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Personal Jurisdiction: Are the Federal Rules Keeping Up with (Internet) Traffic?

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Notes

PERSONAL JURISDICTION: ARE THE FEDERAL RULES KEEPING UP WITH (INTERNET) TRAFFIC?

I. INTRODUCTION

Territorial boundaries have traditionally related to personal jurisdiction because the sovereign entities from which courts derive power are defined according to geographical borders.[1] However, because the United States is a republic comprised of sovereign states, these boundaries implicate federalism concerns.[2] In the words of de Tocqueville,"[t]he aim of the legislator in confederate states ought therefore to be to render the position of the courts of justice analogous to that which they occupy in countries where sovereignty is undivided."[3] Federal courts regularly encounter this tension, as they must resolve controversies without infringing on state sovereignty or citizens' due

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[1] Graham C. Lilly, *Jurisdiction over Domestic and Alien Defendants*, 69 VA. L. REV. 85, 85 (1983) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 4, at 56-57 (1982)); Kendrick D. Nguyen, Note, *Redefining the Threshold for Personal Jurisdiction: Contact and the Presumption of Fairness*, 83 B.U. L. REV. 253, 262 (2003) (noting that territorial limits for jurisdiction "were built around the concept that state governments had territorial power over persons and things within their boundaries").

[2] *See generally* ALAN BRINKLEY, AMERICAN HISTORY: A SURVEY Ch. 6 (11th ed. 2003) (describing the formation of the government). By the late eighteenth century, Americans became dissatisfied with the Confederation's instability. *Id*. at 159. When forming the Confederation, Americans were concerned with state sovereignty, and they avoided creating a powerful national government. *Id*. The new government, created in 1787 by the Constitution, is a federal republic, which is similar to a confederacy, but it vests more power in the federal government. *Id*. at 163.

[3] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 148 (1969). The Continental Congress had adopted the Articles of Confederation in 1777, because Americans were concerned with the instability of state governments. BRINKLEY, *supra* note 2, at 148-149. The Articles of Confederation provided for a national government, and Congress was its only institution. *Id*. at 149. Even so, under the Articles, Congress's power was greatly limited: It lacked power to regulate when problems occurred between states or to enforce its decisions on the states. *Id*.

process rights.[4] Thus, exercising jurisdiction over defendants can be an obstacle to a federal court resolving a dispute.[5]

Jurisdictional questions concern whether a court has the power to decide a case.[6] In order to issue a valid judgment, a court must be able to exercise personal jurisdiction over the defendant.[7] Personal jurisdiction, or *in personam* jurisdiction, refers to a court's power to bring a person before the court in a case.[8] Determining whether a court has personal jurisdiction is important because allowing suits to proceed in improper forums may result in financial hardship for defendants, hostile triers of fact, and application of substantive law less favorable to defendants than the law of other states.[9] Therefore, although jurisdiction is a procedural issue, it has substantive consequences.[10]

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4 BRINKLEY, *supra* note 2, at 163 (noting that one of the main concerns in the colonies was sovereignty). This concern with sovereignty led the framers to distribute power between the state and national governments. *Id*. According to James Madison, "in strictness, [it is] neither a national nor a federal Constitution, but a composition of both." *Id*.

5 Jurisdiction refers to subject matter jurisdiction or to personal jurisdiction. Subject matter jurisdiction concerns whether a federal court can hear a particular kind of case. *See* 28 U.S.C. §§ 1331, 1332, 1367 (2000) (providing for federal court subject matter jurisdiction based on type of claim). In order for a court to have subject matter jurisdiction, the question must arise from a federal law or the Constitution, or the parties must have diverse citizenship and meet the required amount in controversy. *See* 28 U.S.C. § 1331 (2000) (providing for federal question jurisdiction in the federal courts); 28 U.S.C. § 1332 (2000) (providing for diversity jurisdiction in federal courts when the parties are diverse and the amount in controversy exceeds $75,000); 28 U.S.C. § 1367 (2000) (providing for supplemental jurisdiction over claims that share a common nucleus of operative fact with the original claim). Subject matter jurisdiction is beyond the scope of this Note. For a discussion of subject matter jurisdiction, see ROBERT C. CASAD & WILLIAM M. RICHMAN, JURISDICTION IN CIVIL ACTIONS 2-5 (3d Ed. Lexis 2002).

6 Andrew J. Zbaracki, Comment, *Advertising Amenability: Can Advertising Create Amenability?*, 78 MARQ. L. REV. 212, 214 (1994).

7 Nguyen, *supra* note 1, at 255. Usually, jurisdiction is undisputed when courts exercise jurisdiction over in-state defendants. *Id*. (noting that territorial sovereign power confers the authority to exercise jurisdiction). The main concern in personal jurisdiction questions is whether a court can assert jurisdiction over a nonresident defendant. *Id*.

8 Zbaracki, *supra* note 6, at 214; *see* Omni Capital Int'l v. Rudolf Wolff & Co., 484 U.S. 97, 102-03 (1987) (noting that even if due process under the Fifth Amendment were met, the district court could not exercise jurisdiction over the defendants unless they were subject to service of process); Delong Equip. Co. v. Wash. Mills Abrasive Co., 840 F.2d 843, 847 (11th Cir. 1988) (noting that before a court can exercise jurisdiction over a defendant, the defendant must have minimum contacts with the forum state and the forum must have a statute enabling the court to serve summons on the defendant).

9 *Developments in the Law: State-Court Jurisdiction*, *in* ESSAYS ON CIVIL PROCEDURE 198 (1965) [hereinafter *State-Court Jurisdiction*]. Personal jurisdiction analysis has been criticized recently because it involves uncertainty for the parties and expenditure of resources on preliminary issues instead of on the merits of controversies. *See* Lilly, *supra*

In analyzing jurisdiction, courts have traditionally considered the fairness of subjecting a defendant to suit in the forum state.[11] This fairness question has always been sensitive to technological

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note 1, at 108 (noting that personal jurisdiction is litigated often but remains unsettled); *see also* Ruckstul v. Owens Corning Fiberglas Corp., 731 So. 2d 881, 887 n.5, 889 n.7 (La. 1999) (describing lower court and federal court responses to the *Asahi* decision); Robert C. Casad, *Personal Jurisdiction in Federal Question Cases*, 70 TEX. L. REV. 1589, 1593 (1992) (stating that lack of clear guidelines leads to confusion, unclear results, and unpredictability); Walter W. Heiser, *A "Minimum Interest" Approach to Personal Jurisdiction*, 35 WAKE FOREST L. REV. 915, 915 (2000) ("[T]he doctrine today is unwieldy, incoherent, and unpredictable."); Martin H. Redish, *Tradition, Fairness, and Personal Jurisdiction: Due Process and Constitutional Theory After* Burnham v. Superior Court, 22 RUTGERS L.J. 675, 686 (1991) (noting disagreement on the Supreme Court regarding the analysis producing uncertain results); Linda Sandstrom Simard, *Exploring the Limits of Specific Personal Jurisdiction*, 62 OHIO ST. L.J. 1619, 1620 (2001) ("The Court's imprecision . . . creates both theoretical and practical problems."); Flavio Rose, Comment, *Related Contacts and Personal Jurisdiction: The "But For" Test*, 82 CAL. L. REV. 1545, 1545 (1994) ("Personal jurisdiction is widely regarded as . . . problematic, uncertain, and murky . . . .").

Further, because jurisdiction can be raised on appeal, the question also consumes the time of appellate courts. *See, e.g.,* Burnham v. Superior Court, 495 U.S. 604 (1990); *Omni Capital Int'l, Ltd.*, 484 U.S. 97 (1987); Asahi Metal Indus. v. Superior Court, 480 U.S. 102 (1987); Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985); Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408 (1984); Calder v. Jones, 465 U.S. 783 (1984); Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984); Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Kulko v. Superior Court, 436 U.S. 84 (1978); Shaffer v. Heitner, 433 U.S. 186 (1977).

[10] These substantive consequences raise the fairness concerns of due process. Wendy Collins Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and* Pennoyer *Reconsidered*, 62 WASH. L. REV. 479, 508-09 (1987) (asserting that personal jurisdiction is substantive, although other commentators assert it is procedural); Lee Scott Taylor, *Registration Statutes, Personal Jurisdiction, and the Problem of Predictability*, 103 COLUM. L. REV. 1163, 1168-69 (2003) (noting that predictability concerns due process and stating that in choice-of-law doctrine, the value of predictability has been consistently recognized); Sean K. Hornbeck, Comment, *Transnational Litigation and Personal Jurisdiction over Foreign Defendants*, 59 ALB. L. REV. 1389, 1393 (1996) (addressing issues associated with transnational litigation). *But see* Gary A. Haugen, *Personal Jurisdiction and Due Process Rights for Alien Defendants*, 11 B.U. INT'L L.J. 109, 117 (1993) ("[T]he [Supreme] Court has . . . suggested that procedural fairness is the idea that connects due process and personal jurisdiction."); Martin H. Redish & Eric J. Beste, *Personal Jurisdiction and the Global Resolution of Mass Tort Litigation: Defining the Constitutional Boundaries*, 28 U.C. DAVIS L. REV. 917, 922 (1995) (noting that personal jurisdiction should be viewed only as a subpart of procedural due process).

[11] *See infra* Part II.A (tracing the Supreme Court's expansion of personal jurisdiction jurisprudence based on advancements in technology). Fairness refers to convenience or sovereignty. *See infra* note 142. For purposes of this Note, only the fairness aspect is relevant because this Note is only addressing federal question cases. Thus, the Fourteenth Amendment sovereignty limits do not apply to the federal courts on purely federal issues. *See infra* notes 142-45 and accompanying text.

advancement.[12] Technological changes create problems in personal jurisdiction analysis because technology strains territorial principles by connecting people across borders, such as through the Internet.[13] Consequently, the boundaries used to determine whether a court can assert personal jurisdiction are antiquated in the context of modern technology.[14]

Technology over the past decade has dramatically changed, providing new ways for people and businesses to interact with each other.[15] The Federal Rules of Civil Procedure ("FRCP") should accommodate this new technology through amending Federal Rule of Civil Procedure 4 ("Rule 4"), which provides for jurisdiction based on service of process.[16] In amending Rule 4, the Federal Rules of Civil Procedure Advisory Committee ("Advisory Committee") should consider technological advancements that make litigation less burdensome for defendants.[17] This Note suggests one way for the Advisory Committee to embrace the effects of electronic capabilities: reconsider territorial power espoused by Rule 4(k) because current technology renders these traditional boundaries of state borders irrelevant to fairness concerns in federal question cases.[18]

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12 *See infra* Part II.A (tracing the Supreme Court's expansion of personal jurisdiction jurisprudence based on advancements in technology).

13 CASAD & RICHMAN, *supra* note 5, at 178 (noting that courts should not be bound by territorial limitations); Frank Conley, *:-) Service with a Smiley: The Effect of Email and Other Communications on Service of Process*, 11 TEMP. INT'L & COMP. L.J. 407, 407 (1997); Taylor, *supra* note 10, at 1163-64 ("[T]he increasing pressure that technolog[y] . . . bear[s] on jurisdictional doctrine further complicates matters . . . .").

14 Nguyen, *supra* note 1, at 254 (suggesting using history to determine when the next expansion of jurisdiction is appropriate). The history of jurisdiction demonstrates the doctrine's expansion according to social, economic, and technological advancements. *Id*. at 273.

15 *See* BRINKLEY, *supra* note 2, at 931; Conley, *supra* note 13, at 407; Nguyen, *supra* note 1, at 266.

16 *See infra* Part IV (proposing an amendment to Rule 4(k) in federal question cases).

17 *See infra* notes 96-98 (explaining the process for amending the FRCP).

18 *See* FED. R. CIV. P. 4(k). For a general discussion of Rule 4, see JOHN J. COUND ET AL., CIVIL PROCEDURE CASES AND MATERIALS 182-83 (8th ed. 2001). Rule 4(k)(1)(A) allows federal courts to assert jurisdiction over defendants in a state when that state's courts could exercise jurisdiction. FED. R. CIV. P. 4(k)(1)(A); *see* COUND ET AL., *supra*, at 182-83. Section B applies in impleading third parties or joining necessary parties and permits service outside the territorial boundaries of the forum state within a one hundred mile radius of the courthouse. FED. R. CIV. P. 4(k)(1)(B); *see* COUND ET AL., *supra*, at 182-83. Section C governs service pursuant to the Federal Interpleader Act, and section D acknowledges Congress's authorization of nationwide service with specific statutes. FED. R. CIV. P. 4(k)(1)(C), (D); *see* COUND, ET AL., *supra*, at 182-83. The second part of the rule, 4(k)(2), functions as a limited federal long-arm statute for federal question cases when defendants lack sufficient

Part II of this Note presents the doctrine of personal jurisdiction, focusing on the fairness prong of the minimum contacts analysis.[19] This Part also explains how changes in technology have led to expanding personal jurisdiction by the United States Supreme Court and in the FRCP.[20] Then, this Part describes some of the new technology available in courts that may ease a defendant's burden of litigating in an out-of-state forum.[21] Part III analyzes the United States Supreme Court's reasoning in expanding jurisdiction and the Advisory Committee's previous decisions to amend Rule 4.[22] The analysis focuses on previous expansion of personal jurisdiction based on the notion that it would not be too unfair to allow courts jurisdiction over defendants in light of technology and transportation conveniences of the day.[23] Finally, in Part IV, this Note proposes an amendment to Rule 4, which would provide for nationwide jurisdiction in federal question cases based on Rule 4(k) service of process in courts where parties have access to electronic filing and other technological advancements.[24] In selecting the proposed amendment that would best accommodate current technology, this Note considers the objectives of the Rules and past expansions and concerns with amendments and proposals.[25]

II. LEGAL BACKGROUND OF PERSONAL JURISDICTION: THE HORSE AND BUGGY MEETS THE AUTOMOBILE

Before a court can exercise jurisdiction over parties in a civil action, three requirements must be met: (1) The parties must have notice of the judicial proceeding; (2) the court must have jurisdiction over the parties; and (3) subject matter jurisdiction must be authorized and consistent with the Constitution.[26] In federal court, plaintiffs must establish that the

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minimum contacts with a single state. FED. R. CIV. P. 4(k)(2); *see* COUND ET AL., *supra*, at 182-83.

19 *See infra* Part II.A.

20 *See infra* Part II.A–B.

21 *See infra* Part II.C.

22 *See infra* Part III.

23 *See infra* Part IV. Although Part II mentions the purposeful availment prong, this Note is primarily concerned with the fairness inquiry of the personal jurisdiction analysis.

24 *See infra* Part IV.

25 *See infra* Part IV.

