance of a citizen, sovereign power can still be considered as the basis for such jurisdiction. In fact, these two concepts–allegiance and physical power–could be viewed as alternative bases of jurisdiction based upon sovereign power. A sovereign may exercise jurisdiction over its citizens, wherever they may be, and over those persons present within its borders.
court.\textsuperscript{240} To obtain the defendant's appearance, a court could seize the defendant's property, imprison the defendant, or subject the defendant to outlawry, but a defendant who endured such procedures could still refuse to appear and thwart the plaintiff's efforts to obtain a remedy.\textsuperscript{241} Thus, consent of the defendant was initially required to subject the defendant to jurisdiction.

In 1725, however, a fundamental change occurred in English concepts of jurisdiction. The Frivolous Arrest Act of 1725\textsuperscript{242} brought about two major changes in English procedure. First, a plaintiff could force a defendant's involuntary appearance by serving the defendant with a summons, rather than seeking to force the defendant to submit to jurisdiction by attachment, writ of distringas, or arrest.\textsuperscript{243} Second, a defendant failing to defend himself or herself after receiving a summons could be held liable to the plaintiff by default—which was the birth of the default judgment.\textsuperscript{244} Notice that this procedure required the defendant to be summoned. At this point in English history, a sheriff served a summons on a defendant and a summons could not be served beyond the territorial limits of the sheriff's jurisdiction.\textsuperscript{245} At least initially, then, the power of an English court extended only to defendants personally served within the jurisdiction of the court. Like early practice in the United States, direct sovereign authority over the defendant's person was required.

\textsuperscript{240}See Drobak, supra note 76, at 1019; Nathan Levy, Jr., Mesne Process in Personal Actions at Common Law and the Power Doctrine, 78 YALE L.J. 52, 56 (1968).

\textsuperscript{241}See Levy, supra note 240, at 58 (citing 2 FREDERICK POLLOCK & FREDERICK WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW 592 (2d ed. 1899)).

\textsuperscript{242}Frivolous Arrest Act of 1725, 12 Geo. 1, ch. 29.

\textsuperscript{243}See Levy, supra note 240, at 69 & n.84. The Plymouth Colony made such a reform in 1644 by establishing a process whereby parties could serve a summons upon defendants. Thus, sovereign power over a defendant played a role in the American colonies' concept of jurisdiction prior to the transition in England. See id. at n.84.

\textsuperscript{244}See Drobak, supra note 76, at 1019-20 n.24 (discussing the default judgment procedure created by the Frivolous Arrest Act); Hazard, supra note 182, at 248 (discussing the default judgment procedure created by the Frivolous Arrest Act).

\textsuperscript{245}See Maier & McCoy, supra note 105, at 260; Simon E. Sobeloff, Jurisdiction of State Courts over Nonresidents in Our Federal System, 43 CORNELL L.Q. 196, 198 (1957) (explaining that the "common law directed its attention to territory as the measure of judicial power"). English courts wished to avoid entering an unenforceable judgment. Territorial limits provided one way to avoid this problem. See Drobak, supra note 76; at 1020 n.26; Hazard, supra note 182, at 253.
As to parties outside the jurisdiction of England, plaintiffs had to resort to the tool of outlawry. Outlawry allowed a plaintiff to reach the defendant’s property, including debts owed to the defendant, where the defendant was evading arrest. However, this procedure was expensive for the plaintiff and could take a great deal of time to execute. Later, in 1811, a statute was enacted that allowed plaintiffs to seize the defendant’s chattels and the issues of his land after leaving the summons at his home. Such actions allowed the plaintiff to obtain a judgment against the defendant and to satisfy the judgment using the seized property.

Although the “quasi-in-rem” label was not attached to this type of action, it could be considered to be such an action. The English courts narrowly interpreted the 1811 statute, however, requiring the plaintiff to show that the defendant’s absence was due to an attempt to avoid service.

Collectively, this brief summary of English history reveals jurisdictional limits based upon sovereign power, even if sovereign power was not explicitly offered as a basis for such limits. The early history shows that the English courts believed that the physical presence of the defendant was necessary to support an exercise of jurisdiction. Later, the concepts of jurisdiction by summons and the default judgment extended the power of English courts. A defendant could be compelled by the sovereign to

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246 See Levy, supra note 240, at 90.
247 See id. at 89-90.
248 51 Geo. 3, ch. 124 (1811); see Levy, supra note 240, at 90 & n.186.
249 See Levy, supra note 240, at 90.
250 See id. This was in contrast to earlier procedure under which the defendant’s property could be seized, but was only forfeited to the state for failure to appear in response to the summons. See Drobak, supra note 76, at 1019 n.24; Maier & McCoy, supra note 105, at 260; Silberman, supra note 162, at 40. This was little help to the plaintiff who was essentially left without a remedy.
251 The Lord Mayor’s Court of London had a similar attachment procedure, but jurisdiction was territorially restricted to the city of London and the cause of action had to arise within the jurisdiction. Such an action was somewhat similar to a quasi-in-rem action. See Silberman, supra note 162, at 42.
252 See Levy, supra note 240, at 90.
253 In some contexts, England did claim authority to adjudicate conflicts that arose abroad as an exercise of its absolute territorial sovereignty. See Maier & McCoy, supra note 105, at 261.
254 See Sobeloff, supra note 245, at 198. Anything within the physical reach of the power of the English king was subject to the king’s power. Judgments reached without jurisdiction were void. See Hazard, supra note 182, at 270 n.102.
255 See Hazard, supra note 182, at 248 n.19.
appear by service of summons within the jurisdiction of England. Service could only be made within the jurisdiction, however, presumably because that was the territorial extent of the sovereign’s power. If the defendant was so notified, then the sovereign had the power to decide the case against him by way of a default judgment. The advent of a quasi-in-rem-like proceeding may likewise be viewed as resting on the sovereign’s power over the defendant’s property. Thus, Professor Levy’s view that English courts were concerned with physical power is well justified. Early English conceptions of jurisdiction can be seen as dependent upon a sovereign’s power over either persons or property.

Like the United States, however, England realized that jurisdiction over persons and property within its borders was insufficient to allow its courts to exercise jurisdiction in all cases in which it was interested. There were certain acts or transactions which affected England but were beyond the reach of its courts due to lack of jurisdiction over either the defendant’s person or property. However, England expanded its jurisdiction again to handle such problems. In 1852, England gave the common law courts power over defendants in breach of contract actions where the contract was made in England. Courts were allowed to proceed in such actions against aliens and British subjects abroad where (1) a writ had been personally served or reasonable efforts at service had been made of which the defendant was aware and (2) the defendant either willfully did not appear or was living abroad to defraud creditors. Similar provisions were made for service outside the jurisdiction of the courts of chancery. These advances in English jurisdictional thinking may have been based upon a view of sovereign power—the power to decide cases involving conduct that occurred in England or had substantial effects in England.

English cases dealing with recognition of judgments by other sovereignties also provide some support for a view of jurisdiction based upon territorial sovereignty. For example, in the famous case of Buchanan v. Rucker, Lord Ellenborough refused to enforce a judgment entered against

\[256 \text{ See id.} \]
\[257 \text{ See id.} \]
\[258 \text{ See id. at 248-49.} \]
\[259 \text{ See also Maier & McCoy, supra note 105, at 260 (stating that “jurisdiction in England requires physical presence of defendant”).} \]
\[260 \text{ See Levy, supra note 240, at 91.} \]
\[261 \text{ See id.} \]
\[262 \text{ See id. at 92.} \]
\[263 \text{ Buchanan v. Rucker, 103 Eng. Rep. 546 (K.B. 1808).} \]
the defendant by a court in Tobago. That court had issued process by nailing a summons to the courthouse door. The English court would not enforce the judgment because the sovereign could not acquire jurisdiction through such notice.\(^{264}\) The Buchanan court also held that a judgment obtained without jurisdiction over a party was void.\(^{265}\) The court’s dictum also suggests that Tobago’s jurisdiction was limited to its territorial boundaries and that service of process must be within its borders to bind a defendant.\(^{266}\) Lord Ellenborough explained, “Can the island of Tobago pass a law to bind the rights of the whole world? Would the world submit to such an assumed jurisdiction?”\(^{267}\)

Other English cases provide support for the proposition that a judgment obtained without jurisdiction is void.\(^{268}\) In fact, one of these cases notes that the failure to provide notice to a defendant is “contrary to the first principles of justice.”\(^{269}\) If “first principles of justice” can be equated with due process, then English precedent provides some support for treating personal jurisdiction as a matter of procedural due process. Early American courts also relied on the rule that a judgment obtained without jurisdiction is void, which was clearly established by the time of Pennoyer.\(^{270}\)

\(^{264}\) See id. Note, however, that this case may provide some support for Justice Story’s ideas because the court’s dicta implies that a sovereign can only serve a party when within its borders. See id. at 547.

\(^{265}\) See id.

\(^{266}\) See Hazard, supra note 182, at 257 (quoting Rucker and noting that the Tobago statute must necessarily be understood to apply to persons who have been present and within the jurisdiction so as to be subject to the process of the court).

\(^{267}\) Rucker, 103 Eng. Rep. at 547.


\(^{270}\) The pre-Pennoyer case law provides overwhelming support for the proposition that a judgment obtained without jurisdiction over one of the parties is void. See Webster v. Reid, 52 U.S. (11 How.) 437 (1850); Hollingsworth v. Barbour, 29 U.S. (4 Pet.) 466 (1830); Picquet v. Swan, 19 F. Cas. 609 (C.C.D. Mass. 1828); Dennison v. Hyde, 6 Conn. 508 (1827); Aldrich v. Kinney, 4 Conn. 380 (1822); Bimeler v. Dawson, 5 Ill. 536 (1843); Beard v. Beard, 21 Ind. 321 (1863); Mitchell’s Adm’r v. Gray, 18 Ind. 123 (1862); Cone v. Cotton, 2 Blackf. 82 (Ind. 1827); Hakes v. Shupe, 27 Iowa 465 (1869); Darrance v. Preston, 18 Iowa 396 (1865); Weil v. Lowenthal, 10 Iowa 575 (1860); Gleason v. Dodd, 45 Mass. (4 Met.) 333 (1842); Newell v. Newton, 27 Mass. (10 Pick.) 470 (1830); Hall v. Williams, 23 Mass. 232 (1828); Bissell v. Briggs, 9 Mass. 461 (1813); Freedman v. Thompson, 41 Miss. 49 (1866); Smith v. McCutchen, 38 Mo. 415 (1866); Whittier v. Wendell, 7 N.H. 257 (1834); Curtis v. Martin, 2 N.J.L. 399
B. Pre-Pennoyer American Authority Regarding Personal Jurisdiction

Although English case law provides only marginal insight into determining how personal jurisdiction should be limited in a union of independent states, the general principles embodied in English cases are helpful and provide some support for Justice Field’s view of the problem. Sovereign power did limit English exercises of jurisdiction, at least initially, based upon territorial boundaries. English law, however, only served as a guide for jurisdictional principles in the United States. Thus, American authority prior to Pennoyer is most relevant to the issue of whether personal jurisdiction was limited by territorial sovereignty. This Section discusses that authority and concludes that pre-Fourteenth Amendment case law establishes that territorial boundaries provided meaningful limits on personal jurisdiction.271

(1805); Bradshaw v. Heath, 13 Wend. 407 (N.Y. 1835); Holbrook v. Murray, 5 Wend. 161 (N.Y. 1830); Pawling v. Willson, 13 Johns. 192 (N.Y. 1816); Fenton v. Garlick, 8 Johns. 194 (N.Y. 1811); Robinson v. Ward’s Ex’rs, 8 Johns. 86 (N.Y. 1811); Kilburn v. Woodworth, 5 Johns. 37 (N.Y. 1809); Armstrong v. Harshaw, 12 N.C. 116 (1827); Miller’s Ex’r v. Miller, 8 S.C.L. (1 Bail.) 113 (1829); St. Albans v. Bush, 4 Vt. 58 (1832); Hoxie v. Wright, 2 Vt. 263 (1828); Rape v. Heaton, 9 Wis. 328 (1859).

Several of these cases considered whether a judgment previously rendered within the same state was valid. See Beard v. Beard, 21 Ind. 321 (1863); Mitchell’s Adm’r v. Gray, 18 Ind. 123 (1862); Darrance v. Preston, 18 Iowa 396 (1865); Smith v. McCutchen, 38 Mo. 415 (1866). In addition, at least one pre-Pennoyer case allowed a defendant to make a special appearance to directly challenge personal jurisdiction, rather than requiring collateral attack. See Weil v. Lowenthal, 10 Iowa 575 (1860); see also Hakes v. Shupe, 27 Iowa 465 (1869) (allowing direct challenge to personal jurisdiction where affidavt of service did not specify date and where defendant was served outside of the state); Freedman v. Thompson, 41 Miss. 49 (1866) (allowing direct challenge of personal jurisdiction due to absence of notice). Consequently, Justice Field had some support for holding that a judgment which would be void in another state was also void in the rendering state. See Pennoyer v. Neff, 95 U.S. 715, 732 (1877) (citing Smith v. McCutchen, 38 Mo. 415 (1866)); Mitchell’s Adm’r v. Gray, 18 Ind. 123 (1862); Hakes v. Shupe, 27 Iowa 465 (1869); Darrance v. Preston, 18 Iowa 396 (1865). But see Whitten, supra note 81, at 821-24 (arguing that the cases Field cited merely establish that the state statutes at issue in those cases were not “intended to have an extraterritorial effect”).

