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# Personal Jurisdiction Based on Advertising: The First Amendment and Federal Liberty Issues

*Keith H. Beyler\**

## INTRODUCTION

The First Amendment protects most advertising by most businesses.<sup>1</sup> Yet, prudent businesses may think twice about where they exercise this right if advertising is treated as a basis for personal jurisdiction. Such treatment would force a business that wants to advertise in another state to consider the consequences of having the other state's courts determine the legality of its acts.<sup>2</sup> In making this determination, the other state's courts will apply the other state's conflict of laws rules, which may call for the application of the

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\* Associate Professor of Law, Southern Illinois University-Carbondale; A.B. 1969 Princeton University; J.D. 1974 University of Chicago. My colleagues Jill Adams, Patrick Kelley, and William Schroeder gave me extensive and helpful editorial advice. James Pfander made the quite valuable suggestion that the term "federal liberty" best describes the kind of liberty examined here. Barbara Graham and Bianca Truitt provided substantial research assistance.

1. *See* Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n, 447 U.S. 557 (1980). Technically, the First Amendment applies to the states through its incorporation into the Fourteenth Amendment, but this article refers to the right to advertise as a First Amendment right.

2. For one of the better discussions of this point, *see* Linda Silberman, *Can the State of Minnesota Bind the Nation?: Federal Choice of Law Constraints After Allstate Insurance Co. v. Hague*, 10 HOFSTRA L. REV. 103 (1981). The consequences of becoming subject to personal jurisdiction also include having to defend future lawsuits at a different, and often less convenient, place, and having to defend these lawsuits before different, and often less sympathetic, juries. The broad fact-finding discretion of juries on liability and damage issues can work to the disadvantage of any out-of-state business, but it is especially threatening to controversial out-of-state businesses, like abortion providers. This article focuses on the vulnerability of abortion providers to a state's aggressive use of its conflict-of-laws power, but these providers also are vulnerable to aggressive factfinding in ordinary and novel malpractice suits. Recently, Life Dynamics, Inc., a pro-life organization, has sought to use abortion malpractice suits as a weapon in the war against abortion providers. Christopher John Farley, *Malpractice as a Weapon*, TIME, Mar. 13, 1995, at 65; Junda Woo, *Abortion Doctors' Patients Widen Scope of Their Malpractice Suits*, WALL ST. J., Oct. 28, 1994, at B12. The litigation assistance offered by this organization likely will include advice on how to use forum shopping techniques to force abortion providers to defend themselves before unsympathetic juries.

other state's substantive law. As a result, a business may find that its acts will be considered illegal, though its acts would have been considered perfectly legal if challenged in the courts, under the conflict of laws rules, and under the substantive law of the state where the business is located.

Because personal jurisdiction can have this effect on the applicable law, treating advertising as a basis for personal jurisdiction can undermine First Amendment rights. Under the First Amendment, a business has the right to advertise a product or service that is illegal in the state where it is advertised but legal in the state where it is sold.<sup>3</sup> Yet, a business cannot safely exercise this right if its advertising will make it subject to personal jurisdiction and subject to the law of the state that treats the sale as an illegal act.

Treating advertising as a basis for personal jurisdiction also can undermine one of the positive features of our federal system—the liberty that comes from diversity coupled with mobility.<sup>4</sup> This "federal liberty" results from the adoption by different states of different social policies and from the mobility that enables people to take advantage of these differences as they see fit. Advertising promotes federal liberty by making people aware of products and services that are illegal in their state but legal in other states. However, if businesses must refrain from advertising in order to avoid becoming subject to personal jurisdiction, people will find it harder to get this information.

Part I of this Article illustrates the potential impact of treating advertising as a basis for personal jurisdiction by looking at how such treatment might deter interstate advertising by abortion providers. Currently, the states are sharply divided over whether to require parental involvement in abortions performed for minors. Obviously, a parental involvement statute would have greater impact if it required parental involvement in abortions performed for a state's minors outside of the state. Whether a state can force out-of-state abortion providers to honor such a requirement might depend, ultimately, on whether the providers are subject to personal jurisdiction. If advertising is treated as a basis for personal jurisdiction, abortion providers in states with liberal abortion laws might have to stop advertising in states with restrictive abortion laws. Otherwise, these providers might find it necessary to determine a minor's state of residence and then to comply with that state's parental involvement statute.

Parts II and III examine whether advertising is a basis for personal jurisdiction under the current requirements and ground rules for personal jurisdiction laid down by the Supreme Court. Advertising was an insufficient basis in the past, but it might be a sufficient basis today. The Supreme Court's silence on this point has led to division in the lower courts.

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3. See *Bigelow v. Virginia*, 421 U.S. 809 (1975).

4. Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1504 (1987) (book review).

Generally, however, the lower courts are concluding that advertising is a sufficient basis in suits against abortion providers and other similar businesses, such as health care facilities that perform other medical procedures and taverns that serve alcohol to minors.

Parts IV and V examine First Amendment and federalism arguments for treating advertising as an insufficient basis for personal jurisdiction. In the past, personal jurisdiction rules encouraged out-of-state businesses to provide information about their products and services by putting mere advertisers beyond a state's reach. Because the importance of this information has not diminished over the years, the Supreme Court should not approve a new personal jurisdiction rule that will discourage out-of-state businesses from providing it. Advertising should be treated as a basis for personal jurisdiction only when it is unprotected under the First Amendment. Advertising lacks such protection only when it is misleading, concerns an unlawful activity or concerns a socially harmful activity that has received less protective treatment in commercial speech decisions.

## I. THE POTENTIAL IMPACT ON ABORTION PROVIDERS

The controversy over whether to require parental involvement in abortions performed for minors provides a modern example of the importance of federal liberty. On this subject, the states are sharply divided over the proper social policy. Thirty-seven states have statutes that require some form of parental involvement in a minor's decision to have an abortion. Twenty of these states require parental consent, typically from one parent and with a provision for judicial bypass.<sup>5</sup> Seventeen require parental notice, typically to

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5. ALA. CODE § 26-21-1 (1993); ALASKA STAT. § 18.16.010 (1993); ARIZ. REV. STAT. ANN. § 36-2152 (1993); CAL. HEALTH & SAFETY CODE § 25958 (West Supp. 1993); COLO. REV. STAT. ANN. § 18-6-101 (West 1990); IND. CODE ANN. § 16-34-2-4 (West 1993); KY. REV. STAT. ANN. § 311.732 (Michie/Bobbs-Merrill 1990) (requiring consent of both parents or judicial bypass); LA. REV. STAT. ANN. § 40:1299.35.5 (West 1992); MASS. GEN. LAWS ANN. ch. 112, § 12S (West 1983) (requiring consent of both parents or judicial bypass); MICH. COMP. LAWS ANN. § 722.903 (West 1993); MISS. CODE ANN. § 41-41-53 (1993) (requiring consent of both parents or judicial bypass); MO. REV. STAT. § 188.028 (1983); N.M. STAT. ANN. § 30-5-1 (Michie 1978); N.C. GEN. STAT. § 90-21.7 (1995) (requiring written consent of custodial parent, legal guardian or grandparent if minor lives with grandparent, or judicial bypass); N.D. CENT. CODE § 14-02.1-03.1 (1991) (requiring consent of both parents or judicial bypass); 18 PA. CONS. STAT. ANN. § 3206 (1983); R.I. GEN. LAWS § 23-4.7-6 (1989); S.C. CODE ANN. § 44-41-30 (Law. Co-op. Supp. 1993) (requiring consent of a parent, grandparent, or other person standing in loco parentis or judicial bypass); WIS. STAT. ANN. § 48.375 (West Supp. 1993) (requiring consent of one parent or adult family member or judicial bypass); WYO. STAT. § 35-6-118 (Supp. 1993).

### States That Require Parental Involvement



- State enforces a parental involvement statute.
- State has no parental involvement statute or cannot enforce its statute.

one parent and with a provision for judicial bypass.<sup>6</sup> Thirteen states have no statute of either kind, leaving abortion providers in those states free to decide whether to perform abortions for minors who are unwilling to involve their parents.

The Supreme Court has upheld parental involvement statutes of both kinds. In 1990, it upheld the Minnesota and Ohio parental notice statutes in *Hodgson v. Minnesota*<sup>7</sup> and *Ohio v. Akron Center For Reproductive Health*.<sup>8</sup> In 1992, it upheld the Pennsylvania parental consent statute in *Planned Parenthood v. Casey*.<sup>9</sup>

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6. ARK. CODE ANN. § 20-16-801 (Michie 1991) (requiring notification of both parents or judicial bypass); Del. H.B. No. 179, 138th Gen. Ass. (1995) (requiring notification of one or both parents, a grandparent, licensed mental health professional, legal guardian, or judicial bypass); GA. CODE ANN. § 15-11-112 (Harrison 1990); 750 ILL. COMP. STAT. 70/15 (1995) (requiring notification of a parent, grandparent, step-parent living in the household, or legal guardian or judicial bypass); IDAHO CODE § 18-609 (1987) (requiring parents to be notified if possible with no judicial bypass); KAN. STAT. ANN. § 65-6705 (1992); ME. REV. STAT. ANN. tit. 22, § 1597-A (West 1994); MD. CODE ANN., HEALTH-GEN. § 20-103 (Supp. 1993) (requiring notification of one parent but permits the physician to waive the requirement in some cases); MINN. STAT. § 144.343(2) (West 1989) (requiring notification of both parents or judicial bypass); MONT. CODE ANN. § 41-1-405 (1991), *as amended by* Mont. H.B. No. 482, 54th Leg. Sess. (1995) (requiring notification of one parent or legal guardian of judicial bypass); NEB. REV. STAT. § 71-6902 (1994); NEV. REV. STAT. § 442.255 (Michie 1990); OHIO REV. CODE ANN. § 2919.12 (Baldwin 1992); S.D. CODIFIED LAWS ANN. § 34-23A-7 (Supp. 1993); TENN. CODE ANN. § 37-10-303 (1991) (requiring notification of one parent but permits the physician to waive the requirement in some cases); UTAH CODE ANN. § 76-7-304 (1990) (requiring notification of both parents with no judicial bypass); W. VA. CODE § 16-2F-3 (1991).

7. 497 U.S. 417 (1990).

8. 497 U.S. 502 (1990).

9. 112 S. Ct. 2791 (1992). Under these decisions, a parental involvement statute that specifies an adequate judicial bypass procedure does not, on its face, violate a minor's abortion rights. *Id.* at 2832. However, a statute, as applied, might violate these rights if the judicial bypass procedure, as applied, is inadequate. In Indiana, for example, it reportedly is "all but unheard of" for a minor to win judicial bypass. Tamar Lewin, *Parental Consent to Abortion: How Enforcement Can Vary*, N.Y. TIMES, May 28, 1992 at A1. In such a state, the statute might be subject to this kind of challenge. Thus far, the Supreme Court has not heard a case raising this issue. See *Cleveland Surgi-Center, Inc. v. Jones*, 2 F.3d 686 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 696 (1994). A parental involvement statute also might violate rights granted by state constitutions. See *American Academy of Pediatrics v. Van de Kamp*, 263 Cal. Rptr. 46 (Cal. Ct. App. 1989); Colleen K. Connell, *Using the Illinois Constitution To Protect Reproductive Freedom*, 81 ILL. B.J. 30, 33 (1993).

Despite these Supreme Court decisions, nine states currently do not enforce their parental involvement statutes.<sup>10</sup> Seven states remain subject to court decrees blocking enforcement.<sup>11</sup> In another three states, public officials have concluded that their parental involvement statutes are unenforceable because they lack features required by the Supreme Court to make such statutes constitutional.<sup>12</sup> Most of these ten states could resume enforcement, however, if they rewrote their statutes to conform to the Minnesota, Ohio, or Pennsylvania statutes.<sup>13</sup>

The map on the following page identifies the twenty-eight states that currently enforce a parental involvement statute. The map shows that all twenty-eight of these states are located next to or near a state that either has no parental involvement statute or has an unenforceable statute. This pattern might change, of course, if more states enact these statutes and if states with unenforceable statutes rewrite their statutes to make them enforceable.

Some parental involvement statutes—including those upheld by the Supreme Court—allow for civil lawsuits to be brought by a minor or her parents against the abortion provider.<sup>14</sup> Five states have created a statutory

10. The following states are not enforcing their parental involvement statutes: Alaska, Arizona, California, Colorado, Illinois, Montana, Nevada, New Mexico, and South Dakota. *Restrictions on Young Women's Access to Abortion Services*, REPRODUCTIVE FREEDOM IN THE STATES (Center for Reproductive Law & Policy, New York, N.Y.), Nov. 10, 1995, at 2 [hereinafter REPRODUCTIVE FREEDOM].

