Cornell Law Review

Volume 85
Issue 6 *September 2000*

Article 5

King Pennoyer Dethroned: A Policy-Analysis-Influenced Study of the Limits of Pennoyer v. Neff in the Jurisdictional Environment of the Internet

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NOTE

KING PENNOYER DETHRONED: A POLICY-ANALYSIS-INFLUENCED STUDY OF THE LIMITS OF *PENNOYER V. NEFF* IN THE JURISDICTIONAL ENVIRONMENT OF THE INTERNET

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INTRODUCTION

Since the Supreme Court formulated the modern doctrine of personal jurisdiction in *Pennoyer v. Neff*,[1] commentators[2] and courts[3] have debated whether amenability[4] ought to be linked to the sovereign power of a state.[5] Justice Field based the holding in *Pennoyer* on two key assumptions: (1) that a state possesses power over all things and persons located within its boundaries and (2) that a state lacks power over all things outside its boundaries.[6] This doctrine quickly began an evolution necessitated by the doctrine's failure to meet satisfactorily the efficiency and fairness concerns raised by the rapidly changing commercial and legal environment in the United States.[7] Throughout this evolution, and in spite of the criticisms leveled

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1 95 U.S. 714, 723 (1877) (holding that state sovereignty limits the jurisdiction of courts to persons and things present within the state's territorial boundaries), *overruled in part by* Shaffer v. Heitner, 433 U.S. 186 (1977).

2 *See, e.g.*, Geoffrey C. Hazard, Jr., *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 281 (arguing that the minimum contacts test of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), ought to replace the *Pennoyer* sovereignty principle).

3 *See, e.g.*, Donatelli v. National Hockey League, 893 F.2d 459, 462 (1st Cir. 1990) ("In a very real sense, concepts of personal jurisdiction entered the modern era with the watershed opinion in [*International Shoe*, which] signalled a clear retreat from the somewhat mechanical approach to jurisdictional inquiries previously demanded by [*Pennoyer*] and its progeny." (citations omitted)).

4 *See* David S. Welkowitz, *Beyond* Burger King*: The Federal Interest in Personal Jurisdiction*, 56 FORDHAM L. REV. 1, 2 n.5 (1987) ("'Amenability' refers to the authority of a court to force a defendant to come into the forum and to render a valid judgment against a party, assuming proper notice is given.").

5 *See Pennoyer*, 95 U.S. at 722.

6 *See id.*; *see also* Hazard, *supra* note 2, at 262-64 (demonstrating that Justice Field relied on former-Justice Story's sovereignty principles). Justice Story derived inspiration from the Dutch jurist Huber's principles regarding sovereign nations. *See* Stewart Jay, *"Minimum Contacts" as a Unified Theory of Personal Jurisdiction: A Reappraisal*, 59 N.C. L. REV. 429, 452-53 (1981).

7 *Cf.* Kevin M. Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts*, 66 CORNELL L. REV. 411, 415 (1981) (describing the expansion of bases of power for jurisdiction).

against it, *Pennoyer* has had a stranglehold on our courts, if not our minds, and its vestiges remain today.[8]

Just as the original drift away from *Pennoyer* became necessary because of rapid changes in the areas of interstate commerce, travel,[9] and technology,[10] today a new technology, the Internet, will force us to depose King Pennoyer[11] and abandon his concept of sovereignty-based jurisdiction. The borderless nature of the Internet[12] poses an intractable problem for a law of personal jurisdiction that depends upon sovereign power.[13] Despite the fact that a doctrine based on a concept of territorial power is ill-suited to answer questions in an area

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8 *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295-99 (1980); *see also* Jay, *supra* note 6, at 443-46 (criticizing the Court for perpetuating the *Pennoyer* sovereignty principles in *World-Wide Volkswagen*).

9 *Cf.* Dan J. Schulman, *The Constitution, Interest Groups, and the Requirements of Uniformity: The United States Trustee and the Bankruptcy Administrator Programs*, 74 NEB. L. REV. 91, 104 n.63 (1995) (citing Katzenbach v. McClung, 379 U.S. 294, 305 (1964)) (noting growth of interstate commerce); David A. Skeel, Jr., *Bankruptcy Lawyers and the Shape of American Bankruptcy Law*, 67 FORDHAM L. REV. 497, 503 (1998) (same).

10 *See* Andrew E. Costa, Comment, *Minimum Contacts in Cyberspace: A Taxonomy of the Case Law*, 35 HOUS. L. REV. 453, 469 (1998) (discussing the advent of automobiles as a motivating factor in expanding the concept of in personam jurisdiction).

11 *Cf.* Albert A. Ehrenzweig, *From State Jurisdiction to Interstate Venue*, 50 OR. L. REV. 103, 104 (1971) (describing *Hanson v. Denckla*, 357 U.S. 235 (1958), as "King . . . Pennoyer II"); Daniel J. Capra, *Conceptual Limitations on Long-Arm Jurisdiction*, 52 FORDHAM L. REV. 1034, 1036 (1984) (reviewing ROBERT C. CASAD, JURISDICTION IN CIVIL ACTIONS: TERRITORIAL BASIS AND PROCESS LIMITATIONS ON JURISDICTION OF STATE AND FEDERAL COURTS (1983)) (labeling *World-Wide Volkswagen* as "King Pennoyer III").

12 The Internet as we know it today evolved from the defense-related research of the Advanced Research Projects Agency Network (ARPANET). *See* Michael V. LiRocchi et al., *Trademarks and Internet Domain Names in the Digital Millennium*, 4 UCLA J. INT'L L. & FOREIGN AFF. 377, 379 (1999-2000). The ARPANET was born in 1969 and initially consisted of four computers, but quickly expanded to thirty-seven. *See* Shawn G. Pearson, Comment, *Hype or Hypertext? A Plan for the Law Review to Move into the Twenty-first Century*, 1997 UTAH L. REV. 765, 766. The goal of ARPANET was to enable the military to have a national, decentralized computer network that would allow the networked computers to communicate with one another even if a portion of the network was destroyed in a war. *See* ACLU v. Reno, 929 F. Supp. 824, 831 (E.D. Pa. 1996). As the network expanded it became apparent that the original protocols by which the computers in the network communicated would have to be changed to allow the network to accommodate more computers. Researchers developed these new protocols in 1973, and by January 1983 all the machines on ARPANET were required to use this new protocol. *See* Marcus Maher, *An Analysis of Internet Standardization*, 3 VA. J.L. & TECH. 5, ¶ 5 (Spring 1998), at http://vjolt.student.virginia.edu/graphics/vol3/home_art5.htm. The protocols, developed by Vinton Cerf, Robert Kahn, and their research group, were known as Transmission Control Protocol/Internet Protocol (TCP/IP) and are still used extensively today. *See id.* This moment was the birth of the Internet. In 1984, the military split off from ARPANET to form MILNET, making ARPANET available entirely for wide area network research. *See* Charles D. Siegal, *Rule Formation in Non-Hierarchical Systems*, 16 TEMP. ENVTL. L. & TECH. J. 173, 180 (1998). The modem lines that composed the original ARPANET were taken out of service in 1990. *See* Maher, *supra*, at ¶ 8.

13 *Cf.* Pennoyer v. Neff, 95 U.S. 714, 722 (1877) (discussing the connection between personal jurisdiction and state sovereignty), *overruled in part by* Shaffer v. Heitner, 433 U.S. 186 (1977).

where territorial borders hold little meaning, the lower federal courts have been attempting to use the *Pennoyer* sovereignty principle to answer jurisdictional questions arising in suits involving communications and commerce over the Internet.[14] This Note argues that these cases demonstrate the failure of the *Pennoyer* sovereiguty principle to fulfill the main policy goals of the law of amenability.[15] Therefore, it is necessary now more than ever to look beyond the plain doctrinal failings of *Pennoyer* and answer the question of how best to achieve the goals of efficiency and fairness that underlay the law of amenability.

This Note, much like other scholarship in this area, criticizes the current law of amenability and more specifically the principle of sovereignty. However, while other commentators have focused on the doctrinal flaws of the *Pennoyer* sovereignty principle,[16] this Note adopts a more rigorous analysis influenced by the field of policy analysis. Using a goal-oriented policy evaluation methodology, this Note identifies the policy goals of the law of amenability—efficiency and fairness—and argues that the sovereignty principle of *Pennoyer* does not effectively achieve these goals. Finally, this Note proposes replacing the judicially developed law of amenability with a federal amenability statute specifically drafted to satisfy efficiency and fairness concerns. Part I reviews the history, development, and current state of the law of amenability. Part II explains the methodology of policy evaluation and then utilizes that methodology to extract the policy goals embedded in Supreme Court cases and legal commentary. Part III discusses recent federal cases posing jurisdictional questions that arise from Internet communications or commerce. Part III uses these cases to argue that the sovereignty principles of *Pennoyer* fail to serve the policies

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14 *See, e.g.*, Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1321 (9th Cir. 1998) (holding jurisdiction proper because defendant knew that plaintiff's principal place of business was in California and that harm from trademark infringement would occur in California), *aff'g* 938 F. Supp. 616 (C.D. Cal. 1996); Quality Solutions, Inc. v. Zupanc, 993 F. Supp. 621, 623 (N.D. Ohio 1997) (holding jurisdiction proper under Ohio long arm statute because tortious injury occurred in Ohio); EDIAS Software Int'l, L.L.C. v. BASIS Int'l, Ltd., 947 F. Supp. 413, 422 (D. Ariz. 1996) (holding jurisdiction proper because defendant posted defamatory statements to website with intent to harm plaintiff in Arizona and in fact caused harm in Arizona). *Compare, e.g.*, Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 419-20 (9th Cir. 1997) (holding that passive website, without more, constitutes insufficient contact to satisfy due process), *and* Bensusan Rest. Corp. v. King, 126 F.3d 25, 29 (2d Cir. 1997) (reaching same outcome based on limits of New York long arm statute), *with* Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1125-26 (W.D. Pa. 1997) (finding minimum contacts through purposeful availment based on 3000 subscribers and contracts with seven Internet service providers in Pennsylvania), *and* Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1328, 1332-33 (E.D. Mo. 1996) (finding purposeful availment in the solicitation of subscribers to free e-mail service).

15 *See supra* Part III.

16 *See, e.g.*, Clermont, *supra* note 7, at 413; Hazard, *supra* note 2, at 241-45; Jay, *supra* note 6, at 429-31.

identified in Part II. Part IV concludes that Congress should solve the *Pennoyer* problem by drafting an amenability statute.

I
EVOLUTION OF PERSONAL JURISDICTION DOCTRINE

This section traces the history, development, and current state of the law of amenability through the primary Supreme Court cases in this area. First, this section discusses *Pennoyer* itself, and then it reviews the ebb and flow of the sovereignty principle throughout Supreme Court decisions spanning the next century. Finally, this section provides an overview of how a federal court would reconcile these cases and apply the law of amenability.

A. State Sovereignty and Due Process

In *Pennoyer v. Neff*,[17] Justice Field, writing for the majority, originated a way of formulating questions about jurisdiction that continues to influence the way those questions are asked today.[18] Field reasoned that a court does not have jurisdiction to adjudicate unless it has territorial authority over the defendant.[19] Field then distinguished three categories of civil actions: in personam, in rem, and quasi in rem.[20] Noting that "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory"—and that, conversely, states may not reach beyond their borders and assert sovereignty over absent persons or property—Field linked authority to adjudicate with physical presence.[21] Ultimately, the Court held that the Due Process Clause required a state to have sovereigu power over an individual before it could adjudicate that individual's

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17 *See* 95 U.S. 714 (1877), *overruled in part by* Shaffer v. Heitner, 433 U.S. 186 (1977).

18 *See* Hazard, *supra* note 2, at 241 (arguing that *Pennoyer* is "not merely a venerable case," but rather a state of mind); Jay, *supra* note 6, at 430.