271 Notice and an opportunity to be heard were also recognized as due process requirements prior to Pennoyer, as was the fact that a judgment obtained without jurisdiction was void. See Whitten, supra note 81, at 754. Many early cases did not
refer to the due process or law of the land clauses contained in the appropriate state constitution. Rather, these decisions spoke of notice to a defendant in terms of "first principles of justice." See Kilburn v. Woodworth, 5 Johns. 37, 40 (N.Y. 1809); Fisher v. Lane, 95 Eng. Rep. 1065, 1068 (K.B. 1772).

Hall v. Williams, 23 Mass. (6 Pick.) 232 (1828) provides a typical example of such a case. There, Hall brought suit against Williams and Fiske in Massachusetts to enforce a judgment obtained against Williams and Fiske in Georgia. Fiske had no notice of the suit and was not personally served. The court first observed that state courts must give full faith and credit to judgments rendered in another state "in the same manner that they would upon a record of any court of their own state." Id. at 237. Before the adoption of the Constitution, the court observed, judgments of other states were treated like judgments made by foreign countries. After the states adopted the Constitution, however, such judgments had to be treated as domestic judgments. See id. The court then reached the question of notice and whether Massachusetts courts must treat the Georgia judgment as conclusive, even if the Georgia court had no jurisdiction over one of the parties. To this issue, the Massachusetts Supreme Court held:

If it appeared by the record that the defendants had notice of the suit, or that they appeared in defence [sic], we are inclined to think that it could not be gainsaid; for as we are bound to give full faith and credit to the record, the facts stated in it must be taken to be true, judicially; and if they should be untrue by reason of mistake or otherwise, the aggrieved party must resort to the authorities where the judgment was rendered for redress, for he could not be allowed to contradict the record by a plea and by an issue to the country thereon. But if the record does not show any service of process, or any appearance in the suit, we think he may be allowed to avoid the effect of the judgment here, by showing that he was not within the jurisdiction of the court which rendered it, for it is manifestly against first principles, that a man should be condemned, either criminally or civilly, without an opportunity to be heard in his defence [sic].

Id. at 239-40 (emphasis added); see also Hollingsworth v. Barbour, 29 U.S. (4 Pet.) 466, 472 (1830) (noting that notice giving an opportunity to appear and defend constitutes a requirement "dictated by natural justice"); Dennison v. Hyde, 6 Conn. 507, 518 (1827) (invalidating a judgment obtained in another state without notice "accords with the dictates of justice"); Aldrich v. Kinney, 4 Conn. 380, 384 (1822) ("To bind a defendant... when he was never personally summoned, nor had notice of the proceeding, would be contrary to the first principles of justice."); Bradshaw v. Heath, 13 Wend. 407, 418 (N.Y. 1835) ("To bind a defendant personally by a judgment, where he was never summoned or had notice of the proceedings, would be contrary to the first principles of justice."); Robinson v. Ward's Ex'rs, 8 Johns. 86, 90 (N.Y. 1811) ("To bind a defendant by a judgment, when he was never personally summoned, or had not notice of the proceedings, would be contrary to the first principles of justice."); Kilburn v. Woodworth, 5 Johns. 37, 40 (N.Y. 1809)
A review of the case law and an important secondary source at the time of Pennoyer reveals that personal jurisdiction was widely viewed as limited by territorial borders. Few, if any, cases viewed these limits as stemming from the due process clauses of the various states. Yet, states viewed attempts to serve defendants outside of their territorial boundaries as *ultra vires* acts.

As observed above, Justice Field cited only Cooley’s treatise as authority for making personal jurisdiction a matter of due process. In that treatise, Cooley makes an important statement. He observes that:

[It] will often happen that the party proceeded against cannot be found in the State, and personal service upon him is therefore impossible, unless it is allowable to make it wherever he may be found abroad. But any such service would be ineffectual. No State has authority to invade the jurisdiction of another, and by service of process compel parties there resident or being to submit their controversies to the determination of its courts; and those courts will consequently be sometimes unable to enforce a jurisdiction which the State possesses in respect to the subjects within its limits, unless a substituted service is admissible.272

Cooley goes on to explain that substituted service may only be made in *in rem* proceedings.273 This passage offers support for the proposition that a state may not serve a defendant beyond its boundaries. Although Cooley’s work is merely a treatise, it was a widely respected treatise.274 In fact, some have viewed Cooley’s treatise as “America’s second constitution.”275 Thus,

("To bind a defendant by a judgment, when he was never personally summoned, or had notice of the proceedings, would be contrary to the first principles of justice."); Rape v. Heaton, 9 Wis. 328, 333 (1859) (stating that to hold someone bound by a judgment where they never had an opportunity to defend “would seem to be the very essence of injustice”).

These early opinions, therefore, can reasonably be interpreted as making notice and an opportunity to be heard due process requirements under state constitutional due process and law of the land clauses. Another line of cases refer to due process specifically in deciding whether proper notice was provided. See Beard v. Beard, 21 Ind. 321 (1863); Mason v. Messenger, 17 Iowa 261 (1864); Happy v. Mosher, 48 N.Y. 313 (1872); United States Trust Co. v. United States Fire Ins. Co., 18 N.Y. 199 (1858).

272 COOLEY, supra note 198, at 403.
273 See id. at 403-04.
274 See 2 ROTUNDA & NOWAK, supra note 108, § 15.2, at 386.
275 Kogan, supra note 85, at 325.
Cooley’s view would restrict personal jurisdiction based upon territorial sovereignty, just as territorial boundaries restrict a state’s ability to serve a defendant with process. In other words, physical power was required for a state to exercise jurisdiction.

In an oft-quoted passage, Justice Holmes remarked that “[t]he foundation of jurisdiction is physical power.”\(^\text{276}\) Perhaps no case in American history better embodies a jurisdictional theory based on physical power than *Pennoyer*.\(^\text{277}\) In *Pennoyer*, the Court held that a state may not serve process on a defendant outside of the state, based on Justice Story’s international jurisdictional principles.\(^\text{279}\) This part of *Pennoyer* constitutes one of the most criticized portions of the opinion. Professor Ehrenzweig argues that the Court adopted the “physical power” rationale with “little warning.”\(^\text{280}\) Upon closer examination, however, the precedent reveals that a number of courts subscribed to the theory that a state could not provide for service of process outside of its jurisdiction.\(^\text{281}\)

In fact, courts in ten different states subscribed to the theory that a state could not provide for service outside of its borders.\(^\text{282}\) As Professor Drobak observed, “Personal service outside the forum, although giving actual notice of the litigation, had no legal effect because the forum state’s power was thought to end at its borders.”\(^\text{283}\) Courts employing this rule were heavily influenced by Story. Two opinions relying on sovereignty to

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\(^{276}\) McDonald v. Mabee, 243 U.S. 90, 91 (1917).

\(^{277}\) See, e.g., Ehrenzweig, *supra* note 162, at 292-93 (stating that *Pennoyer* depends on the “physical power” concept and that *Pennoyer* significantly altered jurisdictional doctrine).

\(^{278}\) Pennoyer v. Neff, 95 U.S. 714 (1877).

\(^{279}\) See *id.* at 722. Justice Field arguably viewed Justice Story’s rules as a solution to the problem of notice to defendants absent from the jurisdiction. See Hazard, *supra* note 182, at 252.

\(^{280}\) Ehrenzweig, *supra* note 162, at 308.

\(^{281}\) See Drobak, *supra* note 76, at 1022-23; Stein, *supra* note 7, at 740.

\(^{282}\) See Picquet v. Swan, 19 F. Cas. 609 (C.C.D. Mass. 1828); Kibbe v. Kibbe, 1 Kirby 119 (Conn. Super. Ct. 1786); Dearing v. Bank of Charleston, 5 Ga. 497 (1848); Bimeler v. Dawson, 5 Ill. (4 Scam.) 536 (1843); Beard v. Beard, 21 Ind. 321 (1863); Hakes v. Shupe, 27 Iowa 465 (1869); Darrance v. Preston, 18 Iowa 396 (1865); Weil v. Lowenthal, 10 Iowa 575 (1860); Hall v. Williams, 23 Mass. (6 Pick.) 232 (1828); Bissell v. Briggs, 9 Mass. 462 (1813); Smith v. McCutchen, 38 Mo. 415 (1866); Kilburn v. Woodworth, 5 Johns. 37 (N.Y. 1809); St. Albans v. Bush, 4 Vt. 58 (1832); Rape v. Heaton, 9 Wis. 328 (1859).

\(^{283}\) Drobak, *supra* note 76, at 1022.
resolve jurisdictional issues, one from Missouri\textsuperscript{284} and one from Iowa,\textsuperscript{285} demonstrate this influence.

In \textit{Smith v. McCutchen},\textsuperscript{286} the Missouri Supreme Court considered whether Smith could recover in a garnishment action against McCutchen.\textsuperscript{287} Smith had earlier obtained a default in personam judgment against Ogle on a "mere order of publication published in a newspaper," and sought to garnish McCutchen as Ogle's debtor.\textsuperscript{288} McCutchen defended that the judgment obtained against Ogle was void.\textsuperscript{289} In resolving the question, the court stated:

> No sovereignty can extend its powers beyond its own territorial limits to subject either persons or property to its judicial decisions. Jurisdiction must be founded either upon the person of the defendant being within the territory of the sovereign where the court sits, or his property being within such territory; for otherwise there can be no sovereignty exerted upon the known maxim, \textit{extra territoriam jus dicenti impune non paretur}. Even, therefore, should a Legislature of a State expressly grant such jurisdiction to its courts over persons or property not within its territory, such grant would be treated elsewhere as a mere attempt at usurpation, and all judicial proceedings in virtue of it held utterly void for every purpose—Story, \textit{Confl. L.} § 539.\textsuperscript{290}

The court expressed itself unequivocally.

Iowa went one step further than Missouri. Unlike Missouri, the Iowa legislature provided for service of process outside of the state.\textsuperscript{291} In \textit{Weil v. Lowenthal},\textsuperscript{292} the sheriff of Scott County, Iowa, served Lowenthal in Rock Island County, Illinois, which lies just across the Mississippi River from Iowa.\textsuperscript{293} Lowenthal made a special appearance to contest jurisdiction.\textsuperscript{294} The Iowa Supreme Court first held that the sheriff could not serve process

\begin{footnotes}
\footnote{284} Smith v. McCutchen, 38 Mo. 415 (1866).
\footnote{285} Weil v. Lowenthal, 10 Iowa 575 (1860).
\footnote{286} Smith v. McCutchen, 38 Mo. 415 (1866).
\footnote{287} See \textit{id.} at 416.
\footnote{288} Id.
\footnote{289} See \textit{id.}
\footnote{290} Id. at 417.
\footnote{291} See Darrance v. Preston, 18 Iowa 396, 399 (1865).
\footnote{292} Weil v. Lowenthal, 10 Iowa 575 (1860).
\footnote{293} See \textit{id.} at 576.
\footnote{294} See \textit{id.}
\end{footnotes}
outside of his jurisdiction. Next, the court went on to consider whether an Iowa court could ever obtain personal jurisdiction over someone served with process outside of the state. The court concluded:

As a citizen of a sister State, he owed no allegiance nor was he amenable to the laws of this State, unless found within its jurisdiction. The constitution of our State does not give, nor can the legislature by any enactment confer, upon the District Court, jurisdiction over the person of a citizen of another State. This doctrine is so well settled, and carries with it so much common sense and justice, that we regard it as useless to add anything further in support of it. . . . Story in his work upon the Conflict of Laws, section 539, says, "no sovereignty can extend its process beyond its own territorial limits to subject either person or property to its judicial decisions. Every exertion of authority of this sort beyond this limit is a mere nullity, and incapable of binding such persons or property in any other tribunals."

Again, the court spoke in plain language. Importantly, the Iowa court asserted that the principle that a state cannot serve a defendant with process outside of its borders is "well settled." Assuming the Iowa court was correct, this decision strongly rebuts the charge of many critics that Justice Field had little support for the sovereignty-based jurisdictional theory espoused by Pennoyer. Other cases have made similarly strong statements regarding territorial limits. As explained by the Supreme Court of Georgia, "the rule is firmly fixed that no sovereignty can extend its process beyond its territorial limits, to subject either persons or property to its judicial decisions. This is the rule by the law of nations—by the Common Law—and is recognized by the American Courts." Similarly, while interpreting the Full Faith and Credit Clause in *D'Arcy v. Ketchum,* the Supreme Court relied upon territorial jurisdictional principles. There, the Court upheld Louisiana’s refusal to enforce a judgment rendered in New York over a defendant who had not been served with process. The Court treated territorial sovereignty limits as exceptions to the Full Faith and Credit Clause.