11. REPRODUCTIVE FREEDOM, *supra* note 10, at 2. The following states remain subject to decrees entered in the cases cited here: *Arizona*, Planned Parenthood v. Neely, 804 F. Supp. 1210 (D. Ariz. 1992); *California*, American Academy of Pediatrics v. Van de Kamp, 263 Cal. Rptr. 46 (Cal. Ct. App. 1989); *Colorado*, Roe v. Vanderhoof, 389 F. Supp. 947 (D. Colo. 1975); *Illinois*, Wynn v. Carey, 599 F.2d 193 (7th Cir. 1979) and Zbaraz v. Ryan, 84-C-771 (N.D. Ill. filed June 8, 1995) (agreed preliminary injunction order); *Montana*, Doe v. Deschamps, 461 F. Supp. 682 (D. Mont. 1976) (agreed preliminary injunction order) and Wicklund v. Salvagni, No. CV 93-92-BU-JFB (D. Mont. filed Sept. 27, 1995) (memorandum and order granting summary judgment); *Nevada*, Glick v. McKay, 937 F.2d 434 (9th Cir. 1991); *South Dakota*, Planned Parenthood v. Miller, 63 F.3d 1452 (8th Cir. 1995).

12. 66 Op. Alaska Att'y Gen 816 (1981); 1993 Op. Idaho Att'y Gen. 5; 90 Op. N.M. Att'y Gen. 19 (1990). The Idaho Attorney General has concluded that the state's parental notice statute would survive a facial challenge, but is potentially vulnerable to a constitutional challenge under certain factual circumstances because it contains no bypass procedure. Despite the potential vulnerability of the statute, Idaho abortion providers are abiding by its parental notice requirement. Telephone Interview with Janet Kreps, Center For Reproductive Freedom (Nov. 29, 1995).

13. This would not be possible in a state, like California, where enforcement has been enjoined on state constitutional grounds.

14. This article does not discuss the criminal provisions of these statutes. For a discussion of the additional issues that would be raised by an attempt to extend the

cause of action against a provider who violates the parental involvement requirement.<sup>15</sup> Another four states have enacted statutes stating that such a violation is *prima facie* evidence in common-law tort actions for failure to obtain informed consent or for interference with family relations.<sup>16</sup> Two states have enacted statutes stating that the parental involvement statute is not to be construed as exempting persons from civil liability.<sup>17</sup> In the other twenty-six states, the violation of the parental involvement requirement might provide the basis for a common-law tort action, despite the statute's silence on this point.<sup>18</sup>

Abortion providers face having to pay potentially large damage awards if they ignore their duties under these statutes. The violation might lead to an award of compensatory damages covering emotional distress and other non-economic losses over which juries have wide discretion. The violation also might lead to an award of punitive damages. Indeed, all of the states that

criminal provisions of an abortion statute to activity outside of the state, see C. Steven Bradford, *What Happens If Roe Is Overruled? Extraterritorial Regulation of Abortion By the States*, 35 ARIZ. L. REV. 87, 137 (1993).

15. ARK. CODE ANN. § 20-16-806 (Michie 1991) (granting a cause of action to a person wrongfully denied notice); MINN. STAT. ANN. § 144.343 (West 1989) (same); N.D. CENT. CODE § 14-02.1-03.2 (1991) (granting a cause of action to a minor); OHIO REV. CODE ANN. § 2919.12 (Anderson 1987) (granting a cause of action to a minor and a person wrongfully denied notice); 18 PA. CONS. STAT. ANN. § 3206(i) (Supp. 1992) (same).

16. Del. H.B. No. 179, 138th Gen. Ass. (1995); KY. REV. STAT. ANN. § 311.732(10) (Michie/Bobbs-Merrill 1990); MICH. COMP. LAWS § 722.907 (West 1993); MONT. CODE ANN. § 41-1-405 (1995).

17. MASS. GEN. LAWS ANN. ch 112, § 12S (West 1983); MO. REV. STAT. § 188.065 (1983).

18. See, e.g., *Cage v. Wood*, 484 So. 2d 850 (La. Ct. App. 1986) (upholding the minor's battery claim, but rejecting her parents' claim for tortious interference with their right to grandparenthood, and not considering whether the parents would have a claim for tortious interference with their relationship with their daughter). In some states, however, the statute's legislative history might preclude using the violation as the basis for a common law tort action. For example, when the Illinois General Assembly recently amended the state's parental notice statute to try to make it enforceable, the medical profession convinced the General Assembly to use disciplinary proceedings controlled by the medical profession as the means of forcing doctors to honor their parental notice obligations. Christi Parsons & Suzy Frisch, *Edgar Gets a Choice on Abortion Bill; Governor Likely To Sign Weaker of Two Measures*, CHI. TRIB., May 23, 1995, at 1; Amy E. Williams, *Edgar Inks Parental Notification Bill*, STATE J. REG. (Springfield, IL), Jun. 2, 1995, at 1. Arguably, the General Assembly's choice of this enforcement mechanism makes it inappropriate to use a violation of this statute as the basis for a common-law tort action.



have enacted a statutory cause of action have provided for awards of punitive damages.<sup>19</sup>

To avoid parental involvement in the abortion decision, many minors obtain an abortion in a neighboring state whose laws do not require parental involvement.<sup>20</sup> Suppose the home state tries to curb this practice by extending one of these statutory or common-law causes of action to its minors' out-of-state abortions. Specifically, after obtaining personal jurisdiction on the basis of advertising, the home state's courts might decide suits involving these causes of action under a residence-based conflicts rule enacted by the home state's legislature that makes the duty to involve a minor's parents depend on where the minor resides.

Scholars have debated whether the Constitution permits states to extend the requirements of their abortion statutes to their residents' out-of-state abortions.<sup>21</sup> If the home state extended its parental involvement requirement

19. See *supra* note 15 for state statutes.

20. *In re Jane Doe*, 843 P.2d 735, 737 (Kan. Ct. App. 1992) (granting waiver of parental notice to an unemancipated minor from out of state who sought an abortion in Kansas); Virginia G. Cartoof & Lorraine V. Klerman, *Parental Consent For Abortion: Impact of the Massachusetts Law*, 76 AM. J. PUB. HEALTH 397 (1986) (reporting that one-third of minor abortion patients left Massachusetts to get an abortion due to its parental notice statute); Kim Cobb, *Abortion: The Great Debate Access to Abortions Drops Due to Pressures*, HOUSTON CHRONICLE, June 14, 1992 at A22 (reporting that minors routinely cross state lines to obtain abortions in states that do not require parental notice); Tamar Lewin, *supra* note 9, at A1, B8 (reporting that Indianapolis abortion clinics advise minors seeking abortions without parental consent to go to Kentucky or Illinois, and that 100 minors leave Massachusetts each month to avoid parental consent requirements); David Snyder, *Abortion Waiting Period Debated Both Sides Set to Renew Fight*, NEW ORLEANS TIMES PICAYUNE, Nov. 9, 1992 at A1, A8 (reporting an increase in the number of women from Mississippi seeking abortions at clinics in Shreveport and Memphis); Amy Westfelt, *Woman Charged After Driving Girl, 13, to N.Y. for Abortion*, PITTSBURGH POST-GAZETTE, Sept. 16, 1995, at 6A (reporting that Pennsylvania's parental consent statute caused a 17% decrease in the number of minors seeking abortions in that state and caused a 19% increase in the number of Pennsylvania clients at one New York clinic located across the state line); see also *Pittsburgh Clinic Director Views Mixed Impact of Abortion Law on State Clinics*, YORK DAILY RECORD, May 13, 1994, at 7 (reporting that Pennsylvania's abortion statute is causing Pennsylvania women to use New Jersey and New York abortion providers); Roger Worthington, *State By State Laws Create Confusion*, June 30, 1992 at C4 (reporting that 60% of the abortions performed in New York between 1970 and 1973 were on out-of-state women who sought abortions in New York due to its less restrictive abortion statute).

21. Bradford, *supra* note 14; Lea Brilmayer, *Interstate Preemption: The Right To Travel, the Right To Life, And the Right To Die*, 91 MICH. L. REV. 873 (1993); Seth F. Kreimer, "But Whoever Treasures Freedom . . .": *The Right To Travel And*

in the manner described here, an out-of-state abortion provider might attack the extension under the Full Faith and Credit and Due Process Clauses,<sup>22</sup> the federal guarantee of interstate travel,<sup>23</sup> and the Commerce Clause.<sup>24</sup> Whether the extension would survive all of these attacks is unclear.

### *A. The Full Faith and Credit and Due Process Clauses*

The Supreme Court has said that the Full Faith and Credit and Due Process Clauses prevent states from applying their substantive law when they have "no significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction."<sup>25</sup> This contacts-interests test often permits two states to apply their law to the same conduct and issues.<sup>26</sup> When the home state's minors seek abortions from providers located in the neighboring state, the home state's contacts with the minors and with their parents create an interest in securing parental involvement.<sup>27</sup> On the other hand, the neighboring state's contacts with the providers and with the abortions create an interest in protecting the providers' and the minors' liberty. Hence, both states have the kind of contacts and interests required by this test.

The Supreme Court has indicated that states cannot apply their substantive law when doing so would violate the parties' reasonable expectations.<sup>28</sup> Here, this requirement might mean that the home state cannot

*Extraterritorial Abortions*, 91 MICH. L. REV. 907 (1993); Gerald L. Neuman, *Conflict of Constitutions? No Thanks: A Response To Professors Brilmayer And Kreimer*, 91 MICH. L. REV. 939 (1993).

22. U.S. CONST. art. IV, § 1; U.S. CONST. amend. XIV, § 1.

23. *E.g.*, *Shapiro v. Thompson*, 394 U.S. 618 (1969). The textual source of this right is unclear. *Id.* at 630.

24. U.S. CONST. art. I, § 8, cl. 3.

25. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 (1981) (plurality opinion).

26. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 817-18 (1985); see LEA BRILMAYER, *CONFLICT OF LAWS* 138-43 (2d ed. 1995).

27. The Supreme Court has said that the home state cannot apply its health care licensing requirements to out-of-state abortion providers used by its residents. *Bigelow v. Virginia*, 421 U.S. 809, 824 (1975) (dictum). Unlike ordinary health care licensing requirements, however, the parental involvement requirement involves a sensitive question of intra-family relations. Generally, the home state has an interest in applying its law to an interference with intra-family relations, though its interest might be less significant than the interest of the state where the conduct occurs. See RESTATEMENT (SECOND) CONFLICT OF LAWS § 154 cmts. b & e (1971). The contacts-interest test requires *an* interest, not the most significant interest, for a state to make its law applicable. See BRILMAYER, *supra* note 26, at 139-41.

28. *Hague*, 449 U.S. at 317-18, 333 (plurality and dissenting opinions). The true

make the application of its law depend on a fact that it cannot reasonably expect an abortion provider to know in advance.<sup>29</sup> The home state can avoid creating this problem, however, by exonerating any provider that (1) takes reasonable steps to determine whether a minor resides in the home state, and (2) concludes reasonably (though incorrectly) that she does not.<sup>30</sup>

Honoring a provider's reasonable expectations also might mean that the home state cannot demand parental involvement if it cannot reasonably expect the provider to know of this requirement.<sup>31</sup> However, the existence of parental involvement statutes and their effect on where minors seek abortion services are widely reported facts.<sup>32</sup> Any reasonable provider will know that many of the home state's minors are seeking the provider's services because of differences in the two states' abortion laws, not because of quality or price differences. Therefore, the Full Faith and Credit and Due Process Clauses will not bar the home state from applying its law in this situation.

### B. *The Federal Guarantee of Interstate Travel*

The Supreme Court has said that the federal guarantee of interstate travel protects interstate travelers against two kinds of burdens: "the erection of actual barriers to interstate movement" and "being treated differently from

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meaning of this limitation is unclear. BRILMAYER, *supra* note 26, at 143; Bradford, *supra* note 14, at 115-16.