19 *See Pennoyer*, 95 U.S. at 722.

20 *See Pennoyer*, 95 U.S. at 733-34. Professor Clermont describes the three categories as follows:

> In personam jurisdiction could result in a judgment imposing upon the defendant a personal liability or obligation in favor of the plaintiff. In rem jurisdiction could result in a judguent affecting the interests of all persons in a designated thing . . . . Quasi in rem jurisdiction could result in a judgment affecting the interests of particular persons in a designated thing. Further, there were two distinct varieties of proceedings quasi in rem: in subtype-one, the plaintiff sought to establish a pre-existing interest in the thing as against the defendant's interest . . . ; in subtype-two, the plaintiff sought to apply the defendant's property to the satisfaction of an unrelated claim against the defendant . . . .

Clermont, *supra* note 7, at 414.

21 *Pennoyer*, 95 U.S. at 722; Clermont, *supra* note 7, at 415; Ehrenzweig, *supra* note 11, at 107; Hazard, *supra* note 2, at 241; Jay, *supra* note 6, at 432.

rights.[22] Thus, Field characterized territorial authority to adjudicate as a constitutional question and established the Due Process Clause of the Fourteenth Amendment as the minimum floor that a state court had to meet before it could exercise its authority over a defendant.

Unfortunately, Field set the minimum floor too high,[23] and the federal courts were forced to stretch *Pennoyer's* sovereignty principle.[24] For example, the federal courts created fictions that domicile within the forum state,[25] consent,[26] or certain actions within the forum state[27] could serve as "bases of power for jurisdiction over a defendant."[28] These fictions were necessary to allow the federal and state courts to operate effectively in the changing environment of the United States. Eventually the pressures of a rapidly growing country attenuated the need to reduce the restrictions placed on amenability by the sovereignty theory in *Pennoyer*, and the law of amenability began its complex evolution.

B. A More Flexible Standard

In *International Shoe Co. v. Washington*,[29] the Court abandoned these fictions and adopted a test based on fairness and a minimum amount of acts connecting the defendant to the forum state.[30] However, *International Shoe's* flexibility begot ambiguity because the Court did not abandon sovereignty,[31] but merely lowered the floor to the

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22 *See Pennoyer*, 95 U.S. at 733; Jay, *supra* note 6, at 454; *see also* Jay Conison, *What Does Due Process Have to Do with Jurisdiction?*, 46 RUTGERS L. REV. 1071, 1139-1140 (1994) (attempting to situate the due process aspects of amenability within the larger constitutional jurisprudence of due process).

23 *See* Jay, *supra* note 6, at 455 ("Considering the declining burdens imposed by interstate travel, coupled with the corporate use of national marketing, it was virtually inevitable that a responsive system of jurisdiction would have undergone expansion in recent years.") (footnote omitted).

24 *See* Clermont, *supra* note 7, at 415, nn.16-22 (listing representative cases). *See generally* Austin W. Scott, *Jurisdiction over Nonresidents Doing Business Within a State*, 32 HARV. L. REV. 871, 879-84 (1919) (explaining the several expanded theories of amenability in respect to foreign corporations).

25 *See, e.g.*, Milliken v. Meyer, 311 U.S. 457, 462-63 (1940) ("Domicile in the state is alone sufficient to bring an absent defendant within the reach of the state's jurisdiction for purposes of a personal judgment by means of appropriate substituted service.").

26 *See, e.g.*, Hess v. Pawloski, 274 U.S. 352, 356-57 (1927) (upholding constitutionality of a Massachusetts law which provided that nonresidents who drove on Massachusetts roads consented to service of process on a state official on their behalf).

27 *See* Clermont, *supra* note 7, at 415 (noting that courts have based jurisdiction on a defendant's "transacting business, owning real estate, litigating, [or] committing a tortious act" in the state) (footnotes omitted).

28 *Id.*

29 326 U.S. 310 (1945).

30 *See id.* at 316; *see also* Hazard, *supra* note 2, at 274 (describing *International Shoe* as a merging of the fictions into a more flexible doctrine).

31 *Cf.* Jay, *supra* note 6, at 473 (noting that "International Shoe overruled no cases").

minimum contacts,necessary to satisfy due process.[32] The test still depended on the theory of presence, but its language encouraged a more flexible approach to jurisdiction.[33] However, the *International Shoe* test proved too flexible, and it provided little guidance for the lower courts.[34] Over the next forty years the Court attempted to give the minimum contacts-fairness test more definite content.[35] In *Mullane v. Central Hanover Bank & Trust Co.*,[36] the Court dropped the three categories of *Pennoyer*, relying on a reasonable balancing of the opposing parties' interests to "take into account all the shadings in the infinite variety of proceedings."[37] Then, in *McGee v. International Life Insurance Co.*,[38] the Court established the limits of due process by upholding a California court's jurisdiction[39] when the defendant's only contacts with the forum state were: (1) a single insurance policy mailed to one customer in California and (2) premiums received by mail from the insured in California.[40] The Court balanced the interests of the state, the plaintiff, and the defendant, and held that jurisdiction in California was reasonable.[41] Thus, the content of the *International Shoe* test became the balancing of the defendant's contacts and interests, the plaintiff's interests, and the state's interests.[42]

C. Return to Sovereignty

The Court abruptly halted this progress in *Hanson v. Denckla*,[43] a 5-4 decision that pulled the law of jurisdiction back into the clutches of *Pennoyer*.[44] The Court returned to *Pennoyer's* sovereignty theory[45] and characterized the contacts necessary for power as "some act by which the defendant *purposefully avails* itself of the privilege of con-

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32 *See International Shoe*, 326 U.S. at 316.

33 The Court articulated the test as whether, in light of the defendant's contacts, exercising personal jurisdiction over the defendant would comport with "'traditional notions of fair play and substantial justice.'" *Id.* (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)); *see* Clermont, *supra* note 7, at 416; Hazard, *supra* note 2, at 273 n.113; Jay, *supra* note 6, at 430-31.

34 *See* Hazard, *supra* note 2, at 274-75; Jay, *supra* note 6, 463 n.205.

35 *See, e.g.*, Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987); Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Shaffer v. Heitner, 433 U.S. 186 (1977); Hanson v. Denckla, 357 U.S. 235 (1958); McGee v. International Life Ins. Co., 355 U.S. 220 (1957); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

36 339 U.S. 306 (1950).

37 Clermont, *supra* note 7, at 417.

38 355 U.S. 220 (1957).

39 *See id.* at 223.

40 *See id.* at 221-22.

41 *See id.* at 223-24.

42 *See* Clermont, *supra* note 7, at 418.

43 357 U.S. 235 (1958).

44 *See* Clermont, *supra* note 7, at 419.

45 *See Hanson*, 357 U.S. at 251; Jay, *supra* note 6, at 460.

ducting activities within the forum State, thus invoking the benefits and protections of its laws."[46] In *Shaffer v. Heitner*,[47] although initially hailed as a departure from *Pennoyer*,[48] the Court resurrected Justice Field's categorization of civil actions[49] and equated fairness with contacts.[50] Thus, the Court envisioned that some search for presence was necessary;[51] a state could not exercise jurisdiction regardless of how reasonable it might seem, unless it has power.[52] As a result, power triumphed over fairness.[53]

This attachment to sovereign power ruled again in *World-Wide Volkswagen v. Woodson*,[54] a products liability action arising out of an accident that occurred in Oklahoma involving a car purchased in New York.[55] The defendants, who sold the car to the plaintiffs, were New York corporations with no direct contacts with Oklahoma.[56] The Court held that a state does not violate due process by exercising jurisdiction over a defendant who places its product into "the stream of commerce with the expectation that [it would make its way into] the forum state,"[57] but found that these particular defendants did not meet this criterion.[58] In dissent, Justice Brennan conceded Oklahoma's lack of territorial authority over the defendants but argued that Oklahoma's exercise of jurisdiction was reasonable enough to satisfy due process.[59] Justice Brennan applied a balance of interests approach, noting that all of the witnesses were in Oklahoma, the acci-

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46 *Hanson*, 357 U.S. at 253 (emphasis added) (citation omitted).

47 433 U.S. 186 (1977).

48 *See* Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 81-82; Jay, *supra* note 6, at 429; *see also* Andreas F. Lowenfeld, *In Search of the Intangible: A Comment on* Shaffer v. Heitner, 53 N.Y.U. L. REV. 102, 102 (1978) (noting the academic debate over "whether [*Shaffer*] really overruled [*Pennoyer*]") (footnotes omitted); Linda J. Silberman, Shaffer v. Heitner*: The End of an Era*, 53 N.Y.U. L. REV. 33 (1978) (explaining how *Shaffer* overruled *Pennoyer*); Hans Smit, *The Importance of* Shaffer v. Heitner*: Seminal or Minimal?*, 45 BROOK. L. REV. 519, 520 (1979) (discussing *Shaffer*'s impact on the law of jurisdiction).

49 *See Shaffer*, 433 U.S. at 207-12; Clermont, *supra* note 7, at 420.

50 *See* Jay, *supra* note 6, at 466.

51 *See Shaffer*, 433 U.S. at 207-12.

52 *See id.* at 213-17; *Clermont*, *supra* note 7, at 421.

53 *See* Clermont, *supra* note 7, at 421; *see also* Rush v. Savchuk, 444 U.S. 320, 327-33 (1980) (holding that Minnesota lacked in personam jurisdiction and therefore could not assert quasi in rem jurisdiction over the defendant); Kulko v. Superior Court, 436 U.S. 84, 98-101 (1978) (ignoring reasonableness and holding that California did not have power over a New York defendant in a divorce and custody action—relying explicitly on *Hanson*).

54 444 U.S. 286 (1980).

55 *See id.* at 288.

56 *See id.* at 289.

57 *Id.* at 297-98.

58 *See id.* at 298-99. Therefore, Oklahoma lacked jurisdiction.

59 *See id.* at 300 (Brennan, J., dissenting) ("The existence of contacts, so long as there were some, was merely one way of giving content to the determination of fairness and reasonableness.").

dent occurred in Oklahoma, the plaintiffs were in Oklahoma,[60] and the burden on the defendants of litigating in Oklahoma was slight.[61] The majority also recognized the reasonableness of jurisdiction, but stated that the Due Process Clause, as interpreted in *International Shoe*,

> can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.[62]

The first function constitutes the reasonableness test, and the second reflects the *Pennoyer* sovereignty principle.[63] Thus, under *World-Wide Volkswagen*, the sovereignty principle may limit a state's exercise of otherwise reasonable jurisdiction.[64]

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60 *See id.* at 305 (Brennan, J., dissenting).

> [T]he interest of the forum State and its connection to the litigation is strong. The automobile accident underlying the litigation occurred in Oklahoma. The plaintiffs were hospitalized in Oklahoma when they brought suit. Essential witnesses and evidence were in Oklahoma. The State has a legitimate interest in enforcing its laws designed to keep its highway system safe, and the trial can proceed at least as efficiently in Oklahoma as anywhere else.

Id. (Brennan, J., dissenting) (citation omitted).

61 *See id.* at 308 (Brennan, J., dissenting) ("'At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.'" (quoting McGee v. International Life Ins. Co., 355 U.S. 220, 222-23 (1957))). Brennan also argued that the defendant could have predicted that the automobile would be used in a distant forum, and that the defendant derived some benefit from the fact that automobiles are so used. *See id.* at 306-07 (Brennan, J., dissenting). Thus, Brennan concluded that the defendant had some minimal contact with the forum state through the stream of commerce. *See id.* at 307 (Brennan, J., dissenting).

62 *Id.* at 291-92.