26 Brian B. Frasch, Comment, *National Contacts as a Basis for In Personam Jurisdiction over Aliens in Federal Question Suits*, 70 CAL. L. REV. 686, 689 (1982); *see, e.g.*, Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306 (1950) (requiring notice "reasonably calculated" to inform parties of the proceeding); Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945) (noting that the defendant must be amenable to service of process and have minimum contacts with the forum state); *see also* 28 U.S.C. §1331 (2000) (providing for federal question jurisdiction); 28 U.S.C. § 1332 (2000) (providing for diversity jurisdiction).

court has jurisdiction over the defendant.[27] The process of establishing personal jurisdiction begins with a statute from the relevant forum that authorizes jurisdiction.[28] In federal courts, this statute is Federal Rule of

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[27] Bradley W. Paulson, Comment, *Personal Jurisdiction over Aliens: Unraveling Entangled Case Law*, 13 HOUS. J. INT'L L. 117, 119 (1990); *see also* Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez, 171 F.3d 779, 784 (2d Cir. 1999) ("When responding to a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of establishing that the court has jurisdiction over the defendant."); Ballard v. Savage, 65 F.3d 1495, 1498 (9th Cir. 1995) (stating that on a Rule 12(b)(2) motion, a plaintiff must "demonstrate facts that if true would support jurisdiction"); Bally Exp. Corp. v. Balicar, Ltd., 804 F.2d 398, 401 (7th Cir. 1986) ("Normally it is well established that the plaintiff must prove jurisdiction exists once it is challenged by the defendant.").

[28] *See infra* Part II.B (discussing Rule 4, which functions as the federal long arm statute).

State legislators enacted long-arm statutes, which allow state residents to sue nonresident defendants. Zbaracki, *supra* note 6, at 216 (noting that there are three categories of long arm statutes). The statutes permit jurisdiction by enumerated provisions or to the full extent of due process. *Id*. Seven states passed the broadest type of statutes, those which extend the courts' jurisdiction to the limits of due process. *Id*; *see, e.g.*, ARIZ. R. CIV. P. 4.2(a); CAL. CIV. PROC. CODE 410.10 (West 2004) ("A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."); NEV. REV. STAT. ANN. § 14.065 (Michie 1998); N.J. CT. R. 4.4-4(e); OKLA. STAT. ANN. tit. 12 § 2004(F) (West 1993 & Supp. 2005); R.I. GEN. LAWS § 9-5-33 (1997); WYO. STAT. ANN. § 5-1-107 (Michie 2003). To meet statutory requirements, jurisdiction must comport with the constitutional protection. Zbaracki, *supra* note 6, at 216.

Other statutes enumerate situations that constitute adequate contacts with the forum state. *Id*. at 216-17; *see, e.g.*, ALASKA STAT. § 09.05.015 (Michie2004); CONN. GEN. STAT. ANN. § 52-59b (West 1991 & Supp. 2004); DEL. CODE ANN. tit. 10, § 3104 (1999 & Supp. 2004); FLA. STAT. ANN. § 48.193 (West1994 & Supp. 2005); GA. CODE ANN. § 9-10-91 (1982 & Supp. 2004); HAW REV. STAT. § 634-35 (1993 & Supp. 2003); IDAHO CODE § 5-514 (Michie 2004); IND. R. TRIAL PROC. 4.4; IOWA CODE ANN. § 617.3 (West 1999); KAN. STAT. ANN. § 60-308 (1994 & Supp. 2004); KY. REV. STAT. ANN. § 454.210 (Banks-Baldwin 1993); MD. CODE ANN. CTS. & JUD. PROC. § 6-103 (2002 & Supp. 2004); MASS. GEN. LAWS ANN. ch. 223A, § 3 (West 2000 & Supp. 2004); MISS. CODE ANN. § 13-3-57 (2002); MO. ANN. STAT. § 506.500 (West 2003); MONT. R. CIV. PROC. 4B; N.H. REV. STAT. ANN. §510:4 (1997 & Supp. 2004); N.M. STAT. ANN. § 38-1-16 (Michie 1978 & Supp. 2004); N.Y. CIV. PRAC. L. & R. 302(a) (Consol. 2001); N.C. GEN. STAT. § 1-75.4 (2003); OHIO REV. CODE ANN. § 2307.382 (West 2004); TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (Vernon 1997 & Supp. 2004); WASH. REV. CODE ANN. § 4.28.185 (West 1998 & Supp. 2005); W.VA. CODE ANN. § 56-3-33 (Michie 1997); WIS. STAT. ANN. § 801.05 (West 1994 & Supp. 2004). Indiana uses the following enumerated long arm statute:

> (A) *Acts serving as a basis for jurisdiction.* Any person or organization that is a nonresident of this state, a resident of this state who has left the state, or a person whose residence is unknown, submits to the jurisdiction of the courts of this state as to any action arising from the following acts committed by him or her or his or her agent:
> (1) Doing any business in this state;
> (2) Causing personal injury or property damage by an act or omission done within this state;
> (3) Causing personal injury or property damage in this state by an occurrence, act or omission done outside this state if he regularly does or solicits business or engages in any other persistent course of

Civil Procedure 4, and it operates as a federal long-arm statute.[29] Next, courts determine whether exercising personal jurisdiction over the defendant would be constitutional under the Due Process Clause, as required by *Pennoyer v. Neff*.[30] The modern test used in analyzing personal jurisdiction comes from *International Shoe Co. v. Washington*[31] and requires purposeful availment by the defendant and fairness in bringing him to court in the forum state.[32] Federal courts and state

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> conduct, or derives substantial revenue or benefit from goods, materials, or services used, consumed, or rendered in this state;
> (4) Having supplied or contracted to supply services rendered or to be rendered or goods or materials furnished or to be furnished in this state;
> (5) Owning, using, or possessing any real property or an interest in real property within this state;
> (6) Contracting to insure or act as a surety for or on behalf of any person, property or risk located within this state at the time the contract was made;
> (7) Living in the marital relationship within the state notwithstanding subsequent departure from the state as to all obligations for alimony, custody, child support, or property settlement, if the other party to the marital relationship continues to reside in this state; or
> (8) Abusing, harassing, or disturbing the peace of, or violating a protective or restraining order for the protection of, any person within the state by an act or omission done in this state, or outside this state if the act or omission is part of a continuing course of conduct having an effect in this state.

IND. R. TRIAL PROC. 4.4.

Additionally, some statues use enumerated long-arm statutes, but they are interpreted to extend jurisdiction to the limits of due process. *See* Zbaracki, *supra* note 6, at 217-18; *see, e.g.*, ALA R. CIV. P. 4.2; ARK. CODE ANN. § 16-4-101 (Michie 1987 & Supp. 2003); COLO. REV. STAT. ANN. § 13-1-124 (West 1997 & Supp. 2004); D.C. CODE ANN. 13-423 (2001 & Supp. 2004); 735 ILL. COMP. STAT. ANN. §5/2-209(c) (West 2003); LA. REV. STAT. ANN. § 13:3201 (West 1991 & Supp. 2005); ME. REV. STAT. ANN. tit. 14 § 704-A (West 2003); MICH. COMP. LAWS ANN. §§ 600.701-600.735 (West 1996 & Supp. 2004); MINN. STAT. ANN. § 543.19 (West 2000 & Supp. 2005); NEB. REV. STAT. § 25-536 (1995); N.D. R. CIV. P. 4(b); OR. R. CIV. P. 4; 42 PA. CONS. STAT. ANN. § 5322 (West 2004); S.C. CODE ANN. § 36-2-803 (Law Co-op. 2003); S.D. CODIFIED LAWS § 15-7- (Michie 2004); TENN. CODE ANN. § 20-2-214 (1994); UTAH CODE ANN. § 78-27-24 (2002); VT. STAT. ANN. tit. 12 § 855 (2002); VA. CODE ANN. § 8.01-328.1 (Michie 2000 & Supp. 2004).

[29] *See infra* Part II.B (discussing Rule 4); *see also supra* note 28 (discussing state long-arm statutes).

[30] 95 U.S. 714 (1878); *see infra* text accompanying notes 50-54.

[31] 326 U.S. 310 (1945); *see infra* text accompanying notes 57-62.

[32] *See infra* Part II.A. The focus of this Note is on the fairness inquiry in the personal jurisdiction analysis. In order for personal jurisdiction to be established, the defendant must have sufficient minimum contacts with the forum state. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 320 (1945); Stuart v. Spademan, 772 F.2d 1185, 1191 (5th Cir. 1985); Paulson, *supra* note 27, at 119; Rose, *supra* note 9, at 1545 (noting that minimum contacts are either general or specific). "Minimum contacts" refers to a defendant's purposeful availment of the forum so that he should reasonably foresee being subject to

courts both apply the minimum contacts analysis to determine whether jurisdiction may be constitutionally exercised.[33]

The law of personal jurisdiction has largely developed through United States Supreme Court decisions and Advisory Committee modification of the FRCP.[34] Part II.A addresses the past effects of technology on personal jurisdiction, noting how personal jurisdiction has been expanded by the Supreme Court in keeping with advancements in communication and transportation.[35] The purpose of this Part is not to explain the development of the minimum contacts doctrine but to demonstrate that the fairness inquiry has historically responded to technological change.[36] Next, Part II.B describes previous and proposed

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suit there. Nguyen, *supra* note 1, at 258; *see* World-Wide Volkswagen v. Woodson, 444 U.S. 286 (1980). Defendants may purposefully avail themselves of the forum through advertising, marketing, and using distributors there. Nguyen, *supra* note 1, at 258; *see* Asahi Metal Indus. v. Superior Court, 480 U.S. 102 (1987).

Personal jurisdiction can be divided into two categories, general jurisdiction and specific jurisdiction. Rose, *supra* note 9, at 1549. General jurisdiction exists if contacts are continuous and systematic. *Id*. Specific jurisdiction exists when the defendant's contacts with the forum are related to the action, purposeful availment is shown, and jurisdiction is reasonable. *Id*.

Corporate defendants and individual defendants are subject to the minimum contacts test. *See, e.g.*, Burger King Corp. v. Rudzewicz, 471 U.S. 462, 478 (1985) (holding individuals subject to personal jurisdiction); *Int'l Shoe Co.*, 326 U.S. at 320 (holding a company subject to personal jurisdiction).

[33] *See* GEOFFREY C. HAZARD & MICHELE TARUFFO, AMERICAN CIVIL PROCEDURE 177 (1993). The focus of this Note is on federal court jurisdiction. *See infra* Part II.A (tracing United States Supreme Court personal jurisdiction cases); *see also infra* note 36 (listing federal circuit court cases identifying a circuit split regarding the purposeful availment analysis).

[34] *See infra* Part II.B-D.

[35] *See infra* Part II.C.

[36] There are two inquiries in the personal jurisdiction analysis, purposeful availment and fairness. *See, e.g., Asahi Metal Indus*., 480 U.S. 102; *Burger King Corp*., 471 U.S. 462; *World-Wide Volkswagen*, 444 U.S. 286. This Note is only concerned with the fairness inquiry. Therefore, Part II traces personal jurisdiction through history and considers how changes in technology have led to greater fairness in asserting jurisdiction over defendants. *See infra* Part II.A. It is beyond the scope of this Note to trace the development of the purposeful availment analysis.

For more information on the purposeful availment analysis and circuit split, see generally *Bridgeport Music, Inc. v. Still N the Water Publ'g*., 327 F.3d 472, 480 (6th Cir. 2003) ("[I]nstead of undertaking the time-consuming task of analyzing the facts under all three approaches, and then being left to select an approach based upon the end result, we make clear today our preference for Justice O'Connor's stream of commerce 'plus' approach . . . and conduct the remainder of our analysis accordingly."). *Compare* Vermuelen v. Renault, U.S.A., Inc., 985 F.2d 1534, 1548 (11th Cir. 1993) ("Because jurisdiction . . . is consistent with due process under the more stringent 'stream of commerce plus' analysis adopted by the *Asahi* plurality, we need not determine which standard actually controls this case."), *with* Madara v. Hall, 916 F.2d 1510, 1519 (11th Cir. 1990) (determining that contacts were

amendments to Rule 4 based on technology available to society and examines the purpose of the prior amendments or proposals.[37] Finally, to illustrate possibilities for easing litigation burdens of nonresident defendants, Part II.C describes technology currently available to all federal courts.[38]

A. Past Effects of Technology on Jurisdiction: "Start Your Engines"

Generally, federal court personal jurisdiction is limited by state territorial boundaries, which also limit state court jurisdiction.[39]

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insufficient to confer jurisdiction and applying Justice O'Connor's analysis). *But see* Ruston Gas Turbines v. Donaldson Co., 9 F.3d 415, 420 (5th Cir. 1993) (reversing a district court's jurisdiction decision because the district court had relied on the stream of commerce plus analysis); Irving v. Owens-Corning Fiberglas Corp., 864 F.2d 383, 386 (5th Cir. 1989) ("Because the Court's splintered view of minimum contacts in *Asahi* provides no clear guidance on this issue, we continue to gauge . . . contacts with Texas by the stream of commerce standard as described in *World-Wide Volkswagen* and embraced in this circuit."); Bearry v. Beech Aircraft Corp., 818 F.2d 370, 375 (5th Cir. 1987) ("The dimension of the 'stream of commerce' doctrine now divides the Supreme Court."); DeMoss v. City Market Inc., 762 F. Supp. 913, 918 (D. Utah 1991) (applying the *World-Wide Volkswagen* standard due to the Supreme Court's disagreement over the proper test and noting the Tenth Circuit's agreement); Abuan v. Gen. Elec. Co., 735 F. Supp. 1479, 1484 (D. Guam 1990) (attempting to reconcile both parts of *Asahi* with *World-Wide Volkswagen*); Curtis Mgmt. Group v. Acad. of Motion Pictures Arts & Scis., 717 F. Supp. 1362, 1369 (S.D. Ind. 1989) (applying *World-Wide Volkswagen*); Hall v. Zambelli, 669 F. Supp. 753, 756 (S.D. W. Va. 1987) (applying *World-Wide Volkswagen* while noting the confusion created by *Asahi*); Wessinger v. Vetter Corp., 685 F. Supp. 769, 776-77 (D. Kan. 1987) (noting that the *Asahi* court was evenly divided on the stream of commerce theory and following it).

Although several circuits seem to be undecided on whether they expressly adopt one opinion or apply all of the opinions, the Eighth Circuit has applied the two conflicting opinions. *See* Richard M. Elias, *In Search of a Broader Stream of Commerce Theory: The Eighth Circuit Streams Past Inconsistencies in Favor of Equitable Results*, 67 MO. L. REV. 99 (2002); *see also* Barone v. Rich Bros. Interstate Display Fireworks Co., 25 F.3d 610 (8th Cir. 1994); Gould v. P.T. Krakatau Steel, 957 F.2d 573 (8th Cir. 1992); Falkirk Mining Co. v. Japan Steel Works, Ltd., 906 F.2d 369 (8th Cir. 1990).