29. Because conflict-of-laws rules are part of the law, in a legal system that charges persons with knowledge of the law a person normally cannot claim to be unfairly surprised by the application of another state's law. James A. Martin, *The Constitution and Legislative Jurisdiction*, 10 HOFSTRA L. REV. 133, 134 (1981). Professor Martin distinguished this kind of surprise from "factual surprise" based on the failure to anticipate subsequent events, such as an after-acquired domicile, that would connect a dispute with a particular state. *Id.* at 134. A conflicts rule that makes the obligation to secure parental involvement depend on the minor's place of residence at the time of the abortion differs from the kind of rule referred to by Professor Martin. However, the rule still might frustrate a provider's reasonable expectations if the provider has taken reasonable steps to confirm a minor's place of residence and has concluded reasonably (though incorrectly) that the minor does not reside in the home state.

30. Reasonable reliance has served as a defense under the parental involvement statutes approved by the Supreme Court. *E.g.*, MINN. STAT. ANN. § 144.343(5) (West 1989); OHIO REV. CODE ANN. § 2919.12(C)(1) (Anderson 1987); PA. CONS. STAT. ANN. § 3206(i) (Supp 1992) (requires knowledge, reckless disregard or negligence with respect to each element).

31. Bradford, *supra* note 14, at 122-23.

32. For a sample of the many newspaper articles reporting this phenomenon, see *supra* note 20.

intrastate travelers.<sup>33</sup> Professor Kreimer argues that this barriers-or-discrimination analysis gives too little effect to the federal guarantee of interstate travel.<sup>34</sup> In his view, constitutional structure and political theory support the proposition that "citizens do not carry the morality of their home states with them as they travel, like fleeing convicts dragging the shackles of their imprisonment."<sup>35</sup> When citizens travel to other states, he adds, "they are entitled to do so within the frameworks of law and morality that those sister states provide."<sup>36</sup>

The Supreme Court seems to disagree with this broad interpretation of the right to travel. In *Bray v. Alexandria Women's Health Clinic*,<sup>37</sup> it recently used the barriers-or-discrimination analysis to resolve a question of federal protection of abortion rights. This opinion has led Professor Bradford to conclude that the Supreme Court is unlikely to find a violation of the federal guarantee of interstate travel if a state requires its residents to obtain extraterritorial abortions on the same basic terms as it imposes on intraterritorial abortions.<sup>38</sup>

The fundamental problem with the right to travel argument, as Professor Brilmayer has observed, is that the federal guarantee of interstate travel "by itself does not specify which law will apply once one gets to the other state."<sup>39</sup> If some other constitutional provision bars a state from applying its restrictive abortion law extraterritorially, then the right to travel would ensure that people could take advantage of less restrictive abortion laws by traveling to states that have such laws. However, the right to travel does not by itself bar the home state from applying its own restrictive law extraterritorially.<sup>40</sup>

The right to travel argument is subject to yet another objection. The rules of third-party standing often permit businesses to assert their customers' constitutional rights in suits brought by states to enforce restrictions on the products or services that businesses offer.<sup>41</sup> Under these third-party standing

33. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 277 (1993) (internal quotation marks omitted).

34. Kreimer, *supra* note 21, at 916.

35. Kreimer, *supra* note 21, at 938.

36. Kreimer, *supra* note 21, at 938.

37. *Bray*, 506 U.S. at 275.

38. See Bradford, *supra* note 14, at 161. Technically, *Bray* involved an interpretation of a federal civil rights statute, 42 U.S.C. § 1985(3), that creates a cause of action against private persons who conspire to deprive other persons of certain constitutional rights. Yet, the opinion's language also seems to apply to actions taken by a state. See *Bray*, 506 U.S. at 276-78.

39. Brilmayer, *supra* note 21, at 883 (inner quotation marks omitted).

40. Brilmayer, *supra* note 21, at 883.

41. See, e.g., *Carey v. Population Servs. Int'l.*, 431 U.S. 678 (1977); *Craig v.*

rules, a provider could invoke the minors' right to travel in a suit brought by the home state. Here, however, minors will be bringing some of the suits against the providers. Third-party standing rules do not enable businesses which are sued by customers to assert their customers' constitutional rights.

### C. *The Commerce Clause*

The Supreme Court has read into the Commerce Clause three "dormant" limitations on the states' regulatory power.<sup>42</sup> States must not discriminate against interstate commerce,<sup>43</sup> must not impose an excessive burden on interstate commerce in relation to the local benefit,<sup>44</sup> and must not regulate in a way that subjects interstate commerce to inconsistent regulation by different states.<sup>45</sup> These limitations apply even in private damage suits.<sup>46</sup>

#### 1. Discrimination

A state that requires parental involvement in its minors' out-of-state abortions does not discriminate against interstate commerce. Such a state applies the same requirement to local commerce as it applies to interstate commerce. Also, it applies the same requirement to local abortion providers as it applies to out-of-state abortion providers.<sup>47</sup>

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Boren, 429 U.S. 190 (1976).

42. LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 408 (2d ed. 1988).

43. *CTS Corp. v. Dynamics Corp.*, 481 U.S. 69, 87 (1987).

44. *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986).

45. *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336-37 (1989).

46. *See Bendix Autolite Corp. v. Midwesco Enters.*, 486 U.S. 888 (1988). There the state tried to force foreign corporations to appoint agents for service of process, thereby subjecting themselves to personal jurisdiction, by tolling its statute of limitation on claims against a foreign corporation for periods during which it has no appointed agent. The Supreme Court held that this tolling provision, which affected private damage suits, violated the "dormant" Commerce Clause. Previously, the Supreme Court had applied the "dormant" Commerce Clause primarily in public enforcement suits seeking criminal penalties or civil fines. *See Harold W. Horowitz, The Commerce Clause As A Limitation On State Choice-of-Law Doctrine*, 84 HARV. L. REV. 806, 808 n.10 (1971).

47. For a more complete discussion of the reasons why the home state is not discriminating against interstate commerce, *see Bradford, supra* note 14, at 149.

## 2. Burden v. Local Benefit

A state that requires parental involvement in its minors' out-of-state abortions probably does not impose an excessive burden on interstate commerce in relation to the local benefit. Such a state is forcing out-of-state abortion providers to screen minors on the basis of residence, and then to involve her parents if her home state requires it. In order to conduct residence-based screening, providers must ask minors about their place of residence and must take reasonable steps to confirm the minors' answers.

Asking these questions and taking these steps burdens the providers to some extent. However, this burden is not overwhelming.<sup>48</sup> Most medical facilities ask patients to identify their place of residence. These facilities may not demand proof of residence, but they usually demand proof of insurance, which involves comparable effort. If medical facilities can bear the burden of confirming insurance coverage, abortion providers can bear the burden of confirming residence.

By requiring residence-based screening, a state ensures parental involvement in all of its minors' abortion decisions. Under the Supreme Court decisions upholding parental involvement statutes, the state is entitled to say that this involvement will be of substantial benefit to its minors. In relation to this local benefit, the burden on interstate commerce does not seem excessive.

Professor Bradford draws the opposite conclusion about the burdens and benefits of restrictive abortion statutes. In his view, restrictive abortion statutes generally cause relatively few persons to seek abortions in other states, making the burden of identifying them disproportionate to any resulting benefit.<sup>49</sup> He also expects that abortion providers will find it very hard to screen persons on the basis of residence.<sup>50</sup>

Perhaps some restrictive abortion statutes have a small effect on interstate travel, but parental involvement statutes have a large effect. Article after article documents the fact that these statutes cause thousands of minors to seek abortions in other states.<sup>51</sup> Because so many minors seek abortions in other states, the home state can claim a relatively large local benefit from requiring

48. In addition, other states' parental involvement laws are readily available to abortion providers. *See supra* notes 5-6 & 10-12 and accompanying map. The Center for Reproductive Freedom publishes maps, similar to this one, that put this information at a provider's fingertips. A provider also could call the Center. Thus, the burden of checking other states' parental involvement laws is minimized.

49. Bradford, *supra* note 14, at 152.

50. Bradford, *supra* note 14, at 152-53.

51. For a sample of the articles and studies on interstate travel by minors, *see supra* note 20.

parental involvement in its minors' out-of-state abortions. Moreover, in states that require parental involvement, abortion providers must take reasonable steps to screen on the basis of age, marital status, and emancipation.<sup>52</sup> Taking reasonable steps to screen on the basis of residence does not seem to be substantially more difficult.

### 3. Inconsistent Regulation

It is unclear whether a state that requires parental involvement in its minors' out-of-state abortions is regulating in a way that subjects interstate commerce to inconsistent regulation. Such a state is not forcing abortion providers in other states to violate their states' abortion laws, because no state makes it unlawful for providers to demand parental involvement. Yet, the state is trying to dictate the parental involvement policy that providers in other states will apply to its minors, while the other states may want the providers left free to adopt their own parental involvement policies. So, whether there is inconsistent regulation depends on the applicable test.

Professor Brilmayer argues that, in abortion cases, the test for inconsistent regulation by different states should be the broad test used to determine whether state regulation is inconsistent with federal regulation.<sup>53</sup> State regulation is deemed inconsistent with federal regulation, not only when it is impossible to comply simultaneously with both sovereigns' demands,<sup>54</sup> but also when state regulation "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."<sup>55</sup> This purposes and objectives test reaches state regulation that threatens federal regulatory policies giving parties freedom of choice.<sup>56</sup> If applied as Brilmayer suggests, the test would reach any regulation of a pro-life state that tries to restrict its residents' access to abortion services in a pro-choice state. Inevitably, such

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52. See, e.g., OHIO REV. CODE ANN. § 2919.12(C)(1) (Baldwin 1992) (an abortion provider has an affirmative defense if the pregnant woman provided false, misleading or incorrect information about her age, marital status, or emancipation and the provider did not otherwise have reasonable cause to believe she was under eighteen years of age, unmarried, or unemancipated).

53. Brilmayer, *supra* note 21, at 892. Brilmayer also argues for the use of the broad test in right-to-die cases.

54. Michigan Canners & Freezers Ass'n v. Agriculture Mktg. & Bargaining Bd., 467 U.S. 461, 469 (1984).

55. Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

56. See Federal Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141 (1982); City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973).

a regulation would be inconsistent with the pro-choice state's freedom-of-choice policy.<sup>57</sup>

However, as Professor Bradford has rightly observed, the Supreme Court uses the simultaneous compliance test, not the purposes and objectives test, in dormant Commerce Clause cases.<sup>58</sup> Although the Court has not specifically considered whether the purposes and objectives test should apply to regulation of abortion by different states, this kind of state regulation does not seem to deserve fundamentally different treatment under the dormant Commerce Clause.<sup>59</sup> After all, that Clause focuses on promoting commerce, not personal liberty. Given that focus, a pro-choice state's refusal to regulate abortion seems to deserve no greater respect and no greater protection than is given to refusals by states to regulate other commercial activities.

Moreover, the Supreme Court's role in removing inconsistency in state and federal regulation differs from its role in removing inconsistency in regulation by different states. The Supremacy Clause directs the Court to remove inconsistency in state and federal regulation by applying the federal regulation.<sup>60</sup> The Supremacy Clause gives no direction, however, on how to remove inconsistency in regulation by different states. The Court can remove this kind of inconsistency only by deciding, on its own, which of several possible criteria to use. For example, it might resolve the inconsistency in favor of the state with the most common regulation, the state with the least restrictive regulation, or the state with the strongest claim to regulate the conduct.<sup>61</sup> By intervening only when simultaneous compliance becomes

57. Brilmayer, *supra* note 21, at 898.

58. Bradford, *supra* note 14, at 150 n.425.

59. Bradford, *supra* note 14, at 150 n.425.

60. U.S. CONST. art. VI.

61. When a uniform national rule is necessary to avoid an undue burden on interstate commerce, the Supreme Court is likely to strike down the less common regulation, absent a showing of a strong public interest. *See Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959) (determining which state's mudguard requirements were valid when a uniform national rule was needed to avoid an undue burden on interstate trucking). Alternatively, the Supreme Court might strike down the more restrictive regulation. *See Southern Pacific Co. v. Arizona*, 325 U.S. 761, 774-75 (1945) (striking down a state statute that restricted the length of trains travelling in a state, which caused an undue burden on interstate commerce, since trains had to be split up before entering that state). When a uniform national rule is unnecessary, the Supreme Court is likely to decide which state has the stronger claim to regulate the conduct which is subject to inconsistent regulation, and is likely to strike the regulation that attempts to control conduct occurring outside of the state's territory. *See Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 585 (1986) (invalidating a state liquor pricing regulation which, though designed to secure the lowest price for liquor sales within the state, had the effect of limiting the price at



impossible, the Court generally has avoided having to decide the sensitive question of which criterion to use. It probably will not want to decide this question while simultaneous compliance remains possible just because the question is raised in an abortion case.