63 *See also* Clermont, *supra* note 7, at 422-23 (explaining that the test declared in *World-Wide Volkswagen* raises sovereignty concerns over the balance of interests approach, so that even where jurisdiction is eminently reasonable, the limits on a state's sovereign power can prevent the state from exercising jurisdiction consistent with due process); Jay, *supra* note 6, at 438 (noting that the Court attributed "threshold importance" to sovereignty concerns); David E. Seidelson, *A Supreme Court Conclusion and Two Rationales That Defy Comprehension:* Asahi Metal Indus. Co., Ltd. v. Superior Court of California, 53 BROOK. L. REV. 563, 570 (1987) (noting that the Court "disinter[red]" sovereiguty principles in *World-Wide Volkswagen*). *Compare World-Wide Volkswagen*, 444 U.S. at 291-92 (noting both the interests of a defendant and the principle of state sovereignty), *with* Pennoyer v. Neff, 95 U.S. 714, 722 (1877) (focusing on the principle of sovereignty).

64 *See World-Wide Volkswagen*, 444 U.S. at 294; Jay, *supra* note 6, at 438-39. The Court specifically noted:

> Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.

World-Wide Volkswagen, 444 U.S. at 294 (citing Hanson v. Denkla, 357 U.S. 235, 251, 254 (1958)). Several commentators have criticized the Court for labeling the Due Process

D. Uncertain Future for Sovereignty

Two subsequent cases[65] challenged the validity of the sovereignty principle. In *Burger King Corp. v. Rudzewicz*,[66] Justice Brennan wrote a majority opinion that employed the balance of interests approach that he had advocated in his *World-Wide Volkswagen* dissent.[67] The action in *Burger King* arose from a contract between Michigan residents and the Florida-headquartered Burger King corporation.[68] Burger King sued in its home district, and the defendants challenged the district court's jurisdiction.[69] Although the Court held that the defendant was amenable to suit in Florida because he had purposely availed himself of the benefits of doing business in Florida,[70] it also held that exercising power over the defendant in Florida would be reasonable.[71] In dicta, Justice Brennan suggested that the defendant's purposeful availment was weak and could not satisfy the due process clause alone, but that the extraordinary reasonableness of amenability in Florida could satisfy due process.[72] He urged that courts must consider the defendant's contacts with the forum "in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'"[73]

Asahi Metal Industry Co. v. Superior Court[74] did little to clarify the status of the sovereignty principle in relation to the principle of reasonableness. In *Asahi*, an American plaintiff brought a products liability action in California against a Taiwanese company.[75] The Court held that California's exercise of personal jurisdiction over Asahi violated due process,[76] but the Justices differed in their reasoning.[77] Five Justices—Brennan, White, Marshall, Blackmun, and Stevens—held that power existed over the defendant under a stream of commerce plus awareness standard but that jurisdiction was unreasonable.[78] Jus-

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Clause "an instrument of interstate federalism," *id. See, e.g.*, Conison, *supra* note 22, at 1188-90; Seidelson, *supra* note 63, at 570-72.

65 *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987); Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985).

66 471 U.S. 462 (1985).

67 *See id.* at 477-78.

68 *See id.* at 464-67.

69 *See id.* at 468-69.

70 *See id.* at 479-80, 487.

71 *See id.* at 486-87.

72 *See id.* at 476-77.

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

74 480 U.S. 102 (1987).

75 *See id.* at 105-06.

76 *See id.* at 108 (O'Connor, J.).

77 *See id.* at 105.

78 *See id.* at 116-17, 121-22 (Brennan, J., concurring in part and in the judgment) (Stevens, J., concurring in part and in the judgment).

tice O'Connor, in an opinion joined by Chief Justice Rehnquist and Justices Powell and Scalia, found that California lacked power.[79] Justice O'Connor would only find power if the corporation put its product into the stream of commerce with the *intention* of reaching California residents.[80] Justice Brennan argued that power existed where a defendant put its product into the stream of commerce and was merely *aware* that the product was regularly sold in the forum state.[81] However, only Justice Marshall agreed with Justice Brennan's standard.[82] Justices White, Blackmun, and Stevens contended that power existed whether Justices Brennan's or O'Connor's standard governed.[83] Because of these three justices, *Asahi* does not indicate whether Justice Brennan's conception of amenability in *Burger King* or the more traditional minimum contacts rule survives. Regardless, it is clear that the *Pennoyer* sovereignty principle still governs the Supreme Court's thinking about amenability.

E. A Statement of the Law

This section outlines how lower courts, both federal and state, currently apply the Supreme Court case law discussed above. Federal and state courts follow almost the same steps when conducting a jurisdictional inquiry,[84] which consists of the following: (1) identifying whether the court will exercise general or specific jurisdiction,[85] (2) determining whether the state's long arm statute provides jurisdic-

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79 *See id.* at 112-13 (O'Connor, J.). Except for Justice Scalia, who offered no opinion on reasonableness, this group also held that jurisdiction would be unreasonable. *See id.* at 116.

80 *See id.* at 112-13 (O'Connor, J.).

81 *See id.* at 117 (Brennan, J., concurring in part and in the judgment).

82 *See id.* at 116, 121 (Brennan, J., concurring in part and in the judgment). Justices Blackmun and White joined Justice Stevens, contending that power existed under either Justice Brennan's or Justice O'Connor's standard. *See id.* at 121-22 (Stevens, J., concurring in part and in the judgment).

83 *See id.* at 121-22 (Stevens, J., concurring in part and in the judgment).

84 *See* CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 451 (5th ed. 1994) (discussing current Federal Rule of Civil Procedure 4(k) and its widely accepted interpretation that, in diversity actions, federal courts are limited to the jurisdictional statute of the state in which they sit).

85 *See* Lea Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 HARV. L. REV. 1444, 1444 (1988); Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 727-28 (1988); B. Glenn George, *In Search of General Jurisdiction*, 64 TUL. L. REV. 1097, 1099 (1990); Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 628 (1988); Mark M. Maloney, Note, *Specific Personal Jurisdiction and the "Arise from or Relate to" Requirement . . . What Does It Mean?*, 50 WASH. & LEE L. REV. 1265, 1268-70 (1993).

tion,[86] and (3) conducting a due process inquiry if the long arm statute goes to the limits of due process.[87]

1. *General or Specific Jurisdiction?*

There are two types of jurisdiction: specific and general.[88] The difference between the two lies in the relationship of the action to the defendant's contacts.[89] If the defendant has few contacts with the forum state, but all of these are highly related to the litigation, then a court may classify jurisdiction as specific.[90] Alternatively, if the defendant's contacts with the forum state are extensive, then the contacts need not be related to the litigation; the court has general jurisdiction.[91] The distinction between general and specific jurisdiction

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86 *See* RICHARD H. FIELD ET AL., MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE 982 (7th ed. 1997); Linda Sandstrom Simard, *Hybrid Personal Jurisdiction: It's Not General Jurisdiction, or Specific Jurisdiction, But Is It Constitutional?*, 48 CASE W. RES. L. REV. 559, 561-62 (1998).

87 *See* Clermont, *supra* note 7, at 428; Simard, *supra* note 86, at 562. If the long arm statute's limits do not extend as far as the limits of due process, then state courts need not proceed to a due process inquiry. *See* WRIGHT, *supra* note 84, at 450-51. Federal courts need to continue to a due process analysis only if they are adjudicating a federal question. *See* Lisa Rouchell, *Federal Question Jurisdiction: Must a Defendant Have Minimum Contacts with the State Whose Long-Arm Statute is Used to Serve Process?*, 54 LA. L. REV. 407, 409 n.15 (1993) (listing cases). For an action based on diversity jurisdiction, federal courts need only apply the law of the forum state. *See* Clermont, *supra* note 7, at 428.

88 *See* Brilmayer, *supra* note 85, at 1444; Brilmayer et al., *supra* note 85, at 727; George, *supra* note 85, at 1099-1100; Twitchell, *supra* note 85, at 611; Maloney, *supra* note 85, at 1268-70.

89 *See* Twitchell, *supra* note 85, at 611. The Supreme Court has defined specific jurisdiction as "[w]hen a controversy is related to or 'arises out of' a defendant's contacts with the forum, . . . [the] relationship among the defendant, the forum, and the litigation is the essential foundation of *in personam* jurisdiction." Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 414 (1984) (internal quotation marks omitted) (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)). General jurisdiction results "when the cause of action does not arise out of or relate to the foreign corporation's activities in the forum State." *Id.* (footuote omitted). In such a case, "due process is not offended by a State's subjecting the corporation to its in personam jurisdiction when there are sufficient contacts between the State and the foreign corporation." *Id.* (citing *Perkins v. Consol. Mining Co.*, 342 U.S. 437 (1952) and *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779-80 (1984)).

90 *See* Brilmayer, *supra* note 85, at 1445 ("Assume that a defendant who lives in New York travels by car to Massachusetts and there injures a pedestrian. This is an easy case for 'specific jurisdiction' in Massachusetts."); Brilmayer et al., *supra* note 85, at 724 (explaining that under specific jurisdiction "the claim is related to activities in the forum state" (footnote omitted)); Twitchell, *supra* note 85, at 611 ("If . . . a court asserted jurisdiction based on affiliations between the forum and the controversy, . . . it was exercising specific jurisdiction." (footnote omitted)).

91 *See* Brilmayer, *supra* note 85, at 1445 ("If the plaintiff tries to sue [a New Yorker] in Florida [for injuries sustained in Massachusetts], [then] if there were jurisdiction at all, it would be general. Consequently, the plaintiff would have to show a continuous and systematic connection between the defendant and Florida."); Brilmayer et al., *supra* note 85, at 724 ("[A] plaintiff seeks jurisdiction in a forum court over a claim unrelated to activities in the forum. Such jurisdiction usually is called general jurisdiction . . . ." (footnote omitted)); Twitchell, *supra* note 85, at 611 ("If a court asserted jurisdiction based on the affilia-

would have significant impact if the defendant has some contacts with the forum state, but not enough for general jurisdiction, and the contacts are marginally related to the plaintiff's action.[92] In this case, specific jurisdiction would be necessary, and the court's analysis would focus on the nature and quality of the defendant's contacts with the state and the relationship between those contacts and the controversy.[93]

2. *The State's Long Arm Statute*

There are two different types of long arm statutes:[94] those that separate the bases of jurisdiction into "laundry lists,"[95] and those that reach the limits of due process.[96] The laundry-list statutes provide specific grounds on which jurisdiction can be based.[97] The statutes that reach the limits of due process either state so directly[98] or have been interpreted to reach so far by the highest court of the state.[99] If

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tions between the forum and one of the parties without regard to the nature of the dispute, it was exercising general jurisdiction.").

92 *See* Brilmayer, *supra* note 85, at 1444-45. Professor Brilmayer presents the following hypothetical situation to demonstrate the type of action:

> Assume that a defendant who lives in New York travels by car to Massachusetts and there injures a pedestrian. . . .
>
> [W]hat if the plaintiff attempts to sue in Connecticut or Maine on the grounds that the defendant drove through Connecticut on the way to Massachusetts, or was in Massachusetts on the way to Maine? These two cases seem much harder to classify. They do not seem to fit within [the] paradigm of specific jurisdiction. On the other hand, there does seem to be some sort of relationship between the dispute and these two states. . . . Yet, obviously, a great deal turns on whether our case is one of general or specific jurisdiction, because . . . a substantially higher quantum of contacts is necessary to satisfy the former test than is necessary to satisfy the latter.

Id. at 1445 (footnote omitted).

93 *See id.*; Brilmayer et al., *supra* note 85, at 724; Twitchell, *supra* note 85, at 611.

94 A state's long arm statute defines the limits of the state's jurisdictional power. *See* FIELD ET AL., *supra* note 86, at 982-95; WRIGHT, *supra* note 84, at 450-51; Clermont, *supra* note 7, at 427-28. Although a state's jurisdictional reach is limited by due process, the states are not required to exercise their power to its limits. *See* WRIGHT, *supra* note 84, at 450-51. Several states have passed long arm statutes that confine their reach to an area within the limits imposed by due process. *See id.* Other states have long-arm statutes that simply reach to the limits of due process. *See id.*

95 *See, e.g.*, 735 ILL. COMP. STAT. ANN. 5/2-209 (West 1992) (listing fourteen bases for jurisdiction). The origin of the label "laundry list" confuses me in the same way that the turn of phrase "dead as a door-nail" confounded Charles Dickens. *See* CHARLES DICKENS, A CHRISTMAS CAROL 11-12 (2d ed. Alfred A. Knopf, Inc. 1994) (1843).