37 *See infra* Part II.B.

38 *See infra* Part II.D.

39 Howard M. Erichson, Note, *Nationwide Personal Jurisdiction in All Federal Question Cases: A New Rule* 4, 64 N.Y.U. L. REV. 1117, 1123 (1989); *see* HAZARD & TARUFFA, *supra* note 33, at 176; *see also* CASAD & RICHMAN, *supra* note 5, at 528 (noting that the federal courts did not have to be bound by territorial boundaries of states).

The exceptions to this limitation are federal statutory provisions extending jurisdiction nationwide, the "bulge rule" under Fed. R. Civ. P. 4(k)(1)(B), and through federal statutes authorizing jurisdiction. Erichson, *supra*, at 1122-23; *see, e.g.,* Commodity Exchange Act, 7 U.S.C. §§ 13a-1, 13a-2(4), 18(b) (2000); Arbitration Act Award Confirmation, 9 U.S.C. § 9 (2000); Sherman Act, 15 U.S.C. § 5 (2000) (providing that nationwide service of process applies only if justice requires bringing other parties before the court); 15 U.S.C. § 22 (2000) (providing for anti-trust actions against corporations); Clayton Act, 15 U.S.C. § 25 (2000); Federal Trade Commission administrative subpoenas, 15 U.S.C. § 49 (2000); Securities Act of 1933 and Securities Exchange Act of 1934, 15 U.S.C.

Defining power according to state boundaries was efficient after the founding of the United States because citizens considered each state to be its own sovereign nation.[40] Then, most citizens of one state did not travel to other states,[41] and citizens of different states rarely interacted.[42] In this type of society, territorial boundaries of states effectively limited personal jurisdiction.[43]

However, as society became more connected, Congress passed the Full Faith and Credit Implementing Act of 1790,[44] which required states to respect judgments of other state courts.[45] Thus, before *Pennoyer v. Neff*, state court jurisdiction was challenged under the Full Faith and Credit Clause.[46] A judgment from one state was valid in another state

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§§ 77 v(a), 78aa (2000); Public Utility Holding Company Act of 1935, 15 U.S.C. § 79y (2000); Investment Company Act of 1940, 15 U.S.C. § 80a-43 (2000); Investment Advisers Act of 1940, 15 U.S.C. § 80b-14 (2000); Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1965 (2000) (providing for nationwide service of process only if justice requires bringing a party outside the district before the court); Interpleader, 28 U.S.C. §§ 1335, 1397, 2361 (2000); 28 U.S.C. § 1391 (e) (2000) (*Bivens* actions); 28 U.S.C. § 1655 (2000) (lien enforcement); 28 U.S.C. § 2321 (2000) (receiver property actions); 28 U.S.C. § 1695 (2000) (shareholder actions); 28 U.S.C. § 2321 (2000) (interstate commerce laws), 49 U.S.C. §§ 1001 (2000) (interstate commerce laws).

State courts exercised personal jurisdiction over defendants within the territorial borders of the state when the defendant was served with process. Robert T. Mills, *Personal Jurisdiction over Border State Defendants: What Does Due Process Require?*, 13 S. ILL. U. L.J. 919, 922 (1989); *see also* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945); *State-Court Jurisdiction*, *supra* note 9, at 202 (stating that the presence theory "may be attributable to the quasi-criminal origin of most common law personal actions," the common law idea that a judgment is a basis for "immediate levy against the defendant's person or his land," and "the insistence on local settlement of land disputes"). Further, the presence theory allows a judgment to be satisfied without concern for whether other jurisdictions will recognize its validity. *State-Court Jurisdiction*, *supra* note 9, at 203; *see* FED. R. CIV. P. 4(k) (providing for jurisdiction when defendants are served within the territory, within a one hundred mile radius of the courthouse, or in interpleader cases).

40 HAZARD & TARUFFA, *supra* note 33, at 174 (comparing states to nation-states in the international community); Nguyen, *supra* note 1, at 262 (noting that a connection to other states was only through "a vague concept of federalism").

41 Nguyen, *supra* note 1, at 262.

42 HAZARD & TARUFFA, *supra* note 33, at 176 ("[L]itigation occurred between residents of the same locality."); Nguyen, *supra* note 1, at 262.

43 HAZARD & TARUFFA, *supra* note 33, at 176; Nguyen, *supra* note 1, at 262.

44 28 U.S.C. § 1738 (2000) ("[R]ecords and judicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken.").

45 *Id.*; Mills v. Duryee, 11 U.S. (7 Cranch) 481 (1813) (construing the Full Faith and Credit Act of 1790); Nguyen, *supra* note 1, at 263. For a discussion of the Full Faith and Credit Clause, see Harold L. Korn, *The Development of Judicial Jurisdiction in the United States: Part I*, 65 BROOK. L. REV. 935, 959-63 (1999).

46 Paul C. Wilson, *A Pedigree for Due Process?* Burnham v. Superior Court of California, 56 MO. L. REV. 353, 381 (1991); Nguyen, *supra* note 1, at 263; *see* U.S. CONST. art. IV, § 1

when the court deciding the case had personal jurisdiction over the defendant based on his consent or physical presence for service of process.[47] Still, some states qualified or denied judgments of other states if they found the jurisdictional reach excessive.[48] However, as interstate activity increased, litigation between residents of foreign states also increased, resulting in inconsistent exercises of personal jurisdiction.[49]

The Supreme Court finally resolved this inconsistency with the *Pennoyer* decision in 1878, which recognized due process as a limit on jurisdiction.[50] Since then, courts have acknowledged that the Due Process Clause protects defendants from improper exposure to jurisdiction.[51] The *Pennoyer* Court also referred to international law

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(requiring that "Full Faith and Credit . . . be given in each State to the public Acts, Records, and judicial Proceedings of every other State"); D'Arcy v. Ketchum, 52 U.S. 165, 174-75 (1850).

47 Wilson, *supra* note 46, at 381. Courts obtained jurisdiction over defendants through other means when enforcement by other states was not required. *Id.*

48 Korn, *supra* note 45, at 973; Nguyen, *supra* note 1, at 263. Some state courts considered state due process in asserting jurisdiction over nonresident defendants. Nguyen, *supra* note 1, at 263. Moreover, due to the inconsistent approaches, states ignored valid judgments of other states. *Id*.

49 Nguyen, *supra* note 1, at 264 (noting that the personal jurisdiction inquiry did not provide the necessary consistency or predictability for the developing corporate society of the 1800s).

50 HAZARD & TARUFFA, *supra* note 33, at 176 (noting that the modern rule is based on the Due Process Clause); Nguyen, *supra* note 1, at 264.

51 Taylor, *supra* note 10, at 1166; *see also State-Court Jurisdiction*, *supra* note 9, at 204. In *Pennoyer*, the Supreme Court set out the traditional circumstances under which a court could exercise jurisdiction over the defendant including consent, presence, domicile, and quasi *in rem* jurisdiction. *See* Pennoyer v. Neff, 95 U.S. 714 (1878). Dicta in *Pennoyer* identified the Fourteenth Amendment Due Process Clause as the source of the territorial boundary within which service of process could confer jurisdiction over an unconsenting defendant. *Id*. at 733; Nguyen, *supra* note 1, at 257.

Although since *Pennoyer* the Court has consistently identified the Due Process Clause in the Fifth and Fourteenth Amendments as the constitutional limitation on jurisdiction, it relied on interstate federalism in *World-Wide Volkswagen*. CASAD & RICHMAN, *supra* note 5, at 135 ("[P]rinciples of interstate federalism [are] embodied in the Constitution.") (quoting World-Wide Volkswagen v. Woodson, 444 U.S. 286, 293 (1980)). However, in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, the Court readjusted its approach and relied on the Due Process Clause. CASAD & RICHMAN, *supra* note 5, at 135; *see* Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n. 10 (1982). Although interstate federalism restricts states' jurisdiction, it is no longer a due process concern. CASAD & RICHMAN, *supra* note 5, at 136 n.216 (noting that it is an indirect limitation based on the Full Faith and Credit Clause).

Likewise, while some lower courts had restricted jurisdiction based on the First Amendment, the Supreme Court rejected this theory in *Calder v. Jones*. *Id.* at 136; *see* Calder v. Jones, 465 U.S. 783, 790 (1984). Considering the chilling effects of out-of-state litigation was "double counting." CASAD & RICHMAN, *supra* note 5, at 136 (noting the Court's concern for First Amendment restrictions complicating the minimum contacts inquiry).

principles and held that "every State possesses exclusive jurisdiction . . . over persons and property within its territory [but that] no State can exercise direct jurisdiction . . . over persons and property without its territory."[52] The *Pennoyer* approach resulted in greater consistency and predictability for jurisdiction, and it can be viewed as the Supreme Court making jurisdiction compatible with the advancements of the nineteenth century.[53] Although the Court still used the territorial approach with state boundaries, this approach was effective because at that time, society transacted business on a local level.[54]

Improvements in transportation in the twentieth century made travel between states more convenient and less time consuming, resulting in increased interstate commercial activity.[55] Accordingly, the Supreme Court has considered the technological changes since *Pennoyer* in its steady expansion of the physical boundaries within which personal jurisdiction can be exercised over defendants.[56]

Similarly, other constitutional restrictions from the Commerce Clause were also applied by a few courts. *Id*. at 137; *see, e.g.,* Davis v. Farmer's Coop. Equity Co., 262 U.S. 312 (1923). However, these challenges have been uncommon because the due process standards announced in *International Shoe* include any potential burden on interstate commerce. CASAD & RICHMAN, *supra* note 5, at 137. *But see* Patrick J. Borchers, *The Death of the Constitutional Law of Jurisdiction from* Pennoyer *to* Burnham *and Back Again*, 24 U.C. DAVIS L. REV. 20, 94-101 (1990) (arguing that the Constitution should generally not limit state court jurisdiction); Roger Transgrud, *The Federal Common Law of Personal Jurisdiction*, 57 GEO. WASH. L. REV. 849 (1989) (arguing that limits on jurisdiction should be based on the Full Faith and Credit Clause).

52 *Pennoyer*, 95 U.S. at 722; HAZARD & TARUFFA, *supra* note 33, at 174 (explaining that states function like nation-states in an international community); *see* Keith H. Beyler, *Personal Jurisdiction Based on Advertising: The First Amendment and Federal Liberty Issues*, 61 MO. L. REV. 61, 122-23 (1996) (noting that previously jurisdiction was a Full Faith and Credit issue); Nguyen, *supra* note 1, at 264. Connecting the Full Faith and Credit Clause test with the Due Process Clause gave defendants two arguments for objecting to jurisdiction. Beyler, *supra*, at 122. First, the defendant could default and argue that the court lacked jurisdiction, or second, the defendant could attack jurisdiction directly. *Id*. The Full Faith and Credit analysis relied on state territorial boundaries, and because courts connected that analysis with the Due Process Clause analysis, state territorial boundaries became relevant after *Pennoyer*. *Id*.

53 HAZARD & TARUFFA, *supra* note 33, at 176; Nguyen, *supra* note 1, at 264 (noting that the result was a more efficient law).

54 Mills, *supra* note 39, at 922.

55 *See* Walter W. Heiser, *A "Minimum Interest" Approach to Personal Jurisdiction*, 35 WAKE FOREST L. REV. 915, 916 (2000). Strict territorialism resulted in another problem: courts used legal fictions to maneuver around the rigid rules of *Pennoyer*. Mills, *supra* note 39, at 923 (listing legal fictions including the doctrines of "doing business," "implied consent," and "presence"). The Supreme Court addressed these issues in *International Shoe Co.*. *Id*.

56 Mills, *supra* note 39, at 923. Interstate travel became more convenient, and jurisdiction became a complicated inquiry. Nguyen, *supra* note 1, at 264; *see also* Burnham v. Superior

In 1945, the Supreme Court decided *International Shoe Co. v. Washington*, which was the Court's first explicit expansion from the *Pennoyer* doctrine.[57] In *International Shoe*, the Supreme Court found a corporation from one state amenable to suit in another state because the company transacted business in the other state, employed salesmen there, and solicited orders from citizens of the other state.[58]

Holding that in order for jurisdiction to comport with the due process, the defendant must have minimum contacts with the forum state,[59] the Court announced the modern test for personal jurisdiction:

> Due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, *he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice*.[60]

Thus, the Supreme Court removed state borders as barriers to the exercise of personal jurisdiction and recognized that a flexible

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Court, 495 U.S. 604, 617 (1990) (Black, J., dissenting) (noting that in the late nineteenth century technological changes and increasing interstate business relaxed the strict limits on state jurisdiction over nonresident defendants).

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

58 *Id*.

59 *Id*. at 316. Due process requirements apply to the states through the Fourteenth Amendment and to the federal government through the Fifth Amendment. CASAD & RICHMAN, *supra* note 5, at 528.

Requiring minimum contacts before asserting personal jurisdiction protects nonresident defendants and state sovereignty. *See* Van Buskirk v. Carey Canadian Mines, Ltd., 760 F.2d 481 (3d Cir. 1985); Allegheny Ludlum Steel Corp. v. Pac. Gas & Elec. Co., 607 F. Supp. 35 (W.D. Pa. 1984). Because of the minimum contacts requirement, nonresident defendants are protected from litigating in inconvenient forums, where their actions may not justify the exercise of jurisdiction, while states are prevented from increasing their jurisdiction beyond their legitimate interests. *See Van Buskirk*, 760 F.2d at 481; *Allegheny Ludlum Steel Corp.*, 607 F. Supp. at 35.

60 *Int'l Shoe Co.*, 326 U.S. at 316 (emphasis added). The United States Supreme Court found the contacts were neither "irregular nor casual." *Id*. at 320. Rather, they were "systematic" and "continuous," resulting in interstate business from which the defendant received benefits and protections of the state. *Id*. The suit arose out of those activities. *Id*.; *see also* Hess v. Pawloski, 274 U.S. 352 (1927). In *Hess*, although the Court did not explicitly require minimum contacts, it used a minimum contacts analysis to determine a state could exercise jurisdiction over a nonresident served with process. *See State-Court Jurisdiction*, *supra* note 9, at 205 (noting that in *Hess*, although the opinions used traditional consent theory, they emphasized the state's interest in litigation).