Whether there is inconsistent regulation also depends on how the neighboring state responds to the action taken by the home state. Suppose the neighboring state's legislature enacts a statute prohibiting its providers from demanding parental involvement. By making it impossible for providers in the neighboring state to comply with both states' requirements, the statute would enable these providers to make out a clear case of inconsistent regulation. The providers could then ask the Supreme Court to strike the extension of the home state's parental involvement requirement on the theory that the neighboring state has the strongest claim to determine whether parental involvement should be required when the providers perform abortions in the neighboring state for the home state's minors.<sup>62</sup>

Professor Brilmayer argues that the neighboring state does, indeed, have the strongest claim. Although "abortion implicates two competing conflicts paradigms: family law, which is ordinarily residence-based; and health-care regulation, which one would expect to be territorial,"<sup>63</sup> she argues that the two states would instinctively focus on territory if forced to look to a single factor to divide the spheres of regulation fairly and equally between them.<sup>64</sup>

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which liquor could be sold in other states).

62. The providers probably would not argue that a uniform national rule is necessary to avoid an undue burden on interstate commerce. Unlike the interstate truckers and interstate railroads that have argued for uniform national rules, the providers do not oppose state regulation based on territory. Arguing for a uniform national rule also would be quite risky. When the Supreme Court concludes that a uniform national rule is necessary, it is likely to strike down the less common regulation. Thirty-seven states have enacted statutes that require parental involvement. *See supra* notes 5-6. Though only twenty-nine states are enforcing their parental involvement statutes, *see supra* notes 10-12, the thirteen states that have not enacted a parental involvement statute have the less common regulation.

63. Brilmayer, *supra* note 21, at 887. Other conflicts analogies also could be cited. For example, the Second Restatement of Conflict of Laws has a presumption favoring the use of the territorial rule for claims of tortious interference with certain family relationships. RESTATEMENT (SECOND) CONFLICT OF LAWS § 154 comments b & e (1971) (tortious interference with the marriage relationship or with a parent's affections). By analogy, the territorial rule might designate the neighboring state as the state presumptively entitled to determine whether an abortion provider tortiously interferes with the parent-child relationship by helping a minor avoid parental involvement.

64. Brilmayer, *supra* note 21, at 887.

Brilmayer's argument assumes that the home state is blind to the consequences of agreeing to the territorial rule. Under this rule, the neighboring state's law will apply when the home state's minors seek abortions in the neighboring state. The territorial rule denies the home state the assurance of parental involvement in these abortions, but the residence-based rule does not. Parental involvement will matter most to the home state when its own minors' needs are at stake, so, on reflection, the home state is likely to insist on the residence-based rule.

At the same time, the neighboring state will insist on the territorial rule. Under this rule, the neighboring state's minors will not lose freedom of choice. Nearly all of them will seek abortions in the neighboring state where the neighboring state's law will apply. The territorial rule will hurt only those few minors from the neighboring state who, for some reason, seek abortions in the home state. In return for letting these few minors become subject to the home state's requirement, the territorial rule enables the neighboring state to extend freedom of choice to the large number of minors from the home state who will come to the neighboring state to take advantage of its liberal abortion law. As a pro-choice state, the neighboring state will welcome this trade-off.

Brilmayer, therefore, is wrong to assume that the two states would resolve the conflict between them by choosing the territorial rule. It is more reasonable to assume that the states would remain at impasse, with the home state rejecting the territorial rule and the neighboring state insisting on it. So, if forced to resolve a conflict of this kind between the two states, the Supreme Court should not pretend that it is doing only what the states themselves would do.

Nevertheless, Brilmayer is correct that the Supreme Court probably would resolve the conflict on a territorial basis. In the leading decision eliminating inconsistent regulation by dividing regulatory authority, the Supreme Court used the territorial rule.<sup>65</sup> This kind of division honors the traditional understanding that the territorial state generally has the strongest claim to regulate commercial activity that occurs within its borders. Here, this division would have the further advantage of minimizing the burden of state regulation on interstate commerce, as it would let abortion providers in the neighboring state follow that state's law automatically, without having to do residence-based screening.

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65. See *Brown-Forman Distillers*, 476 U.S. at 582 (striking a state regulation that had the effect of regulating liquor pricing outside of the state).

*D. The Role of Personal Jurisdiction*

In the end, the resolution of the conflict of laws issue hinges on the answer to one key question: Do abortion providers in the neighboring state really face inconsistent regulation? If so, the Supreme Court probably will strike the extension of the home state's parental involvement requirement. If not, the Supreme Court is unlikely to strike the extension, because the other arguments for striking it are weak.

The providers might prevail on this key question. Abortion regulation is so politically charged that if the home state extended its parental involvement requirement, the Supreme Court might decide to intervene immediately, without requiring any counterdemand by the neighboring state that its providers perform abortions for minors who object to parental involvement. In other words, regardless of what logic and precedent seem to require, Brilmayer might be correct about what the Supreme Court would do. Moreover, the neighboring state might make this difficult point moot by making the counterdemand required to create inconsistent regulation under the simultaneous compliance test.

Nevertheless, the sharp differences of opinion expressed by Kreimer, Brilmayer, and Bradford provide telling evidence that the rather loose restrictions on a state's conflict of laws power might permit the home state to make the kind of extension considered here. To summarize these differences, Kreimer makes the right to travel argument, but Brilmayer and Bradford reject it. Brilmayer makes the inconsistent regulation argument, but Bradford rejects it. Bradford makes the excessive burden argument, but Kreimer and Brilmayer decline to make it. Surely, these well-respected scholars would not disagree so much if the extension clearly violated the Constitution on one of these conflict of laws grounds.

The dominant conflict of laws ideology has made it hard to defend federal liberty on any conflict of laws ground. According to that ideology, a state should be able to direct its courts to apply its law whenever: (1) the state has an interest in applying its law based on its contacts with the parties or the occurrence, unless (2) the state would be causing unfair factual or legal surprise. When people buy a product or service in another state because that product or service is illegal in their state, their state automatically has a contact with one of the parties to the transaction and normally has an interest in preventing harm caused by the product or service. Often, the business knows of the difference in the two states' laws, knows that its customers include people from the state with the more restrictive law, and can screen customers based on their residence. So, these principles threaten many businesses, not just abortion providers.

Thus far, no state has exercised its conflict of laws power in the manner examined here. It seems only a matter of time, however, before the effect of federal liberty on some important state social policy will cause some state to

test the outer limit of its power. Whether federal liberty will survive such a test may depend, ultimately, on whether the state has personal jurisdiction over the out-of-state businesses used by its residents to avoid its restrictive law.

Here, for example, the home state cannot force out-of-state abortion providers to comply with its parental involvement requirement if it lacks personal jurisdiction over them. Without personal jurisdiction, the home state's courts cannot enter valid judgments in suits brought against the providers. The minors and the parents still could sue the providers in the neighboring state's courts, but this would accomplish nothing. The neighboring state's courts would apply the neighboring state's law, leaving the minors and the parents with no cause of action. In this way, the restrictions on a state's personal jurisdiction power may provide a more tenable line of defense against efforts by states to override federal liberty.

## II. REQUIREMENTS AND GROUND RULES FOR PERSONAL JURISDICTION

Territorial boundaries have limited the personal jurisdiction of state courts throughout our nation's history. Originally, personal jurisdiction over a nonresident depended primarily on the nonresident's physical presence in the state's territory at the time of service.<sup>66</sup> Then, in 1945, the Supreme Court said in *International Shoe Co. v. Washington* that physical presence is unnecessary for personal jurisdiction if the nonresident has "minimum contacts" with the state sufficient to satisfy "traditional notions of fair play and substantial justice."<sup>67</sup> This change reduced, but did not eliminate, the effect of territorial boundaries.<sup>68</sup>

In subsequent opinions interpreting *International Shoe*, the Supreme Court has indicated that "the constitutional touchstone remains whether the defendant purposefully established minimum contacts in the forum state."<sup>69</sup>

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66. *Pennoyer v. Neff*, 95 U.S. 714, 726 (1877); *D'Arcy v. Ketchum*, 52 U.S. (11 How.) 165 (1850); James Weinstein, *The Early American Origins of Interstate Federalism In Judicial Jurisdiction*, 37 ST. LOUIS U. L.J. 1 (1992); see also, *Burnham v. Superior Court*, 495 U.S. 604, 619-620 (1990) (holding that physical presence at the time of service still provides a sufficient basis for personal jurisdiction).

67. 326 U.S. 310, 316 (1945) (inner quotation marks omitted).

68. *Hanson v. Denckla*, 357 U.S. 235, 250-51 (1958). For the argument that territorial boundaries should not limit personal jurisdiction, see Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112, 1137 (1981); Russell J. Weintraub, *Due Process Limitations on the Personal Jurisdiction of State Courts: Time for Change*, 63 OR. L. REV. 485, 527-28 (1984).

69. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985) (inner quotation marks omitted).

It has added, however, that "minimum requirements inherent in the concept of fair play and substantial justice may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities."<sup>70</sup>

In the abortion setting examined here, the home state is able to meet the second requirement. The following five factors determine whether a state is unreasonably extending its courts' personal jurisdiction: (1) the burden on the defendant; (2) the interests of the forum state; (3) the plaintiff's interest in obtaining relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the shared interest of the several states in furthering fundamental substantive social policies.<sup>71</sup> The first factor favors the abortion providers, but only slightly. The providers will incur some additional expense in hiring an attorney in the home state and transporting its witnesses and evidence to the home state's courts. However, the difference in litigation cost attributable to the place of trial, rather than to the law that will be applied there, is relatively slight. The second and third factors favor the home state, because the state has a strong interest in upholding its parental involvement policy, and the minors and the parents have some interest in obtaining relief in its courts. The fourth and fifth factors have no effect, because the home state's courts can resolve the controversies just as efficiently as those in the neighboring state, and the several states have no shared fundamental substantive social policy on whether to require parental involvement. Thus, the overall balance is roughly even, and it does not favor the providers by enough to say that the home state is making the litigation unreasonably inconvenient.

However, the constitutional restrictions on personal jurisdiction guard against more than just unreasonably inconvenient litigation.<sup>72</sup> These restrictions are also, in the Supreme Court's words, "a consequence of territorial limitations on the power of the respective States."<sup>73</sup> Due to these territorial limitations, "[h]owever minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the minimal contacts with that State that are a prerequisite to its exercise of power over him."<sup>74</sup>

Hence, whether the abortion providers are subject to personal jurisdiction depends on what activities they can conduct without being deemed to have purposefully established minimum contacts in the home state. In particular, can they advertise in the home state? If they stop advertising in that state, but

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70. *Id.* at 477-78.

71. *Asahi Metal Indus. v. Superior Court*, 480 U.S. 102, 113 (1987).

72. *Hanson*, 357 U.S. at 251.

73. *Id.*

74. *Id.* (inner quotation marks omitted).

still perform abortions for its minors, will this activity by itself give rise to minimum contacts?

Consider the importance of these questions from the standpoint of one abortion provider—the Hope Clinic for Women—which is located near the Illinois-Missouri border in Granite City, Illinois. Illinois has had a parental notice statute for many years, but a consent decree had blocked enforcement of the older version,<sup>75</sup> and a decree in a pending lawsuit has blocked enforcement of the modified version just enacted by the Illinois General Assembly.<sup>76</sup> Missouri has a parental consent statute which is enforced.<sup>77</sup> In the St. Louis yellow pages, Hope Clinic runs a display ad which calls attention to the fact that it is located "15 minutes from St. Louis" and that "No Parental Consent [Is] Required."<sup>78</sup>

The latter statement indicates that Hope Clinic seeks to attract Missouri minors who want to avoid that state's parental consent requirement. If Hope Clinic stops running this ad—and stops all other direct advertising in Missouri—fewer Missouri minors will come to it. Typically, abortion providers also give information about their services to counseling agencies, doctors, attorneys, and others who advise pregnant minors. If Hope Clinic stops this indirect advertising in Missouri, still fewer Missouri minors will come to it.

Stopping all direct and indirect advertising in Missouri will not eliminate all of the contacts that Hope Clinic might have in that state. A substantial number of Missouri minors still will learn of Hope Clinic's services through word of mouth and will come to the clinic in Illinois in order to avoid parental involvement. Performing abortions for these minors without involving their parents will have three effects in Missouri. It will interfere—according to Missouri law—with family relationships that are centered in that state. It will cause some babies not to be born in Missouri. And, it will cause emotional distress in Missouri to some minors and some parents.