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295 See id. at 577.
296 Id. at 578.
297 See supra note 182 and accompanying text.
300 See Redish, supra note 81, at 1123 (construing *D'Arcy*, 52 U.S. at 176).
301 See id. at 1124. Significantly, my research does not reveal a single case suggesting that a state did have power to legally serve a defendant outside of its
Overall, pre-Pennoyer American authority plainly establishes that states viewed service of process outside of the state as an *ultra vires* act. Such service was ineffective to obtain personal jurisdiction over a defendant so served. Thus, the stage was set for Justice Field to connect the *ultra vires* jurisdictional rules with rules regarding substantive due process. As observed above, Justice Field viewed the Due Process Clause as protecting a defendant from *ultra vires* acts by state governments. Because service outside of a state was viewed as an *ultra vires* act, substantive due process restrictions on personal jurisdiction are logical.

C. State Sovereign Power in a Modern Federal System

Following Pennoyer, jurisdictional principles had to evolve as the United States became an increasingly mobile society. *International Shoe Co. v. Washington*\(^{302}\) was a result of this evolution. Although some would view *International Shoe* as more of a revolution,\(^{303}\) the decision is more properly characterized as part of an evolution.\(^{304}\) Those who would characterize the case as a revolution contend that *International Shoe* abandoned Pennoyer's justification for jurisdiction—physical power.\(^{305}\) Viewed at a proper level of abstraction, however, physical power is not the theory behind the decision in Pennoyer, but is the implementation of the true theory. The true theory behind Pennoyer is that the sovereign power of states is limited and personal jurisdiction is likewise limited to the extent of that sovereign power. Sovereign power over persons and property within the borders of the state was the first attempt at defining how far that power should go. *International Shoe* and its progeny represent an evolution to a broader scope of sovereign power. States' sovereign power should also extend to conduct within their borders or conduct having substantial proximate effects within their borders, as well as to persons and property within its borders.

In the years between Pennoyer and International Shoe, courts struggled to provide states with greater regulatory power while remaining true to the territorial rules established in Pennoyer. This Section will briefly summarize that struggle. Although different fictions were employed to handle borders.


\(^{303}\) See Jay, *supra* note 79, at 434, 473; see also Stein, *supra* note 7, at 692.

\(^{304}\) See Stein, *supra* note 7, at 692-93.

\(^{305}\) See Jay, *supra* note 79, at 429 (arguing that *International Shoe* "seemed to rest on an entirely different conceptual foundation" than did Pennoyer).
different jurisdictional problems, the reason for employing such fictions remained constant. Courts tended to employ such fictions when it was felt that a state should legitimately be able to exercise jurisdiction over a controversy, but the controversy did not quite fit existing jurisdictional rules. These fictions expanded state jurisdiction to regulate conduct, in addition to persons and property. When the Court decided *International Shoe,* it removed the need for several fictions, but the evolution of jurisdictional doctrine remained, and still remains, incomplete. That evolution will now be summarized, beginning with the decision in *Pennoyer.*

Although the general theory of *Pennoyer*—that limits on the sovereign power of a state prevent *ultra vires* exercises of personal jurisdiction—had a sound precedential basis, the specific implementation of that principle left much to be desired. Those limits of sovereign power had to be defined. The *Pennoyer* court imposed limits on state sovereign power based upon "well established principles":

One of these principles is, that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. . . . The other principle of public law referred to follows from the one mentioned; that is, that no State can exercise direct jurisdiction and authority over persons or property without its territory.  

These principles focus on physical entities—only persons and property within the state's borders were subject to jurisdiction. As Professor Kogan has observed, this focus on the physical stemmed from Lockean notions of property. A person was viewed as having a property right in his body. A state's jurisdiction was limited by a person's choice as to where to locate his body. Thus, the only justification for exercising jurisdiction was the consent of the individual "either by filing an appearance or by placing her body within the state's boundaries." This reasoning is similar to that which underlies the modern focus on the purposeful availment of the protection of a state's laws.

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308 See id. at 339.
309 See id.
310 Id. Of course, Locke would not have so restricted jurisdiction. Locke believed that a state could exercise jurisdiction over those whose conduct amounted to tacit consent to its jurisdiction. See *Locke, supra* note 90, at 20-21.
311 As will be discussed below, the focus on consent goes too far. True, under Lockean notions of government, the government derives its power from the
It did not take long for the Court to realize that a doctrine of personal jurisdiction based upon these principles was unworkable, particularly in a country where citizens were free to cross state lines on a regular basis. In fact, the Court acknowledged the limits of these principles a few pages later in the opinion and the struggle to find workable limits on sovereign power commenced. That struggle continues even today.

Two exceptions to the limits on sovereign power are described in the Pennoyer opinion itself. First, a state may exercise jurisdiction over divorce cases or cases involving the “status” of its citizens because a state always has the power to determine the status of its inhabitants. This exception was interpreted more broadly to allow a state to exercise power over absent citizens. Second, a state may force a legal entity such as a corporation or partnership to consent to the appointment of a representative in the State to receive service of process on behalf of the entity. These exceptions seem to stem from a feeling that the Pennoyer restrictions on personal jurisdiction were too limiting. Other situations also exist where the state should be able to exercise jurisdiction. The Court merely had a problem identifying what those situations were and formulating a rule that would encompass them.

In the years that followed, courts struggled with the Pennoyer framework as the limits on sovereign authority became increasingly restrictive and unworkable in a nation with an expanding industrial economy and an increasingly mobile citizenry. In attempting to live within the constraints of that progress, courts used the two exceptions described in the opinion to find jurisdiction in cases that did not fit neatly

312 See Hazard, supra note 182, at 271-72.
314 See Stein, supra note 7, at 696 & n.39.
315 See Pennoyer, 95 U.S. at 735-36. This exception developed in state courts because the Supreme Court originally rejected the proposition that a corporation could be deemed to be present in a state other than its state of incorporation. See von Mehren, supra note 7, at 298 (citing Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 588 (1839)). Consequently, a corporation could only be sued in its state of incorporation or in a state where it held property. See id. To solve this problem, the consent tool was developed. See id.
316 See Stein, supra note 7, at 695-96; see also Hazard, supra note 182, at 246; McDougal, supra note 157, at 2.
within the Pennoyer framework.\footnote{317} Those exceptions ended up being stretched as far as possible to support expansive jurisdiction by state courts.\footnote{318} 

Automobiles proved especially problematic. Automobiles increased the number of people crossing state boundaries. Additionally, the use of automobiles increased the number of tort cases with multistate elements because of the accidents that went along with automobile travel. After the accident, a nonresident would return to his state of residence, theoretically preventing a lawsuit because a state could not serve notice outside of its territorial boundaries.\footnote{318} To address this problem, legislatures used one of the Pennoyer exceptions to justify exercises of jurisdiction in automobile accident cases.\footnote{319} The alleged tortfeasor was deemed to have constructively consented to jurisdiction by using the highways of the state wishing to exercise jurisdiction.\footnote{320} Although the Court acknowledged the regulatory need of the state, it still relied upon consent as the basis for a state’s exercise of jurisdiction.\footnote{321}

\footnote{317} See Stein, supra note 7, at 695-96. These exceptions were stretched so far that they became tantamount to legal fictions. See McDougal, supra note 157, at 2.

\footnote{318} See Hazard, supra note 182, at 274.

\footnote{319} See supra notes 313-15 and accompanying text.

\footnote{320} See Hess v. Pawloski, 274 U.S. 352, 356 (1927); Hazard, supra note 182, at 274; Stein, supra note 7, at 696. Along with constructive consent, the motorist was deemed to appoint the Secretary of State as the motorist’s agent for service of process. Unfortunately, the Secretary of State did not have to give notice of the suit to the motorist in some states. Struggling with the limits of Pennoyer and its limits on extraterritorial service of process, the Supreme Court proceeded to require mail notice. See Wuchter v. Pizzutti, 276 U.S. 13, 19 (1928). Although Professor Hazard finds this result unattainable within the Pennoyer system, see Hazard, supra note 182, at 274, one can at least make some sense of this decision. Perhaps the substantive due process constraint of Pennoyer is satisfied by service within the state on the motorist’s registered agent, while procedural due process requires an extra effort to give notice to the motorist where the agent is always unreliable due to some characteristic of that agent. See Mullane v. Central Hanover Bank & Trust, 339 U.S. 306, 314-15 (1950) (Notice must be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. . . . But when notice is a person’s due, process which is a mere gesture is not due process.”). Even though Mullane was decided after International Shoe, its reasoning does not depend upon the minimum contacts test. Thus, even under the Pennoyer framework of jurisdiction, procedural due process may have properly required notice calculated to reach the defendant, not notice that was a “mere gesture.”

\footnote{321} See Hess, 274 U.S. at 356. The Court stated:

In the public interest the State may make and enforce regulations reasonably
Consent, however, was just a myth. In a later case involving the issue of implied consent to a waiver of objection to venue in federal court as a result of the use of state highways, the myth was rather bluntly denounced:

In point of fact, however, jurisdiction in these cases does not rest on consent at all. The liability rests on the inroad which the automobile has made on the decision of [Pennoyer v. Neff]. . . . The potentialities of damage by a motorist in a population as mobile as ours, are such that those whom he injures must have opportunities of redress against him . . . .

In a mobile society where people cross state lines frequently, the Pennoyer framework proved inadequate. States should have the power to adjudicate disputes over persons and property within their borders but sovereignty means something more. States, it was felt, should also have the power to regulate conduct as well as persons or property. Consent was not necessary for that right; it was only needed because of the Pennoyer framework.

Presence was another myth used to justify jurisdiction in cases where the Court correctly felt that a state ought to be able to exercise jurisdiction but technically could not due to a strict application of Pennoyer. Instead, the courts deemed a defendant to be present in the state due to some act or omission. Typically, corporate presence was used as a justification to exercise jurisdiction over a corporation who had done something wrong within a state but had not appointed an agent for service of process within that state. Again, courts were searching for a way to allow a state to calculated to promote care on the part of all, residents and non-residents alike, who use its highways. The measure in question operates to require a non-resident to answer for his conduct in the State where arise causes of action alleged against him, as well as to provide for a claimant a convenient method by which he may sue to enforce his rights.

Id. The Court plainly saw the valid regulatory interest of a state, but could not quite identify the jurisdictional principle that would allow the furtherance of that regulatory interest through a private lawsuit.

32 See Stein, supra note 7, at 696.
34 See Hazard, supra note 182, at 273.
35 See id.; von Mehren, supra note 7, at 299 ("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." (quoting Philadelphia & Reading Ry. v. McKibbin, 243 U.S. 264, 265 (1917))). Note that the results that this system encouraged were worse than if extraterritorial service of process had been allowed.
regulate conduct within its borders as well as persons and property therein.  

The evolution continued in International Shoe. In that case, the Court began to recognize that the regulatory interests of a sovereign state justified its exercise of personal jurisdiction over nonresidents served with process outside of the state, even though the Court did not say so explicitly. In an attempt to develop a test that would take a state’s regulatory interest into account yet prevent state courts from overreaching, the Court developed the minimum contacts test. Although fairness concerns began to creep into the jurisdictional calculus, the underlying theme of sovereign power remained.

As discussed above, International Shoe represents a significant step in the evolution of jurisdictional doctrine, not a revolution. This is because Pennoyer expresses a jurisdictional theory of sovereign power while the implementation of that theory constitutes a test based upon physical power. Physical power is a means to an end, not an end in itself. International Shoe continues to recognize sovereign power as a jurisdictional theory, while it expands upon the implementation of the theory begun in Pennoyer. Unfortunately, the minimum contacts test proves to be a difficult proxy for measuring the proper extent of sovereign power.

The minimum contacts test requires “sufficient contacts or ties with the state of the forum to make it reasonable and just, according to our traditional conception of fair play and substantial justice, to permit the state to enforce the obligations which appellant has incurred there.” On its face, this test says nothing about when a sovereign state should have jurisdiction over a controversy. In fact, the test does not say much at all—only that there must be enough contacts to make jurisdiction reasonable. The entire problem exists, however, because courts had not been able to define when jurisdiction truly was reasonable.

At least a portion of International Shoe acknowledges the regulatory need of a sovereign state to regulate conduct which affects persons or things within its jurisdictional boundaries. As the Court noted:

Finally, although the commission of some single or occasional acts of the corporate agent in a state sufficient to impose an obligation or liability on

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326 See Stein, supra note 7, at 696-97.