96 *See, e.g.*, CAL. CIV. PROC. § 410.10 (West 1973) (permitting California courts to exercise "judicial jurisdiction on any basis not inconsistent with the state or federal Constitutions").

97 *See, e.g.*, ch. 735, 5/2-209.

98 *See, e.g.*, § 410.10.

99 *See, e.g.*, U-Anchor Adver., Inc. v. Burt, 553 S.W.2d 760, 762 (Tex. 1977) (finding that Texas's long arm statute reaches to the limits of federal due process); Beechem v. Pippin, 686 S.W.2d 356, 358-61 (Tex. App. 1985) (focusing on judicial interpretation of due process).

a state statute provides a laundry list, then the court may decide the jurisdictional issue by the statute alone and not reach the due process question.[100] If the long arm statute provides that the state's power extends to the limits of due process, then a court must proceed to the due process analysis.

3. *Due Process Analysis*

The due process analysis is precisely the two-pronged test outlined above.[101] First, the court must find that the defendant has some minimum contacts with the forum state.[102] Minimum contacts may be shown by the defendant's purposeful availment of the benefits of doing business in the forum state.[103] The absolute minimum contact required is that the defendant placed its product into the stream of commerce with the intention that the product reach an audience in the forum state.[104] Second, the court determines reasonableness by balancing the following: (1) the plaintiff's interest in adjudicating the suit in her forum of choice; (2) the state's interest in the litigation; and (3) the defendant's interest in avoiding litigation in an inconvenient or distant forum.[105] This two-pronged due process test renders two jurisdictional scenarios unconstitutional—(1) where the defendant has minimum contacts with the forum, but the exercise of jurisdiction is not reasonable;[106] and (2) where the defendant lacks minimum contacts with the forum state, yet the exercise of jurisdiction seems otherwise reasonable.[107]

II
THE POLICY GOALS EMBEDDED IN THE LAW OF PERSONAL JURISDICTION

This part explains the methodology of policy evaluation. Influenced by this methodology,[108] this part then distills from other com-

100 *See, e.g.*, Bensusan Rest. Corp. v. King, 126 F.3d 25, 27-28 (2d Cir. 1997) (applying New York's long arm statute and not reaching the due process issue).

101 *See supra* Part I.B-D.

102 *See* International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

103 *See* Hanson v. Denckla, 357 U.S. 235, 253 (1958).

104 *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 117 (1987); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297-98 (1980) ("The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." (citation omitted)).

105 *See* International Shoe Co. v. Washington, 326 U.S. 310, 316-18 (1945) (describing evolution of the law of personal jurisdiction).

106 *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 485-86 (1985); McGee v. International Life Ins. Co., 355 U.S. 220, 222 (1957).

107 *See Asahi*, 480 U.S. at 116; Shaffer v. Heitner, 433 U.S. 186, 216 (1977).

108 This Note adopts a methodology that is *influenced* by some of the principles of the field of policy analysis, but does not follow a true, rigorous policy analysis methodology.

mentators' critiques and the case law a core set of policy goals that the law of personal jurisdiction should achieve—efficiency and fairness.

A. The Methodology of Policy Evaluation and Analysis

In the realm of policy analysis, the formulation of the problem is key to finding that problem's solution.[109] A policy analyst tries to answer five general questions in order to formulate the problem and gather the information relevant to finding a solution.[110] These questions are the following: (1) "What is the nature of the problem?"[111] (2) "What present and past policies have been established to address the problem, and what are their outcomes?"[112] (3) "How valuable are these outcomes in solving the problem?"[113] (4) "What policy alternatives are available to address the problem, and what are their likely future outcomes?"[114] (5) "What alternatives should be acted on to solve the problem?"[115] Part I answered the first portion of the second question by identifying the past and present law of jurisdiction. Now this part answers the first question by determining the nature of the problem with the existing law. Part III answers the third question and the second portion of question two by looking at a sample of the cases in which jurisdictional questions have arisen out of the conducting of commerce or communications across the Internet. Part IV answers the fourth question by presenting two alternatives for a better law of jurisdiction: a pure reasonableness theory and a framework for a federal statute of amenability. In the conclusion, this Note will answer

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The field of policy analysis presents a strong framework for structuring problems and finding their solutions. *See* WILLIAM N. DUNN, PUBLIC POLICY ANALYSIS: AN INTRODUCTION 2-14 (2d ed. 1994); *see also* ROBERT A. HEINEMAN ET AL., THE WORLD OF THE POLICY ANALYST: RATIONALITY, VALUES, & POLITICS 9-31 (1990) (providing social context and history of the policy analysis field); STUART S. NAGEL, CONTEMPORARY PUBLIC POLICY ANALYSIS 1-9 (1984) (describing the history of the field); EVERT VEDUNG, PUBLIC POLICY AND PROGRAM EVALUATION 35-37 (1997) (describing different models for policy analysis); G. David Garson, *From Policy Science to Policy Analysis: A Quarter Century of Progress, in* POLICY ANALYSIS: PERSPECTIVES, CONCEPTS, AND METHODS 3 (William N. Dunn ed. 1986) (presenting past, present, and future perspectives on policy analysis); Stuart S. Nagel, *Conceptualizing Public Policy Analysis, in* POLICY ANALYSIS: PERSPECTIVES, CONCEPTS, AND METHODS, *supra*, at 247 (discussing basic concepts associated with public policy analysis). However, a true policy analysis generally contains an empirical component and considers a variety of different paths to achieving the policy goals in question. *See* DUNN, *supra*, at 6-10; NAGEL, *supra*, at 38-75; VEDUNG, *supra*, at 37-50.

109 *See* DUNN, *supra* note 108, at 2; VEDUNG, *supra* note 108, at 37-92.

110 There is not always a struggle solution, and policy analysis is often used as a method for determining which solution out of several is the best. This Note, however, will only consider two alternatives.

111 DUNN, *supra* note 108, at 12.

112 *Id.*

113 *Id.*

114 *Id.*

115 *Id.*

the fifth question by choosing a federal statute as the best alternative to pursue.

B. Other Commentators' Criticisms of the *Pennoyer* Sovereignty Theory

Commentators criticize the law of amenability for lacking rationality, consistency, efficiency, and fairness. Although each of the commentators presented in this section agrees that the current law of amenability is flawed and must be corrected, they all argue from a purely doctrinal perspective. This Note undertakes a policy analysis of jurisdictional law, which provides a more rigorous critique and a rational basis from which to build a better law of amenability.

1. *The Current Law Lacks Rationality*

The primary criticisms of the *Pennoyer* theory is that it reaches "wrong"[116] results and that it is based on flawed concepts that should have no place in jurisdictional law.[117] Professors Capra, Clermont, and Cox argue that personal jurisdiction doctrine should not depend on rigid formalisms[118] and bankrupt concepts.[119] For example, several commentators attack what Professor Ehrenzweig calls the "'tran-

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116 Clermont, *supra* note 7 at 444 n.146 ("[T]he power test simply gives the wrong answers.").

117 *See* Albert A. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289, 289-93 (1956); Hazard, *supra* note 2, at 241-42; Jay, *supra* note 6, at 452-53; Capra, *supra* note 11, at 1035.

118 *See* Capra, supra note 11, at 1034.

119 *See* Clermont, *supra* note 7 at 444 n.146; Stanley E. Cox, *Would That* Burnham *Had Not Come to Be Done Insane! A Critique of Recent Supreme Court Personal Jurisdiction Reasoning, An Explanation of Why Transient Presence Jurisdiction Is Unconstitutional, and Some Thoughts About Divorce Jurisdiction in A Minimum Contacts World*, 58 TENN. L. REV. 497, 541 (1991); *see also* Peter Hay, Comment, *Transient Jurisdiction, Especially Over International Defendants: Critical Comments on* Burnham v. Superior Court of California, 1990 U. ILL. L. REV. 593, 602-03 (calling for re-examination of transient jurisdiction); Hazard, *supra* note 2, at 241-42 (challenging "*Pennoyer*'s conceptual endurance"); Jay, *supra* note 6, at 453 (objecting to the application of sovereignty doctrine to states within a federal system); Earl M. Maltz, *Personal Jurisdiction and Constitutional Theory—A Comment on* Burnham v. Superior Court, 22 RUTGERS L.J. 659, 689 (1991) (characterizing *Burnham* as judicial activism); Martin H. Redish, *Tradition, Fairness, and Personal Jurisdiction: Due Process and Constitutional Theory After* Burnham v. Superior Court, 22 RUTGERS L.J. 675, 675-76 (1991) (criticizing disjunction between personal jurisdiction doctrine and traditional due process analysis); Linda Silberman, *Reflections on* Burnham v. Superior Court*: Toward Presumptive Rules of Jurisdiction and Implications for Choice of Law*, 22 RUTGERS L.J. 569, 571 (1991) (discussing tag jurisdiction and the relationship between jurisdiction and choice of law); Allan R. Stein, Burnham *and the Death of Theory in the Law of Personal Jurisdiction*, 22 RUTGERS L.J. 597 (1991); Russell J. Weintraub, *An Objective Basis for Rejecting Transient Jurisdiction*, 22 RUTGERS L.J. 611 (1991) (discussing transient jurisdiction in context of international law); Barbara Surtees Goto, Note, International Shoe *Gets the Boot:* Burnham v. Superior Court *Resurrects the Physical Power Theory*, 24 LOY. L.A. L. REV. 851, 903 (1991); Paul C. Wilson, Note, *A Pedigree for Due Process?*, 56 MO. L. REV. 353, 378 (1991).

sient rule,'"[120] also called "transient, or tag, jurisdiction."[121] Transient jurisdiction was the basis for the action in *Burnham v. Superior Court*,[122] in which the defendant was served with process for a California suit while temporarily in the state on a business trip.[123] The Supreme Court unanimously upheld jurisdiction, but the Justices failed to agree on a rationale.[124] The clearest ruling from *Burnham* is that transient jurisdiction is constitutional under most circumstances.[125] Unfortunately, transient jurisdiction is inconsistent with the bifurcated due process test because it forces a defendant to litigate in a state with which he has no contacts.[126] Moreover, transient jurisdiction does not fit with notions of general or specific jurisdiction, because the defendant has neither systematic nor litigation-related contacts. Nonetheless, the Supreme Court clings to the sovereignty principle and maintains, despite contrary case law, that transient jurisdiction is permissible in most cases. This internal inconsistency leads many commentators to characterize the sovereignty theory as lacking rationality.

2. *The Sovereignty Theory Lacks Predictability Through Consistency*

The Supreme Court has often declared that the law of personal jurisdiction requires some rigidity in order to allow defendants to structure their behavior in ways that will allow them to avoid amenability to suit in certain fora.[127] Thus, the Court has attempted to con-

120 Ehrenzweig, *supra* note 117, at 289. The transient rule provides that a court may have in personam jurisdiction over an individual as long as physical delivery of service of process takes place within the territory of the state, regardless of whether the defendant, plaintiff, or litigation has any connection with the forum state. *See id.*

121 Kevin M. Clermont, *Jurisdictional Salvation and the Hague Treaty*, 85 CORNELL L. REV. 89, 111 (1999) (emphasis omitted) (footnote omitted).

122 495 U.S. 604 (1990).

123 *See id.* at 608.

124 *See id.* at 607; *id.* at 628 (White, J., concurring in judgment); *id.* at 628-40 (Brennan, J., concurring in judgment); *id.* at 640 (Stevens, J., concurring in judgment).