Prior to the adoption of the minimum contacts test, advertising in the forum state was an insufficient basis for personal jurisdiction.<sup>79</sup> Whether

75. 720 ILL. COMP. STAT. 515/4 (1993) (repealed 1995); *Winn v. Carey*, 599 F.2d 193 (7th Cir. 1979); REPRODUCTIVE FREEDOM, *supra* note 10, at 2.

76. *Zbaraz v. Ryan*, No. 84-C-171 (N.D. Ill. filed June 8, 1995) (agreed preliminary injunction order enjoining the enforcement of 750 ILL. COMP. STAT. 70/15 (1995)).

77. MO. REV. STAT. § 188.028 (1983); REPRODUCTIVE FREEDOM, *supra* note 10, at 2.

78. SOUTHWESTERN BELL YELLOW PAGES, GREATER ST. LOUIS EDITION, at 2 (1995).

79. See *infra* notes 263-275 and accompanying text.

advertising in the forum state is now a sufficient basis—and whether the effects in the forum state of an abortion provider's activity in another state are also a sufficient basis—depends on the meaning of four ground rules laid down by the Supreme Court in interpreting *International Shoe*. First, a state must show that the defendant has "purposefully avail[ed] itself of the privilege of conducting activities within the state, thus invoking the benefits and protections of its laws."<sup>80</sup> Second, a state cannot base personal jurisdiction on contacts that result from "the unilateral activity of another party or a third person."<sup>81</sup> Third, a state can proceed on the basis of less substantial contacts if it is exercising specific jurisdiction, which requires that the suit be one "arising out of or related to the defendant's contacts with the forum."<sup>82</sup> Fourth, more substantial contacts are required if a state is exercising general jurisdiction, and such contacts are sometimes present when the defendant conducts in the state "a continuous and systematic, but limited, part of its general business."<sup>83</sup>

#### A. *The Purposeful Availment Rule*

One of the main features of *International Shoe* was that it established a new rationale for personal jurisdiction. Previously, the Supreme Court had used the consent and presence rationales to develop personal jurisdiction rules for foreign corporations.<sup>84</sup> The Supreme Court replaced these older rationales with a fairness rationale, to be used to develop personal jurisdiction rules for all nonresidents.<sup>85</sup>

Yet, the Supreme Court did not make a clean break with its prior rationales. In a key sentence describing the fairness rationale, it continued to use the language of "privilege" that had long been associated with the consent rationale.<sup>86</sup> Specifically, the Supreme Court suggested that it can be fair for a state to exercise personal jurisdiction over a foreign corporation on the basis of the corporation's contacts with that state, because "to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protections of the laws of that state."<sup>87</sup>

80. *Hanson*, 357 U.S. at 253.

81. *Burger King*, 471 U. S. at 475 (inner quotation marks omitted).

82. *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 413 (1984).

83. *Id.* at 414-15 (inner quotation marks omitted).

84. Philip B. Kurland, *The Supreme Court, the Due Process Clause, and the In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569, 577-86 (1958).

85. *Id.* at 589-590.

86. *Id.*

87. *International Shoe*, 326 U.S. at 319.

The Supreme Court did not further develop this suggestion in *International Shoe*. Thirteen years later, however, this suggestion became the basis for the purposeful availment rule which the Supreme Court laid down in *Hanson v. Denckla*.<sup>88</sup> According to this rule, "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."<sup>89</sup>

### 1. With Advertising

*Hanson's* statement of the rule requires that the defendant perform some act that occurs "within" the forum state. If the providers advertise in the home state, their advertising will meet this requirement. Newspapers, radio stations, and other intermediaries might be doing the actual distributing and broadcasting, but the providers have paid for these activities, so the providers bear responsibility for their occurrence in the home state.<sup>90</sup>

The purposeful availment rule further describes the required act as one by which the defendant avails itself of the "privilege" of conducting activities within the forum state. The use of this word raises the following question: When the Constitution requires states to permit certain activities in their territory, is the defendant availing itself of a "privilege" when it conducts one of these activities?

Abortion providers have a well-established First Amendment right to advertise their services in other states.<sup>91</sup> Yet, the purposeful availment rule does not seem to exclude activities merely because the Constitution requires a state to permit them. Long before *International Shoe*, foreign corporations had established their right under the Commerce Clause to carry on interstate commerce in a state's territory.<sup>92</sup> Despite that federal constitutional right, the Supreme Court had permitted state courts to exercise personal jurisdiction over those corporations.<sup>93</sup> In essence, the right had not carried with it an immunity from personal jurisdiction. Having refused to create a jurisdictional immunity for activity protected under the Commerce Clause, the Supreme Court surely did not intend to create a far broader jurisdictional immunity that

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88. *Hanson*, 357 U.S. at 253.

89. *Id.*

90. The Supreme Court has stressed that, "[s]o long as a commercial actor's efforts are purposefully directed toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there." *Burger King*, 471 U.S. at 476 (inner quotation marks omitted).

91. *Bigelow v. Virginia*, 421 U.S. 809, 824-25 (1975).

92. *Pensacola Tel. v. Western Union Tel.*, 96 U.S. 1, 13 (1877).

93. *Kurland*, *supra* note 84, at 581.



would cover any activity protected from state interference under any clause of the Constitution. So, if abortion providers advertise in the home state, they seem to be invoking the "privilege" of conducting activities in that state within the intended meaning of this rule.

The purposeful availment rule describes the required jurisdictional act as one by which the defendant invokes the "benefits and protections" of the forum state's laws. No doubt, many home state laws benefit and protect those who advertise in that state. For example, its contract laws make advertising contracts enforceable. Also, its property and employment laws enable newspapers, radio stations, and other intermediaries to assist advertisers in getting their message to consumers in the home state.

## 2. Without Advertising

In the absence of advertising, the home state must identify another act by the providers that occurs "within" its territory. The providers' activity in the neighboring state has certain effects in the home state—namely, it interferes with family relationships, it causes some babies not to be born, and it causes emotional distress. It is not certain that these effects have the same jurisdictional significance as the more tangible effects present in a typical bodily injury case. If these effects do have jurisdictional significance, however, the attempt to base personal jurisdiction on them raises the following general question: When a defendant's activity in another state has effects in the forum state, in what circumstances should the defendant be deemed to have acted partly "within" the forum state based on the effects of its activity?

The prototypical example involves a defendant who, while standing in another state, aims a gun, shoots, and hits the plaintiff in the forum state.<sup>94</sup> In one respect, the providers' activity resembles that of the prototypical defendant. The providers know that their activity will have certain effects, they know or should know where these effects will occur, and they know or should know that some of these effects will occur in a state that has tried to prevent the effects by making the activity illegal. In other respects, however, the providers' activity differs from the gunshot. Most obviously, the providers' services are directed at persons who are physically located in the same state as the providers (a state in which the services are legal) when these services are performed for them. Also, these services have effects in the home state only because minors voluntarily leave that state and return to it after obtaining an abortion.

Whether the gunshot analogy is apposite depends on the general policies that the purposeful availment rule is designed to serve. In *Burger King Corp.*

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94. ROBERT C. CASAD, JURISDICTION IN CIVIL ACTIONS § 7.02[1][b] (2d ed. 1991).

*v. Rudzewicz*,<sup>95</sup> the Supreme Court explained that the rule "ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts . . . or of the unilateral activity of another party or a third person."<sup>96</sup> This statement ties the policies underlying the purposeful availment rule to the policies underlying these other two rules. The "random-fortuitous-attenuated" contacts rule seems designed to prevent unfair surprise, while the unilateral activity rule seems designed to respect personal autonomy.

Basing personal jurisdiction on the effects in the home state of the providers' activity in the neighboring state does not seem to create unfair factual or legal surprise. The providers will or should be aware of the fact that their activity is having effects in the home state. Also, the providers will be or can be made aware of the home state's law making them subject to personal jurisdiction in the home state's courts.

Whether it violates the personal autonomy policy to base personal jurisdiction on the effects in the home state of the providers' activity in the neighboring state is a more difficult question. Essentially, the answer depends on whose autonomy matters—the minors' autonomy, the providers' autonomy, or both. The minors, through their decision about where to seek an abortion, have total control over the occurrence or nonoccurrence of the effects within the home state. The providers, through their decisions about where to locate their business and whether to conduct residence-based screening, have substantial control over the occurrence or nonoccurrence of these effects. The next section covers the unilateral activity rule, and it will discuss what kinds of autonomy might be important under that rule.

The absence of advertising forces the home state to identify another way in which the providers are invoking the "benefits and protections" of its laws. No doubt, various home state laws still indirectly benefit the providers by making it possible for the home state's minors to do business with them. For example, various home state public works laws support the building and maintenance of transportation facilities used by the minors while traveling to the neighboring state. Similarly, home state property and contract laws assist the minors in getting the money they need to pay for their abortions.

Yet, any state could point to similar indirect benefits whenever any out-of-state business deals with one of its residents. The Supreme Court has said that entering into a contract with a person, by itself, does not automatically establish sufficient minimum contacts in that person's home state.<sup>97</sup> Very

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95. 471 U.S. 462 (1985).

96. *Id.* at 475 (citations and inner quotation marks omitted).

97. *Burger King*, 471 U.S. at 478; *see also Helicopteros*, 466 U.S. at 408 (stating that the acceptance of checks drawn on a bank in the forum state is usually, by itself, of negligible significance in determining whether there are sufficient minimum

likely, selling a service to a person, by itself, does not automatically invoke sufficient "benefits and protections" of the laws of that person's home state to comply with the personal availment rule.

### B. *The Unilateral Activity Rule*

Often the defendant's act in another state must combine with someone else's act in order for an effect to occur in the forum state. To apply the minimum contacts requirement in this situation requires rules for determining when an effect is to be attributed to the defendant. The Supreme Court laid down the basic contact attribution rule in *Hanson v. Denckla*.<sup>98</sup> According to *Hanson*, "[t]he unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State."<sup>99</sup>

Twelve years later, the Supreme Court elaborated on this rule in *World-Wide Volkswagen v. Woodson*.<sup>100</sup> There, a New York car dealer had sold a car in New York to a New York couple, who suffered personal injury in Oklahoma when the gas tank exploded during a car crash. The couple filed a products liability suit in Oklahoma against the car dealer, the regional distributor, and other defendants. The dealer and the distributor had not solicited business in Oklahoma, and they had not regularly sold cars to Oklahoma residents or served the Oklahoma market, but they still could have foreseen that the couple might drive the car to Oklahoma and become involved in an accident there.<sup>101</sup> Nevertheless, the Supreme Court held that the couple's Oklahoma driving was unilateral activity, which made the Oklahoma contact count as only the couple's contact.<sup>102</sup>

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contacts).

98. 357 U.S. 235 (1958).

99. *Id.* at 253. A Pennsylvania woman had executed a deed of trust in Delaware appointing a Delaware trust company to serve as trustee. *Id.* at 238. She later moved to Florida, where she performed some trust-related acts, including the execution of a power of appointment to benefit two of her grandchildren. *Id.* at 238-39. After she died, other family members challenged the appointment and sued the trust company in Florida. *Id.* at 252-53. The trust company had not solicited business in Florida, but it still could have foreseen that the woman might move to Florida and perform trust-related acts there. Therefore, when the Supreme Court concluded that the Florida contacts counted as the woman's contacts alone, the Court implicitly was saying that another person's activity can be "unilateral" even though the defendant could have foreseen it. *Id.*

100. 444 U.S. 286 (1980).

101. *Id.* at 295.

102. *Id.* at 298.

In *World-Wide Volkswagen*, the Supreme Court explained that "foreseeability alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause."<sup>103</sup> Furthermore, it added, the kind of foreseeability that is critical to due process analysis "is not the mere likelihood that a product will find its way into the forum State," but rather "that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."<sup>104</sup> The Court then contrasted the facts before it with the facts in the more usual stream-of-commerce case. Often, it noted, the sale "is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its product in other States."<sup>105</sup> In that situation, it said, "it is not unreasonable to subject [the manufacturer or distributor] to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others."<sup>106</sup> So, it added, "[t]he 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."<sup>107</sup>

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103. *Id.* at 295 (inner quotation marks omitted).

104. *Id.* at 297 (citations omitted).