327 See id. at 697 (“The minimum contacts test, however, is not a jurisdictional justification. Minimum contacts only imply the existence of another justification.”).

the corporation has not been thought to confer upon the state authority to enforce it, other such acts, because of their nature and quality and the circumstances of their commission, may be deemed sufficient to render the corporation liable to suit.\footnote{329}

This acknowledgment is based upon a recognition of the need for states to regulate conduct.\footnote{330} However, it does not go far enough. Notice that the power of a state does not extend to all causes of action that arose due to “single or occasional acts” of a corporate agent in the state, but only to those that are “sufficient to render the corporation liable to suit” because of their nature, quality, and circumstances. This statement is somewhat circular—jurisdiction is reasonable when the circumstances make it reasonable to exercise jurisdiction.\footnote{331} Still, by acknowledging the potential for jurisdiction based upon conduct, rather than on consent or presence, the Court had at least been true to the sovereign theory of jurisdiction underlying Pennoyer.\footnote{332}

Following International Shoe, the Court continued to rely, at least in part, on the regulatory authority of a state as the basis for a valid exercise of personal jurisdiction. The evolution is exemplified, perhaps, by Helicopteros Nacionales de Colombia, S.A. v. Hall.\footnote{333} In that case, the Court explicitly recognized a distinction between specific and general jurisdiction.\footnote{334} Specific jurisdiction is based upon contacts with the state that implicate the state’s regulatory interest—those contacts that relate to the cause of action directly.\footnote{335} General jurisdiction depends upon contacts so extensive that a party can be deemed to be present within the state.\footnote{336} Thus, general jurisdiction carries forward the Pennoyer concept of presence and acknowledges a sovereign interest in regulating that party based upon that presence. Specific jurisdiction, however, is dependent on sovereign power to regulate conduct. To the extent that the Supreme Court apparently recognizes specific jurisdiction as a separate category of cases, the Court

\begin{footnotes}
\footnoteref{329} Id. at 318.
\footnoteref{330} See Stein, supra note 7, at 698-99.
\footnoteref{331} See id. at 699 (arguing that the Court failed to articulate the boundaries of extraterritorial service). This language is also similar to the language basing jurisdiction on where a defendant can reasonably expect to be haled into court. This justification for jurisdiction has also been criticized as circular. See id. at 701.
\footnoteref{332} See id. at 698-99.
\footnoteref{334} See id. at 414 nn.8 & 9.
\footnoteref{335} See id. at 414 n.8.
\footnoteref{336} See id. at 414 & n.9.
\end{footnotes}
is recognizing that the sovereign power to regulate conduct within a state’s borders alone may justify jurisdiction. This basis for jurisdiction does not depend on any mythical presence.

Since *Pennoyer*, the Supreme Court’s approach to jurisdiction has evolved from a sovereign power over people and property to a sovereign power based upon people, property, and conduct. This evolution has rightfully extended state jurisdictional power to address disputes that the state could not otherwise address. Unfortunately, as described above, notions of purposeful availment and fairness have entered the jurisdictional equation and have even started to dominate it. Future improvement of jurisdictional theory should focus on identifying those cases where a state has the sovereign right to regulate the conduct or transaction that is at issue in the dispute.

VII. PERSONAL JURISDICTION INVOLVING THE INTERNET AND OTHER MULTIUSER COMPUTER ENVIRONMENTS

The stage is now set for the next step in the evolution of personal jurisdiction doctrine. The constraints of purposeful availment and inconvenience (a.k.a. fairness) should now be removed from the jurisdictional calculus. The minimum contacts test should be expanded to recognize personal jurisdiction in cases where events upon which the defendant’s liability depends involve conduct which occurs at least partially within the forum state or which proximately causes effects there. This Part applies the proposed rules to several different factual scenarios that either are, or are likely to be, common and are likely to generate litigation. This Part next responds to concerns of some commentators that expansive jurisdictional rules will affect Internet usage.

A. Application of Proposed Rules

Application of the above jurisdictional rules, like the application of any set of jurisdictional rules, will be straightforward in some cases and more complicated in others. Here, the above jurisdictional principles will be analyzed in the context of several types of torts which either have occurred or are likely to occur in the context of data communications. Some scenarios present easy cases, while others present more difficult issues. When analyzing various types of torts, the difference between the proposed jurisdictional rules and the existing jurisdictional rules is best illustrated in

337 *See* Stein, *supra* note 7, at 703.
the context of prior personal jurisdiction cases involving data communications.

Targeted data communications, such as e-mail, present fairly straightforward jurisdictional questions. "Targeted" refers to the fact that an electronic mail message is directed at someone. That "someone" might be personally unknown to the sender of the e-mail message, but e-mail messages are targeted at a person having a particular address. Certainly, it is possible to target many persons simultaneously with a single e-mail message. An example is the weekly Net SAAver e-mail that American Airlines sends to subscribers to alert them to weekly airfare specials. American Airlines does not send these messages by typing the e-mail address of each recipient every week; that would be impractical. Instead, American maintains an electronic mailing list of recipients and sends the e-mail to all of them. Yet, each of these e-mail messages can still be said to be targeted at a specific person—they are specifically targeted at each person on the list, rather than broadcast by some other method to the public at large.

Certain torts involving e-mail messages are most likely to cause harm to the recipient of the message. In other words, the recipient is the likely plaintiff in a cause of action arising out of the e-mail message. The content of the communication may create the cause of action. For example, such content may cause the recipient emotional distress. An e-mail message to a child might have pornographic or violent pictures attached, causing emotional distress. Similarly, an e-mail message may create a cause of action because its content amounts to sexual harassment or racial hate speech. Each of these causes of action depends upon some emotional or psychological effect on the recipient of the message.

These are easy cases—both the state from which the e-mail originated and the state in which the e-mail was read may properly assert jurisdiction. The origination of such an e-mail message amounts to an act comprising a part of the conduct on which the sender’s liability depends. The state in which that conduct occurs may rightfully regulate that conduct as a portion of the tortious conduct occurred within the state. Similarly, receiving and

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338 See infra notes 421-29 and accompanying text for a discussion of electronic mail.
340 One signs up for this service using American Airline's Web page. See id. at Specials: Net SAAver.
341 See supra Part III.
reading such an e-mail message also constitutes an event upon which the sender’s liability depends. Unless the message is read, no cause of action arises. Thus, the reception and the reading of the message is equally as important an event as the writing and sending of the message. Similarly, the reading of the message must cause some emotional or psychological harm to the message recipient for a cause of action to arise. Again, the emotional or psychological harm amounts to a proximate effect of the message in the state where the message is received and read. Because some of the events upon which the defendant’s liability depends occur in the states from which the e-mail was sent and in which the e-mail was received and read, these states may exercise personal jurisdiction over the sender of the e-mail message.  

E-mail communications may also lead to other torts where the injured party is the recipient of the message, but the harm is not caused simply by reading the message. Other acts may need to take place after the message has been read before a cause of action accrues. Common law fraud as well as Securities and Exchange Commission Rule 10b-5 fraud fall into this category. For either type of fraud to occur, there must be some type of communication, followed by an action by the recipient of the communication in reliance upon the substance of the fraudulent communication. Of course, a communication must be sent as well. The above analysis regarding torts involving emotional and psychological harm would similarly apply to fraudulent torts. For liability to attach, a fraudulent communication must first be made. The state from which the communication originated would thus have personal jurisdiction over the sender of the message because the sending of the fraudulent message is one event necessary to establish the liability of the sender. In addition, the state in which the communication is received would also have personal jurisdiction over the sender of the message because the reading of the message by the recipient is also an event necessary to establish the liability of the sender. Additionally, a third state may also exercise personal jurisdiction. If the recipient of the message acts in reliance upon the fraud in some third state, that state also has personal jurisdiction over the defendant because conduct based on reliance is a necessary event upon which either the recipient’s or the sender’s liability depends.

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342 See supra Part III.
One reported case found personal jurisdiction, in part, based upon e-mail messages containing fraudulent information about a corporation that led to a purchase of the corporation’s stock. In *Cody v. Ward*, the defendant, a California resident, posted allegedly fraudulent information about a Louisiana corporation on Compuserve. In addition, the defendant called the plaintiff and sent the plaintiff e-mail messages that were allegedly fraudulent. The court held that the telephone calls and e-mail messages were sufficient to establish personal jurisdiction but expressly declined to address the significance of the Compuserve messages. In applying the purposeful availment test, the court held that the defendant could reasonably expect to be sued in Connecticut based upon these contacts. Although the case was an easy one due to the defendant’s knowledge of the plaintiff’s residence, one could read the case broadly as construing the sending of e-mail messages as purposeful availment.

In some cases involving other torts arising out of e-mail messages, the plaintiff will be a third party rather than the recipient of the message. Normally, such torts will involve a trespass by the sender of the message on some intangible interest of the third party. An e-mail message could contain libelous statements which cause harm to a third party’s intangible reputation in the state where the libel is received. Similarly, an e-mail message could violate an intellectual property right of a third party. The message may include a trademark or trade dress confusingly similar to that of a third party. E-mail messages might also contain false statements about a product being advertised, giving a competitor a cause of action for unfair competition. A celebrity might find his name or likeness being used without permission in an e-mail containing advertising, violating the celebrity’s right of publicity. Suits might also arise for misappropriation of trade secrets where an e-mail message contains trade secrets owned by a third party.

Although these cases are arguably different from the cases where the e-mail message injures the recipient rather than a third party, they should actually be treated similarly. The state from which the message was sent may exercise personal jurisdiction over the data communication because the act of sending the message comprises one of the events upon which the

346 See id. at 44-45.
347 See id. at 45-46.
348 A trade dress is “the total appearance and image of a product,” which includes size, texture, shape, etc. See *BLACK’S LAW DICTIONARY* 1493 (6th ed. 1990).
defendant's liability depends.\textsuperscript{349} Similarly, the state in which the message was read may exercise personal jurisdiction because the harm to the third party occurs where the message is read.\textsuperscript{350} The reading of the message is another event on which the defendant's liability depends and it is the reading of the message that causes harm to the third party. For example, the trend in intellectual property cases is to recognize harm to an intangible interest of the third party in the state where either an infringing trademark is used, a product infringing a copyright is distributed, or a patented product is sold without authorization.\textsuperscript{351} Harm occurs in such states because that is where trespass on the third party's intangible property interest occurs. Similar reasoning applies in libel cases—a person has an intangible reputational interest everywhere and that interest is infringed only in those locations where the libel is published. Thus, the state of reception of a data communication that infringes an intangible interest of a third party may exercise personal jurisdiction over the sender of that data communication, while in some limited circumstances the state of the third party's residence may not. If the communication is not read in the state of the third party's residence, no event on which the defendant's liability depends occurs there, and that state has no regulatory power to exercise over the data communication.\textsuperscript{352}

Each of the above scenarios represents a straightforward application of the jurisdictional rules proposed above for data communications. Both the state of origination and the state of receipt of the e-mail may exercise jurisdiction. This result does not depend upon any particular knowledge of the defendant. The defendant need not know who will receive the e-mail message or, more importantly, in what state the recipient of the e-mail resides. Persons may maintain an anonymous or pseudonymous existence on the Internet.\textsuperscript{353} The potential anonymity of the recipient of the message

\textsuperscript{349} See supra Part III.

\textsuperscript{350} See Tom Hentoff, Note, Speech, Harm and Self-Government: Understanding the Ambit of the Clear and Present Danger Test, 91 COLUM. L. REV. 1453, 1474 (1991) (arguing that damage to defamed person is only caused after libel is read) (citing Hustler Magazine Co. v. Falwell, 485 U.S. 46 (1988)).


\textsuperscript{352} Some courts have chosen to exercise jurisdiction because a libel caused economic harm to a resident of the forum. The reasoning of these cases is flawed. See supra note 24.

\textsuperscript{353} See supra note 160 and accompanying text.
is irrelevant to the issue of jurisdiction. A state does not lose regulatory power merely because the defendant directs a tortious communication at an anonymous recipient. In most cases, the conduct will be equally culpable regardless of knowledge of the recipient's identity.

Under existing precedent, the defendant's knowledge might affect the issue of personal jurisdiction. For example, a defendant can make a strong argument that he or she did not purposefully avail himself or herself of the protection of a state's laws where the defendant does not know who the recipient of its communication is or where that recipient resides. Although plaintiffs may legitimately take an opposite position, the inquiry is difficult under the existing personal jurisdiction rules and would likely lead to inconsistent outcomes. When fairness considerations are injected into the mix, the potential for conflicting results increases substantially. Existing jurisdictional principles, then, do not adequately address easy cases under the proposed jurisdictional rules. Additionally, existing rules may be even more clumsy in more difficult cases.

A slightly more difficult case would involve an e-mail message that contains a virus capable of destroying certain information on any computer with which it comes in contact and which is capable of being easily spread to other computers. As to the recipient of the message, the analysis is identical to the torts cases above—both the state from which the e-mail was sent and the state in which it was received may exercise jurisdiction. A more difficult question arises when, unbeknownst to the original recipient of the message, the virus spreads to other computers connected to the Internet or connected to the original recipient's computer. Based upon the proposed jurisdictional rules, any state where the virus destroys information could exercise jurisdiction over the creator of the virus. Because the destruction of the information, no matter where it occurs, is an event upon which the virus sender's liability depends and is a proximate effect of the original data communication, the state in which the destruction occurs may exercise personal jurisdiction over the defendant. In other words, this problem should be treated as if the virus creator sent the virus to every person whose information is destroyed by the virus. A virus creator should not be able to escape jurisdiction in states to which the virus was spread automatically. By setting up the virus so that it would be spread automatically, the virus creator proximately causes damage wherever the virus destroys information. Again, existing jurisdictional rules would not resolve the issue so easily because a serious question would arise regarding purposeful availment by the virus creator.

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354 See supra Part III.
Some instances of computer break-ins should be treated similarly to the virus hypothetical. Here, the term "computer break-in" refers to unauthorized access to a computer system. A computer trespasser may use the Telnet service\textsuperscript{355} over the Internet to perform a computer break-in. Because a computer connected to the Internet by a Telnet server may also be connected to an internal network of computers owned by a single party, the computer trespasser might be able to use his entry into the internal network using the Telnet server to break into other computers on the internal network. All of these computers on the internal network could be located in separate states. If the computer trespasser releases a virus that destroys data and that virus spreads to computers on the internal network in separate states, then the result is identical to the virus hypothetical—the state from which the computer trespasser sent the communication and the states where the virus destroys data may all exercise personal jurisdiction over the trespasser. Again, the trespasser's knowledge of where the computers receiving the virus are located is irrelevant.