"minimum contacts" standard would better suit a mobile society.[61] Since *International Shoe*, courts can still assert jurisdiction based on the defendant's physical presence, but his presence is no longer required to exercise jurisdiction.[62]

The Supreme Court further expanded the personal jurisdiction doctrine in *McGee v. International Life Insurance Co.*,[63] decided in 1957, where, for the first time, the Court openly acknowledged a "clearly discernable trend toward expanding the permissible scope of state jurisdiction."[64] In *McGee*, the plaintiff sued a Texas company in a California court to collect benefits from her son's life insurance policy.[65] The son's life insurance policy was the only contact the company had with California.[66] Still, the Supreme Court upheld the California court's exercise of jurisdiction.[67] In its analysis, the Court reasoned that the "national economy" resulted in the trend to expand jurisdiction.[68] Likewise, "modern transportation and communication made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity."[69]

While in *McGee* it became clear that personal jurisdiction may be upheld with minimal contacts, *Hanson v. Denckla*,[70] decided in the same term, showed that due process cannot be stretched beyond certain

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61 Nguyen, *supra* note 1, at 265; *see also Int'l Shoe Co.*, 326 U.S. at 319 ("[The Due Process] clause does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations.").

Traditional jurisdiction analysis insufficiently considered the developing needs of a mobile population. *State-Court Jurisdiction*, *supra* note 9, at 204. The test operated inadequately in the context of exercising jurisdiction over nonresident corporations, especially when a nonresident committed a tort in the state but left before service and when the nonresident conducted business in the state only through agents. *Id.*

62 Nguyen, *supra* note 1, at 257; *see, e.g.*, Burnham v. Superior Court, 495 U.S. 604 (1990); Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); Shaffer v. Heitner, 433 U.S. 186 (1977).

63 355 U.S. 220 (1957). The Supreme Court upheld the exercise of personal jurisdiction, finding that it was sufficient for due process that the suit was based on a contract substantially connected to the state. *Id.* at 223. According to the Court, the connection of mailing premiums from California, as well as the insured residing in California upon his death, gave California a sufficient interest in local litigation. *Id*. at 223-24.

64 *Id*. at 222.

65 *Id*. at 221.

66 *Id*.

67 *Id*.

68 *Id*. at 222 (referring to the national economy as interstate commercial transactions and interactions between parties from different regions of the country).

69 *Id*. at 223. The Supreme Court also noted that even a single contract could be a basis for jurisdiction because it showed a substantial relationship with the forum. *Id.*

70 357 U.S. 235 (1958).

limits.[71] In *Hanson*, the Supreme Court held that a state's exercise of jurisdiction violated the Due Process Clause for the first time since its holding in *International Shoe*.[72] Also, the Court included a new factor, the defendant's purposeful availment, in the minimum contacts requirements for a constitutional exercise of jurisdiction: "[I]t 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."[73]

In *World-Wide Volkwagen*,[74] it became clear that absent purposeful availment, the minimum contacts test described in *International Shoe* could not be met.[75] However, the *World-Wide Volkswagen* decision

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71 CASAD & RICHMAN, *supra* note 5, at 90.

72 *Hanson,* 357 U.S. at 254; *see* Kenneth J. Vandevelde, *Ideology, Due Process and Civil Procedure*, 67 ST. JOHN'S L. REV. 265, 290 (1993).

73 *Hanson*, 357 U.S. at 253. *Shaffer v. Heitner*, decided in 1977, reaffirmed the purposeful availment requirement of *Hanson*. 433 U.S. 186 (1977). According to *Shaffer*, exercises of quasi in rem jurisdiction and in personam jurisdiction must meet the *International Shoe* standard for minimum contacts. *Id*. at 212 ("We therefore conclude that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in International Shoe and its progeny."). Quasi in rem jurisdiction refers to jurisdiction over a person based on that person's interest in property located within the forum's jurisdiction. BLACK'S LAW DICTIONARY 857 (7th ed. 1999). The *Shaffer* Court indicated that "the relationship among the defendant, the forum and the litigation . . . became the central concern" of personal jurisdiction. *Shaffer*, 433 U.S. at 204.

In *Kulko v. Superior Court*, the Supreme Court again found a defendant had not purposefully availed himself of the forum, as mandated by *Hanson* and reaffirmed in *Shaffer*, so the court could not exercise jurisdiction. 436 U.S. 84 (1978). In *Kulko*, a California resident sought to increase child support payments by her ex-husband, a New York resident. *Id*. at 87-88. The father voluntarily sent one of his children to live with ex-wife in California. *Id*. Although California's interest in the welfare of resident minors was arguably sufficient to permit the child support action, the Court's opinion focused on the nature of the defendant's contacts and lack of foreseeability. *Id*. *passim*.

The purposeful availment test, as applied in *Shaffer*, was used again three years later in *World-Wide Volkswagen Corp. v. Woodson*. 444 U.S. 286 (1980). In *World-Wide Volkswagen*, the Robinsons brought a products liability action in Oklahoma state court as a result of a car accident there. *Id*. at 288. The car accident caused a fire that burned Kay Robinson and her two children. *Id*. Two of the defendants, Seaway and World-Wide Volkswagen, entered special appearances and claimed that Oklahoma's exercise of personal jurisdiction over them would violate due process. *Id*. at 288-89. The Oklahoma trial court rejected that argument and held that it could assert jurisdiction over them. *Id*. at 289. Although the Supreme Court of Oklahoma upheld the assertion of jurisdiction, the United States Supreme Court reversed, denying jurisdiction. *Id*. at 289-91.

74 444 U.S. 286.

75 *World-Wide Volkswagen*, 444 U.S. at 298. The United States Supreme Court held that the Oklahoma court did not have jurisdiction over the defendants because the unilateral activity of a third party did not constitute purposeful availment. *Id*. at 298 (quoting *Hanson*, 357 U.S. at 253). Thus, while the plaintiffs claimed that a car could foreseeably cause injury

contributed to the fairness inquiry also; it was the first case in which the Supreme Court listed reasonableness factors as part of the fairness analysis:

> The burden on the defendant . . . will in an appropriate case be considered in light of other relevant factors, including the forum State's interest in adjudicating the dispute; the plaintiff's interest in obtaining convenient and effective relief, at least when that interest is not adequately protected by the plaintiff's power to choose the forum; the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.[76]

Even so, the Supreme Court decided *World-Wide Volkswagen* on the purposeful availment prong and held that the Due Process Clause may divest a forum of its power to render an enforceable judgment.[77] Thus, even if litigating in the forum were convenient for the defendant, and even if the forum's interests in applying its law were strong, the court could not exercise jurisdiction.[78]

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in Oklahoma, foreseeability alone does not confer jurisdiction under the Due Process Clause. *Id*. The Court stated:

> [T]he foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.

Id. at 297 (noting that requiring purposeful availment "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit"). Thus, a defendant who is aware he may be sued in a forum can protect himself from liability by removing ties with the forum or insuring himself, in order to avoid risk to which he does not consent. *Id*.

[76] *Id*. at 292; *see* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113 (1987); Heiser, *supra* note 55, at 925 (noting that the *Asahi* Court gave little guidance as to whether or how much weight courts should give to the convenience factors when dealing with a United States citizen defendant).

[77] *World-Wide Volkswagen*, 444 U.S. at 294; *see* Andrew Kurvers Spalding, *In the Stream of the Commerce Clause: Revisiting* Asahi *in the Wake of* Lopez *and* Morrison, 4 NEV. L.J. 141, 152 (2003) (asserting that the majority opinion refused to allow "convenience" and "reasonableness" to override consent); *see also* Stuart v. Spademan, 772 F.2d 1185 (5th Cir. 1985) (noting that fairness factors cannot confer jurisdiction over a nonresident defendant where minimum contacts analysis weighs against the exercise of jurisdiction).

[78] *World-Wide Volkswagen*, 444 U.S. at 294; Spalding, *supra* note 77, at 152; *see Stuart*, 772 F.2d at 1185.

Justice Brennan dissented in *World-Wide Volkswagen*, asserting that jurisdiction should be based on the state's interests instead of the defendant's volitional conduct.[79] He quoted *McGee* for the notion of expanding jurisdiction and noted that "the nationalization of commerce and ease of transportation and communication has accelerated . . . since 1957, when *McGee* was decided."[80] Although he concurred in the finding of purposeful availment, he favored a proportionality test in which the reasonableness factors could displace the defendant's contacts and vice-versa.[81]

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[79] *World-Wide Volkswagen*, 444 U.S. at 299 (Brennan, J., dissenting) (arguing that emphasis on the defendant's contacts does not properly weigh other reasonableness factors such as the forum State's interests and the degree of inconvenience suffered by a defendant). His view would not completely remove the purposefulness requirement. *Id*. at 300. Instead, he would look to "actual inconvenience" rather than "theoretical inconvenience" of the defendant. Spalding, *supra* note 77, at 153.

[80] *See World-Wide Volkswagen*, 444 U.S. at 308 (Brennan, J., dissenting). According to Justice Brennan's analysis, the automobile dealer could foresee and intended to place a vehicle into the stream of commerce that could travel to distant states. *Id*. at 306; Vandevelde, *supra* note 72, at 302 (noting that all of the dissenters from *World-Wide Volkswagen* opposed the majority's limit on the expansion of personal jurisdiction). Justice Brennan observed that technological advancements, which previously had resulted in expanded jurisdiction, had increased. Vandevelde, *supra* note 72, at 302. Further, the dissenters disagreed with the majority's attempt to create a mechanical test for minimum contacts. *See World-Wide Volkswagen*, 444 U.S. at 300 (Brennan, J., dissenting) (stating that *International Shoe* itself had "specifically declined to establish a mechanical test based on the quantum of contacts between a State and the defendant").

[81] *World-Wide Volkswagen*, 444 U.S. at 300 (Brennan, J., dissenting). For Justice Brennan, a defendant's participation in the stream of commerce satisfies purposeful availment. *Id*. Under this analysis, a defendant could reasonably expect to be sued in a forum where his product causes injury. *Id*. A majority of the Court believed the *International Shoe* minimum contacts test could only be met if the defendant had availed himself of the forum state. *Id*. However, each of the three Supreme Court cases that had considered purposeful availment had not found sufficient purposeful availment to confer jurisdiction. *See, e.g.*, *World-Wide Volkswagen*, 444 U.S. at 286; Shaffer v. Heitner, 433 U.S. 186 (1977); Hanson v. Denckla, 357 U.S. 235 (1958). Thus, since purposeful availment had not been found, it was questionable if purposeful availment could support jurisdiction. Vandevelde, *supra* note 72 , at 303.

The Supreme Court decided three cases in the time between *World-Wide Volkswagen* and *Burger King*. For example, see *Keeton v. Hustler Magazine Inc.* in which the Court held that selling ten to fifteen thousand magazines per month was sufficient to base jurisdiction over the out-of-state corporation. 465 U.S 770, 772-73 (1984). Justice Rehnquist questioned the fairness of bringing the defendant into the forum and inquired into the forum's interest in adjudicating the claim. *Id*. at 775-78. Next, he observed that the defendant had continuous and systematic contacts with the state market. *Id*. at 781. Thus, the state had jurisdiction. *Id*.

The Supreme Court in *Calder v. Jones* held that California had jurisdiction over a reporter and editor of the *National Enquirer* in a libel action. 465 U.S. 783, 788-89 (1984). The article was written based on California sources and caused harm in California, where the plaintiff lived. *Id*. Jurisdiction was proper because of the effects in California from the

In 1985, the Supreme Court decided *Burger King Corp. v. Rudzewicz*,[82] which clarified the necessity of purposeful availment and its relevance to minimum contacts factors discussed in earlier cases.[83] The Court explained that once purposeful contact was found, contacts should be weighed with other factors to determine whether jurisdiction comported with "traditional notions of fair play and substantial justice."[84] Moreover, the Supreme Court recognized that "it is an inescapable fact of modern commercial life that a substantial amount of business is

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defendant's out of state conduct. *Id*. at 789. The Court recognized that the defendant's tortious actions were aimed at California where the defendant participated "in an alleged wrongdoing intentionally directed at a California resident." *Id*. at 790.

In *Helicopteros Nacionales de Colombia v. Hall*, the Court decided that no jurisdiction existed over a Colombian corporation in a wrongful death action. 466 U.S. 408, 418-19 (1984). All of the parties agreed that the wrongful death claims did not "arise out of" and were unrelated to the defendant's activities in the forum. *Id*. at 415. The plaintiffs in *Helicopteros* asserted general personal jurisdiction over the defendants, but they were unsuccessful because the Court found that general jurisdiction could only be asserted when contacts are continuous and systematic. *Id.* at 416-17 (quoting Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952)). Thus, regular and substantial purchasing activity does not support general jurisdiction. *Id*. at 416-19. Justice Brennan dissented, noting that specific in personam jurisdiction existed when general in personam jurisdiction did not. *Id*. at 419 (Brennan, J., dissenting).

82 471 U.S. 462 (1985). In *Burger King*, the defendants were two Michigan residents who had a franchise of the Burger King Corporation in Michigan. *Id*. at 466-67. The Michigan defendants had applied for a Burger King franchise at the Michigan office and had mainly worked with that office. *Burger King Corp*., 471 U.S. at 466-67. However, they had contacted Burger King's headquarters in Florida, and the franchise contract had provided for Florida law. *Id*. at 465-66 (noting that the franchise agreement contained a Florida choice of law clause and required that monthly payments be made to Florida). Burger King sued in Florida federal district court when the defendants fell behind in their payments. *Id*. at 468. The *Burger King* Court held that the Florida courts had jurisdiction over the Michigan defendants. *Id*. at 487. *Burger King* was the first United States Supreme Court case since *McGee* involving personal jurisdiction in the context of a contracts question. *Compare id*., *with Helicopteros Nacionales de Columbia*, 466 U.S. at 418-19, *Calder*, 465 U.S. at 188-89, *Keeton*, 465 U.S. at 781, *World-Wide Volkswagen*, 444 U.S. at 294, *and Hanson*, 357 U.S. at 253.

83 *Burger King Corp*., 471 U.S. at 487; *see* Vandevelde, *supra* note 72 , at 304. Justice Brennan wrote the opinion and set out a two step process for analyzing personal jurisdiction questions. *Burger King Corp*., 471 U.S. at 472-74. First, the defendant must have "'purposefully directed' his activities at residents of the forum." *Id.* at 472. Thus, the unilateral activity of a person other than the defendant could not satisfy the requirement of the defendant's purposeful contact with the forum. *Id*. at 474. However, the requirement of purposeful availment could be met by placing a product in the stream of commerce with the expectation that it would reach consumers in the forum. *Id*. at 476.