105. *Id.*

106. *Id.*

107. *Id.* at 297-98. Seven years later, the Supreme Court briefly commented on the possible significance of advertising in stream-of-commerce cases in *Asahi Metal Indus. v. Superior Court*, 480 U.S. 102 (1987). There, a Japanese component supplier had sold tube valve assemblies to a Taiwanese manufacturer, which had incorporated them into tubes for motorcycle tires sold throughout the world. *Id.* at 106. A tire tube sold in California exploded and caused an accident in California which injured a California motorcyclist and killed his wife. *Id.* When he sued the California retailer and the Taiwanese manufacturer, the manufacturer joined the Japanese component supplier on an indemnity claim. *Id.* The motorcyclist later settled all of his claims, leaving only the indemnity claim. *Id.* The Supreme Court held that it was unreasonable for the California courts to exercise personal jurisdiction over the Japanese component supplier in a suit that had come to involve only that indemnity claim. *Id.* at 116. This holding ended the case, but the Justices also discussed whether California had met the minimum contacts requirement. Justice O'Connor, in an opinion joined by three other Justices, said, "[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State," although "[a]dditional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example . . . advertising in the forum State." *Id.* at 112. Justice Brennan, in an opinion also joined by three other Justices, denied that additional conduct should be required in stream-of-commerce cases. *Id.* at 117 (Brennan, J., concurring). Justice Stevens, in a separate opinion joined by two of the Justices who joined in Justice Brennan's opinion,

From this review of the relevant Supreme Court decisions, it appears to be undeniable that any advertising by abortion providers that reaches a substantial number of consumers in the home state will count as the providers' contacts due to the providers' control over whether their advertising will reach that state's consumers. When the providers decide whether to advertise in a newspaper, for example, they can determine whether it has substantial circulation in the home state. If it does, they can avoid advertising in that state by not placing advertisements in that newspaper.

Of course, abortion providers might not have complete freedom to target their advertising on a state-by-state basis. For example, a provider might want to advertise in a newspaper that has most of its circulation in the neighboring state but has some circulation in the home state. If the newspaper prints a single edition for both states, the newspaper's single-edition policy denies the provider the option of using that newspaper to reach consumers in the neighboring state without reaching consumers in the home state. Yet, the Supreme Court's statements about stream-of-commerce cases make it unlikely that this option is essential in order to count any advertising in that newspaper as a contact of the provider with the home state.<sup>108</sup>

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indicated that if he had to decide the question, the placement of a product in the stream of commerce, by itself, might meet personal jurisdiction requirements, depending on the volume, value and hazardous character of the product reaching the forum state. *Id.* at 122 (Stevens, J., concurring).

The lower courts have been unable to agree on *Asahi's* significance. The First Circuit has said that "those circuits that have squarely addressed the stream-of-commerce issue since *Asahi* have adopted Justice O'Connor's plurality view." *Boit v. Gar-Tech Prods.*, 967 F.2d 671, 683 (1st Cir. 1992); *accord* *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 945-47 (4th Cir. 1994) (adopting the narrow version of the stream-of-commerce doctrine), *cert. denied*, 115 S. Ct. 1103 (1995). Professor Weintraub has called attention, however, to the error in the First Circuit's statement about what other circuits have done. *Conference on Jurisdiction, Justice and Choice of Law for the Twenty-First Century; Case Three: Personal Jurisdiction*, 29 NEW ENG. L. REV. 627, 666 (1995). For example, the Fifth Circuit has concluded that *Asahi* has given it no reason to abandon the broad version of the stream-of-commerce doctrine criticized by Justice O'Connor. *Irving v. Owens-Corning Fiberglas Corp.*, 864 F.2d 383, 385-86 (5th Cir.), *cert. denied*, 493 U.S. 823 (1989). The Seventh Circuit also has declined to abandon the broad version of the stream-of-commerce doctrine. *Dehmlow v. Austin Fireworks*, 963 F.2d 941, 946-47 (7th Cir. 1992). For a discussion of how advertising affects personal jurisdiction in stream-of-commerce cases, see Andrew J. Zbaracki, Comment, *Advertising Amenability: Can Advertising Create Amenability?*, 78 MARQ. L. REV. 212 (1994).

108. Suppose, for example, that an Arkansas manufacturer delivers its products to a Wal-Mart distribution center in Arkansas with the expectation that consumers will buy them at Wal-Mart stores throughout the United States. Just as the abortion provider could say that the newspaper's single-edition policy denies it the option of

The more difficult question is how the unilateral activity rule applies to the effects that occur in the home state—namely, the interference with family relationships, the reduced number of births, and the emotional distress of some minors and some parents. The occurrence of these effects in the home state requires not just the providers' activity in the neighboring state, but also the minors' interstate travel. For without that travel, the minors would be seeking abortions in the home state where parental involvement would be required.

The Supreme Court has not indicated how a consumer's interstate travel should be treated in these circumstances. Unlike the dealer and the distributor in *World-Wide Volkswagen*, the providers regularly sell to consumers from the forum state. To apply the unilateral activity rule in light of this difference requires careful consideration of the policies that underlie the distinction between "unilateral" and "nonunilateral" activities.

### 1. With Advertising

When an abortion provider advertises in the home state, the question arises whether the provider must participate in, or need only influence, a minor's interstate travel in order for that travel to constitute "nonunilateral" activity. A provider that merely advertises does not actually participate in the minor's travel. It is very likely, however, that the provider's advertising has influenced the minor's decision to travel.

The unilateral activity rule could be interpreted to focus on consumer autonomy, stressing the minors' freedom to decide whether and where to travel, or it could be interpreted to focus on seller autonomy, stressing the provider's freedom to decide whether and where to advertise. Whether consumer autonomy matters—or whether only seller autonomy matters—depends on what purpose or purposes are to be served by the personal autonomy policy.

Consumer autonomy should matter if one of the purposes of the unilateral activity rule is to preserve federal liberty. To take advantage of the liberty that comes from diversity in the states' social policies coupled with mobility, people need information about the choices available to them in other states. It is therefore important not to discourage out-of-state businesses from

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reaching consumers only in the neighboring state, the manufacturer could say that Wal-Mart's distribution policy denies it the option of reaching consumers only in Arkansas. Nevertheless, under the opinions of Justice Brennan and Justice Stevens in *Asahi*, the manufacturer can be forced to defend products liability suits in all of the states where Wal-Mart sells the manufacturer's products in substantial volume and value. *See supra* note 107. The stream-of-commerce analysis is somewhat different, however, when the claim arises out of a service, rather than a product. *See infra* note 158 and accompanying text.

providing this information through commercial advertising. Treating a consumer's interstate travel as unilateral activity despite the influence of advertising would protect this flow of information. Such treatment would assure a business that any harmful effects that occur in a consumer's home state would not provide a basis for personal jurisdiction merely because the business has advertised in that state.

Seller autonomy alone should matter if the only purpose of the personal autonomy policy is to minimize one of the negative features of our federal system. The same diversity and mobility that help secure personal liberty also make it harder and more important for businesses to be able to arrange their affairs knowing where and for what conduct they will be subject to personal jurisdiction. When a business sells products or services in one state, consumer mobility makes it likely that the effects of these sales will occur in many other states. If these effects subject the business to personal jurisdiction in each of these states, diversity in the states' social policies magnifies the business's litigation risks.

To minimize this negative feature of our federal system, personal jurisdiction rules must give clear notice of what conduct the out-of-state business must avoid. Yet, this purpose does not require a consumer's interstate travel to be treated as unilateral activity when a business influences it by advertising in the consumer's home state. The business alone decides where to advertise. So, the consumer's home state is not undercutting seller autonomy if, because of advertising in that state, it treats the effect of sales by an out-of-state business as a contact of that business with that state.

The consumer-based version of the personal autonomy policy received limited support in *World-Wide Volkswagen*. Early in the opinion, the Supreme Court said that the minimum contacts requirement "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."<sup>109</sup> Later, it added, "[t]he sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment."<sup>110</sup> These statements describe the feature of our federal system that is essential in order to preserve federal liberty—namely, territorial limits on the states' sovereign powers. Yet, the statements focus more on allocating sovereign power for the benefit of the states than on allocating it for the benefit of the people.

Since *World-Wide Volkswagen*, the Supreme Court has qualified what it said there about personal jurisdiction requirements, limited state sovereignty, and federalism. In *Insurance Corp. of Ireland v. Compagnie des Bauxites de*

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109. *World-Wide Volkswagen Corp.*, 444 U.S. at 292.

110. *Id.* at 293.

*Guinee*,<sup>111</sup> the Court held that a defendant can waive a personal jurisdiction objection by refusing to provide discovery pertinent to that objection. In a footnote explaining the theoretical basis for this holding, it said:

The restriction on state sovereign power described in *World-Wide* . . . must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns. Furthermore, if the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement: Individual actions cannot change the powers of sovereignty, although the individual can subject himself to powers from which he may otherwise be protected.<sup>112</sup>

Scholars have debated the significance of this footnote. Some interpret it as a repudiation of the view that personal jurisdiction requirements are designed to enforce limitations on state sovereignty.<sup>113</sup> Others say that this interpretation is based on a false dichotomy between personal rights and sister-state rights.<sup>114</sup>

The seller-based version of the personal autonomy policy also received support in *World-Wide Volkswagen*. In describing the way in which personal jurisdiction requirements take into account foreseeability, the Supreme Court said, "[t]he 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."<sup>115</sup> It added that a corporation that purposefully avails itself of the privilege of conducting activities within a state "has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State."<sup>116</sup>

In two subsequent opinions, the Supreme Court has stressed the need for predictability.<sup>117</sup> In doing so, it has given clearer and more enduring support to the seller-based version of the personal autonomy policy. Of

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111. 456 U.S. 694 (1982).

112. *Id.* at 703 n.10.

113. *E.g.*, Harold S. Lewis, Jr., *The Three Deaths of "State Sovereignty" and the Curse of Abstraction in the Jurisprudence of Personal Jurisdiction*, 58 NOTRE DAME L. REV. 699, 731-32 (1983).

114. *E.g.*, BRILMAYER, *supra* note 26, at 271.

115. 444 U.S. at 297.

116. *Id.*

117. *Asahi*, 480 U.S. at 102; *Burger King*, 471 U.S. at 472.



course, acceptance of this version does not automatically entail rejection of the consumer-based version. Personal jurisdiction requirements might help both to preserve the liberty and to minimize the unpredictability that result from diversity in the states' social policies coupled with consumer mobility.

## 2. Without Advertising

Abortion providers can attract minors from the home state just by locating their place of business in the neighboring state. Given the control that a business has over its location, it has been argued that the Supreme Court should adopt a "market area" theory of minimum contacts.<sup>118</sup> Under this theory, the market area served by a business refers to all of the states from which the business draws a substantial number of customers, including states in which it may do no advertising and may have no place of business. A consumer's interstate travel within the market area should not count as "unilateral" activity, so the theory goes.<sup>119</sup> As a result, the business is subject to personal jurisdiction in any state within that area in which its activity causes harmful effects.

*World-Wide Volkswagen* shed no light on the validity of this market area theory. The Supreme Court noted that the record before it did not show that the dealer and the distributor regularly sold cars to Oklahoma residents.<sup>120</sup> Thereby, the Court implied that regular sales to the forum state's residents might have jurisdictional significance. Yet, the Court did not commit itself to holding that a business has minimum contacts with the forum state in such circumstances.

The validity of the market area theory seems to depend on what purpose or purposes are to be served by the personal autonomy policy. Clearly, this theory undercuts federal liberty. Essentially, it requires a business that wants to avoid becoming subject to personal jurisdiction to exclude the forum state's residents from its customer base. On the other hand, the market area theory does not prevent a business from structuring its activities so that it knows where it will be subject to personal jurisdiction. A business can exclude the forum state's residents from its customer base by screening customers based on their residence or locating its business far away from the forum state.<sup>121</sup>

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118. Gregory Trautman, Comment, *Personal Jurisdiction in the Post-World-Wide Volkswagen Era—Using A Market Analysis to Determine the Reach of Jurisdiction*, 60 WASH. L. REV. 155 (1984).

119. *Id.* at 162-67.

120. *World-Wide Volkswagen*, 444 U.S. at 295.