125 *See* Cox, *supra* note 119, at 518.

126 *See id.* at 517-22; *see also* Daniel O. Bernstine, Shaffer v. Heitner*: A Death Warrant for the Transient Rule of In Personam Jurisdiction?*, 25 VILL. L. REV. 38, 61 (1979) (noting the inconsistency between the approach of the *International Shoe* line of cases and the exercise of transient jurisdiction); Brilmayer et al., *supra* note 85, at 748-55 (discussing the original and current justifications for transient jurisdiction); David P. Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. ILL. L.J. 533, 583-84 (criticizing transient jurisdiction); Peter Hay, *Judicial Jurisdiction and Choice of Law: Constitutional Limitations*, 59 U. COLO. L. REV. 9, 14 (1988) (same); Geoffrey C. Hazard, Jr., *Revisiting the* Second Restatement of Judgments*: Issue Preclusion and Related Problems*, 66 CORNELL L. REV. 564, 570-71 (1981) (questioning the use of transient jurisdiction after *Shaffer*); Bruce Posnak, *A Uniform Approach to Judicial Jurisdiction After* World-Wide *and Abolition of the "Gotcha" Theory*, 30 EMORY L.J. 729, 729-30 (1981) (proposing elimination of transient jurisdiction); Donald J. Werner, *Dropping the Other* Shoe: Shaffer v. Heitner *and the Demise of Presence-Oriented Jurisdiction*, 45 BROOK. L. REV. 565, 606 (1979) (claiming transient jurisdiction is inconsistent with *Shaffer*).

127 Predictability should allow defendants to structure their behavior so as to avoid amenability in a particular forum. *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S.

struct an amenability doctrine that will allow potential defendants to foresee the fora in which they may be amenable to suit.[128] Yet commentators have complained about the doctrine's lack of consistency.[129] This inconsistency reveals itself primarily in defendants' inability to foresee the fora in which they will be subject to adjudication,[130] but also in the Justices' failure to agree on and give content to the concept of minimum contacts.[131]

C. Policy Goals for a Law of Amenability

This section distills two main policy goals from the criticisms of the commentators and the Supreme Court cases themselves. The first goal, efficiency, results from an analysis of the law of amenability in relation to the other areas of law governing the placement of a suit in a particular court—venue and subject-matter jurisdiction. The second goal, fairness, results from the Supreme Court cases themselves.

1. *Efficiency Is a Core Policy Goal for the Law of Amenability*

Efficiency means putting each case in the correct court.[132] The Supreme Court has tried unsuccessfully to instill efficiency through the *Pennoyer* theory.[133] Two key concepts in the U.S. legal tradition—

102, 109-10 (1987); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) ("The Due Process Clause, by ensuring the orderly administration of the laws, 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.") (internal quotation marks and citation omitted); Hanson v. Denckla, 357 U.S. 235, 253 (1958); Welkowitz, *supra* note 4, at 1.

128 *See Asahi*, 480 U.S. at 109-10; *World-Wide Volkswagen*, 444 U.S. at 297; *Hanson*, 357 U.S. at 253.

129 *Cf.* Welkowitz, *supra* note 4, at 1 (discussing the complaint of Judge Evans in *Hall's Specialties, Inc. v. Schupbach*, 758 F.2d 214, 216 (7th Cir. 1985), that lawyers are unable to answer their clients' questions about amenability with anything but "'Gee, I can't say for sure'"); Capra, *supra* note 11, at 1034-35 (describing the comprehensive treatment of Casad's book and the difficulty Casad encountered in extracting some sense of predictability from his extensive case studies). In addition to a lack of predictability, the *Pennoyer* theory lacks theoretical consistency. *See* Welkowitz, *supra* note 4, at 29 n.170. *Compare World-Wide Volkswagen*, 444 U.S. at 291-93 (recognizing that due process protects interstate federalism), *with* Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702-03 (1982) (noting that the restrictions of the Due Process Clause protect a liberty interest of the defendant).

130 *See, e.g.*, Burnham v. Superior Court, 495 U.S. 604, 608, 628 (1990) (finding that California has jurisdiction over New Jersey defendant who was served with divorce papers while on a California business trip).

131 *See id.*; *see also Asahi*, 480 U.S. at 110, at 607, 628-40 (noting divisions in lower courts).

132 Professors Ehrenzweig, Hazard, and Clermont each advocate an alternative theory of personal jurisdiction that focuses on finding the best forum in which an action should be placed. *See* Clermont, *supra* note 7, at 437; Ehrenzweig, *supra* note 117, at 312-14; Harzard, *supra* note 2, at 246-47.

133 *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); World-Wide Volkswagen v. Woodson, 444 U.S. 286 (1980); Sbaffer v. Heitner, 433 U.S. 186 (1977).

venue and subject-matter jurisdiction—address efficiency concerns. The law of venue identifies the correct court in which to bring an action by requiring some relationship between the action and the geographic location of the court.[134] The law of subject-matter jurisdiction situates cases in the correct section of the judicial department.[135] Amenability's concern with fairness centers primarily on whether a particular court has authority to render a judgment validly binding the parties. Our legal tradition gives no indication that the only way for a court to acquire this authority is through sovereign power over the parties.[136] In other words, the court that can exercise its sovereign power over the parties is not necessarily the most efficient court for that case. Efficiency in amenability goes beyond the concerns of venue, which focuses on the nature of the action, and subject-matter jurisdiction, which focuses on dividing judicial business among different courts. Efficiency in the context of amenability concerns the burden on the defendant of litigating in a distant forum, the location of witnesses and evidence, the plaintiff's interest in choosing the court, and finally the state's interest in the litigation.[137]

2. *The Policy Goal of Fairness*

This Note argues that fairness is the more important of the two core policy goals. From *Pennoyer* through *Asahi* and *Burnham*, fairness has driven the Supreme Court's construction of amenability law.[138] Fairness simply asks whether a plaintiff may force a defendant to litigate in the court of the plaintiff's choosing.[139] According to the Supreme Court, the Due Process Clause of the Fourteenth Amendment governs this inquiry.[140] In other words, it may be a violation of the defendant's due process rights to force the defendant to litigate in an inconvenient or unforeseeable forum.[141] Under *Pennoyer*, a state

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134 *See generally* WRIGHT, *supra* note 84, § 42 (discussing the law of venue).

135 *See generally* RESTATEMENT (SECOND) OF JUDGMENTS § 11 (1982) (describing subject-matter jurisdiction); FIELD ET AL., *supra* note 86, at 858 (discussing subject-matter jurisdiction).

136 *See* Clermont, *supra* note 7, at 414 & n.9; Ehrenzweig, *supra* note 117, at 293-309; Hazard, *supra* note 2, at 252-62; Joseph J. Kalo, *Jurisdiction as an Evolutionary Process: The Development of Quasi In Rem and In Personam Principles*, 1978 DUKE L.J. 1147 (tracing the evolution of the law of jurisdiction in the United States); *Developments in the Law: State-Court Jurisdiction*, 73 HARV. L. REV. 909, 915-17 (1960).

137 *Cf.* Clermont, *supra* note 7, at 418 (noting that the *McGee* Court held that "courts should decide . . . jurisdictional issues by balancing the interests of the public, the plaintiff, and the defendant." (footnotes omitted)).

138 *See supra* Part I.

139 This inquiry assumes, of course, that no venue or subject-matter jurisdiction problems exist. *See* Pennoyer v. Neff, 95 U.S. 714, 724 (1877), *overruled in part by* Shaffer v. Heitner, 433 U.S. 186 (1977).

140 *See id.* at 733.

141 *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 110 (1987); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) (holding that a state has jurisdic-

could trigger this type of violation by reaching beyond its borders.[142] Although *International Shoe* and its progeny de-emphasized the notion of states as limited sovereigns in a federal system, they continued to link fairness to a state's limited sovereign reach.[143] Thus, in order to preserve the constitutional rights of defendants, fairness is a major policy goal of the law of amenability.

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tion over defendants who can reasonably foresee being hauled into court there because of purposeful contacts with that state); *Pennoyer*, 95 U.S. at 724. *But see* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985) (declaring that modern technology has significantly reduced the burden of litigating in a distant forum); McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957) (same). Welkowitz argues that "[a]t a minimum [due process requires that a defendant] not be forced to litigate in a surprising forum." Welkowitz, *supra* note 4, at 28 (footnote omitted); *see also* Brilmayer, *supra* note 48, at 88-96 (discussing the types of contacts that ought to subject a defendant to a state's jurisdiction); Clermont, *supra* note 7, at 437 (noting that due process requires that state courts not exercise territorial jurisdiction without first establishing both power and reasonableness); Ehrenzweig, *supra* note 117, at 312-14 (advocating the adoption of a doctrine of forum conveniens); Hazard, *supra* note 2, at 246-47 (noting the tension between the many unitary characteristics of the United States and the basic principles of federalism); Jay, *supra* note 6, at 474-75 (criticizing the foundation of the minimum contacts test); Lowenfeld, *supra* note 48, at 131 ("As enunciated in *International Shoe*, the minimum contacts test is an inquiry into the fairness of requiring the defendant to answer a particular claim in the forum state." (footnote omitted)); Stanley E. Cox, Comment, *Giving the Boot to the Long-Arm: Analysis of Post-*International Shoe *Supreme Court Personal Jurisdiction Decisions, Emphasizing Unrealized Implications of the "Minimum Contacts" Test*, 75 Ky. L.J. 885, 890-92 (1987) (noting that "[r]aw territorial power plays no part in present-day 'minimum contacts' analysis" and that now a defendant must reasonably foresee amenability to suit). A rule that requires a suit to be brought only at the place in which the defendant may be found is not fair to plaintiffs but is not prohibited under due process. *Cf.* Jay, *supra* note 6, at 446-47 ("Defendants should not be able to hide within their state boundaries when they have used the entire country as a free trade zone and in the process have visited injury on those who do not enjoy the economic fortunes derived from substantial interstate business operations."). *But see* Brilmayer, *supra* note 48, at 107 (identifying the due process interest opposite defendant's as a state's interest in providing a forum for its residents); Allan R. Stein, *Case Three: Personal Jurisdiction*, 29 New Eng. L. Rev. 627, 653 n.2 (1995) (arguing that a plaintiff has no fairness concerns because it is the plaintiff that chooses the forum) (citing Rush v. Savchuk, 444 U.S. 320, 332 (1980)). Whether the opposing interest to a defendant's interest in a less burdensome forum is a state's interest or the plaintiff's interest is a purposeless distinction for this argument; the fact is that there is an opposing interest. *Cf. World-Wide Volkswagen*, 444 U.S. at 300 (Brennan, J., dissenting) (stating that a state has a "manifest interest in providing effective means of redress for its citizens" (citing Kulko v. Superior Court, 436 U.S. 84, 92 (1978); Shaffer v. Heitner, 433 U.S. 186, 208 (1977); Mullane v. Central Hanover Trust Co., 339 U.S. 306, 313 (1950) (internal quotation marks omitted))).

142 *See Pennoyer*, 95 U.S. at 723.

143 *See* International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945); *see also Burger King*, 471 U.S. at 476 (noting that "territorial presence frequently will enhance a potential defendant's affiliation with a State and reinforce the reasonable foreseeability of suit there").

III

THE FAILURE OF *PENNOYER*: INTERNET CONTACTS

Part III answers the third policy analysis question—"How valuable are these outcomes in solving the problem?"[144]—by looking at a sample of the cases in which jurisdictional questions have arisen out of commerce or communications across the Internet. Internet cases generally present the most attenuated kinds of contacts.[145] Therefore, these cases highlight the sovereignty principle's failure to achieve the policy goals of efficiency and fairness. To facilitate the analysis, this part focuses on four representative cases, even though a large number of other cases also tackle these issues.[146]

A. *Pres-Kap, Inc. v. System One, Direct Access, Inc.*[147]

Although not a true Internet case,[148] *Pres-Kap* poses an intrigning question: whether electronic contacts can be sufficient to establish

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144 DUNN, *supra* note 108, at 12.