84 *Burger King Corp*., 471 U.S. at 477. The fairness factors used by the Court were those listed in *World-Wide Volkswagen*. *Id*. (citing *World-Wide Volkswagen*, 444 U.S. at 292). The factors were discussed in *Burger King*, and the factors were applied in *Asahi*. *Id*.; *see* Asahi Metal Indus. v. Superior Court, 480 U.S. 102 (1987).

transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence."[85]

In 1987, the Supreme Court decided *Asahi Metal Industry v. Superior Court*.[86] In *Asahi*, although the Justices disagreed on the purposeful availment issue, the Court agreed on the fairness concerns.[87] The Supreme Court looked to the factors from *World-Wide Volkswagen* and *Burger King* in deciding that litigation between a Japanese defendant and a Taiwanese plaintiff in California was too unfair.[88] Even so, Justice

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[85] *Burger King Corp.*, 471 U.S. at 476; *see also* Quill Corp. v. North Dakota, 504 U.S. 298 (1992).

[86] 480 U.S. 102 . In *Asahi*, a California resident sued Cheng Shin Rubber Company for injuries that occurred as a result of a tire blow-out on his motorcycle. *Id*. at 105-06. The parties settled, leaving only the indemnity action between the manufacturer of the inner-tube, Cheng Shin Rubber Industrial Company, a Taiwanese company, and the manufacturer of the tube's valve, Asahi Metal Industry Company, a Japanese company. *Id*. at 106. The sales between Cheng Shin and Asahi occurred in Taiwan. *Id*. Although a substantial number of tires with Asahi valves were sold in California, Asahi had not itself sold the valves in California. *Id*.

Asahi was never named by the plaintiff in the case; Asahi was only brought into the suit by Cheng Shin in an indemnity action. *See id*. at 106. In Part II-B, the Court found that California's exercise of jurisdiction over Asahi would violate due process because it would be too unfair to force two foreign companies to litigate in a foreign court. *Id.* at 113-16. The court emphasized the burden on Asahi, California's lack of interest, and the unreasonableness of asserting jurisdiction in such a case. *Id*. However, the Court was dramatically split over the question of if Asahi had purposefully availed itself of the forum. *Id*. at 116-17.

[87] *Id*. at 113-16. Justice O'Connor used a stream of commerce plus analysis, noting that additional conduct is needed beyond the defendant placing a product in the stream of commerce. *Id*. at 112-13 (O'Connor, J., plurality). Some factors that may constitute the necessary additional conduct include designing the product for the forum state, providing advice to customers in the state, marketing through a distributor in the state, or advertising in the state. *Id*. In applying these factors to the case, Justice O'Connor found insufficient contacts to exercise jurisdiction. *Id*.

Therefore, under Justice O'Connor's analysis, mere awareness that a product would injure a California plaintiff because it was placed in the stream of commerce is insufficient to establish purposeful availment of the laws and protections of California. *Id*. *But see generally* Beyler, *supra* note 52 (suggesting that because personal jurisdiction can affect applicable law, treating advertising as a basis for personal jurisdiction can undermine First Amendment rights).

In contrast, according to Justice Brennan's opinion, placing the product in the stream of commerce with the awareness that it may enter the forum state would render a defendant liable there. *Asahi Metal Indus.*, 480 U.S. at 116-17 (Brennan, J., concurring in part and dissenting in part). ("[T]he stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale."). Therefore, according to Justice Brennan's view, as long as "a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise." *Id*.

[88] *Asahi Metal Indus.*, 480 U.S. at 116-17 (Brennan, J., concurring in part and dissenting in part); Heiser, *supra* note 55, at 925-27 (noting that because *Asahi* involves two noncitizen

Brennan's concurrence referred to the recent changes in technology, such as mobile phones and computers, and how these changes should affect jurisdiction.[89]

B. Past Effects of Technology on Jurisdiction: Changing Gears with the Federal Rules

Changes that have influenced the Supreme Court in expanding jurisdiction have also impacted decisions of the Advisory Committee in proposing amendments to Rule 4. In order for a federal court to assert jurisdiction over a defendant, the defendant must either consent or be served with process pursuant to Rule 4.[90] However, a defendant who is

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defendants, the Supreme Court gave little guidance as to whether or how much weight should be given to the convenience factors when dealing with a United States citizen defendant).

[89] *Asahi Metal Indus.*, 480 U.S. at 117 (Brennan, J., concurring in part and dissenting in part). Since *Asahi*, the Court decided *Burnham v. Superior Court* in which the Court upheld the authority of a state to assert jurisdiction over a transient defendant based only on territorial power. Burnham v. Superior Court, 495 U.S. 604, 609 (1990); *see also* Grace v. MacArthur, 170 F. Supp. 442 (E.D. Ark. 1959) (upholding jurisdiction under the transient rule over a person flying over Arkansas in an airplane because the person was within the territorial limits of Arkansas and was therefore subject to service under the federal rules).
In *Burnham*, Dennis Burnham visited southern California on business, and, during the same trip, he visited his children in San Francisco. 495 U.S. at 608. While he was in San Francisco, he was served with a summons in a divorce action brought by his wife who resided there. *Id*. The issue decided by the Court was "whether the Due Process Clause of the Fourteenth Amendment denies . . . jurisdiction over a nonresident, who was personally served with process while temporarily in that State, in a suit unrelated to his activities in the State." *Id*. at 607. The Court upheld the state's authority to assert jurisdiction. *Id*. at 620-21 (Scalia, J., plurality). The defendant voluntarily present in a forum has clear notice that he is subject to suit in the forum. *Id*. at 624.

The effect of the *Burnham* decision is that the defendant's physical presence within the borders of a state at the time of service is alone sufficient to confer jurisdiction. *See id*. at 613 (Scalia, J., plurality). The Court still uses raw territorial power to confer jurisdiction over a transient defendant. *See id.* (Scalia, J., plurality). *But see id.* at 628-40 (Brennan, J., concurring in part and dissenting in part) (holding that *Shaffer* requires applying the minimum contacts test while finding that presence itself satisfies the test and confers jurisdiction). Regarding fairness in asserting jurisdiction based on presence, Justice Brennan argued that three elements reduce the likelihood of unfair and burdensome results. *Id.* at 628-40 (Brennan, J., concurring in part and dissenting in part). One of the elements, technology, in the form of modern communication and transportation, decreases the costs of defending a suit in a foreign forum. *Id*. at 638-39. Likewise, discovery by mail and telephone can decrease the burden. *Id.* Moreover, the defendant had already traveled to the forum at least one time—the time when he was served with process—so returning to the state is likely not "prohibitively inconvenient." *Id*. at 639-40.

[90] *See* CASAD & RICHMAN, *supra* note 5, at 223 (noting that "the physical connection between the defendant and the process server . . . gives the defendant notice . . . [and] symbolizes the court's physical power over the defendant"); Simard, *supra* note 9, at 1645 (noting that courts assert personal jurisdiction over defendants through service of process);

amenable to service is not always subject to personal jurisdiction.[91] Further, while jurisdiction must comport with due process requirements, as explained in Supreme Court jurisprudence,[92] Congress may expand the federal courts' authority to exercise personal jurisdiction over defendants.[93] Accordingly, some federal statutes provide for nationwide service of process, thereby increasing the federal courts' jurisdictional reach.[94]

Congress grants the Supreme Court the power to promulgate the Rules, and the Supreme Court looks to committees to draft and revise the Rules.[95] The process for creating the Rules is found in the Rules Enabling Act of 1934.[96] The Rules were first adopted on September 16, 1938.[97]

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see FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson, 636 F.2d 1300, 1312 n.61 (D.C. Cir. 1980); *see also* Omni Capital Int'l v. Rudolf Wolff & Co., 484 U.S. 97, 103 (1987).

91 *Omni Capital Int'l*, 484 U.S. at 103; CASAD & RICHMAN, *supra* note 5, at 222 (noting that constitutional limitations such as minimum contacts are separate from service).

92 CASAD & RICHMAN, *supra* note 5, at 222; *see supra* Part II.A (discussing United States Supreme Court personal jurisdiction cases).

93 Frasch, *supra* note 26, at 698; *see also* 28 U.S.C. § 2072 (2000); Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 418 (9th Cir. 1977); CASAD & RICHMAN, *supra* note 5, § 5-1.

94 HAZARD & TARUFFA, *supra* note 33, at 177; Erichson, *supra* note 39, at 1122-25. Rule 4 permits a federal court to assert jurisdiction over a defendant who would be subject to jurisdiction in state court, under the one hundred mile bulge rule, in interpleader cases, and pursuant to specific federal statutes. CASAD & RICHMAN, *supra* note 5, at 552-56.

95 Frasch, *supra* note 26, at 699. The current process of federal rule-making began in 1958. Thomas E. Baker, *An Introduction to Federal Court Rulemaking Procedure*, 22 TEX. TECH L. REV. 323, 324 (1991); *see also* RICHARD L. MARCUS & EDWARD F. SHERMAN, COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE, 6 (West 3d ed. 1998) (referring to procedural reforms of 1938 leading to this process). Now, federal rule-makers are the members of the Judicial Conference's Standing Committee on Rules and the Advisory Committee on Civil Rules. Baker, *supra*, at 329; *see* Erichson, *supra* note 39, at 1117 n.4. The Judicial Conference includes the Chief Justice and other federal judges. Erichson, *supra* note 39, at 1117 n.4. This Conference has a standing committee, and the standing committee has an advisory committee on the Rules. *Id*. Therefore, although the rules are officially prescribed by the Supreme Court, the Judicial Conference drafts the rules. *Id*.

The Advisory Committee Reporter, usually a law professor, drafts new rules or amendments. *Id*. Then, the Advisory Committee revises the rule. *Id*. Next, the Standing Committee reviews the rule, which then goes for public consideration, another revision, and finally Supreme Court approval. *Id*. The Rules are presented to Congress for review and approval prior to becoming effective. *Id*.; *see* 28 U.S.C. § 2072 (2000) ("[S]uch rules shall not take effect until they have been reported to Congress by the Chief Justice.").

96 *See* Erichson, *supra* note 39, at 1117 n.4; *see also* 28 U.S.C. § 2072 (2000) (providing that the judicial rulemaking may affect practice and procedure, but it may not enlarge, modify, or abridge substantive rights). The Permanent Process Act of 1792 first allowed the Supreme Court to make rules for federal courts. Jay S. Goodman, *On the Fiftieth Anniversary of the Federal Rules of Civil Procedure: What Did the Drafters Intend?*, 21 SUFFOLK U. L. REV. 351, 353 (1987). However, the Conformity Act of 1872 removed the Court's rule-

A main objective of the Rules is to allow federal courts to determine entire controversies.[98] The procedures established by the Rules demonstrate this objective by allowing parties to plead multiple theories, amend complaints, and join claims arising out the same transaction as the original claim.[99] This objective has also influenced amendments to the Rules, such as adding the "bulge rule" to Rule 4, which provides for service to confer jurisdiction over joined parties within one hundred miles of the courthouse from which the summons issues.[100] The

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making authority. Baker, *supra* note 95, at 324. As a result, the federal courts lacked uniformity in pleading or procedure. *Id*. at 354. In 1912, Thomas W. Shelton, head of the ABA's Uniform Judicial Procedure Committee, worked to reform federal civil procedure by giving the rule-making authority to the Supreme Court. Goodman, *supra*, at 354. The Law and Equity Act of 1915 partially reformed equity courts through modern procedures and a code system. *Id*. Then, in 1934, Congress passed the Enabling Act with President Roosevelt's support; this Act authorizes the Supreme Court to make general rules and allowed the Court to create one procedure for equity and law. *Id*. at 355.

97 *See* Hon. Charles E. Clark, *Experience Under the Amendments to the Federal Rules of Civil Procedure*, 8 F.R.D. 497 (1949). The federal rules were adopted in two stages. Goodman, *supra* note 96 , at 353. First, the supporters obtained legislative authority for the Supreme Court to create rules for the district courts. *Id*. Then, the bar needed to agree to the nature of the proposed rules before taking the rules to Congress. *Id*.

The new rules proposed a uniform federal system for all federal courts. *Id*. at 359. Rule 2 created a civil action and abolished the distinction between law and equity. *Id*. The rules included provisions for joining claims and parties, and they provided for discovery. *Id*.

98 Simard, *supra* note 9, at 1647; *see also* FED. R. CIV. P. 1 (stating that the rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action"). The word "action" has been construed to mean "entire controversy" instead of claim or cause of action. Simard, *supra* note 9, at 1647.

99 Simard, *supra* note 9, at 1647; *see also* FED. R. CIV. P. 1; FED. R. CIV. P. 8 (allowing a party to plead multiple theories arising out of the same operative facts); FED. R. CIV. P. 15 (allowing a party to amend a complaint to include an omitted count with permission of the court). Also, the joinder rules allow courts to resolve entire controversies by requiring parties to bring against opposing parties any claims, counter-claims, or cross-claims arising out of the same transaction. Simard, *supra* note 9, at 1647. Further, other federal civil procedure practices outside the rule operate towards this objective. *Id*. at 1649-50. For example, supplemental jurisdiction encourages parties to consolidate their related claims by allowing courts to exercise jurisdiction over those claims that would otherwise be jurisdictionally insufficient. *Id*. Res judicata also requires litigants to bring all of their related claims in one suit. *Id*.

100 *See* FED. R. CIV. P. 4(k)(1)(B); FED. R. CIV. P. 4(f) (1963), advisory committee notes; Quinones v. Pa. Gen. Ins., 804 F.2d 1167 (10th Cir. 1986); Coleman v. Am. Exp. Isbradtsen Lines, Inc., 405 F.2d 250 (2d Cir. 1968) (noting that the third party only needs to have minimum contacts with the state in which the bulge service is made). The bulge rule applies regardless of whether the jurisdiction is federal question, diversity, or admiralty. The bulge rule applies to parties that have been joined to a lawsuit to allow courts to fully decide matters before them. *See* Sprow v. Hartford Ins. Co., 594 F.2d 412 (5th Cir. 1979) (noting that the correct method for measuring the one hundred mile distance within which the district court process may be served is by a straight line or "as the crow flies" measure

Advisory Committee notes for the 1963 Amendments, which established this rule, emphasized that the policy of the rule was "to promote the objective of enabling the court to determine entire controversies."[101]

In the 1960s, the Advisory Committee found that then-modern transportation and ease of communication decreased the potential burden suffered by a defendant forced to litigate in more distant forums.[102] Because courts were more easily accessible, allowing service within a one hundred mile radius of the courthouse would not offend due process for the defendant.[103] Thus, according to the Committee, "[i]n the light of present-day facilities for communication and travel, the territorial range of the service allowed, analogous to that which applies to the service of a subpoena . . . can hardly work hardship on the parties summoned."[104]

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of air miles, which constitutes a uniform standard and offers more certainty than measuring based on road miles). CASAD & RICHMAN, *supra* note 5, at 554.