121. Past experience teaches that residence-based screening may be the only practical option for an abortion provider, since providers located in one state can serve a national market if other states are prohibiting the services that they offer. In the

*C. Specific Jurisdiction Based On Activity  
Connected With the Claim*

*International Shoe* provided the basis for the distinction between specific jurisdiction and general jurisdiction. In a key sentence, the Supreme Court said that in most instances state courts can exercise personal jurisdiction when the defendant's obligations "arise out of" or are "connected with" the defendant's activities within the state.<sup>122</sup> The term "specific" jurisdiction refers to the exercise of jurisdiction in a suit involving claims of this description,<sup>123</sup> while the term "general" jurisdiction refers to the exercise of jurisdiction in a suit involving claims that are not of this description.<sup>124</sup>

The two forms of jurisdiction depend on different rationales for the exercise of state authority. Specific jurisdiction involves the assertion of state power over local events; it is justified largely on the basis of the state's regulatory interest.<sup>125</sup> General jurisdiction involves the assertion of state power over local people and businesses; it is justified largely on the theory that these people and businesses have voluntarily agreed to abide by the decisions of the community.<sup>126</sup>

Because specific jurisdiction requires less substantial contacts than does general jurisdiction, it is sometimes necessary to determine whether the plaintiff's claims against the defendant are related to the defendant's forum activities in the manner required for specific jurisdiction. Unfortunately, the terms used by the Supreme Court to describe the required relationship have several possible meanings. This ambiguity has led to debate among scholars and among the lower courts over the proper specific jurisdiction test.<sup>127</sup>

Professor Brilmayer has proposed the use of a substantive relevance test.<sup>128</sup> Under her proposal, claims are deemed related to the defendant's forum activities in the manner required for specific jurisdiction only when these activities are relevant to the merits of the lawsuit. Essentially, this

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period before *Roe v. Wade* when abortion services were legal in New York that were illegal in other states, New York abortion providers served women from throughout the United States. See *Bigelow*, 421 U.S. 809; Worthington, *supra* note 20.

122. *International Shoe*, 326 U.S. at 319.

123. *Helicopteros*, 466 U.S. at 414 n.8.

124. *Id.* at 414 n.9.

125. BRILMAYER, *supra* note 26, at 285-96.

126. BRILMAYER, *supra* note 26, at 281-85.

127. The Supreme Court has not yet adopted a more definite test. See *Helicopteros*, 466 U.S. at 415 n.10.

128. Lea Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 HARV. L. REV. 1444, 1451 (1988); Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 82-88.

means that the activities must be ones that "would ordinarily be alleged as part of a comparable domestic complaint."<sup>129</sup> Substantive relevance is the appropriate test, she argues, because a state has no regulatory interest, according to its own view of that interest, if the activity in its territory has no relevance to the merits of the lawsuit.<sup>130</sup>

Professor Twitchell has objected to Brilmayer's proposal on the ground that the substantive relevance test is too rigid, can cause injustice, and unduly limits state power.<sup>131</sup> She has proposed that courts should have discretion "to find specific jurisdiction even when the facts do not fall clearly within the substantive relevance scheme, and to deny it even when they do."<sup>132</sup> According to her, courts should carefully develop "the factors that should play a role in determining the fairness of deciding a particular suit."<sup>133</sup>

Professor Richman has proposed a third alternative.<sup>134</sup> Instead of drawing a sharp line between specific jurisdiction and general jurisdiction, he has suggested that courts supplement this dichotomy with "a *sliding scale* model of the relationship between two key variables: the extent of the defendant's forum contacts on the one hand and the proximity of the connection between those contacts and the plaintiff's claim on the other."<sup>135</sup> So, "[a]s the quantity and quality of the defendant's forum contacts increase, a weaker connection between the plaintiff's claim and those contacts is permissible."<sup>136</sup> But, "as the quantity and quality of the defendant's forum contacts decrease, a stronger connection is required."<sup>137</sup>

The lower courts have found themselves equally unable to agree on the proper test for specific jurisdiction.<sup>138</sup> For example, the Supreme Court of Oregon has adopted the substantive relevance test.<sup>139</sup> On the other hand, the Sixth Circuit has adopted a looser test that includes suits based on occurrences

129. Brilmayer, *How Contacts Count*, *supra* note 128, at 82.

130. Brilmayer, *How Contacts Count*, *supra* note 128, at 82.

131. Mary Twitchell, *A Rejoinder to Professor Brilmayer*, 101 HARV. L. REV. 1465, 1469 (1988).

132. *Id.* at 1469.

133. *Id.*

134. William M. Richman, *Part I—Casad's Jurisdiction In Civil Actions. Part II—A Sliding Scale To Supplement the Distinction Between General and Specific Jurisdiction* (Review Essay), 72 CAL. L. REV. 1328, 1345 (1984) (emphasis in original).

135. *Id.* at 1345 (emphasis in original).

136. *Id.*

137. *Id.*

138. See generally, Flavio Rose, Comment, *Related Contacts and Personal Jurisdiction: The "But For" Test*, 82 CAL. L. REV. 1545 (1994).

139. State *ex rel.* Michelin v. Wells, 657 P.2d 207, 210-11 (Or. 1982).

that were "made possible only by" the defendant's forum activities.<sup>140</sup> Similarly, the Seventh Circuit's test includes suits in which the defendant's forum activities were "critical steps in the chain of events" that led to the occurrence on which the suit is based.<sup>141</sup>

### 1. With Advertising

An abortion provider's advertising will not meet the substantive relevance test. The home state requires parental involvement whether or not a provider advertises its services. Advertising thus has no substantive relevance to a claim based on a violation of this requirement.

The First Circuit reached a similar conclusion in *Marino v. Hyatt Corp.*,<sup>142</sup> where a Hawaiian hotel had solicited reservations in Massachusetts. A Massachusetts resident made a reservation and while in Hawaii at the hotel, she sustained personal injuries. She then sued in Massachusetts and argued that the court could exercise specific jurisdiction over the hotel. The First Circuit rejected her argument, explaining that the hotel's solicitation in Massachusetts "would hardly be an important, or perhaps even a material element of proof."<sup>143</sup>

An abortion provider's advertising does seem to meet the looser tests for specific jurisdiction. Many minors will seek a provider's services after they (or someone they know) saw or heard the provider's advertising. Under these circumstances, the provider's advertising has a close enough link to the

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140. *Lanier v. American Bd of Endodontics*, 843 F.2d 901, 909 (6th Cir. 1988) (inner quotation marks omitted) (business contacts in the forum state that led to, or were part of, plaintiff's application for board certification provide a sufficient basis for specific jurisdiction in a sex discrimination suit based on a discriminatory decision made outside of the forum state).

141. *In re Oil Spill By Amoco Cadiz*, 699 F.2d 909, 915, 917 (7th Cir.) (inner quotation marks omitted) (entry into a shipbuilding contract in the forum state provides a sufficient basis for specific jurisdiction in a property damage suit based on damages caused by the ship outside of the forum state), *cert. denied*, *Astilleros Espanoles, S.A. v. Standard Oil Co.*, 464 U.S. 864 (1983).

142. 793 F.2d 427 (1st Cir. 1986).

143. *Id.* at 428-29 (decided under the Massachusetts long arm statute); *accord* *Pearrow v. National Life & Acc. Ins. Co.*, 703 F.2d 1067, 1069 (holding that a suit for personal injuries sustained at an out-of-state theme park did not arise out of the theme park's mailing of advertising brochures to plaintiff in the forum state; decided under the Arkansas long arm statute). For a useful summary of the many cases deciding whether a state is exercising specific jurisdiction when (a) the defendant's advertising in the forum state has led the plaintiff to use the defendant's services or facilities in another state, and (b) the plaintiff has suffered personal injury there, *see* *Wims v. Beach Terrace Motor Inn, Inc.*, 759 F. Supp. 264, 267-68 (E.D. Pa. 1991).

violation of the home state's parental involvement requirement to say, as required by the Sixth Circuit, that the violation was "made possible only by" the advertising,<sup>144</sup> or to say, as required by the Seventh Circuit, that the advertising was a "critical ste[p] in the chain of events" that led to the violation.<sup>145</sup>

The Ninth Circuit reached a similar conclusion in *Shute v. Carnival Cruise Lines*.<sup>146</sup> There, a cruise line had solicited reservations in Washington by placing advertisements in Washington newspapers, providing brochures to Washington travel agents, and holding seminars for travel agents in Washington. Through a Washington travel agent, a Washington couple had purchased tickets for a cruise between ports in California and Mexico. While the ship was sailing in international waters off the coast of Mexico, the wife sustained personal injuries. The couple then sued in Washington and argued that the court could exercise specific jurisdiction over the cruise line. The Ninth Circuit agreed. Rejecting the substantive relevance test, it held that the cruise line's Washington activity provided a basis for specific jurisdiction, because that activity had put the parties within "tortious striking distance" of one another.<sup>147</sup>

In *Marino and Shute*, the plaintiffs had sustained their injuries outside of the forum state, eliminating that alternative possible basis for specific jurisdiction. Consequently, advertising provided the only possible basis for specific jurisdiction. Here, some of the effects of an abortion provider's activity occur in the home state and have substantive relevance. For example, a parent might allege an interference with a family relationship that is centered in the home state, or a minor might allege emotional distress that occurred in the home state. However, these effects cannot be a basis for specific jurisdiction if the unilateral activity rule requires them to be viewed as only the minor's contacts. A court that treats the minor's interstate travel as unilateral activity should also adopt the substantive relevance test for specific jurisdiction. The rationale for treating the minor's interstate travel as unilateral activity is to avoid discouraging advertising by out-of-state businesses. The looser tests for specific jurisdiction strongly discourage such advertising by making it a basis for specific jurisdiction even when it has nothing to do with the merits of the claim.

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144. See text accompanying *supra* note 140.

145. See text accompanying *supra* note 141.

146. 897 F.2d 377, 386 (9th Cir.), *rev'd on other grounds* 111 S. Ct. 39 (1990).

147. *Id.* at 385-86 (inner quotation marks omitted). Whether the Ninth Circuit applied the right test was left unresolved by the Supreme Court, which reversed the Ninth Circuit for failing to honor the forum selection clause set forth in the tickets. *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 594 (1991).

## 2. Without Advertising

The absence of advertising forces the home state to argue that the effects of an abortion provider's activity provide a basis for specific jurisdiction. At least some of these effects meet the substantive relevance test, for reasons already stated. So, the crucial question is not whether the Supreme Court should adopt one of the looser tests for specific jurisdiction. Instead, the crucial question is whether the home state violates the purposeful availment rule or the unilateral activity rule when it tries to exercise personal jurisdiction over an abortion provider on this basis.

### *D. General Jurisdiction Based On Continuous and Systematic Business Activity*

*International Shoe* offered only limited guidance about the circumstances in which it is proper for a state to exercise general jurisdiction.<sup>148</sup> The Supreme Court merely noted that it had previously concluded that "continuous activity of some sorts within a state" provides an insufficient jurisdictional basis in a suit unrelated to that activity,<sup>149</sup> while in other circumstances "the continuous corporate operations within a state [can be] . . . so substantial and of such a nature" that they do provide a sufficient jurisdictional basis in a suit unrelated to that activity.<sup>150</sup> Obviously, these statements reaffirmed many prior decisions. However, the statements gave no hint of what changes might be forthcoming as a result of replacing the consent and presence rationales with a fairness rationale.

In 1946, the Supreme Court hinted of one possible change. In *Nippert v. City of Richmond*,<sup>151</sup> a case involving a city's power to tax persons engaged in soliciting business in the city, the city argued that "'mere solicitation' when it is regular, continuous and persistent, rather than merely casual, constitutes 'doing business,' contrary to formerly prevailing notions."<sup>152</sup> The Supreme Court commented that this argument had been "given more substance" by *International Shoe*,<sup>153</sup> and thereby suggested that it intended to modify older rules in the tax field and comparable rules in the personal jurisdiction field.

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148. Kurland, *supra* note 84, at 584-86 & 592.

149. *International Shoe*, 326 U.S. at 318.

150. *Id.*

151. 327 U.S. 416 (1946).

152. *Id.* at 422.