The same results are obtained where the computer trespasser deletes data either on the computer running the Telnet server (the accessed computer) or on a computer connected to the accessed computer. In such circumstances, the accessed computer may make it appear to the trespasser that certain data is stored on the accessed computer, when in fact it is stored on a computer in another state that is connected to the accessed computer through the internal network. If the computer trespasser issues a command to delete a file stored on another computer (the remote computer), then the accessed computer would likely process that command and route it to the appropriate remote computer. Existing jurisdictional rules make this a difficult problem as the computer trespasser may not know the state in which the accessed computer is located, may not know where the remote computer is located, and has sent a data communication only to the accessed computer. Purposeful availment becomes a difficult inquiry in light of these possibilities. One could view the routing of the command by the accessed computer to the remote computer as a unilateral act of the owner of the accessed computer, similar to driving a car to Oklahoma from New York.\textsuperscript{356} Under the proposed jurisdictional rules, however, the question is not difficult. The deletion of data on the remote computer proximately results from a data communication initiated by the user and is

\textsuperscript{355} See infra notes 440-45 and accompanying text for a discussion of the Telnet service.

an act upon which the computer trespasser’s liability depends. Thus, the state in which the data was deleted may properly exercise jurisdiction over the computer trespasser.

The above examples involving electronic mail illustrate torts that might occur due to communications involving push technology.\(^{357}\) Thus, a communication received from a push service could lead to a cause of action for emotional distress, fraud, racial hatred, sexual harassment, libel, trademark infringement, right of publicity infringement, copyright infringement, trade secret misappropriation, or any other tort that may arise out of a communication. If a push communication contains a virus, then tort causes of action relating to damage caused by the virus might also arise from such a communication. The above-stated analysis applicable to viruses spreading from an e-mail message is equally applicable to torts arising from push communications. Like viruses, push communications may proximately cause effects on which the sender’s liability depends in many different states. Each of these states has a right to regulate data communications causing such effects. This result is also consistent with the treatment of the jurisdictional question relating to users of electronic mass-mailing lists—such as the example set out above for airline ticket specials.\(^{358}\) In both examples, one who sends a communication to numerous locations is subject to jurisdiction in all locations where the communication proximately causes harm upon which the sender’s liability depends.

The analysis in the previous paragraph was primarily concerned with untargeted push technology—that is, push communications not targeted at specific people. Some push technologies require subscriptions, making the communications targeted and most analogous to e-mail distributed using an electronic mass-mailing list.\(^{359}\) In the future, push communications will be more like television—the push messages are broadcast using particular push “channels” and anyone will be able to tune in.\(^{360}\) Usenet services provide another form of untargeted electronic communications.\(^{361}\) True, the content of the message contained in a Usenet posting may be targeted at a particular person or an anonymous person. Such messages, however, are not sent to particular people. Instead, they are posted on Usenet servers throughout the Internet for anyone to read who has access to Usenet

\(^{357}\) For a discussion of push technology, see infra notes 490-95 and accompanying text.

\(^{358}\) See supra notes 338-40 and accompanying text.

\(^{359}\) See supra notes 338-40 and accompanying text.

\(^{360}\) See infra notes 490-95 and accompanying text.

\(^{361}\) For a discussion of Usenet, see infra notes 430-39 and accompanying text.
services. Usenet services should be treated like untargeted push technologies. Accessing a Usenet server is very similar to selecting a particular push channel. In both cases, the user’s computer will send messages to servers to retrieve the available information and that information will be sent to the user’s computer. In both cases, the sender of a communication broadcasts the communication to various points on the Internet. Senders of Usenet messages causing torts should thus be subject to jurisdiction in the state from which the communication was sent and the state in which the communication causes damage.

The difficulty in the application of the minimum contacts test to World Wide Web data communications was discussed above in Part II. In contrast to the uncertainty and difficulty in applying existing jurisdictional rules to World Wide Web sites, the proposed jurisdictional rules provide a straightforward jurisdictional analysis in such cases. When an accessor “visits” a Web page, the Web server sends a copy of that Web page to the accessor’s Web browser. Thus, the Web server sends a data communication to the accessor’s Web browser. If the contents of that data communication (the Web page) cause tortious injury when read, then the owner of the Web server is subject to jurisdiction in the state where that data communication causes damage. A state where the contents of a Web page proximately cause damage may exercise personal jurisdiction over the owner of the Web page no matter whether the recipient or a third party is injured by the communication. The reasoning relevant to third-party injury in the context of e-mail is equally applicable here. Similarly, the analysis above regarding viruses attached to e-mail messages applies equally to rogue applets attached to Web pages. Where an applet attached to a Web page proximately causes tortious effects in states other than that in which it was originally received, the Web page owner is subject to personal jurisdiction in those states.

Notice that the proposed jurisdictional rules focus on the conduct which a state may legitimately regulate, regardless of the relationship of the defendant with the state or his intent to purposefully establish a relationship with that state. The wisdom of this rule becomes apparent when one considers the potential evolution of the Internet. Computers on the Internet

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362 Compare infra note 434 and accompanying text with infra notes 490-91 and accompanying text.
363 See infra note 453 and accompanying text.
364 See supra Part III.
365 See supra notes 338-54 and accompanying text.
366 For a discussion of applets, see infra notes 460-68 and accompanying text.
communicate with one another using numerical Transmission Control Protocol/Internetworking Protocol ("TCP/IP") addresses. Although having no geographical significance now, these addresses, like telephone numbers, could be altered to carry geographical significance. If this evolution takes place, Web site operators could control, to a certain extent, the geographical regions from which their Web sites are accessed. Those viewing personal jurisdiction questions involving Web sites from the perspective of purposeful availment may find personal jurisdiction appropriate because the Web site owner can geographically restrict the distribution of its Web page. Thus, control over geographical distribution might be outcome determinative under existing jurisdictional rules.

The result under the proposed rules is unchanged—personal jurisdiction over a Web page operator is appropriate wherever the Web page proximately causes tortious injury, even if the Internet does not provide an adequate mechanism for restricting geographical access. Suppose that a child in Texas accesses the Barney Web Page, thinking that this Web page is for Barney the dinosaur. The child clicks on a box that says "View Barney," thinking that she is going to see a picture of Barney. Instead, a man named Barney engaged in a sexual act appears on the screen, causing the child severe emotional distress and an aversion to Barney. Whether the Internet allows a Web page owner to geographically restrict access to its Web page or not, the child still suffers emotional damage. Texas does not suddenly become more interested in preventing such acts merely because the Web site operator could have chosen to prevent residents from Texas from accessing its Web page. Texas should be able to regulate such conduct proximately causing harm to its residents. The Web site operator's

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367 See supra notes 412-13 and accompanying text.

368 Total control may not be possible unless Telnet is altered. Suppose that the Internet is changed such that TCP/IP addresses indicate the geographical location of one attempting to access a Web page. The Web page operator might allow access only to residents of Maine. However, an Internet user in Texas with access privileges on a computer connected to the Internet located in Maine could use Telnet to log into the Maine computer and then access the Web page. Telnet would make it appear to the Web server that the accessor was from Maine. If Internet addressing were altered to include the TCP/IP address of the point at which a communication originated (the Texas computer), as well as the computer to which an answer to the communication should be sent (the Maine computer accessed through Telnet), then Web pages could base access on one or both of these addresses.

369 This situation would be truly hypothetical to some adults as they already have an aversion to Barney.
liability in no way depends upon its ability to control geographical access to its Web site. Similarly, such ability should have no bearing on a state’s power of personal jurisdiction.

B. The Sky Will Not Fall Under the Proposed Rules

Several commentators would adopt narrow jurisdictional rules in cases involving data communications, particularly in the context of Web sites, because of the fear that more expansive jurisdictional rules would interfere with legitimate uses of the Internet. These commentators contend that one of the Internet’s strengths is the ability of average citizens to participate at low cost. If jurisdictional rules are expansive, then citizens will be deterred from participating and only those with deeper pockets will establish Web sites. Average users cannot afford the cost of defending multiple suits in multiple jurisdictions. Further, these commentators lament that the average user cannot afford the cost of complying with the regulatory requirements of every jurisdiction. Critics also state that subjecting corporations to jurisdiction in all fifty states simply by posting a Web page on the Internet is viewed as somehow unfair. Although these arguments are appealing on their surface, they fail to withstand more careful scrutiny.

The first argument is that low cost participation is an advantage of the Internet and expansive jurisdictional rules would raise the cost of Internet participation such that only those with deep pockets would establish Web pages. This argument has several flaws. It makes a value judgment that

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370 See, e.g., Burk, supra note 5, ¶ 46, 60 (arguing that Web site passwords established through telephone or mail communications would harm advantages of the Internet’s automation and that expansive jurisdictional rules would drive away users without deep pockets); see also Ackerman, supra note 5, at 422-23 (arguing that expansive jurisdictional rules present “frightening” prospects for the future of business conducted on the World Wide Web).

371 See Burk, supra note 5, ¶ 60.

372 See Hearst Corp. v. Goldberger, No. 96 Civ. 3620, 1997 WL 97097, at *20 (S.D.N.Y. Feb. 26, 1997) (noting that a finding of jurisdiction based upon operation of a Web site would have a “devastating impact” on the users of the World Wide Web); Burk, supra note 5, ¶ 60; Kalow, supra note 5, at 2253; see also Ackerman, supra note 5, at 422-23 (noting that the growth of the Internet may be impeded by jurisdictional rules).

373 See Burk, supra note 5, ¶ 60.

374 See Ackerman, supra note 5, at 425 (noting that 50-state jurisdiction resulting from posting of a Web page is seemingly unfair).
more participation on the Internet is better, particularly participation by those that do not have deep pockets. One can certainly take the opposite view—that the Internet drowns users with so much information that encouraging creation of more Web sites is bad. Searching for a particular location on the Internet can be cumbersome because thousands of Web sites may have words falling within the scope of a search. Excessive generation of Web sites makes searching for information inefficient because a user may have to visit more Web sites to find what he or she is looking for or review a long list of potential Web sites containing the information the user seeks. Moreover, those with deeper pockets, as a general rule, may be more likely to create Web sites appealing to a broad segment of the public.\footnote{A user searching for Web sites about Elvis Presley probably does not care to waste time (and potentially money) visiting a Web site run by the Penobscott family which contains family photos, including one of their dog, Elvis Presley.} In addition, the low cost participation argument makes a value judgment that having more Web pages is more important than punishing Web page operators for wrongdoing. Presumably, lessening the number of places where a lawsuit can be filed will marginally reduce the number of lawsuits filed, some of which would be meritorious. When parties do not enforce their rights, the deterrent value of laws is reduced, encouraging further wrongdoing.\footnote{Courts deciding jurisdictional issues should not make such value judgments. If expansive personal jurisdiction truly has negative effects on the World Wide Web, Congress could choose to restrict jurisdictional rules or liability rules.} In addition, the low cost participation argument makes a value judgment that having more Web pages is more important than punishing Web page operators for wrongdoing. Presumably, lessening the number of places where a lawsuit can be filed will marginally reduce the number of lawsuits filed, some of which would be meritorious. When parties do not enforce their rights, the deterrent value of laws is reduced, encouraging further wrongdoing.\footnote{Courts deciding jurisdictional issues should not make such value judgments. If expansive personal jurisdiction truly has negative effects on the World Wide Web, Congress could choose to restrict jurisdictional rules or liability rules.} The jurisdictional rules proposed by this Article are neutral in two ways. First, they make no judgment as to whether having a certain number of World Wide Web pages is good or bad. Instead, these jurisdictional rules

\footnote{But see GERARD VAN DER LEUN & THOMAS MANDEL, RULES OF THE NET: ON-LINE OPERATING INSTRUCTIONS FOR HUMAN BEINGS 149 (1996) (noting that some corporate entities, presumably eager to get into the Internet game, “spawn info junk that jams Web sites and fritters away hours of a user’s day promising but failing to deliver high impact information”). One would have a difficult time empirically determining whether Web sites controlled by large or small entities are the most valuable.} This example is purely hypothetical.\footnote{See Joel Selig, The Reagan Justice Department and Civil Rights: What Went Wrong, 1985 U. ILL. L. REV. 785; Charles Yablon, The Good, the Bad, and the Frivolous Case: An Essay on Probability and Rule 11, 44 U.C.L.A. L. REV. 65 (1996); Eric Gouvin, Note, Drunk Driving and the Alcoholic Offender: A New Approach to an Old Problem, 12 AM. J.L. & MED. 99 (1986).}
depend upon the neutral principle of territorial sovereignty. Courts should not make jurisdictional rules based upon their value judgments as to the effect that their exercise of jurisdiction will have on the conduct of others. Second, these rules do not attempt to balance the importance of the regulation at issue against some threat of reduced Internet usage or inconvenience to the defendant. Courts should respect established laws and not attempt to determine which ones are most important. Likewise, courts should not determine jurisdictional rules by speculating as to the potential implications of an exercise of jurisdiction.