101 FED. R. CIV. P. 4(k)(1)(B), advisory committee notes.

102 *See* FED. R. CIV. P. 4(f) (1963), advisory committee notes; *see also* Aaron R. Chacker, Note, *E-ffectuating Notice:* Rio Properties v. Rio International Interlink, 48 VILL. L. REV. 597, 600 (2003) (noting that Rule 4 lists available methods of service, and defining service of process as the formal method of giving notice).

103 *See* FED. R. CIV. P. 4(f) (1963), advisory committee notes. Technology has changed since the *Mullane* "reasonably calculated" standard was first set out by the Court, and in 1980, the first post-*Mullane* authorization of notice through a novel communication technology was approved by a district court. Chacker, *supra* note 102, at 605. The court there allowed service by telex partly because telex was a reasonable method of communication to which most defendants had access, stating:

> Courts . . . cannot be blind to changes and advances in technology. No longer do we live in a world where communications are conducted solely by mail carried by fast sailing clipper or steam ships. Electronic communication via satellite can and does provide instantaneous transmission of notice and information. No longer must process be mailed to a defendant's door when he can receive complete notice at an electronic terminal inside his very office, even when the door is steel and bolted shut.

Id. at 606 (quoting *New England Merchants Nat'l Bank v. Iran Power Generation and Transmission Co.*, 495 F. Supp. 73, 81 (S.D.N.Y. 1980)). Courts have also approved of service of process by facsimile. *Id*. at 608. Also recently, television notice was approved by a court for service on Osama Bin Laden and al Qaeda. *Id*. at 611. Because the location of the defendants was unknown, only this "unusual method of notification" would likely notify the defendants of the litigation. *Id*. Courts have also recently considered service of process via electronic mail. *Id*.

104 *See* FED. R. CIV. P. 4(f) (1963) advisory committee notes. Service of a subpoena follows FED. R. CIV. P. 45(e)(1). *Id*.

The Advisory Committee considered amending Rule 4 again in 1989, to allow for nationwide service of process in all federal question cases.[105] The proposed rule provided:

> Unless a statute of the United States otherwise provides, or the Constitution in a specific application otherwise requires, service of a summons or filing of a waiver of service is also effective to establish jurisdiction over the person of any defendant against whom is asserted a claim arising under federal law.[106]

Had the rule passed, it would have effectively allowed federal courts to assert jurisdiction over defendants in federal question cases based on aggregate minimum contacts with the United States rather than on the contacts with the state in which the federal district court was located.[107]

Since 1938, when the Rules were adopted, to 1963, when the bulge rule was passed, technology had changed enormously.[108] In 1938, there were no typewriters, no direct dialing long distance phone calls, and no passenger jets.[109] By 1963, technology had advanced so dramatically that the Rules were amended to account for the changes.[110] Technology has again dramatically changed in the more than forty years since the bulge rule amendment.[111] Today, attorneys regularly rely on electronic mail, Internet based legal research services, and computers with word

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105 Erichson, *supra* note 39, at 1127 (providing the text of the proposed amendment). An earlier draft of the proposed rule had recommended making the proposal contingent on Congress amending 28 U.S.C. § 1331 to include the same provision, thus making Congress's consent to the change explicit. *Id*. at 1129 n.82.

106 *See* Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure and the Federal Rules of Civil Procedure, 127 F.R.D. 237, 280-81 (1989); Erichson, *supra* note 39, at 1127. Under a rule that gives a federal court personal jurisdiction from a nationwide service of process provision, the minimum contacts test would become whether there were minimum aggregate contacts with the entire nation instead of with the state in which the district court is located. Erichson, *supra* note 39, at 1123 n.30.

The proposed rule included three ideas and would have dramatically changed 1989 Rule 4(e) and (f). *Id*. at 1127 n.65. The proposed rule left unchanged the bulge rule for joinder. *Id*. at 1127. Also, in diversity actions, it connected federal jurisdiction to state-court jurisdiction by only allowing federal courts to exercise jurisdiction when a state-court could do so. *Id*. Finally, it provided for nationwide service in federal question cases. *Id*.

107 Erichson, *supra* note 39, at 1123 n.30, 1127.

108 MARCUS & SHERMAN, *supra* note 95, at 6.

109 *Id*.

110 *See* FED. R. CIV. P. 4(f) (1963), advisory committee notes.

111 *See* BRINKLEY, *supra* note 2, at 931.

processing programs in conducting their day-to-day activities.[112] These technological advancements which enhance attorneys' abilities to manage their workload are also used by the federal courts.[113]

C. Current Technology and the Federal Courts: The Vehicle of the Future

Since *Asahi* and the 1963 amendments to Rule 4, technology has rapidly advanced and is now used throughout society.[114] The development of the Internet allows many Americans access to businesses, resources, and each other from home and work.[115] For example, electronic access to court information is available to the public through the Public Access to Court Electronic Records ("PACER") system.[116] Further, the PACER system has recently been enhanced by

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[112] MARCUS & SHERMAN, *supra* note 95, at 6.

[113] *See infra* Part II.C.

[114] *Cf. supra* notes 86-89 and accompanying text (discussing changes between 1963 and the *Asahi* decision and since *Asahi* was decided and today). While in 1984, there were less than one thousand computers connected to the Internet, by 1994, there were over six million computers connected. *See* BRINKLEY, *supra* note 2, at 931. In 2001, approximately four hundred million people world-wide and one hundred thirty million Americans were using the Internet. *Id*.; *see* Matthew Oetker, Note, *Personal Jurisdiction and the Internet*, 47 DRAKE L. REV. 613, 614 (1999); Richard Philip Rollo, *Casenote: The Morass of Internet Personal Jurisdiction: It Is Time for a Paradigm Shift*, 51 FLA. L. REV. 667, 676 (1999). The Internet is a network of computers that developed from a Department of Defense project called the Advanced Research Project Administration, which allowed researchers direct access to laboratory computers and assisted with transmitting communications. Rollo, *supra*, at 676. Thus, the Internet is a series of linked and overlapping networks that use the same data transfer protocol. *Id*. Transfer of information happens almost instantly, and the Internet can be used to communicate with the world. *Id*.; Eric C. Newburger, *Current Population Reports: Home Computers and Internet Use in the United States: August* 2000, United States Census Bureau (2001), *available at* http://www.census.gov/prod/2001pubs/p23-207.pdf (last visited Feb. 2, 2004).

[115] *See* Newburger, *supra* note 114. Fifty-four million households, about fifty-one percent of homes, had a computer in August 2000. *Id*. (noting that this is an increase from forty-two percent of homes having a computer in the December 1988 study). Further, in households that have computers, Internet usage is so common that computer availability and Internet use are practically the same. *Id*. Ninety-four million people use the Internet at home, and more than two in five homes have Internet access. *Id*. Since 1984, the first year the Census Bureau collected information on computer usage, the country has experienced a five-fold increase in the number of households with computers. *Id*. In 1997, less than half of all households with computers had a member of the household who was using the Internet. *Id*. In 2000, more than four out of five households with a computer had at least one member using the Internet at home. *Id*.

[116] *Id*. PACER, an electronic service, provides public access to case and docket information from federal appellate, district, and bankruptcy courts. Public Access to Court Electronic Records, *available at* http://pacer.psc.uscourts.gov/pacerdesc.html (last visited Feb. 2, 2004) (noting that PACER logins are available on the website). User fees fund the electronic access. *Id*. The federal judiciary set the fee at a rate of seven cents per page with a maximum cost of $2.10 per document. *Id*.

the Case Management and Electronic Files System ("CM/ECF") which also utilizes the Internet.[117] Through the CM/ECF program, federal courts maintain case documents in electronic form.[118] Further, each court may permit online filing of case documents such as pleadings, motions, and petitions.[119]

In all federal courts, the projected implementation date for the CM/ECF program is May 2005.[120] However, many courts already use

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[117] *See* Maria Perez Crist, *The E-Brief: Legal Writing for an Online World*, 33 N.M. L. REV. 49, 54 (2003) (noting that as electronic filing alters courts' procedures, the use of electronic submissions will dominate); Case Management and Electronic Case Files, *available at* http://www.uscourts.gov/cmecf/cmecf.html (last visited Feb. 2, 2004). One judge noted that this program may "significant[ly] change in the way federal courts do their work since the adoption of the Federal Rules of Civil Procedure in 1938." Crist, *supra*, at 51.

The CM/ECF system uses standard computer hardware, an Internet connection, and a browser, and it accepts documents in Portable Document Format ("PDF"). Case Management and Electronic Case Files, *available at* http://www.uscourts.gov/cmecf/cmecf.html (last visited February 2, 2004). The CM/ECF system is designed to accept only PDF documents because that format allows a document to keep its formatting, fonts, and pagination, regardless of what kind of computer is used to view the document. *Id*. Adobe created the software and has also developed a way to convert most documents created in word processing programs into PDF. *Id*. Each user has a court-issued password, and after logging on to the court's website, the filer enters information about the case and document and attaches the document. *Id*.

[118] Case Management and Electronic Case Files, *available at* http://www.uscourts.gov/cmecf/cmecf.html (last visited February 2, 2004). CM/ECF gives the courts enhanced docket management, as well. *Id*. With the program, courts can make their documents available to the public over the Internet. *Id*. While the Internet raises privacy concerns, the Judicial Conference has adopted recommendations to address these issues. *Id*.

[119] *Id*. Federal courts have also recently approved service by electronic mail under Rule 4. Jeremy A. Colby, *You've Got Mail: The Modern Trend Towards Universal Electronic Service of Process*, 51 BUFF. L. REV. 337 (2003) (noting a modern trend towards universal electronic service); *see also* Heather A. Sapp, *You've Been Served!* Rio Properties, Inc. v. Rio International Interlink, 43 JURIMETRICS J. 493 (2003) (noting that while the Rules do not explicitly authorize service by electronic mail, it is permitted so long as it meets the requirements of the Fifth and Fourteenth Amendments); Yvonne A. Tamayo, *Are You Being Served?: E-Mail and (Due) Service of Process*, 51 S.C. L. REV. 227 (2000) (discussing the feasibility of electronic mail to notify defendants of actions filed against them in federal courts).

[120] Case Management and Electronic Case Files, *available at* http://www.uscourts.gov/cmecf/cmecf.html (last visited February 2, 2004). Bankruptcy courts began implementation in 2001. *Id*. District courts began in 2002, while appellate courts should begin in late 2004. *Id*.; *see* Colby, *supra* note 119, at 337 (noting that a modern trend allows service of process by electronic mail to foreign defendants that may be difficult to reach outside of the United States by traditional means, and arguing for amending FED. R. CIV. P. 4 to include electronic service within the United States); *see also* Chacker, *supra* note 102, at 598 (noting that changes in technology, such as facsimile and telex, have given courts extended reach so that previously unattainable parties are now unable to avoid submission to a court's jurisdiction).

the system and accept electronic filings.[121] In these courts, attorneys file documents over the Internet.[122] Further, although regular document filing fees apply, internet filing does not include any additional fees.[123]

While all courts will have electronic filing capabilities in 2005, courts are not required to use electronic filing.[124] The use of electronic filing is a district by district determination.[125] Thus, district courts allow electronic filing by passing a local rule pursuant to Rule 5(e).[126] Further, in November 2004, the Advisory Committee proposed an amendment to

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121 Case Management and Electronic Case Files, *available at* http://www.uscourts.gov/cmecf/cmecf.html (last visited February 2, 2004). There are currently thirty-three district courts, sixty-eight bankruptcy courts, the Court of International Trade, and the Court of Federal Claims that are using the CM/ECF system. *Id*. Over ten million cases are on CM/ECF systems and more that fifty thousand lawyers have filed documents over the Internet. *Id*. Each court goes through a ten month process to implement the system, and each month four or five courts have completed the implementation. *Id*. As of January 2005, the following federal courts were currently operational on the system: Alabama Middle; Alabama Northern; Alabama Southern; California Central; California Eastern; California Northern; Colorado, Connecticut; District of Columbia; Florida Middle; Florida Northern; Georgia Middle; Georgia Northern; Idaho; Illinois Central; Illinois Southern; Indiana Southern; Indiana Northern; Iowa Southern; Kansas; Kentucky Eastern; Kentucky Western; Louisiana Western; Maryland; Maine; Massachusetts; Michigan Eastern; Michigan Western; Minnesota; Mississippi Northern; Mississippi Southern; Missouri Eastern; Missouri Western; Nebraska; New Hampshire; New Jersey; New York Eastern; New York Northern; New York Southern; New York Western; Ohio Northern; Ohio Southern; Oklahoma Northern; Oklahoma Western; Oregon; Pennsylvania Eastern; Pennsylvania Middle; Puerto Rico; South Dakota; Tennessee Eastern; Tennessee Western; Texas Eastern; Texas Northern; Texas Southern; Vermont; Virginia Western; Washington Eastern; Washington Western; West Virginia Southern; Wisconsin Eastern; Wyoming; Court of International Trade; Court of Federal Claims. *Id*. However, of those courts, the following courts did not accept electronic filing: Alabama Northern; Colorado; Iowa Southern; Michigan Eastern; Oklahoma Northern; Tennessee Western; Vermont; West Virginia Southern; Wyoming. As of January 2005, the following federal district courts were in the process of implementing the system: Alaska; Arkansas Eastern; Arkansas Western; Arizona; California Southern; Delaware; Florida Southern; Georgia Southern; Guam; Hawaii; Illinois Northern; Louisiana Eastern; Louisiana Middle; Montana; Nevada; North Carolina Eastern; North Carolina Middle; North Carolina Western; North Dakota; Northern Mariana Islands; Oklahoma Eastern; Pennsylvania Western; Rhode Island; South Carolina; Tennessee Middle; Texas Western; Utah; Virginia Eastern; West Virginia Northern. *Id*.

122 *Id*. Further, after filing, parties to the litigation receive immediate electronic mail confirmation in the form of a "Notice of Electronic Filing." *Id*. This automatically generated notice indicates the court's receipt of the filing. *Id*. Also, other parties automatically receive electronic mail notification of the filing. *Id*.

123 *Id*. Parties receive one free copy of documents filed electronically in their cases, and it can either be saved or printed for their files. *Id*. Additional copies are available at $.07 per page with a maximum fee of $2.10 per document. *Id*.

124 *Id*.

125 *Id*.

126 *Id*.; *see* FED. R. CIV. P. 5(e).