145 *See* Katherine C. Sheehan, *Predicting the Future: Personal Jurisdiction for the Twenty-first Century*, 66 U. CINN. L. REV. 385, 393 (1998); Sonia K. Gupta, Comment, *Bulletin Board Systems and Personal Jurisdiction: What Comports with Fair Play and Substantial Justice?*, 1996 U. CHI. LEGAL F. 519, 528-31; Michael MacClary, Note, *Personal Jurisdiction and the Internet*, 3 SUFFOLK J. TRIAL & APP. ADVOC. 93, 93 (1998); Timothy B. Nagy, Comment, *Personal Jurisdiction and Cyberspace: Establishing Precedent in a Borderless Era*, 6 COMMLAW CONSPECTUS 101, 103 (1998); Michael J. Sikora III, Note, *Beam Me into Your Jurisdiction: Establishing Personal Jurisdiction via Electronic Contacts in Light of the Sixth Circuit's Decision in* Compuserve, Inc. v. Patterson, 27 CAP. U. L. REV. 163, 187 (1998); David D. Tyler, Note, *Personal Jurisdiction Via E-Mail: Has Personal Jurisdiction Changed in the Wake of* CompuServe, Inc. v. Patterson?, 51 ARK. L. REV. 429, 429 (1998).

146 *See, e.g.*, Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316 (9th Cir. 1998), *aff'g* 938 F. Supp. 616 (C.D. Cal. 1996) (trademark infringement); Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414 (9th Cir. 1997) (trademark infringement); Bensusan Restaurant Corp. v. King, 126 F.3d 25 (2d Cir. 1997) (trademark infringement); CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996) (contract and trademark infringement); Quality Solutions, Inc. v. Zupanc, 993 F. Supp. 621 (N.D. Ohio 1997) (trademark infringement); SF Hotel Co. v. Energy Invs., Inc., 985 F. Supp. 1032 (D. Kan. 1997) (trademark infringement); Digital Equip. Corp. v. AltaVista Tech., Inc., 960 F. Supp. 456 (D. Mass. 1997) (contract and trademark infringement); Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D. Pa. 1997) (trademark infringement); EDIAS Software Int'l, L.L.C. v. BASIS Int'l Ltd., 947 F. Supp. 413 (D. Ariz. 1996) (libel); Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1328 (E.D. Mo. 1996) (trademark infringement); Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161 (D. Conn. 1996) (trademark infringement); Pres-Kap, Inc. v. System One, Direct Access, Inc., 636 So. 2d 1351 (Fla. Dist. Ct. App. 1994) (contract).

147 636 So. 2d 1351 (Fla. Dist. Ct. App. 1994).

148 *Pres-Kap* concerns electronic contacts between computers by modem, but not the Internet directly. *See id.* at 1351-52. However, because the Internet is essentially a large decentralized network of computers communicating through modems, *see supra* note 12, *Pres-Kap* is relevant. *See, e.g.*, Karen Mika & Aaron J. Reber, *Internet Jurisdictional Issues: Fundamental Fairness in a Virtual World*, 30 CREIGHTON L. REV. 1169, 1182 (1997); Howard B. Stravitz, *Personal Jurisdiction in Cyberspace: Something More is Required on the Electronic Stream of Commerce*, 49 S.C. L. REV. 925, 936 (1998); Michael J. Santisi, Note, Pres-Kap, Inc. v. System One, Direct Access, Inc.: *Extending the Reach of the Long-Arm Statute Through the Internet?*, 13 J. MARSHALL J. COMPUTER & INFO. L. 433 (1995); Tammy S. Trout-McIntyre, Comment, *Per-*

specific jurisdiction.[149] Defendant Pres-Kap was a New York corporation with its principle place of business in Rockland County, New York.[150] Plaintiff System One was a Delaware corporation with its main office in Miami, Florida and a branch office in New York City.[151] The contacts with New York were as follows: the plaintiff solicited the defendant's business there through a representative from the plaintiff's New York office; the parties negotiated the lease contract there; the defendant executed the lease there; and the plaintiff delivered and installed the computer system there.[152] The contacts with Florida were as follows: the defendant mailed a monthly rental fee to Miami;[153] and for nine years the defendant electronically accessed the plaintiff's database in Florida for the purpose of making airline reservations.[154] The Florida court held that the sum of the contacts with New York made that forum more appropriate and reasonable, and that, in comparison, the minimal contacts with Florida made amenability there unreasonable.[155]

In relation to the Supreme Court's jurisprudence of personal jurisdiction,[156] the *Pres-Kap* decision is unique, because the *Pres-Kap* court diverged from the Supreme Court's personal jurisdiction jurisprudence by blurring the bifurcated due process test. Unfortunately, the *Pres-Kap* court made its decision in a conclusory manner. It is necessary to separate this conclusion into its constituent parts in order to properly place it in the context of the current jurisdictional law. *Pres-Kap* breaks down into three elements. First, the court sought specific jurisdiction because the dispute related to the electronic contacts.[157] Second, the court could only assert territorial authority over the defendant if the defendant's Florida contacts satisfied the minimum contacts requirement.[158] The third element of the inquiry should

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sonal Jurisdiction and the Internet: Does the Shoe *Fit?*, 21 HAMLINE L. REV. 223, 248-49 (1997); Richard S. Zembek, Comment, *Jurisdiction and the Internet: Fundamental Fairness in the Networked World of Cyberspace*, 6 ALB. L.J. SCI. & TECH. 339, 361-63 (1996).

149 *See Pres-Kap*, 636 So. 2d at 1352. The Florida court did not state that the issue involved specific jurisdiction, but the dispute arose out of the defendant's contacts with Florida. *See id.* at 1351-52.

150 *See id.* at 1352.

151 *See id.* at 1351.

152 *See id.* at 1352.

153 *See id.* at 1353.

154 *See id.*

155 *See id.*

156 *See supra* Part I.

157 *See* 636 So. 2d at 1352. The *Pres-Kap* court never stated that it was seeking specific jurisdiction, but the defendant's contacts with Florida were not sufficient to establish general jurisdiction in Florida. *Cf.* Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 414 & nn.8-9 (1984) (discussing specific and general jurisdiction). Therefore, the court must have been seeking specific jurisdiction. *Cf. id.* (same).

158 *See Pres-Kap*, 636 So. 2d at 1352; *see also* International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (describing minimum contacts rule).

have evaluated the reasonableness of jurisdiction in Florida.[159] However, the court conflated the minimum contacts and reasonableness inquiries, holding not that Pres-Kap's contacts with Florida were insufficient to satisfy due process, but rather that the defendant's contacts with New York more fully satisfied due process.[160] Although the court did not expressly find that the defendant had sufficient contacts with Florida,[161] the dissent correctly argued that Pres-Kap could reasonably have expected to be haled into court in a forum with which it had regular contacts for nine years.[162] Essentially, the majority found that jurisdiction by the Florida court would not be reasonable because the dispute primarily concerned a "New York-based transaction."[163] Therefore, rather than relying on the bifurcated power-reasonableness test, the *Pres-Kap* court relied solely on reasonableness.[164]

Pres-Kap poses a question that the sovereignty principle cannot answer: Which forum is the *most* efficient? Nonetheless, the court did discern the correct answer. Accordingly, the court did not rely on the sovereignty principle. The *Pres-Kap* court found that it lacked authority to adjudicate the dispute in Florida because jurisdiction in New York was more reasonable. Had the court adhered to the sovereignty principle and treated reasonableness as a secondary consideration, the litigation could have gone forward in Florida. In other words, if the sovereignty principle guided the *Pres-Kap* court, which is the actual law, it would have concluded that the defendant's contacts created a sufficient foreseeability of litigation in Florida to supply the court with the necessary sovereign authority to adjudicate the dispute and render a valid judgment over the parties.

By holding that the defendant's home state constituted the correct forum, *Pres-Kap* also produced the most fair result for the defendant. Had the court relied on sovereignty, it would have been likely to

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159 *See supra* Part I.E.3.

160 *Cf. Pres-Kap*, 636 So. 2d at 1353 (discussing the reasonableness of a New York forum). The *Pres-Kap* court noted:

> The defendant's only contact with Florida is twofold: (1) the defendant forwarded all rental payments under the contract to the plaintiff's billing office in Miami, and (2) the computer database of the plaintiff's airline reservation system, which the defendant accessed through computer terminals, is located in Miami. Contrary to the trial court's determination, however, we conclude that these two contacts cannot convert this obviously New York-based transaction into a Florida transaction . . . .

Id.

161 *See id.*

162 *See id.* at 1354 (Barkdull, J., dissenting) ("The appellant, for over nine years, availed itself of information supplied by a computer data base located here in Florida. . . . It executed a total of four contracts between 1982 and 1989, and made rental payments in Florida for such use from 1982 until 1991." (footnote omitted)).

163 *Id.* at 1353.

164 *Cf. id.* (dismissing the significance of the defendant's contacts with the forum state).

violate fairness because, as the court noted in its opinion, the defendant's contacts with Florida did not satisfy due process.[165] In this case, then, the sovereignty principle fails to achieve both of its goals.

B. *CompuServe, Inc. v. Patterson*[166]

Plaintiff CompuServe filed for a declaratory judgment in the United States District Court for the Southern District of Ohio against defendant Patterson, a Texas resident.[167] The plaintiff sought a judgment stating that it had not infringed on defendant Patterson's software trademarks.[168] Based on a contract between the parties and Patterson's continuous course of conduct over three years,[169] the Sixth Circuit held that jurisdiction was proper because Patterson purposefully availed himself of the privilege of doing business in Ohio,[170] and that jurisdiction in Ohio would be reasonable.[171]

The court's reasoning regarding minimum contacts is difficult to fault. Patterson contracted with CompuServe for the distribution of his software from an Ohio-based business.[172] In addition, Patterson regularly uploaded other software to CompuServe's system over a period of three years.[173] In the Supreme Court's parlance, Patterson injected his software product into the stream of commerce with the intent that it end up in Ohio.[174] Therefore, he could reasonably expect to be haled into court there.[175]

However, the court's reasonableness analysis leaves a great deal to be desired. After spending four pages analyzing Patterson's contacts with Ohio,[176] the court spent one paragraph on reasonableness.[177] In this single paragraph, the court conclusorily states that Ohio has an interest in the litigation because the case involves Ohio law, CompuServe alleges that a great deal of money is at stake, and that these

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165 *See id.*

166 89 F.3d 1257 (6th Cir. 1996).

167 *See id.* at 1260-61.

168 *See id.* at 1259. CompuServe is headquartered in Ohio. *See id.* at 1260. Patterson resides in Texas. *See id.* Patterson and CompuServe entered into distribution contract under which CompuServe would sell Patterson's software on its network. *See id.* After CompuServe introduced a software product similar in nature to Patterson's, defendant accused plaintiff of violating its trademarks. *See id.* at 1261. CompuServe then instituted a declaratory judgment action. *See id.*

169 *See id.* at 1261. Patterson uploaded numerous software files from his home in Texas to CompuServe's system in Ohio from 1991 to 1994. *See id.*

170 *See id.* at 1265.

171 *See id.* at 1268. The court conducted a due process analysis because it found that Ohio's long-arm statute reached to the limits of the Due Process Clause. *See id.* at 1262-63.

172 *See id.* at 1260.

173 *See id.* at 1261.

174 *See supra* Part I.D-E.

175 *See CompuServe*, 89 F.3d at 1264-65.

176 *See id.* at 1264-67.