Next, one might question the fears that those of lesser means will avoid setting up Web pages due to expansive jurisdictional rules. Certainly, potential liability may deter people from undertaking otherwise useful activities. Theoretically, at least, the expansion of jurisdictional rules should not affect the liability of the Web site operator. Because liability for damages is likely to be a significant deterrent to certain conduct, liability rules may arguably be the most important determinant of the number of Web site operators. The location where liability is determined is arguably less important. A Web site operator can hire a lawyer where a suit is filed to defend the lawsuit. Although the lawyer and client may have to travel for certain meetings, these travel expenses are likely to be insignificant compared to the cost of legal fees and other litigation expenses.\(^{378}\) The greatest amount of travel expense arises when a case reaches trial, but only a small number of lawsuits ever reach that stage.\(^{379}\) Lawsuits are expensive to defend wherever they are brought and an out-of-state venue may or may not add significantly to that cost.\(^{380}\) While some courts have established expansive jurisdictional rules and others have aggressively sought to regulate the Internet,\(^{381}\) no empirical evidence exists to support the contention that expansive jurisdictional rules will chill Internet participation.

Also, if jurisdictional rules do affect behavior, one might contend that expansive jurisdictional rules perform a useful deterrent role. If a Web page

\(^{378}\) See Cody v. Ward, 954 F. Supp. 43, 47 n.9 (D. Conn. 1997) (noting that litigating out-of-state is not so burdensome because of features such as fax machines, telephone conferences, and overnight mail).

\(^{379}\) See id. (noting also that litigating out-of-state is not so burdensome as most cases do not go to trial).

\(^{380}\) Similarly, a Web page operator sued by multiple parties in multiple suits is more likely to be deterred from operating the Web page in the future by legal fees and the cost of liability, rather than by the location of those suits.

\(^{381}\) See Burk, supra note 5, \(\text{¶} 3-4.\)
operator truly desires to avoid being sued in different states, the operator will likely operate the Web page in a conservative manner, seeking to avoid any type of lawsuit. More aggressive Web page operators that skate closer to the line defining liability face greater risks of litigation. Because deterrence increases when laws are enforced, making such enforcement easier may serve a valuable deterrent function, leading to more responsible use of the World Wide Web, rather than merely less total use.

Commentators in favor of restrictive jurisdictional rules point to the inexpensive nature of Internet communications. Deterrence concerns are heightened precisely because of the inexpensive nature of Internet communications. The Internet allows several advantages in communication. It allows inexpensive communication to people over long distances, as well as communication to many people simultaneously. Finally, the full-text searching capabilities allow Internet users to easily locate a party having some sought-after knowledge, thus reducing the costs of obtaining information. Inexpensive communications media have disadvantages as well. One seeking to harm others with one's communications can do so inexpensively, from a long distance away, and with an effect on many different parties. Where a tool can be used for significant good and significant evil, the potential for evil suggests that jurisdictional rules which create additional deterrence are desirable.

A second argument advanced by commentators against liberal jurisdictional rules is that average Web page operators cannot afford the cost of complying with the regulatory rules in all fifty states. Again, no empirical evidence suggests that this is the case. Parties often have to take actions that satisfy the strictest laws of a plurality of states. For example, states may have varying standards as to the degree of warning required for certain products. Because manufacturers do not want to create separate documentation for all states, they might create one set of documentation complying with the strictest law. One often purchases soft drink cans containing deposit information for a different state. By putting deposit information for those states that require deposits on all cans, a soft drink bottler may avoid the costs both of making a number of different cans and of supply distribution problems caused by those different cans. If certain laws prove to be particularly problematic in interfering with Internet transactions, then these laws may be scrutinized under substantive

382 See id. ¶ 60.
383 See supra note 1 and accompanying text.
384 See supra note 2 and accompanying text.
385 See supra notes 371-74 and accompanying text.
doctrines, such as the dormant commerce clause, that may affect their validity. Congress could also choose to preempt those state regulations that were particularly problematic. The deterrence rationale discussed above has application here as well—if jurisdictional rules encourage Web site operators to avoid engaging in conduct close to the line of illegality, then jurisdictional rules may promote a desirable level of behavior.

Turning to the third argument—that jurisdiction in all fifty states is simply unfair—one cannot ignore the implicit rejection of a theory of jurisdiction based upon sovereign power in such an argument. Some causes of action arising out of communications with Web pages will involve federal causes of action such as patent infringement, trademark infringement, or copyright infringement. Where federal rights are involved, commentators have argued that a national contacts approach is appropriate, reasoning that personal jurisdiction is based upon territorial sovereignty and violations of federal law implicate the regulatory authority of the United States. Assuming that Congress provided for such jurisdiction, as they have in several contexts, those who argue that jurisdiction in all fifty states is unfair necessarily reject a national contacts theory. Because the national contacts theory is consistent with this Article’s contention that personal jurisdiction is properly based upon territorial sovereignty, jurisdiction in all fifty states resulting from the operation of a Web page may well be fair. In addition, fairness has no place in an analysis of personal jurisdiction. A defendant that causes harm in all fifty states should be made to answer for that harm in all fifty states.

VIII. CONCLUSION

The Internet and other arenas for data communications present many new challenges from a legal standpoint. Defining the limits of personal jurisdiction is one important challenge. This Article has proposed some general rules to guide courts in deciding issues of personal jurisdiction. Although these rules do not mesh with the modern manifestations of the minimum contacts rule, the proposed rules are consistent with the minimum contacts approach at a more abstract level. Both the minimum

388 See supra notes 170-79 and accompanying text.
contacts test and the proposed rules implicate considerations of territorial sovereignty. In a future case, the Supreme Court will hopefully delineate a guiding principle underlying the rules of personal jurisdiction. Future cases presenting new difficulties like those presented by data communications will arise some day, and courts will once again face the prospect of attempting to apply rules that somehow do not seem to fit the situation. When such cases are encountered, a consideration of guiding principles should steer courts to decide cases correctly and consistently. Those are the goals that the proposed rules seek to further.

IX. APPENDIX—
THE INTERNET AND OTHER MULTIUSER COMPUTER SYSTEMS

This Article has proposed jurisdictional rules for disputes involving data communications. Because of their potential importance to the resolution of jurisdictional issues, this Appendix briefly summarizes some technical details of popular types of data communications. In spite of the popularity of the Internet, computer bulletin boards are still widely used and are discussed first. Next, this Appendix explains the nature of computer communications using the Internet, beginning with a general discussion of Internet operation. Although many people are aware of electronic mail and the World Wide Web, the Internet offers other services that may spawn litigation. Thus, the Internet discussion also addresses Internet service providers, Usenet services, and Telnet services.

A. Bulletin Boards

Although not used as widely as the Internet, computer bulletin boards are still prevalent. A computer bulletin board typically is comprised of a computer operated by an individual or an organization. One or more modems connect to the computer, which is set up to receive dial-up communications from users of the bulletin board. Some bulletin boards charge subscription fees and require password access, while others operate

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389 See Byassee, supra note 4, at 200 n.13.
390 A modem (short for modulator/demodulator) electronically prepares digital information for transmission over a communications medium, such as a telephone line. The modem also receives a signal over a communications medium which can be converted to digital data. See DON MACLEOD, THE INTERNET GUIDE FOR THE LEGAL RESEARCHER 1:4 (2d ed. 1997).
free of charge. Bulletin boards may be general in nature or may be targeted towards a particular common interest of their users.

When a user desires to access a bulletin board, she contacts the bulletin board using her computer, often over regular telephone lines with a modem connected to the computer. Normally, the bulletin board will then prompt the user for some type of information to identify the user, even if the bulletin board provides free access. Bulletin boards commonly provide a series of menus that allow the user to navigate through their various features. During this navigation, the bulletin board sends data, including perhaps text, pictures, and sound, to the user's computer. The user's computer acts as if the user had gone to the physical location of the bulletin board computer, sat down, and begun using the bulletin board computer itself.

Bulletin boards provide many different types of services. Some allow users to engage in conversation about a variety of topics. Thus, bulletin boards may include a newsgroup-like service where users can make comments about various subjects and read the comments of other users. Another common service available on bulletin boards is an upload/download capability. Users are often allowed to upload software, pictures, graphics, sound recordings, electronic documents, or any other type of content to share with other users. Similarly, bulletin board users may often download such content, either in exchange for content of their own or for a small fee. Because of this capability, bulletin boards have been a popular forum for copyright infringement. Bulletin boards may also provide a forum for users to play games against other users, either interactively while on-line or separately. Role-playing games may be played over a period of time. Bulletin boards may also provide features such as games or news information that may be used while connected to the bulletin board but may not be downloaded by the user.

B. The Internet

The Internet is a large computer network, more specifically, it is a network of many computer networks. Although the history of the Internet

391 See Byassee, supra note 4, at 200 n.13.
392 See id.
393 See id.
394 See id.
396 A computer network comprises computers connected to one another by communication links and operable to communicate with one another in a way that all computers understand so that the networked computers may exchange and share information. See JAVED MOSTAFA ET AL., THE EASY INTERNET HANDBOOK 2 (1994).
397 See Burk, supra note 5, ¶ 7; MOSTAFA ET AL., supra note 396, at 25.
is complicated, a very brief summary is appropriate because the Internet has only become widely known to the public at large within the past five to ten years. The U.S. Advanced Research Projects Agency ("ARPA") planted the seeds for the modern day Internet in the late 1960s. ARPA wanted to study how networks could be effectively used with computers and to create a way to allow scientists at dispersed geographic locations to work together. In late 1969, the Advanced Research Projects Agency Network of U.S. Department of Justice ("ARPAnet") was born. Computers at UCLA, Stanford University, UC Santa Barbara, and the University of Utah formed the first network. From these humble beginnings, the ARPAnet evolved and led eventually to the creation of the Internet. As the ARPAnet grew, a need developed for more sophisticated communications protocols. In 1983, the TCP/IP was adopted as the official communications protocol for the ARPAnet. The adoption of this protocol led to the development of the Internet because it allowed a common communication mechanism addressed to many services for communication among many different types of computers using various operating systems. Soon, computer networks in many different countries were interconnected to form the Internet. Computers connected to these networks communicated with one another using the TCP/IP protocol. Today, the Internet connects tens of millions of users, with a projection that the network will serve 100 million users by some time in 1998. The Internet's exponential growth in recent years has been triggered primarily by the advent of Windows-oriented applications to access various sites on the Internet. These hypertext-driven applications have allowed the Internet to evolve to offer easy access to graphics, pictures, video clips, sound, and stylized text.

The Internet is a distributed network, meaning that the shared information accessible on the network resides in multiple locations, rather than a single location. In addition, it means that data communications
traveling through the network do not follow any predefined path and do not have to travel through any centralized location. The computers on the Internet are connected in a hierarchical fashion. An individual using the Internet normally connects to a network or large mainframe computer, known as a “domain,” that is connected directly to the Internet. The domain, in turn, is connected to a mid-level regional network which connects a number of domains. Mid-level regional networks are connected to a backbone network, such as the NSFNET in the United States. Backbone networks are then connected to other backbone networks to support worldwide communications. As the level in the hierarchy gets higher, the computing power of computers increases as does the capacity and speed of the communications links.

The Internet is a packet-switched network. That means data to be communicated between two computers connected to the Internet is divided into smaller packets of information. The information to be transmitted is broken up into packets by the source computer and reassembled by the destination computer. Each packet contains the information to be communicated, a source address, and a destination address. Packets are like a letter—they contain two addresses and some information. However, Internet packets also contain additional information identifying the size of the packet and some other control information. The computers directly connected to the Internet are programmed to route the packets to their

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406 See id.
408 For a discussion of the structure of the Internet, see MOSTAFA ET AL., supra note 396, at 24-30.
409 A packet-switched network should be distinguished from a circuit-switched network. In a circuit-switched network, users communicate with one another by setting up a “circuit” or connection through the network which remains connected until the users have finished their communications. The telephone network is an example of a circuit-switched network. When a first person dials a phone number of a second person, the telephone network sets up a path through the network to allow communications between those two persons. When a suitable path has been established, the telephone of the second person rings. The circuit remains connected until one party hangs up the phone. Circuit-switching may make inefficient use of the communications circuit because that circuit may not be fully utilized while it is maintained. For a brief discussion of circuit-switching, see MOSTAFA ET AL., supra note 396, at 17, and Burk, supra note 5, ¶ 8.
410 See Burk, supra note 5, ¶ 8.
411 See MOSTAFA ET AL., supra note 396, at 18.
proper destination based upon the address and control information in the packets.

The source and destination addresses contained within the packets are unique identifiers of source and destination computers. These numerical identifiers are known as Internetworking Protocol ("IP") addresses. Unlike telephone numbers, however, the IP address for a specific computer provides no indication of the geographical location of the computer residing at the address. IP addresses contain two pieces of information, the IP network address and the local address. The IP network address refers to the address of a particular network connected to the Internet, whereas the local address refers to a specific location within that network. For example, the University of Wisconsin may have a single network connection to the Internet identified by its IP network address but the computer science department and psychology department may have their own department networks identified by a local address.