Rule 5, which would allow district courts to require electronic filing of documents.[127] The Committee note specifically refers to the advantages to courts and litigants from electronic filing.[128] Additionally, the Committee clearly recognized that all parties may not be able to use electronic filing easily, and the notes suggest that district courts exclude these parties from the requirement for good cause.[129]

III. ANALYSIS: THE FEDERAL RULES SHOULD KEEP UP WITH (INTERNET) TRAFFIC

Personal jurisdiction rules in federal court are antiquated in light of modern technology because they still follow traditional state boundaries as a proxy for fairness.[130] Therefore, technology that connects people across these traditional boundaries strains the current personal jurisdiction analysis.[131] As a result, methods courts use to address developing technology are inconsistent because courts are obligated to apply the *International Shoe* approach to resolve a problem unanticipated by the *International Shoe* Court.[132] Similarly, technological progress has resulted in jurisdictional issues not considered by those who designed the current FRCP, and the FRCP should be reformed to embrace this progress.[133] Thus, jurisdictional problems created by new technology can be answered through using that same technology to reform the law.[134]

Fairness and sovereignty have traditionally been guiding principles in the development of jurisdictional analysis.[135] Part IV.A of this Note discusses the meaning of fairness and argues that the fairness inquiry is ineffective because territorial boundaries are no longer relevant to the

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127 FED. R. CIV. P. 5 (Nov. 2004) (preliminary draft).

128 *Id.* advisory committee notes. Most courts with this technology use electronic filing because it reduces judicial expenditures. Case Management and Electronic Case Files, *available at* http://www.uscourts.gov/cmecf/cmecf.html (last visited February 2, 2004).

129 FED. R. CIV. P. 5, advisory committee notes (Nov. 2004) (preliminary draft).

130 *See supra* notes 91-114. Use of the Internet has rapidly increased. *See* Newburger, *supra* note 114. The Internet is now accessible from school, work, public libraries, and homes. *Id.*; *see* Nguyen, *supra* note 1, at 266-67; Oetker, *supra* note 114, at 614 (noting that in 1981, only a few hundred computers used the Internet, but by 1997, over fifteen thousand host computers and thirty million users existed).

131 Conley, *supra* note 13, at 407; Taylor, *supra* note 10, at 1163-64; *see* CASAD & RICHMAN, *supra* note 5, at 178.

132 Conley, *supra* note 13, at 407 (suggesting that now is the time to alter the jurisdictional inquiry).

133 *Id.*; *supra* notes 90-114.

134 *Cf.* Conley, *supra* note 13, at 407.

135 *See* Nguyen, *supra* note 1, at 273-74.

issue of fairness.[136] Then, Part IV.B analyzes the Supreme Court's previous expansion of jurisdiction in response to changing technology and suggests that since the last case decided by the Supreme Court was both factually distinguishable from most cases and dated before the widespread use of the Internet, the fairness inquiry is outdated.[137] Finally, Part IV.C argues that it is time to expand jurisdiction again, based on the history of expanding Rule 4, to accommodate technological advancements.[138]

A. Irrelevance of Territorial Boundaries to Fairness Concerns

While the fairness inquiry has become basic to personal jurisdiction analysis, the inquiry has not been stagnant.[139] Instead, the idea of fairness has evolved over time, responding to social, economic, and technological changes.[140] In the inquiry, fairness often refers to either convenience or sovereignty.[141] Thus, while the term can focus on convenience issues, jurisdictional fairness also refers to how much power the sovereign entity has.[142] Because a court can assert jurisdiction when a defendant subjects himself to the forum,[143] if territorial boundaries are used as proxy for fairness, the relevant boundaries for asserting jurisdiction should be those of the "sovereign who has created the court."[144] Therefore, because the sovereign power of the United States covers a larger geographical territory than that of any one state, federal service of process could be fully effective without regard to state boundaries.[145]

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136 *See infra* Part III.A.

137 *See infra* Part III.B.

138 *See infra* Part III.C.

139 Erichson, *supra* note 39, at 1140; *see* Casad, *supra* note 9, at 1599-1606.

140 Nguyen, *supra* note 1, at 273; *see supra* Part II.A (discussing Supreme Court jurisprudence regarding the changing personal jurisdiction analysis).

141 Erichson, *supra* note 39, at 1142; Nguyen, *supra* note 1, at 274; *see also* World-Wide Volkswagen v. Woodson, 444 U.S. 286, 293 (1980).

142 Erichson, *supra* note 39, at 1142. Article III of the United States Constitution allows Congress to establish federal courts inferior to the Supreme Court as necessary. *Id*. at 1141. Therefore, Congress could have chosen to establish only one nationwide federal district. *Id*. Jurisdiction could have then been asserted throughout the district (or across the country). *Id*. Federal districts did not have to be limited by state boundaries. *Id*.

143 *Id*. at 1142-43.

144 *Id*. at 1143 n.171; *see also* Stafford v. Briggs, 444 U.S. 572, 554 (1980) (Stewart, J., dissenting); Miss. Publ'g Corp. v. Murphree, 326 U.S. 438 (1946) (noting that Congress may extend the territorial jurisdiction of a federal court to any part of the United States). A state court's ability to exercise jurisdiction is irrelevant. Erichson, *supra* note 39, at 1143 n.171.

145 *See* Erichson, *supra* note 39, at 1143 n.171, 1144; *see also* FTC v. Jim Walter Corp., 651 F.2d 251, 255-56 (5th Cir. 1981). Fairness and sovereignty are both elements of the

Personal jurisdiction has used state or district lines as a proxy for convenience since *Pennoyer v. Neff*.[146] Then, the sovereign-created boundaries were state lines largely because of society's inability to travel.[147] With the creation of the Rules, the federal service provisions also followed state boundaries, at least partially, because of the immobility of society at the time.[148] However, state lines do not accurately measure the time or expense of travel.[149] These boundaries were always inadequate as a proxy for fairness because they ignored that one defendant possibly suffered no inconvenience by crossing a nearby state line, while another could have suffered substantial inconvenience by crossing a large state but remaining within the territorial borders of the forum.[150] Indeed, *International Shoe* demonstrates that the Supreme Court recognized the ineffectiveness of state boundaries as a proxy for fairness because it allowed courts to reach beyond the borders of their forum states when minimum contacts were shown.[151]

While society was more mobile in the 1940s than during the time of *Pennoyer*, it was still far less technologically advanced than society is

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Fourteenth Amendment state-court jurisdiction test, but they do not apply equivalently to the federal courts. *See* Casad, *supra* note 9, at 1600. For example, fairness does not explain why a federal court can reach outside the forum's territorial boundaries to exert jurisdiction when a state court cannot, such as under the bulge rule. *Id*. Other factors limit state jurisdiction, and these factors are irrelevant to federal courts in federal question cases. *Id*. Therefore, the Fifth Amendment does not require minimum contacts with a state. *Id*. Another proposition is that contacts with the nation as a whole may not satisfy the Fifth Amendment, but contact with the state where the federal court sits is also not required. *Id*. at 1601; *see also* Oxford First Corp. v. PNC Liquidating Corp., 372 F. Supp. 191 (E.D. Pa. 1974). However, this view creates additional problems in analyzing the same fairness factors required by *International Shoe*. Casad, *supra* note 9, at 1603. One possible solution would be to adjust venue requirements to handle situations of substantial unfairness. *Id*.

146 Erichson, *supra* note 39, at 1156 n.249; *see* CASAD & RICHMAN, *supra* note 5, § 1:07; *supra* Part II.A.

147 *See supra* note 41 and accompanying text.

148 *See* FED. R. CIV. P. 4(f) (1963), advisory committee notes; HAZARD & TARUFFO, *supra* note 33, at 177 (noting that although Congress created the federal courts in 1789 and provided that they should use the same methods of process as the states, the permissible forms of federal process have expanded over time in various situations to provide for nationwide service of process); *supra* Part II.B.

149 Erichson, *supra* note 39, at 1156 n.249; *see* CASAD & RICHMAN, *supra* note 5, § 1:07.

150 Erichson, *supra* note 39, at 1156 n.249.

151 *See* Warren B. Chick, *International Law and Technology: U.S. Jurisdictional Rules of Adjudication over Business Conducted via the Internet – Guidelines and a Checklist for the E-Commerce Merchant*, 10 TUL. J. INT'L & COMP. L. 243, 250-51 n.28 (noting that *International Shoe* responded to communication and transportation technological advancements of the 1940s).

today.[152] Between the time *International Shoe* was decided, when the FRCP had only existed for six years, and today, many changes in technological capabilities, transportation, and communication have influenced society, the Advisory Committee, and the Supreme Court.[153] Evidence of these changes is even visible in the federal courts through the implementation of on-line filing, the use of electronic discovery, and service by electronic mail.[154] The next step in the Rules is to account for these technological advancements in obtaining jurisdiction.[155]

B. Supreme Court Trends Demonstrate the Expansion of Jurisdiction Based on Technological Advancements

Technology has progressed so that alternative methods of communication, including electronic mail and the Internet, have surpassed the traditional limitations of geographical boundaries, resulting in increased interstate activities and commerce.[156] Supreme Court cases, which altered jurisdiction analysis as technology developed and noted the increasing nationalization of commerce, modern transportation, and communication, illustrate the trend of technology operating to relax due process limits on jurisdiction. [157] As demonstrated by this trend in Supreme Court jurisprudence, defendants need less protection from litigation by the federal Constitution because federal forums are more easily accessible.[158]

With each of the Supreme Court's many references to technological changes throughout its personal jurisdiction jurisprudence, some major technological advancement had occurred.[159] As a result of the advancement, the defendant's unfairness argument was substantially

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[152] *See* Nguyen, *supra* note 1, at 273. *Compare supra* text accompanying notes 41-43, *with supra* text accompanying Part II.C.

[153] *See supra* notes 57-114.

[154] *See supra* Part II.C. For a discussion of video depositions and other technology used by courts, see Rebecca White Berch, *A Proposal to Amend Rule 30(B) of the Federal Rules of Civil Procedure: Cross-Disciplinary and Empirical Evidence Supporting Presumptive Use of Video to Record Depositions*, 59 FORDHAM L. REV. 347 (1990); *see* FED. R. CIV. P. 30(b) (permitting video depositions). The Rules have also provided for service by electronic mail when other means of service are ineffective. *See supra* note 119.

[155] *See infra* Part IV.

[156] *See supra* Part II.C.

[157] *See supra* text accompanying notes 57-89.

[158] *See supra* Part II.B.

[159] *See supra* text accompanying notes 57-89 (tracing the development of the personal jurisdiction analysis and technology).

weakened.[160] The development of the Internet is another such technological change.

A court should rarely determine that it is too unfair to bring a defendant into a forum because current technology available to defendants eases traditional concerns regarding court accessibility.[161] Accordingly, the Supreme Court has been narrowing the unfairness prong of the test since *International Shoe* when it first used technology to expand boundaries beyond those of the defendant's state.[162] Since then, although state boundaries, as a proxy for geographic convenience, have been considered in the personal jurisdiction analysis for state-court jurisdiction, they have not completely limited jurisdiction since *Pennoyer*.[163] Moreover, caselaw demonstrates that even where it may seem unfair to bring a defendant into a forum, unfairness alone is insufficient—exercising jurisdiction must be so unfair as to deny due process.[164]

Recent decisions such as *Burger King* and *Asahi* also point to determining the fairness question as a function of mobility, which is an area of continued technological advancement.[165] However, the problem with the *Burger King* approach is that it went too far; by operating as a sliding-scale, it disregarded the purposeful availment requirement, which is clearly required according to other Supreme Court personal jurisdiction cases.[166] Even so, *Burger King* illustrates that as early as the 1980s, the Supreme Court was reluctant to find unfairness to the defendant because of the technological advancements available.[167]

Despite this reluctance, it seems reasonably clear that defendants have some due process rights in personal jurisdiction inquiries, as

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160 *See supra* notes 57-89.

161 Heiser, *supra* note 55, at 935-36. For example, defendants need not travel to the courthouse to file paperwork, and electronic discovery is available to ease pretrial travel. Moreover, very few cases are actually tried in federal court.

162 *See supra* notes 57-89 and accompanying text.

163 *See supra* note 57-89 and accompanying text; *see also* Charles W. Adams, World-Wide Volkswagen v. Woodson – *The Rest of the Story*, 72 NEB. L. REV. 1122, 1153 (1993). But see *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 294 (1980), which noted that even if the defendant would suffer no inconvenience from litigating in another forum, and even if the forum had a strong interest, jurisdiction could violate due process. Therefore, *World-Wide Volkswagen* suggests that in state-court jurisdiction, state boundaries should be considered regardless of geographical convenience. Adams, *supra*, at 1153.

164 *See supra* notes 63-69.

165 *Supra* notes 82-89 and accompanying text.

166 *See supra* notes 70-89 and accompanying text.

167 *Supra* notes 82-85 and accompanying text.

illustrated by *Asahi*.[168] However, the facts of *Asahi* are easily distinguished from the other Supreme Court cases referring to technology and expanding jurisdiction.[169] Indeed, at least some of the factors considered in the fairness inquiry did not involve the defendants at all but rather concerned the state's diminished interest in the outcome of the case.[170]

Although *Asahi* demonstrates that due process for the defendant cannot be stretched beyond limits, inconvenience to plaintiffs should be considered as well.[171] For example, when a plaintiff is an injured person and the defendant is a corporation, by requiring plaintiffs to sue the corporation where it resides, the inconvenience and burdens are placed on plaintiffs who may deserve a remedy and be unable to seek one due to costs associated with the time and expense of litigation.[172] While *McGee* is the only Supreme Court case demonstrating this notion, there the plaintiff's interests trumped the defendant's fairness argument because any inconvenience the defendant suffered did not divest the state of jurisdiction.[173]

Likewise, although various factors are considered in the fairness inquiry, the connection between fairness to the defendant and technology is evident and central to the question.[174] The Supreme Court's pattern of expanding jurisdiction based on the notion that advanced technology eases accessibility to the forum supports a further jurisdictional expansion based on new technological advancements.[175] The CM/ECF System has the capability of easing burdens on defendants litigating in distant forums by making the forums more accessible.[176] A more accessible forum increases fairness in asserting jurisdiction beyond state boundaries because defending is less burdensome.[177]

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168 *Supra* notes 74-89 and accompanying text.

169 *Supra* notes 86-89 and accompanying text.

170 *See supra* notes 87-89.

171 *Compare* Asahi Metal Indus. Co., 480 U.S. 102, 112 (1987), *and* Hanson v. Denckla, 357 U.S. 235, 251 (1958), *with* McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957).

172 *See supra* notes 74-81 (discussing *World-Wide Volkswagen*).

173 *See supra* notes 63–69 and accompanying text (discussing *McGee*).

174 *See supra* notes 86–89 and accompanying text (discussing *Asahi*).

175 *See supra* Part II.A (describing the expansion of personal jurisdiction doctrine by the Supreme Court due to technological advancements).

176 *See supra* Part II.C (describing the CM/ECF system).

177 *See supra* Part II.A (describing Supreme Court cases which expand jurisdiction because it is not "too unfair" to assert jurisdiction in the context of then-current technology).