177 *See id.* at 1268.

interests outweigh the defendant's burden of defending in a distant forum.[178] But the court overlooked three key points. First, Patterson is an individual being sued for a declaratory judgment by a corporation, and litigating in a distant forum is likely to be more burdensome on an individual than on a corporation.[179] Second, the court's choice of law justification does not deserve great weight in a jurisdictional context.[180] Third, the amount at stake for CompuServe should not have any relevance to the jurisdictional inquiry.[181] Therefore, given the weakness of the court's analysis, jurisdiction was more likely to be unreasonable than reasonable.

Again, the *Pennoyer* sovereignty principle produces infirm results because of inefficiency and unfairness. *CompuServe* produces inefficiency by permitting the litigation to go forward in a forum that does not have stronger contacts with the litigation than any alternative forum.[182] The decision also produces unfairness because the court's cursory due process analysis fails to correctly evaluate the opposing interests of the state, the defendant, and the plaintiff.[183]

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178 *See id.*

179 *Cf.* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 302-03 (1980) (Brennan, J., dissenting) ("[A] resident forced to travel to a distant State to prosecute an action against someone who has injured him could, for lack of funds, be entirely unable to bring the cause of action."). *But see* Burger King Corp. v. Rudzewicz, 471 U.S. 462 n.25 (1985) ("Absent compelling considerations, a defendant who has purposefully derived commercial benefit from his affiliations in a forum may not defeat jurisdiction there simply because of his adversary's greater net wealth." (citation omitted)).

180 *Cf. Burger King*, 471 U.S. at 481-82 (stating that courts should give weight to contractual choice of law provisions, but not to generalized choice of law concerns).

181 *Cf. id.* at 480-85 (analyzing the interests at stake but not attaching any importance to the amount at stake for plaintiff); *World-Wide Volkswagen*, 444 U.S. at 295-99 (same).

182 *See supra* notes 173-76 and accompanying text.

183 *See supra* notes 177-82 and accompanying text. In a similar case, the district court avoided the *CompuServe* mistake. *See Digital Equip. Corp. v. Altavista Tech., Inc.*, 960 F. Supp. 456 (D. Mass. 1997). *Digital*'s reasonableness analysis is thorough and well-reasoned, *see id.* at 470-71, but the minimum contacts analysis is weak. *See id.* at 468-70. However, because greater reasonableness may bolster weak contacts, *see Burger King*, 471 U.S. at 477, the court wisely rested its decision on the fact that jurisdiction in Massachusetts was reasonable. *See Digital Equipment*, 960 F. Supp. at 472. In another case, the court found Zippo Dot Com amenable to suit in Pennsylvania because it had 3,000 Pennsylvania subscribers to its Internet news service and contracts with seven Pennsylvania Internet access providers. *See Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997). The dispute arose out of alleged trademark infringement by Zippo Dot Com for using the word "Zippo" in its website domain names. *See id.* In this case, the court replicated the *CompuServe* error by relying heavily on minimum contacts analysis and only paying lip-service to reasonableness. *See id.* at 1125-27; *see also* EDIAS Software Int'l, L.L.C. v. BASIS Int'l Ltd., 947 F. Supp. 413, 420, 422 (D. Ariz. 1996) (finding nonresident software producer amenable to suit based on a contract, a long-term business relationship, and location of alleged libelous injury).

C. *Maritz, Inc. v. Cybergold, Inc.*[184]

Defendant Cybergold was incorporated in California, and Plaintiff Maritz in Missouri.[185] Cybergold's website, accessible to anyone browsing the World Wide Web, described its future free mailing list as a service.[186] Maritz alleged that Cybergold actively solicited businesses to advertise on its site.[187] At the time of the suit, Missouri users had accessed Cybergold's site 311 times; of these 311 hits, 180 were by Maritz and its employees.[188] Maritz brought an action for a preliminary injunction in the United States District Court for the Eastern District of Missouri, alleging trademark infringement.[189] The district court held Cybergold amenable to jurisdiction in Missouri under both the long arm statute and the Due Process Clause.[190]

For the minimum contacts prong of the due process inquiry, the court gave great weight to whether the website was interactive or passive in nature.[191] The court considered the site interactive because "CyberGold has consciously decided to transmit advertising information to all internet users, knowing that such information will be transmitted globally."[192] Thus, the court held that its exercise of jurisdiction over Cybergold was consistent with due process because Cybergold had "purposefully availed itself of the privilege of doing business" in Missouri, and thus "could reasonably anticipate the possibility of being haled into court" there.[193]

The district court's treatment of Cybergold's website constitutes the primary flaw in this case and the source of its unfairness.[194] The

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184 947 F. Supp. 1328 (E.D. Mo. 1996).

185 *See id.* at 1330-31.

186 *See id.* at 1330.

187 *See id.*

188 *See id.*

189 *See id.* at 1329.

190 *See id.* at 1331-34.

191 *See id.* at 1333.

192 *Id.* In conducting its minimum contacts inquiry, the court also considered the quantity of contacts, the relatedness of the action to the website, and Missouri's interest in the litigation. *See id.* at 1333-34. When assessing the quantity of contacts the court only considered the 131 times that Cybergold's site was accessed by persons unrelated to Maritz. *See id.* at 1333. The court found a substantial link between the action and Cybergold's website because Maritz alleged that the site infringed on its trademark. *See id.* Finally, the court found that Missouri's interest in adjudicating a dispute over a resident corporation's trademark and the plaintiff's interests in litigating in Missouri outweighed the burden on the defendant of litigating in a distant forum. *See id.* at 1334.

193 *Id.*

194 *See* Corey B. Ackerman, Note, World-Wide Volkswagen, *Meet the World Wide Web: An Examination of Personal Jurisdiction Applied to a New World*, 71 ST. JOHN'S L. REV. 403, 423-24 (1997); David L. Stott, Comment, *Personal Jurisdiction in Cyberspace: The Constitutional Boundary of Minimum Contacts Limited to a Web Site*, 15 J. MARSHALL J. COMPUTER & INFO. L. 819, 847-48 (1997). *But see* Sean M. Flower, Note, *When Does Internet Activity Establish the Minimum Contact Necessary to Confer Personal Jurisdiction?*, 62 MO. L. REV. 845, 864 (1997).

court found that Cybergold purposefully availed itself of the benefits of doing business in Missouri through its website.[195] However, under this theory, Cybergold would have purposefully availed itself of the benefits of doing business in all fifty states.[196] The court's reasoning runs counter to the Supreme Court's rationale in *World-Wide Volkswagen* and *Asahi*.[197] The *World-Wide Volkswagen* Court found that World-Wide lacked the expectation that its product would arrive in Oklahoma even though it had inserted its car into the stream of commerce.[198] Similarly, Cybergold lacked any focused intent that its website be accessed in Missouri or any other locale.[199] Thus, the creation of a website alone cannot satisfy minimum contacts.[200] In this case, the sovereignty principle led the court to assert unfairly its authority over the defendant and, therefore, to situate the litigation in an inefficient forum.[201]

D. *Cybersell, Inc. v. Cybersell, Inc.*[202]

In *Cybersell*, the defendant, a Florida corporation, advertised its web design business on its website and offered browsers a chance to indicate their interest in the business by submitting their names and addresses.[203] The plaintiff, an Arizona corporation with the same name, had brought a trademark infringement suit in federal court in Arizona.[204] The district court dismissed the case for lack of personal jurisdiction, and the plaintiff appealed.[205] In deciding whether jurisdiction was proper, the court looked to whether the defendant had

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195 *See Maritz*, 947 F. Supp. at 1334.

196 *See* Ackerman, *supra* note 194, at 425; Stott, *supra* note 194, at 852-53.

197 *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 110-12 (1987) (rejecting an interpretation of the due process clause that would make a defendant amenable if "the defendant acted by placing a product in the stream of commerce, and the stream eventually swept defendant's product into the forum State, but the defendant did nothing else to purposefully avail itself of the market in the forum State"); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297-98 (1980) (holding that foreseeability is relevant to the due process inquiry but that it is not enough that a defendant could foresee that its product could wind up in the forum state).

198 *See World-Wide Volkswagen*, 444 U.S. at 298.

199 *Cf. supra* notes 12-13 (explaining the nature of the Internet and the World Wide Web); Ackerman, *supra* note 194, at 424-25 (arguing that posting a website does not necessarily involve directing activity toward a particular state); Stott, *supra* note 194, at 852-53 (noting the worldwide nature of a website and contending that Cybergold's activities were not otherwise specifically directed at Missouri residents).

200 *See* Ackerman, *supra* note 194, at 424-25; Stott, *supra* note 194, at 852-53.

201 Missouri was not necessarily the most efficient forum because its contacts with the litigation were minimal. *See* Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1328, 1330 (E.D. Mo. 1996). CyberGold's contacts with Missouri were no more siguificant than with any other state except California. *See id.*

202 130 F.3d 414 (9th Cir. 1997).

203 *See id.* at 415-16.

204 *See id.* at 415.

205 *See id.* at 416.

conducted any commercial activity with residents of Arizona and found that the defendant

> entered into no contracts in Arizona, made no sales in Arizona, received no telephone calls from Arizona, earned no income from Arizona, and sent no messages over the Internet to Arizona. . . . In short, [the defendant] has done no act and has consummated no transaction, nor has it performed any act by which it purposefully availed itself of the privilege of conducting activities, in Arizona, thereby invoking the benefits and protections of Arizona law.[206]

Under *Cybersell*, the definition of interactivity includes the ability to make contracts and sales, earn income, and communicate electronically with forum residents through a website.[207] This test has an advantage over the *Cybergold* test, because the *Cybersell* test does not define website contacts as broadly.[208] However, the "new" *Cybersell* test fails to do anything new. It merely tells us that contracts, sales, income derivation, and regular communication are contacts—a concept with which courts are already familiar.[209] This test merely tells lower courts that when they find the familiar contacts occurring through the Internet, they should treat those incidents the same as non-Internet occurrences.[210] But most important, this test does not situate Internet contacts in the context of reasonableness, and thus it fails to address the due process inquiry.[211] Because *Cybersell*'s test simply restates the current law, it suffers from the same inability to achieve the goals of fairness and efficiency.[212]

IV
AVAILABLE ALTERNATIVES AND POSSIBLE OUTCOMES

This Part looks at two available alternatives to the current personal jurisdiction test. The first is the pure reasonableness formulation favored by former-Justice Brennan, Professor Clermont, and

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206 *Id.* at 419.

207 *See id.*

208 *See supra* note 201.

209 *See, e.g.*, Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 108-13 (1987); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 478-82 (1985); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295-99 (1980); McGee v. International Life Ins. Co., 355 U.S. 220, 222-23 (1957).

210 *See Cybersell*, 130 F.3d at 419.

211 The *Cybersell* court did not reach the reasonableness prong of the jurisdictional inquiry because it did not find sufficient minimum contacts. *See id.* at 419-20. To the extent that the court clings to the bifurcated framework then, it is trapped by *Pennoyer*'s principles. *See supra* Part II.B and accompanying text. Thus, the sovereignty principles clouded the jurisdictional inquiry influencing the court to consider Cybersell's contacts separate from reasonableness and resulting in this "new" old test.

212 *See supra* Part II.C.

Professor Ehrenzweig. The second is this Note's proposal: a federal amenability statute.

A. Pure Reasonableness: A Framework

This alternative is based primarily on the formulation presented in *Burger King*,[213] and, in some measure, on the works of Professors Clermont and Ehrenzweig.[214] The pure reasonableness theory does not contain any surprises. First, it abandons the categorization of actions and the bifurcated test.[215] Second, it requires the court to determine whether the action is related to the defendant's contacts with the forum.[216] Third, it requires the court to decide whether jurisdiction satisfies due process by measuring the defendant's contacts with the forum and the burden of litigating in a distant forum.[217] Finally, the court should balance the defendant's interests against those of the state and the plaintiff.[218] A finding that the forum is highly reasonable may tip the balance in favor of jurisdiction even if the defendant's contacts are negligible.[219] Under a pure reasonableness theory, it is not necessary for the court to show that the defendant has sufficient contacts with the forum.[220] In addition, the forum need not have the most contacts with the litigation; rather, the forum must be a reasonable venue for the action based on the nexus of the defendant's, the state's, and the plaintiff's interests.[221] If the forum is inconvenient, in a nonconstitutional sense, the courts must transfer the action to a

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213 *See Burger King*, 471 U.S. at 476 ("Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'" (quoting International Shoe Co. v. Washington, 326 U.S. 310, 320 (1945))).