In practice, though, Internet users do not concern themselves with IP addresses. Instead, users identify computers using Internet domain addresses. The computer that creates the packets to send over the Internet uses software to look up the IP address associated with that domain name. A domain name, however, may be structured similarly to an IP address, containing a network portion and a local portion. The network portion is usually the name of the organization, while the local portion comprises the name of the network or computer within the organization. Referring to the example in the previous paragraph, the domain name for Professor Cooper’s computer on the psychology department network at the University of Wisconsin might be “Cooper.psych.UWis.edu.” The “edu” portion of the address identifies the University as an educational institution. Although some domain names contain geographic information, many do not. All of the Internet services discussed below use IP addresses and domain names for communications.

No authority directly regulates the Internet. Domain names are assigned by a central authority in each country on the Internet, but that authority does not otherwise regulate actions by the Internet’s users.

412 See DERN, supra note 398, at 69-70.
413 See id. at 69.
414 See supra note 16 and accompanying text.
415 See DERN, supra note 398, at 75-76.
416 See MOSTAFA ET AL., supra note 396, at 69.
417 See DERN, supra note 398, at 74-75.
418 See Burk, supra note 5, ¶ 10; Byassee, supra note 4, at 200-01.
Instead, the Internet operates by informal agreement among its users. The owners of those computers forming the Internet backbone agree to exchange all data transferred to them that satisfies various TCP/IP protocols.\textsuperscript{419} Each computer acts essentially on its own, receiving information from computers to which it is directly connected and sending information to those computers.

1. *Internet Service Providers*

Individuals desiring to access the Internet often do not set up their own domain. Instead, they subscribe to services provided by an Internet service provider such as America On-line, Prodigy, or Compuserve. These services maintain a network of computers that constitutes an Internet domain connected directly to the Internet. A user that subscribes to Internet service through one of these providers normally uses a modem to connect his computer to one of the computers in the Internet service provider's network. The Internet service provider then provides facilities to allow the user to access the Internet. In addition, the Internet service provider normally has facilities to allow its users to receive electronic mail from other Internet users. When a user logs onto the Internet service provider, the service provider's computers make the user's electronic mail available for viewing.

Internet service providers, such as those listed above, also provide other bulletin board-like services to their subscribers. These services may include software shopping services that allow users to purchase and download software, newsgroups where users can carry on discussions about a variety of topics, news services where news is provided on a variety of subjects, and "chat" services that allow users to talk to other users of the service in real time. Chatting involves carrying on a conversation with another user by typing the information to be communicated with the other user being able to quickly respond.\textsuperscript{420}

2. *E-mail*

Electronic mail is one of the most widely used Internet services.\textsuperscript{421} Like the label suggests, electronic mail is an electronic version of mail. Internet users can type a message and send it to anyone else connected to the

\textsuperscript{419} See Byassee, *supra* note 4, at 201.
\textsuperscript{420} See MACLEOD, *supra* note 390, at 2:41.
\textsuperscript{421} See DERN, *supra* note 398, at 129.
Internet, provided that the user knows the Internet address of the intended recipient of the message. In addition to messages, Internet users can attach pictures, graphics, video clips, data, sound, or entire computer software applications to an electronic mail message. In short, electronic mail provides a convenient means to communicate data of virtually any kind to another Internet user anywhere in the world in a matter of seconds or minutes. In addition, one can easily send electronic messages to many different individuals and can forward received messages to others.

The operation of electronic mail is straightforward. An electronic mail user application, such as Lotus CC:Mail, allows a user to create electronic mail messages to send to others as well as to read electronic mail messages received from others. This application is also known as an e-mail client application. E-mail clients often provide the ability to reply to received messages, forward them to someone else, and store them in an organized manner. In addition, an e-mail client may allow the user to attach files to an electronic mail message to be sent or retrieve and store attachments to received messages. The e-mail client application interacts with an e-mail server application, also known as a post office application. The post office application interacts with the Internet, sending e-mail messages out over the Internet and receiving e-mail messages from the Internet. Although an Internet domain that supports e-mail must necessarily have one post office, a domain can have many post office applications. Returning to the example above, the University of Wisconsin could have one electronic mail post office for the entire campus or one for each smaller network on the campus.

Electronic mail is low priority traffic on the Internet because the Internet presumes that the e-mail message need not be transported immediately. Like a regular letter, e-mail may be delayed depending upon the traffic on the Internet. Electronic mail is a store and forward technology. When a post office receives a message intended for another, it stores the message on disk and tries to send the message at some point. When the message is sent, the post office waits to receive an acknowledgment that the message has reached its destination. If no such acknowledgment is received, then the post office attempts to send the message again.

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422 See id. at 131-32.
423 See id. at 134. However, some applications use the terms “client” and “server” in the opposite sense. See id.
424 See id. at 134-35.
425 See id. at 136.
426 See id.
This feature comes in handy when someone unplugs the computer before a message is delivered. The confirmation function can be used to provide a notification to the sender of the message that the message was successfully delivered, analogous to a return receipt for a registered letter.

For users, such as salespersons, that travel from place to place frequently, various special features are available for electronic mail. One special feature is voice e-mail. Voice e-mail allows a user to call a specific number on the phone and "listen" to the user's electronic mail by way of a speech synthesizer that converts the text of an e-mail message into synthesized sound. Another special feature one can purchase is the ability to have e-mail messages sent to one's alphanumeric pager. Thus, one sending an e-mail message cannot assume that the recipient of the message will actually read that message where the recipient's computer is located.

3. Usenet

Usenet services have been referred to as the bulletin board of the Internet. Usenet provides a number of newsgroups organized topically to allow Internet users from all over the world to communicate on a variety of subjects. Internet users may access these newsgroups and make contributions to ongoing discussions about a topic or simply monitor the discussions. These newsgroups allow what amounts to worldwide roundtable discussions. Internet users may share information, discuss politics, and address questions about particular topics to other people interested and knowledgeable about those topics.

Usenet operates similarly to e-mail. Each posting to Usenet comprises an individual message like a textual e-mail message that may be read and shared by many users. In addition, these messages may contain graphics, pictures, sound, software applications, etc., that may be downloaded by

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427 See id. at 139.
428 See id.
429 This concept has particularly interesting consequences when trying to apply the purposeful availment rule to disputes involving Internet communications. See infra Part VII.A.
430 See DERN, supra note 398, at 195. "Usenet is fair, cocktail party, town meeting, notes of a secret cabal, chatter in the hallway at a conference, Friday night fish fry, conversations overheard on an airplane, and a bunch of other things." Id. at 197 (quoting Ed Vielmetti, Vice-President for Research at MSEN, an Internet service provider in Ann Arbor, Mich.).
431 See id. at 196-98.
432 See id. at 198.
others accessing Usenet. Unlike e-mail, however, Usenet does not automatically provide the user with a personal copy of each newsgroup message. Instead, many users retrieve the information from a Usenet server that acts like a bulletin board. Another difference is the life of the message. Normally, an e-mail message is not deleted until the user chooses to do so. Usenet messages, however, are automatically deleted by the server after they reach a certain age.

User interaction with Usenet, however, is similar to interactions involving e-mail. A user has a newsreader application that operates on his computer to allow both the reading of material posted to newsgroups as well as the creation of his own contribution to a newsgroup. Newsreader applications can provide a number of features to save the user time, such as keeping track of which news items the user has already read. To access Usenet, a user usually needs an account with an organization that maintains a Usenet server. Usenet servers are a bit complicated. When a user generates a contribution to a newsgroup, that contribution is sent to a Usenet server. That server then distributes that message to other Usenet sites throughout the world. Thus, copies of the newsgroups are stored in various locations around the world. In addition, the server receives copies of messages from other Usenet sites and stores them locally. A copy of each message theoretically is maintained on every Usenet site in the world.

4. Telnet

The Telnet service allows an Internet user to log into a computer or computer network connected to the Internet but located in a distant location. The user can then interact with that computer as if the user were actually present at the distant location. Originally, this Internet service was designed to allow scientists from all over the country to share access to supercomputers without having to be present at the location of the

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433 See id. at 199.
434 See id. at 202.
435 Some organizations, however, archive Usenet messages and make copies available for purchase. See id. at 204; Can Privacy be Protected in Cyberspace? Even Those Who've Never Been on the Net May Be at Risk; April Issue of Home PC Reveals How Privacy Is Compromised on the Net and Offers Consumers Tips on How to Protect Themselves, PR NEWSWIRE, Mar. 25, 1997.
437 See id. at 216-17.
438 See id. at 211.
439 See id. at 196-97.
Although resource sharing is still one purpose for remote login, other uses of this feature have become prevalent. For example, a salesperson traveling on business may desire to access the computer system back at the company facility. To do so, the salesperson could access the Internet wherever he or she is located and use a Telnet connection to the company computer system. Remote login through Telnet also allows Internet users to access on-line library card catalogs and databases. Certain weather information and other news is also available through remote login. Some companies even connect soda machines and candy machines to the Internet and use remote login to determine the current inventory of the machine.

Again, the traveling salesperson example will be used to illustrate the operation of the remote login service. The salesperson's computer will use a piece of software called a Telnet client. Of course, the computer must be connected to the Internet in some way. The user may request a Telnet connection to the company computer using the Internet domain name for that computer. The Telnet client handles all communications with the company computer. The company computer, on the other hand, has to have a Telnet server program available to support Telnet operation. For security reasons, some companies may not allow remote login using Telnet. When the Telnet client sends a request to the company computer seeking permission to initiate a Telnet session, the company computer activates the Telnet server program. After proper security procedures are followed, the Telnet client and server may then interact so that the salesperson may use the company computer as if the salesperson were back home in his or her office.

One can make multiple remote logins using Telnet. For example, while remotely logged in to the company computer, the salesperson might use a Telnet client available on the company computer to access a supercomputer in a different location. Unfortunately, remote login may allow a hacker who obtains unauthorized access to a particular computer to conceal his identity. Because the source address of a packet of Internet information is the source address of the computer from which the packet is sent, multiple Telnet logins may conceal the true location of the hacker. In this situation,
any packet sent will be labeled as originating from the remote computer, and not from the hacker's computer.

5. *The World Wide Web*

The most widely used Internet service\(^4^4\) and the one perhaps most responsible for the explosion in Internet use outside of the technical community is the World Wide Web. The Web allows users who employ a piece of software known as a browser to view electronic documents stored on computers connected to the Internet. The browser communicates with a piece of software on a remote computer known as a Web server. Electronic documents accessible on the Web, however, are not documents in the traditional sense. Web “pages” may contain text, graphics, pictures, sound, video, and even other computer software that is used to create special effects for a particular Web page. Besides viewing Web pages and obtaining information from them, a Web browser also allows the user to interact with certain Web pages and send information to the operator of that Web page. For example, a Web page owner may conduct a survey of those who access the Web page by obtaining input from users who access that Web page. On some Web pages, a user can page through a computer catalog and use the browser to provide the user’s credit card number and a list of products that the user desires to purchase. Thus, Web pages, if programmed to do so, can provide a type of two-way communication with one who accesses them. Normally, a user of the Internet is able to view a Web page using a browser within seconds, no matter where in the world that Web page is located.

In Internet history, the World Wide Web is a relatively recent phenomenon. As late as 1994, the World Wide Web was viewed as just another “contender” to be the major Internet resource for remotely accessing information, services, and resources.\(^4^7\) The Web’s emergence as the primary tool for remotely accessing information stems mainly from its use as a commercial tool. Such usefulness results from the hypertext capabilities of the Web as will be discussed below. Traditionally, Internet users have looked down upon commercial use of other Internet services, often engaging in some sort of punishment of those who attempted such commercial use.\(^4^8\) The Web, on the other hand, has embraced commercial

\(^{44}\) See Byassee, *supra* note 4, at 202 n.22.

\(^{47}\) See *DERN*, *supra* note 398, at 323. Prior to 1994, the leading tool used to access information on the Internet was Gopher. See Byassee, *supra* note 4, at 202 n.22.

\(^{48}\) See *VANDER LEUN & MANDEL*, *supra* note 375, at 146-47.
use of the Internet, allowing businesses to make contacts with people all over the world. Most large businesses, at the very least, now use a Web page to convey information about their products and services. Of course, where there is commerce, there are violations of the law.

Internet browsers interact with Internet servers in a client-server relationship much as clients and servers for other Internet services interact. The Internet browser serves as the client for Web services. An Internet browser is comprised of software that runs on a user's machine and is able to access and display Web pages in response to user commands. Because Web page data has a universal format, the particular brand or model of the user's computer is unimportant. The user's Web browser interprets the data making up a Web page using this universal format and tailors that information for display on the user's particular type of computer. Because companies would not want to create a Web page for every type of computer, the universal format of Web pages provides a critical element in the success of the World Wide Web. Creators of Web pages need not concern themselves with the type of computer that will be accessing their page; one size fits all. Most Internet browsers employ Windows and a graphical user interface controlled by a mouse to allow efficient and pleasurable access to Web pages.

World Wide Web servers are comprised of software that runs on computers connected to the Internet. Web servers frequently are available twenty-four hours per day and await requests to access the Web pages stored on them. Web browsers generate requests to Web servers using the TCP/IP address for the Web server. Of course, all the user needs to know is the Internet domain name for the Web server. When a Web server receives a request from a Web browser for a Web page, the Web server transfers the entire contents of that Web page to the requesting browser. This concept is important to the jurisdictional issues discussed above. The entire Web page is actually transferred to the requesting Web browser.