C. Amendments to the Rules Have Led to Expanding Jurisdiction Beyond State Boundaries

Just as the Supreme Court has recognized that state lines are inadequate as a proxy for jurisdiction over the past several years, so has Advisory Committee.[178] The Committee's specific contemplation of technological and transportation advancements when amending Rule 4 to include the "bulge rule" demonstrates this recognition.[179] The Advisory Committee should again amend Rule 4 so that it reflects defendants' ease of access to the Internet and courts' abilities to utilize electronic filing.

Although clear sovereign power is needed to exercise jurisdiction, federal courts can reach beyond state sovereignty when authorized by a statute, such as Rule 4.[180] Therefore, due process limits based on territorial principles of state sovereignty do not bind federal courts because Congress can authorize service of process in any part of the United States for suits brought pursuant to federal law.[181] For example, the Federal Interpleader Act authorizes nationwide service to confer jurisdiction, and its passage demonstrates that state boundaries are not required as definite borders before exercising jurisdiction.[182] Likewise, the bulge rule demonstrates that state boundaries do not limit federal jurisdictional power.[183] The bulge rule cases hold that the defendant's

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178 *See supra* Part II.B.

179 *See supra* notes 102–04 and accompanying text (discussing the committee's reasons for including the bulge rule and its implications).

180 *See supra* notes 39, 94 (discussing other statutes that authorize nationwide federal jurisdiction and Rule 4, respectively).

181 *See supra* notes 105-07 and accompanying text. Although Congress rejected the proposed 1989 amendment to the FRCP, providing for nationwide jurisdiction in all federal question cases, Congress has provided for the federal courts to exercise nationwide jurisdiction in specific instances. *See supra* note 39.

182 *See supra* note 39 (identifying federal statutes with nationwide service provisions). The interpleader statute allows a party who may be exposed to multiple claims for money or property in the party's possession to settle the dispute in a single proceeding. *See* COUND ET AL., *supra* note 18, at 656. It permits nationwide service of process so that all claimants may be joined. *Id*. at 664. Further, the stake must only be worth five hundred dollars for interpleader jurisdiction. *Id*. The interpleader statute also requires only minimal diversity, or diversity of citizenship between two or more claimants, without regard to adverse co-claimants citizens of the same state. *Id*. at 672; *see also* State Farm & Casualty Co. v. Tashire, 386 U.S. 523 (1967). Some courts have limited jurisdiction under the interpleader statute because of the small federal interest and remedial function of the Act. David S. Welkowitz, *Beyond* Burger King*: The Federal Interest in Personal Jurisdiction*, 56 FORDHAM L. REV. 1, 47 (1987); *see also* Hagan v. Cent. Ave. Dairy, Inc., 180 F.2d 502, 503 (9th Cir. 1950) (dismissing a cross-claim although it arose under the same transaction because it impermissibly expanded jurisdiction beyond the limits of the Act).

183 *See supra* notes 100–04 and accompanying text.

contacts with the forum state are entirely irrelevant to a court's constitutional exercise of jurisdiction, so long as the defendant has sufficient contacts with the bulge area.[184]

Technological advancements make possible many improvements in the judicial system, and they often affect society so that changes in the law must reflect new technology if the law is to continue to serve its purpose.[185] As before, technological advancements have led to the ability to further expand jurisdiction.[186] Because of the current technology available for communication and litigation, due process violations should rarely occur.[187] As a result of this decreased likelihood, unfairness to a defendant should only defeat personal jurisdiction on an individualized basis.[188] Therefore, unfairness should not be justified as a "broad invalidating rule" that generally requires minimum contacts with a geographic area smaller than that of the sovereign entity that created the court.[189] The Committee needs to consider the most recent technological developments, such as electronic filing, in its next set of proposed amendments to Rule 4. Considering the Internet when determining the fairness of a forum is the next logical step in personal jurisdiction expansion, as it is capable reducing inconvenience in defending lawsuits from distant forums.

IV. CONTRIBUTION: INTRODUCING THE 2005 MODEL OF RULE 4

Rule 4(k) allows the federal courts to establish jurisdiction over a person through service.[190] However, the current Rule 4(k) does not account for current technological advancements, including the Internet. This Note proposes an amendment and comment to Rule 4(k).[191] The proposed amendment enables federal courts to assert nationwide personal jurisdiction over defendants in federal question cases in areas where the district court uses electronic filing.[192] Unlike the Advisory Committee's 1989 proposal, which suggested nationwide jurisdiction in

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184 *See supra* notes 100–04 and accompanying text.

185 *See supra* Part II.A-B and accompanying text discussing the motivations of the rule-makers when proposing changes to or amending the Federal Rules.

186 *Cf.* text accompanying notes 100-04.

187 *See supra* Part II.C (discussing current technology available).

188 Heiser, *supra* note 55, at 935-36. This article suggests using a test common to choice-of-law and personal jurisdiction as announced by the Supreme Court in *Allstate Insurance Co. v. Hague*, 499 U.S. 302 (1981)). *Id.* at 937.

189 *Id.* at 936.

190 *See supra* Part II.B.

191 *See infra* Part IV.A.

192 *See infra* Part IV.A.

all federal question cases,[193] this Note's proposal specifically uses technology in amending the rule to provide for such jurisdiction. It proposes that a federal court in a federal question case may have personal jurisdiction over a defendant when the district court in which the defendant is sued uses electronic filing. The jurisdiction is based on service and would build on Rule 4(k)(1).

A. Proposed Amendment

The following proposed amendment to Rule 4(k) should be recommended by the Advisory Committee. First, Rule 4(k)(1)(A)-(D) and (2) should remain unedited. Then, the new method of obtaining jurisdiction should be added as section Rule 4(k)(1)(E).

> (k) Territorial Limits of Effective Service.
>
> (1) Service of a summons or filing a waiver of service is effective to establish jurisdiction over the person of a defendant
>
> (A) who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located, or
>
> (B) who is a party joined under Rule 14 or Rule 19 and is served at a place within a judicial district of the United States and not more than 100 miles from the place which the summons issues, or
>
> (C) who is subject to the federal interpleader jurisdiction under 28 U.S.C. § 1335,
>
> (D) when authorized by a statute of the United States,
>
> or
>
> (E) when the summons issues from a district where the court utilizes electronic filing on a claim arising under federal law.
>
> (2) If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective,

[193] *See supra* text accompanying note 106.

> with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.[194]

B. Proposed Comment

The Federal Rules Advisory Committee lists committee notes following amendments indicating the motivation for the changes or additions in the FRCP. In explaining the above suggested amendment to Rule 4, Subsection (k), paragraph (E) should be added as follows:

> *The new section E applies to federal question cases and allows for effective service outside of the State in which the action is filed when the district court issuing the summons utilizes electronic filing. This is designed to promote the objective of enabling courts to determine entire controversies. In consideration of current advancements in technology, which facilitates increased communication and less expensive travel, the amenability to service in federal question cases would not burden the parties summoned. This provision does not affect federal venue rules. It also does not affect the transfer of venue statutes. Therefore, any requirements of subject-matter jurisdiction and venue will still have to be satisfied as to the parties served. Also, forum non conveniens remains available for foreign defendants who would be severely burdened by the jurisdiction.*[195]

Commentary

The current Rule 4(k) provides for personal jurisdiction based on service of process in five situations: (1) when a court of that state could exercise jurisdiction; (2) within one hundred miles of the court when necessary to establish jurisdiction over third parties in impleader or joinder; (3) pursuant to the Federal Interpleader Act; (4) pursuant to a federal statute authorizing nationwide jurisdiction; and (5) in federal question cases where there is no jurisdiction over a defendant in any single state court.[196] The proposed amendment to Rule 4 extends the reach of federal courts to account for the widespread Internet usage in

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194 The proposed amendment is italicized and is the contribution of the author. Rule 4(k)(1)(A)-(D) and (2) is the current language of FED. R. CIV. P. 4(k).

195 The proposed comment is italicized and is the contribution of the author.

196 *See* FED. R. CIV. P. 4(k).

America today.[197] Also, it works with the other federal rules to make courts more efficient by allowing them to hear entire controversies.[198] Fairness is still ensured for nonresident defendants because with the widespread use of the Internet, the burden of litigating in another state is substantially decreased. Electronic filing allows parties and courts immediate access to documents, while electronic and technological advancements in discovery can ease burdens of collecting evidence.[199]

The proposed amendment operates consistently with previous expansions of personal jurisdiction under Rule 4, such as establishing personal jurisdiction under the bulge rule.[200] Further, this rule is consistent with the objectives of the rules, efficiency and enabling courts to resolve entire controversies.[201] If jurisdictional inquiries are no longer necessary, litigation can focus on the merits of cases, saving much time and expense. While this proposed amendment will have the effect of nationwide jurisdiction once the federal courts all make electronic filing available, technology has led to a need for this development.[202] The benefit of enacting this proposed amendment would not be instant nationwide jurisdiction; instead, it could develop as courts decide to pass the necessary local rules utilizing or requiring electronic filing. Further, unlike when the previous nationwide jurisdiction amendment was suggested in 1989, technology has now progressed to the point that most Americans have access to computers, alleviating fairness concerns.[203]

While the use of technology has grown enormously in recent years, there will still likely be citizens who are without access to the Internet and are therefore inconvenienced. This problem is temporary and transitional. Internet business transactions are the current trend. As the number of citizens with access to the Internet continues to grow and technology continues to develop, any possible unfairness will substantially decrease. Further, other Rules could be amended to alleviate any possible unfairness that may occur in the interim period.

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197 *See supra* notes 114-15, 130 (describing the increased use of the Internet by Americans).

198 *See* FED. R. CIV. P. 1.

199 *See supra* text accompanying notes 116.

200 *See supra* Part II.B.

201 *See supra* Part II.B.

202 *See supra* notes 114-15, 130 (describing the growing use of the Internet).

203 *See supra* note 115 (discussing the number of Americans that have access to computers).

For example, the transfer of venue statutes could be amended to further assist inconvenienced defendants.[204]

Although a counter-argument will be made in favor of due process limitations on jurisdiction, this argument neglects the *International Shoe* line of cases, which established that territorial sovereignty is not an absolute limit on a court's jurisdictional reach and has not been since 1945.[205] Moreover, federal courts do not have to be limited by state boundaries because Congress can authorize jurisdiction over parties based on contacts with the United States as a whole.[206] In addition, federal courts are designed to adjudicate federal law.[207] Therefore, they should be able to exert jurisdiction over parties concerning federal issues.

Likewise, subsequent amendments in the Rules could remedy any other potential problems with the proposed amendment to Rule 4.[208] Thus, any amendment to Rule 4 would likely be the first in a series of steps needed to fully update the Rules to embrace new technology. This proposed amendment is a compromise between a more radical option,[209] which extends jurisdiction in all cases following interpleader reasoning,

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[204] The issue is venue, not jurisdiction, after a party is constitutionally in federal court. CASAD & RICHMAN, *supra* note 5, at 529; *see* 28 U.S.C. § 1391 (2000). It is beyond the scope of this Note to discuss how the transfer of venue statutes should be amended to accommodate this situation.

[205] *See supra* notes 57-62 and accompanying text.

[206] *See supra* note 171 and accompanying text (noting that Federal sovereignty extends through the territory of the United States and that the relevant territory for minimum contacts is that of the whole United States).

[207] *See* 28 U.S.C. § 1331 (2000) (providing for federal courts to have subject matter jurisdiction over federal question claims); Admin. Comm. of Wal-Mart Stores, Inc. Assoc.'s Health & Welfare Plan v. Varco, 338 F.3d 680, 686 (7th Cir. 2003); Funkhouser v. Wells Fargo Bank, 289 F.3d 1137 (9th Cir. 2002).

[208] It is beyond the scope of this Note to discuss other measures that could ease some of the difficulties encountered in amending Rule 4. The Rule 4 amendments are designed to be one part of reforming the FRCP.

[209] In the alternative, it could be suggested to format the rule so that when a diversity or a federal question claim is brought in federal court the relevant minimum contacts are with the United States. Although that more radical suggestion could remedy the current circuit split on the purposeful availment question, that language could also result in substantial problems. For example, in diversity cases, plaintiffs could forum shop to the federal court of their choice without the concern of whether the defendant purposefully availed himself of the state where the federal court is located. Thus, the plaintiff would not only select a federal forum to avoid jurisdictional problems, but the plaintiff would also select the law of the state that is to apply. Another concern is with judicial resources: If plaintiffs forum shop to federal court on diversity cases, federal courts expend their resources deciding state law instead of federal law.

and a more conservative option,[210] which still requires minimum contacts within the traditional boundaries of the state where the federal district court is located. The proposed amendment results in fewer problems than these other two possibilities and is consistent with objectives of the FRCP.

Moreover, the proposed amendment balances the concerns of predictability and reducing forum shopping, and it accounts for technology capable of easing the burdens of litigation. The proposed amendment would also promote conserving judicial resources while limiting forum shopping by narrowing the scope of its application to federal law. Further, by allowing federal courts using electronic filing to assert jurisdiction based on minimum contacts with the United States in federal question cases, courts could spend more time on the merits of controversies.

V. CONCLUSION: ON THE ROAD AGAIN

Modern jurisdictional rules are the result of two centuries of evolution of personal jurisdiction. The Supreme Court and the Advisory Committee have historically considered advancements in technology to extend courts' jurisdiction. New developments in technology have again led to the need to reconsider fairness issues. An amendment to Rule 4 would ensure efficiency in litigation and expanded federal regulatory power. The proposed amendment would follow the *International Shoe* line of cases, by expanding jurisdiction based on technological advancements, and it follows de Tocqueville's notion of the federal courts having equal standing with other sovereigns. Further, this proposed amendment is not designed to accommodate due process "fairness" concerns. The fairness inquiry has become irrelevant to due process analysis because of the increased accessibility to federal courts. Instead, the proposed amendment looks to the sovereignty of federal courts and is premised on the idea that the availability of electronic filing through the Internet makes jurisdiction fairer to defendants. It is the first

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[210] Another possible format for the amendment would be to allow federal courts to exercise jurisdiction once the traditional inquiry of whether the defendant purposefully availed himself of the state has been met. No fairness inquiry would be required. Because of electronic filing and widespread use of the Internet, if a defendant has purposefully availed himself of the forum state, it seems unlikely that he could show the burden is too heavy to litigate there. Therefore, that more conservative suggestion would only codify the current test used by the courts without considering that federal courts can have jurisdiction based on a wider range of contacts. By leaving in place the traditional boundaries used in purposeful availment analysis, those of the states, that suggestion would not recognize recent advancements in technology.

step in a series of amendments that would need to occur in the Rules to make the system more efficient in light of current technology, and ultimately fairer to parties involved in litigation.

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