214 *Cf.* Clermont, *supra* note 7, at 437-41 (presenting a theory of "forum reasonableness"); Ehrenzweig, *supra* note 11, at 111-12 (arguing for adoption of the doctrine of forum conveniens, or interstate venue).

215 *See supra* Part I. *Cf.* Clermont, *supra* note 7, at 453 (discussing abandoning the categories and bifurcated analysis in his own theory, "forum reasonableness").

216 *See supra* Part I.E.1 (describing general and specific jurisdiction). The specific or general nature of the case will simply be one factor in the pure reasonableness analysis. That is, if the forum contacts are less related to the dispute, then the contacts must be of a more substantial nature and quality to support a finding of amenability. *Cf. supra* notes 90-93 and accompanying text (explaining the purpose of the distinction between general and specific jurisdiction).

217 *See Burger King*, 471 U.S. at 476-78.

218 *See id.* at 477.

219 *See Burger King*, 471 U.S. at 478-80 (giving great weight to the voluntary business relationship between the parties, as well as defendant's refusal to make contractually-required payments to plaintiff).

220 *But cf.* Pennoyer v. Neff, 95 U.S. 714, 722 (1877) (establishing physical presence within a state as a prerequisite to in personam jurisdiction).

221 *See Burger King*, 471 U.S. at 476-78; World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 301 (1980) (Brennan, J., dissenting) ("The defendant has no constitutional entitlement to the best forum or, for that matter, to any particular forum.").

more convenient forum.[222] Thus, if two fora would be reasonable, the plaintiff need not seek the most reasonable forum, but rather the forum that is reasonable enough to satisfy due process.

1. *Pure Reasonableness Addresses the Criticism of Rationality*

Part II of this Note defined the element of rationality as the capacity to reach consistently correct outcomes based on a logical theory.[223] The *Pennoyer* theory lacks this capacity because it forces courts to fit their analyses within its terms even when their instincts tell them that jurisdiction is reasonable.[224] A pure reasonableness theory, on the other hand, allows courts to conduct their analyses outside a formal framework. For example, in *Pres-Kap*, the Florida court ultimately held that Pres-Kap lacked sufficient contacts with Florida, but it spoke in terms of reasonableness.[225] A pure reasonableness theory would have allowed the court to articulate specifically why jurisdiction in Florida was unreasonable.[226] Therefore, the pure reasonableness theory is more rational than the *Pennoyer* theory.

2. *Pure Reasonableness Addresses the Criticism of Consistency*

Unfortunately, a reasonableness theory offers less predictability than a bright-line rule.[227] However, one can hardly characterize the *Pennoyer* theory as bright line, either.[228] To the extent that the *Pennoyer* theory has created confusion about whether Internet contacts create amenability,[229] the pure reasonableness theory could do no worse. For example, the result in *CompuServe* would be the same under either a pure reasonableness test or the *Pennoyer* approach, because the facts in *CompuServe* bore some resemblance to those in *Bur-*

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222 *Cf.* Clermont, *supra* note 7, at 440 (arguing that the current system of territorial jurisdiction ought to be replaced with a system of "forum reasonableness" that will allow for free transfer to more convenient fora in the interest of efficient litigation); Ehrenzweig, *supra* note 117, at 312-14 (arguing for a system of interstate venue).

223 *See supra* Part II.B.1.

224 *See* Part II.B.1.

225 *See* Pres-Kap, Inc. v. System One, Direct Access, Inc., 636 So. 2d 1351, 1353 (Fla. Dist. Ct. App. 1994).

226 In *Inset Systems, Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161 (D. Conn. 1996), a pure reasonableness approach would have enabled the court to find jurisdiction reasonable solely because the defendant's main office was less than two hours away. *See id.* at 165. Greater clarity in *Inset's* reasoning would have set an example for other courts, preventing *Cybergold*-type errors. *See supra* notes 194-201 and accompanying text.

227 *Cf.* Clermont, *supra* note 7, at 454 (discussing the "objective of certainty" in relation to a "forum reasonableness" rule and recoguizing that flexible rules do not serve this objective well).

228 *See supra* Part I.

229 *See supra* Part III.

ger King.[230] Thus, the pure reasonableness theory is neither more nor less consistent than the *Pennoyer* theory.

3. *Pure Reasonableness Is More Efficient than Sovereignty*

With respect to the element of efficiency, the pure reasonableness theory is a significant improvement upon the *Pennoyer* theory. Like the transient rule,[231] the aspects of *Pennoyer* that most offend the goal of efficiency do not constrain the pure reasonableness theory and therefore cannot prevent courts from allocating suits to efficient forums. Unfortunately, the nebulous content and fact-based nature of a pure reasonableness standard prevents it from providing courts with gnidance beyond barring transient jurisdiction. An efficient rule must produce correct outcomes on a case-by-case basis as well as reduce the effort that courts expend in applying the rule. Thus, the pure reasonableness theory is too amorphous to ease the burden of the courts.

4. *Pure Reasonableness Preserves Fairness*

As the efficiency inquiry demonstrated, pure reasonableness is not oriented towards the interests of either defendants or plaintiffs. This fairness is its greatest strength. In measuring fairness it would be appropriate, for instance, for courts to take into account the parties' relative capacities for absorbing the burden of distant litigation.[232] The *Pennoyer* theory cannot accommodate this concern,[233] and to that extent it appears to be weighted in favor of the parties that would be able to better bear this burden.[234] Pure reasonableness will allow courts to balance each party's interests and will not favor either defendants or plaintiffs. For example, in *CompuServe*, a court applying the pure reasonableness test would have been able to take into account the litigants' relative capacities for pursuing a suit in a distant forum, and thus jurisdiction over Patterson might have been inappropriate.[235] Therefore, the pure reasonableness theory is more fair than

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230 *Compare* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 478-80 (1985) (finding that contacts with forum state included a franchise contract, payments, and frequent communication with a business incorporated in the forum state), *with* CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1264 (6th Cir. 1996) (finding that defendant's contacts with forum state consisted of a contract and regular communication). Thus, small business owners would be on notice that contracts with out-of-state entities resulting in long term regular relationships can make the business amenable to suit in distant fora.

231 *See supra* Part II.B-C.

232 *Cf. Burger King*, 471 U.S. at 477 (discussing the interests of defendants and plaintiffs); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980) (same).

233 *See Burger King*, 471 U.S. at 477; *World-Wide Volkswagen*, 444 U.S. at 292. That is, the *Pennoyer* theory looks at the burden on the defendant of litigating in a distant forum and the plaintiff's interest in its choice of forum, but not directly at the relative burdens. *See Burger King*, 471 U.S. at 477; *World-Wide Volkswagen*, 444 U.S. at 292.

234 *See generally supra* Part I (describing the evolution of the *Pennoyer* theory).

235 *See supra* Part III.B.

the *Pennoyer* theory because it is more flexible and not biased toward defendants or plaintiffs.

B. A Framework for a Federal Amenability Statute

Other commentators have proposed drafting a federal statute to cure the existing jurisdictional ailments.[236] However, like the commentators discussed in Part II, these commentators base their arguments on pure doctrinal analysis, not policy analysis. This Note gathered information about the policy goals of amenability by answering the questions posed in Part II. This Note argues that amenability is based on a framework that produces irrational and inconsistent results. The framework itself is a bifurcated test that requires a constitutionally satisfactory presence of sovereigu power and reasonableness. An analysis of the Internet cases reveals that the outcomes of the part of the test based on the sovereignty principle fail to meet the policy goals of efficiency and fairness. Now, it is time to discern a framework for a statutory solution.

1. *Providing for Efficiency*

Efficiency, as noted above, requires that every case be tried in the most efficient jurisdiction. From the perspective of amenability, an efficient jurisdiction adequately balances the following factors: the burden on the defendant of litigating in a distant forum, the location of witnesses and evidence, the plaintiff's interest in choice of court, and finally the state's interest in the litigation. An efficient rule also provides for consistent application and does not require case-by-case determinations. These two aspects of efficiency contradict one another, and thus a perfect statutory rule cannot be formulated. The goal, however, is not necessarily perfection, but rather a law that is better than what we have now or any available alternative. The best way to ensure efficiency is to draft the statute so that the permissible bases of amenability fall within the boundaries of due process.

2. *Providing for Fairness*

Fairness is the primary goal for a law of amenability because the Constitution requires it: an unfair exercise of authority over the defendant violates the defendant's due process rights. Due process requires that the defendant reasonably foresee that his conduct in relation to

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236 *See* Clermont, *supra* note 121, at 89-90 (arguing for a federal jurisdiction statute based upon the Hague Treaty); Sheehan, *supra* note 145, at 438-39 (arguing for a statute based upon the Full Faith and Credit and Due Process Clauses of the Constitution as well as the limits of state sovereignty).

the forum may result in him being haled into court there.[237] The most clear basis for this foreseeability is conducting business with a person located in the forum—buying from, selling to, or simply paying the party located in the forum.[238] Because jurisdiction based on this kind of conduct is clearly fair, it should be an element of the federal statute. The defendant's habitual residence also constitutes a fair forum because it forces the plaintiff to travel to the defendant, thus relieving the defendant of any burden that may result from a distant forum.[239] Finally, the statute must also accommodate cases arising out of tort. To do so, it should provide that when the defendant commits a tortious act, the defendant will be amenable to suit in the following fora: (1) where the injury occurred; (2) where the act occurred; and (3) where the defendant resides.[240] In the products liability context, such as a case like *Asahi*,[241] the statute should provide that when a defendant intentionally places its product into the stream of commerce and intends for the product to reach the forum, the defendant will be amenable to suit in that forum. These provisions clearly fall within the bounds of due process because they have all had the approval of the Supreme Court. Most important, they all serve the goal of fairness without relying on the sovereignty principle. Therefore, these provisions avoid the unfair outcomes that are inextricably linked to the sovereignty principle.

CONCLUSION

This Note argnes that the current law of amenability fails to achieve the policy goals that the Supreme Court and many commentators agree that it should. Through a policy analysis-influenced methodology, this Note identifies these policy goals as efficiency and fairness and demonstrates that the best way to achieve these goals is to take a new approach to amenability. In Part III, this Note illustrated the failure of the sovereignty principle by analyzing jurisdictional problems in recent Internet cases. In Part IV, this Note presented two alternatives: pure reasonableness theory and a federal amenability statute. To answer the fifth and final policy analysis question posed in Part II, a federal amenability statute has a greater likelihood of achiev-

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237 *See Burger King*, 471 U.S. at 478-82; *see also* McGee v. International Life Ins. Co., 355 U.S. 220, 222 (1957) (noting that courts should analyze the due process requirement of minimum contacts in light of "'traditional notions of fair play and substantial justice'" (citing International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

238 *See* Hanson v. Denckla, 357 U.S. 235, 251-55 (1958).

239 *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980); Milliken v. Meyer, 311 U.S. 457, 463-64 (1940).

240 *See* Clermont, *supra* note 121, at 115; *see also* Hazard, *supra* note 2, at 281 (proposing the expansion of long arm statutes "to embrace multiparty litigation").

241 Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 105 (1987).

ing the goals of efficiency and fairness because it is more efficient than a pure reasonableness theory which fails to provide a consistent, across-the-board rule. Thus, a statute that balances the interests of plaintiffs and defendants and sets its own boundaries well within the bounds of due process would remedy the flaws of the current sovereignty-based law of amenability.

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