Repeated interactivity with a Web page is not possible as the protocol that Web pages use to communicate is not designed for back and forth

449 See id.
451 See id. at Introduction to the World Wide Web.
453 See id.
interactive communications. Instead, each request to a Web server is completely independent of any other request. Still, creative use of the various Web resources allows the creation of a limited amount of perceived interactivity. Any such interactivity is facilitated by the Web browser and comprises a separate transaction with the Web server. Although one might think that one is interacting with a particular Web page through a series of communications analogous to an on-line session with Lexis or Westlaw, this is not the case. Web servers cannot keep track of which items a user has viewed or prior input provided by the user, unless that Web server keeps track of each user’s identity. A user who merely retrieves a Web page and displays it on the user’s browser, however, has not provided any information to allow a Web page server to identify that user during future communications unless the Web server employs a device called a cookie, discussed below.

As mentioned, the Web provides an attractive method to exchange information because it allows electronic documents to contain graphics, pictures, sound, animation, video, etc. A special language employing the technique of hypertext allows such effects. Hypertext allows one to insert special codes into a document that may be used to create special effects for displaying text, pictures, etc. Web browsers are designed to interpret the hypertext contained in a Web page electronic document to facilitate display of that document on a user’s computer screen. Hypertext does not require a picture to be inserted directly into the electronic document that serves as a Web page. Instead, the Web page creator can specify the location of another computer file that contains the picture. That location can be

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454 The hypertext transport protocol, HTTP, was designed to be a stateless protocol, allowing only responses from Web servers to requests by Web clients. See David Morro, Demystifying Web Hyper Links, NETWORK WORLD, July 31, 1995, at 41.

455 See id.

456 See Alan Frank, Lesson 96: HTML and CGI; Building Interactive Web Sites; Common Gateway Interface Tutorial, LAN MAG., Aug. 1996, at 27. HTML is a read-only format. It is not interactive except to the extent that it allows one to use a mouse to navigate around a Web page when that page is stored on one’s computer under control of a Web browser. See id.


anywhere on the World Wide Web or on a computer connected to the Web server. Portions of a Web page, then, may reside at different points in the world and end up being assembled together through the work of the Web browser. When the Web browser encounters data identifying the location of a picture, rather than the data for the picture itself, it sends out another request over the Internet to retrieve the picture.

The hypertext concept is so powerful that it actually allows a Web server to transfer an entire piece of computer software used to create special effects or perform some other function. Such programs are known as applets. An applet is a miniature software application commonly designed to perform one small task. An example of an applet would be a software routine to cause information from a Web page to scroll across the bottom of a computer screen much like stock prices or weather bulletins scroll across the bottom of one’s television screen on certain channels. Applets, although providing powerful effects and functions for Web pages, may also be used for improper purposes. For example, some applets can be used to invade one’s privacy by recording the contents of one’s hard drive and sending that information to some other Internet user. An applet might be used to read a user’s financial information stored on his hard drive or his passwords to other computer accounts. In fact, a computer club concerned about security has created an applet that accesses a user’s copy of Intuit Quicken, obtains the user’s bank account number, and initiates an electronic funds transfer. Applets might also be used like computer viruses to interfere with the operation of any computer with which it comes into contact. Because of these potential misuses of applets, users of Web browsers should be careful to properly screen applets and not simply allow

459 See A Beginner’s Guide to HTML, supra note 457 (discussing linking).
462 See PATRICK NAUGHTON, THE JAVA HANDBOOK 4-6, 253 (1996).
464 See McGraw & Felten, supra note 460, at 89.
465 See Chen, supra note 463, at 38. In fact, applets might even be used to gain control of a computer’s microphone and eavesdrop on communications occurring in the room where the computer is located. See McGraw & Felten, supra note 460, at 89.
466 See Chen, supra note 463, at 38.
467 See McGraw & Felten, supra note 460, at 89.
them to be automatically loaded upon accessing a Web site. Merely visiting a Web page with a malicious applet could cause that applet to be loaded onto one's computer.\textsuperscript{468}

As discussed above, some Web sites allow a certain amount of interactivity with the Web page. For example, a user of a Web site for computer shopping may need to type in her name, address, telephone number, product number, and credit card number to order merchandise. This type of transaction is not as easy as one might think. Recall that when a user accesses a Web page, a copy of that page is sent to the user's Web browser. That is the extent of the contact between the Web browser and server. No connection between the browser and server is established, such as might be established in a Lexis or Westlaw session. Because of the lack of a connection, the kind of interaction that is desirable for an Internet shopping transaction is not possible. The World Wide Web does allow a type of remote communication, however, using the common gateway interface.

In the Internet shopping example, the Web page for the shopping Web site would include a hypertext form comprising a series of boxes that would allow the shopper to enter the relevant data using her Web browser.\textsuperscript{469} The form included with the Web page would also have a send button for the user to click on with the mouse after completing the form. When the send button is pushed, the user's Web browser sends the data from the form to a special location on the Web server with the shopping Web page.\textsuperscript{470} This location is controlled by the common gateway interface, which accepts the input that the user entered on the form and executes the appropriate software program in response to the received information.\textsuperscript{471} Computer software connected to the common gateway interface then processes the data to accept the user's order.\textsuperscript{472} To provide the user with an

\textsuperscript{468} See Chen, supra note 463, at 38.

\textsuperscript{469} "HTML forms are similar to paper forms: They provide specific space in which to enter specific data items." Frank, supra note 456, at 27.


\textsuperscript{471} The common gateway interface is the standard way of achieving some level of perceived interactivity with a Web page. See Duncan, supra note 470, at 207; Frank, supra note 456, at 27.

\textsuperscript{472} Web servers use a special directory to store such executable programs, known as the CGI-BIN directory. Web servers know that files stored in this directory are programs to be executed, rather than hypertext documents to be sent
acknowledgement of her purchase, the Web server might generate a special hypertext page by inserting a few hypertext statements in an existing hypertext document and then sending that page to the user's Web browser. The returned page appears just like any other Web page to the user's Web browser.

Cookies are another feature of the World Wide Web that allow a Web server to learn something about the user who has made a request for a Web page. Recall that when a user accesses a Web page, the Web browser knows the identity of the user because the Web server must have this information to know where on the Internet to send the Web page. Certain Web servers keep track of which areas of a Web page a particular user accesses and use that data to selectively provide information to the user the next time that the user visits that Web page. To keep track of a user's desires, the Web server may send back a cookie to the user's Web browser when the Web server returns a copy of the Web page. The cookie can contain any information that the Web server chooses to maintain for users who access the Web page. When the user next attempts to access the Web server that created the cookie, the user's Web browser will send the cookie to the Web server to provide the Web server with the information stored in the cookie.

Although cookies can be useful, they can also lead to problems. Some have expressed concern about cookies being used to obtain private information about a user, including the contents of the user's hard drive. Such concerns are valid ones where applets are concerned but unfounded for cookies because cookies are not operational software. Instead, cookies to the requesting Web browser. The common gateway interface activates the proper program in this directory in response to a request from a Web browser and passes any data supplied by the browser to the program. See Duncan, supra note 470, at 207; Frank, supra note 456, at 27.

473 See Duncan, supra note 470, at 207; Frank, supra note 456, at 27.
474 See Jason Snell, Big Brother Meets the Cookie Monster, MACUSER, July 1997, at 96 (noting that in addition to the user's TCP/IP address, the user's browser also sends information about what Web browser and operating system is running on the user's computer as well as the domain name of the last Web page that the user previously visited).
475 See Ed Bott, C Is for Cookie, PC/COMPUTING, July 1997, at 324; Snell, supra note 474, at 96.
476 See Snell, supra note 474, at 96.
477 See Bott, supra note 475, at 324; Snell, supra note 474, at 96.
478 See Bott, supra note 475, at 324; Snell, supra note 474, at 96.
are merely a small amount of data.\textsuperscript{479} Cookies are only problematic in the sense that a hacker might be able to disguise himself or herself as another user by capturing that user's cookie. When this happens, the hacker might be able to retrieve private data about the user. For example, if a Web server maintains a record of the user's credit card number based upon the user's cookie, false use of the cookie might place the cookie in the hands of a criminal.\textsuperscript{480}

One particularly powerful aspect of the World Wide Web is the ability to conduct text searches. Several Web servers actually serve as Web searchers, also known as search engines, allowing a user to conduct boolean searches for the occurrence of key words on a Web page.\textsuperscript{481} Search engine providers claim to maintain copies of nearly every Web page available on the World Wide Web.\textsuperscript{482} To do so, these computers maintain huge databases of information organized in a way to allow efficient searching.\textsuperscript{483} Because Web pages allow one to provide hypertext links to other Web pages, the search engines guide users to Web pages containing the requested terms using hypertext links to the relevant Web pages.\textsuperscript{484}

\textsuperscript{479} A cookie may only be four kilobytes in size. See Snell, \textit{supra} note 474, at 96.
\textsuperscript{481} See Web Searching: \textit{It's a Text Thing}, \textit{Imaging World}, Sept. 1996, at 53; see also MOSTAFA ET AL., \textit{supra} note 396, at 134.
\textsuperscript{482} At least one service, Open Text, makes this claim. See Web Searching: \textit{It's a Text Thing}, \textit{supra} note 481, at 53. Other search engines approach this goal. See \textit{id}. Maintaining an index of every page on the Internet is difficult because Web pages are constantly changing. Web servers with search engines employ software sometimes referred to as robots or Web wanderers to continually access Web pages and ensure that the indexed Web page is up to date. See \textit{id}. Wanderers also follow hyperlinks in an attempt to discover new sites that have not yet been indexed. See \textit{id}. Note that many search engines do not store the entire text of a Web page. Each Web page may have a meta tag associated with it. Meta tags are textual in nature and provide a brief summary of the contents of the Web page. Ordinarily, Web browsers do not access the meta tag. Some search engines index the meta tag while others may index only the first few hundred text characters contained on a Web page. See \textit{id}.
\textsuperscript{483} The Alta Vista search engine indexes 30 million Web pages and over 3 million Usenet articles. The Infoseek search engine employs 30 computers, high speed telephone lines, and 350 gigabytes of disk space. See Web Searching: \textit{It's a Text Thing}, \textit{supra} note 481, at 53.
\textsuperscript{484} See MOSTAFA ET AL., \textit{supra} note 396, at 134.
Some popular search engines include Yahoo!,\(^{485}\) infoseek,\(^{486}\) Alta Vista,\(^{487}\) excite,\(^{488}\) and Lycos.\(^{489}\)

The latest Internet advance is push technology, so named because information is pushed to the user rather than being pulled in by the user through a Web browser.\(^{490}\) With push technology, the user employs a special type of Web browser designed to receive broadcast information from a push technology Web server.\(^{491}\) For example, a push technology news service might broadcast news over the Internet, identifying the type of story being transmitted. Identification of story type prevents the user from being buried in an avalanche of information. The push technology browser can be used to filter the information received and provide the user only with that information that the user desires to receive.\(^{492}\) In addition, the user might only be prompted with a brief message about a news story that allows the user to choose to read or reject the story.\(^{493}\) Push technology may also be used in the future to deliver updates of software packages that a


\(^{490}\) See Ed Bott, Push: Promise or Peril, PC/COMPUTING, Sept. 1997, at 318; Jason Snell, When Push Comes to Shove, MACUSER, Oct. 1997, at 89. Some push technology is only push in its appearance to the user. The user's computer is actually pulling information in at specific time intervals, checking for new information of interest to the user, and notifying the user of relevant information. See Bott, supra, at 318; William R. Stanek, Pushing the Envelope with Push Technology, PC MAG., Sept. 23, 1997, at 245.

\(^{491}\) Some have noted that push technology in its present form sends much useless data over the Internet as those receiving the broadcast data certainly will not use all of the data. The large amounts of data broadcast also have potential to slow down the network and overwhelm disk storage available on a push subscriber's computer. See Stephen E. Arnold, Push Technology: Driving Traditional Online into a Corner, DATABASE, Aug. 18, 1997, at 36; Snell, supra note 474, at 89.

\(^{492}\) See Arnold, supra note 491, at 36. Other more cynical commentators have noted that "[p]ush technology is just another buzzword for annoying people with unwanted commercial crap." Id. This view is not unsupported. Airlines and car rental companies have announced plans to use push technology to alert potential customers to discounts and special offers. See Clinton Wilder & Justin Hibbard, Pushing Outside The Enterprise—Companies Begin to Tap Push Technology's Potential as a Sales and Marketing Tool, INFO. WK., Aug. 4, 1997, at 20.

\(^{493}\) See Snell, supra note 474, at 89 (describing BackWeb push service).
user previously purchased.\textsuperscript{494} Push technology can also be used by businesses to provide intelligent agents that keep track of a user’s previous interaction with a Web server and use that interaction to guide the user on subsequent visits—kind of like having your own on-line sales clerk.\textsuperscript{495} Although push technology is in its infancy, it promises to be a widely used technology in the future.

\textsuperscript{494} See Bott, supra note 490, at 318; Pushing Software, BYTE, Aug. 1997, at 84

\textsuperscript{495} See Rivka Tadjer, Giving Content a Push, COMM. WK., June 2, 1997, at 73.