153. *Id.*

In 1992 in *Quill v. North Dakota*,<sup>154</sup> the Supreme Court abandoned the rule that due process requires a seller to be physically present in a state in order for the state to impose on the seller the duty to collect a use tax.<sup>155</sup> The Court cited developments in the personal jurisdiction field,<sup>156</sup> so the opinion is relevant to personal jurisdiction questions arising out of comparable patterns of business activity. However, the pattern of business activity of the mail order firm in *Quill* differs significantly from that of an abortion provider in this illustration. In *Quill*, the mail order firm not only had advertised in the taxing state by sending catalogs to the state's residents; it also had shipped about a million dollars of merchandise annually via common carrier destined for delivery to customers in that state.<sup>157</sup> An abortion provider does not ship products into or deliver services in the forum state. Rather, a provider performs services at its own place of business outside of the forum state.<sup>158</sup>

### 1. With Advertising

The limited guidance given by the Supreme Court has led to a division in the lower courts on whether continuous and systematic advertising in the forum state provides a basis for general jurisdiction. One view is expressed

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154. 112 S. Ct. 1904 (1992).

155. *Id.* at 1911.

156. *Id.* at 1910.

157. *Id.* at 1907-08.

158. The pattern of business activity of an abortion provider differs even more substantially from the patterns reviewed by the Supreme Court on the two other occasions it has dealt with general jurisdiction issues since *International Shoe*. In *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952), a Philippine mining company "ha[d] been carrying on in Ohio a continuous and systematic, but limited, part of its general business." *Id.* at 438. Essentially, the mining company had its temporary headquarters in Ohio during the Japanese occupation of the Philippine Islands. In these circumstances, the Supreme Court held that the Ohio courts could exercise personal jurisdiction over the mining company in a suit involving claims unrelated to its Ohio activities. *Id.* at 448. This holding does not apply here, because the abortion provider has no place of business of any kind in the home state. In *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408 (1984), a Columbian corporation's contacts with Texas had consisted primarily of the purchase of helicopters, spare parts, and accessories from a Texas manufacturer and the related training trips to Texas by its prospective pilots, management and maintenance personnel. The Supreme Court held that "purchases and related trips, standing alone, are not a sufficient basis" for the exercise of general jurisdiction. *Id.* at 417. This holding does not apply here, because the home state is trying to base personal jurisdiction on an abortion provider's actions as a seller, not as a buyer.

in the First Circuit's decision in *Seymour v. Parke, Davis & Co.*<sup>159</sup> There, the First Circuit held that New Hampshire could not exercise general jurisdiction over a drug company when the company's only activity in that state was advertising and employing salespersons to solicit orders there. It noted that the company "had not adopted the state as one of its major places of business" and the state was not even "a community into whose business life the defendant had significantly entered . . . ."<sup>160</sup> A similar view is expressed by federal district courts that have concluded that the home state of a person injured at a hotel or resort cannot exercise general jurisdiction over the hotel or resort owner based on advertising and promotional activities alone.<sup>161</sup> However, the opposite view is expressed by those federal district courts that have permitted the injured person's home state to exercise general jurisdiction over the hotel or resort owner in such circumstances.<sup>162</sup>

The democratic consent rationale explains why it is fair to subject local businesses to general jurisdiction.<sup>163</sup> Local businesses, like local people, have chosen to be part of the community and have access to the local political process. Local businesses do not vote, of course, but their employees do. As a result, local politicians usually listen to local businesses and try to avoid driving them out of the state.

However, an out-of-state business that merely advertises within the forum state lacks comparable access to the local political process. Such a business has no local employees. At most, its advertising dollars provide a small part of the revenue supporting local employment by local newspapers, radio and television stations, and telephone companies. Hence, local politicians have little reason to give favorable attention to an out-of-state business merely because it advertises locally. In fact, local politicians may view this kind of business unfavorably given that it may be taking trade away from other businesses that have local employees. So, treating advertising as a basis for

159. 423 F.2d 584 (1st Cir. 1970).

160. *Id.* at 587; *accord* Glater v. Eli Lilly & Co., 744 F.2d 213, 217 (1st Cir. 1984) (following *Seymour* in a similar case); *see also* Sandstrom v. Chemlawn Corp., 904 F.2d 83, 89 (1st Cir. 1990) (extending *Seymour* to advertising done for personnel recruitment purposes).

161. *E.g.*, Schenck v. Walt Disney Co., 742 F. Supp. 838, 840-42 (S.D.N.Y. 1990) (applying New York law); Russo v. Sea World, 709 F. Supp. 39, 41-42 (D. R.I. 1989); Wims v. Beach Terrace Motor Inn, Inc., 759 F. Supp. 264, 269-70 (E.D. Pa. 1991).

162. *E.g.*, Passero v. Killington, Ltd., 1993 WL 406726 (E.D. Pa. 1993); Boone v. Sulphur Creek Resort, Inc., 749 F. Supp. 195, 199-201 (S.D. Ind. 1990); Gavigan v. Walt Disney World, Inc., 646 F. Supp. 786 (E.D. Pa. 1986). For a collection of decisions involving hotel or resort injuries, *see* CASAD, *supra* note 94, at § 7.02[2][e].

163. For a general discussion of the democratic consent rationale, *see* BRILMAYER, *supra* note 26, at 283-84.



general jurisdiction is inconsistent with the democratic consent rationale on which this form of jurisdiction is based.

## 2. Without Advertising

In the absence of advertising, the home state must argue that the effects of an abortion provider's activities provide a basis for general jurisdiction. When an abortion provider is not even contributing advertising dollars to support local employment in the home state, local politicians have even less reason to give favorable attention to the provider. It is indefensible to treat such a provider as a local business that has access to the local political process. So, the home state cannot exercise general jurisdiction based on the effects of a provider's activity.

### *E. Preliminary Assessment*

This review of the four ground rules laid down by the Supreme Court suggests that the restrictions on a state's personal jurisdiction power might safeguard federal liberty to a greater extent than the restrictions on a state's conflict of laws power. If an abortion provider advertises in the home state, the provider might persuade the Supreme Court that its advertising is an insufficient basis for personal jurisdiction. Later parts of this article will explore First Amendment and federalism arguments for this view. If the provider stops advertising in the home state, the Court is very likely to conclude that the effects of the provider's activity are an insufficient basis.

Of course, an abortion provider will lose some business if it must stop advertising in the minors' home state. Yet, taking this step might create a smaller problem for the provider than for other out-of-state businesses. In the kind of circumstances considered here, the provider probably could rely on pro-choice groups within the home state to make independent efforts to ensure that information about its services still would reach that state's minors. However, those independent efforts might be less effective, and other out-of-state businesses could not count on comparable efforts in comparable circumstances. So it is important to determine whether this step is really necessary.

## III. DECISIONS INVOLVING ABORTION PROVIDERS AND SIMILAR BUSINESSES

Some lower courts have considered the impact of advertising on personal jurisdiction in suits against abortion providers and other similar businesses, such as health care facilities and taverns that serve alcohol to minors. Generally, the lower courts have concluded that advertising in the forum state

provides a sufficient basis for personal jurisdiction. The lower courts have further concluded that advertising is essential to establish jurisdiction in such suits. The effects of the activities conducted by abortion providers, health care facilities, and taverns have been held to be an insufficient basis for personal jurisdiction in the absence of advertising in the forum state.

### *A. Abortion Providers*

The leading decision involving abortion providers is *Soares v. Roberts*.<sup>164</sup> There, Rhode Island residents filed a medical malpractice suit in Rhode Island against a Massachusetts abortion clinic and the doctor who performed the abortion. For several years, the clinic had solicited Rhode Island residents, who accounted for five percent of its abortion patients. The clinic had advertised in Rhode Island college newspapers and in a major Rhode Island newspaper, and it had employed a community relations administrator who had kept medical, university, and community organizations in Rhode Island informed of its services, in part by traveling to Rhode Island once per year. It also had advertised in a Boston newspaper and on a Boston television station, both of which reached a substantial number of Rhode Island residents. Plaintiff Soares had learned of the clinic's services through a friend, who had been referred to the clinic by Planned Parenthood of Rhode Island.

The federal district court held that the clinic's solicitation in Rhode Island met the minimum contacts requirement.<sup>165</sup> On the other hand, it dismissed the claims against the staff doctor who had performed the abortion, because the doctor had not participated in the clinic's solicitation, and therefore the doctor lacked minimum contacts with Rhode Island according to prior decisions in favor of doctors and hospitals that had not solicited in the forum state.<sup>166</sup> The court did not clearly indicate whether it thought the clinic's solicitation provided a basis for specific jurisdiction or general jurisdiction. It said the clinic "has submitted itself to the jurisdiction of the Rhode Island courts at least as to those individuals whose business the solicitation was designed to obtain."<sup>167</sup> Later, however, it expressed its agreement with the authorities who have interpreted *International Shoe* to have implicitly rejected the old "mere solicitation" rule.<sup>168</sup> Under that interpretation of *International*

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164. 417 F. Supp. 304 (D.R.I. 1976).

165. *Id.* at 307-10.

166. *Id.* at 306-07.

167. *Id.* at 308. It fortified its conclusion by citing a decision involving an injury sustained by Rhode Island residents at a Florida hotel that had advertised in Rhode Island. *Id.* at 309.

168. *Id.*

*Shoe*, solicitation within the forum state would provide a basis for general jurisdiction, making it unnecessary to show that the defendant's solicitation was linked to the plaintiff's claim.

Another decision involving abortion providers is *S.R. v. City of Fairmont*.<sup>169</sup> There, a West Virginia woman filed a malpractice suit against a Pennsylvania abortion clinic, the Pennsylvania doctor who performed the abortion, the doctor's Pennsylvania professional corporation, and certain West Virginia defendants. The woman alleged that the doctor had known that the abortion procedure had not been totally successful, yet the doctor had permitted her to return to West Virginia without advising her of the proper follow-up care. The abortion clinic had advertised its services in West Virginia and had listed its toll-free number in various West Virginia telephone directories. The clinic conceded it was subject to personal jurisdiction in West Virginia, but the doctor and the professional corporation did not. The woman sought certain discovery to determine whether the doctor and the professional corporation were involved in or had knowledge of the clinic's solicitation, but the trial court denied the discovery and dismissed the claims against the doctor and the professional corporation for lack of personal jurisdiction.<sup>170</sup>

The West Virginia Supreme Court held that the trial court erred in that dismissal.<sup>171</sup> In concluding that the plaintiff was entitled to conduct discovery designed to show "involvement and knowledge, express or implied, with the solicitation of abortions by [the clinic] in this State," the court indicated that solicitation in the forum state has a decisive impact on personal jurisdiction.<sup>172</sup>

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169. 280 S.E.2d 712 (W. Va. 1981).

170. *Id.* at 714.

171. *Id.* at 714-15. It distinguished several decisions favorable to health care providers on the grounds that in those decisions, "no claims were made for a breach of the continuing duty of a physician to treat or arrange for competent after care" and "no claims were made that the physicians or medical facilities were advertising or soliciting services in the plaintiffs' states." *Id.* at 716-17. Regarding the latter distinction, it noted that the doctor's professional corporation "derives direct economic benefit from the solicitation made by the abortion clinic." *Id.* at 717.

172. *Id.* at 718. The above-quoted directions concerning the scope of discovery on remand suggest that the West Virginia Supreme Court might have disagreed with *Soares* on the narrow issue of when an abortion clinic's solicitation provides a basis for personal jurisdiction over the doctor who performs the abortion. The directions seem to leave room for an implied involvement theory that might not require actual participation by the doctor in the clinic's solicitation, provided the doctor knowingly benefitted from it.

### B. Health Care Facilities

Decisions involving out-of-state abortion providers mirror the decisions involving out-of-state health care facilities. The large number of personal jurisdiction decisions involving health care facilities have been analyzed by Professor Trail and Mark Maney. They have concluded that "[s]olicitation has become the touchstone of personal jurisdiction for health care facilities."<sup>173</sup>

#### 1. With Advertising

This conclusion is supported by the Sixth Circuit's decision in *Creech v. Roberts*.<sup>174</sup> There, an Ohio resident filed a medical malpractice suit in Ohio against various Oklahoma defendants, including a medical research center associated with a television evangelist. The evangelist's broadcasts in Ohio had solicited patients and funds for the center. Because these broadcasts had led the plaintiff to seek treatment at the center, the Sixth Circuit concluded that the Ohio courts could exercise specific jurisdiction over the medical research center in the malpractice suit.<sup>175</sup>

The Ninth Circuit reached a similar conclusion in *Cabbage v. Merchant*.<sup>176</sup> There, a California resident filed a medical malpractice suit in California against an Arizona hospital and other Arizona defendants. The hospital had its place of business in a sparsely populated desert region near the Arizona-California border. California residents accounted for about twenty-six percent of the hospital's patients, and the State of California reimbursed the hospital for its services to some of these patients. The hospital maintained white pages and yellow pages listings and placed a yellow pages ad in the

173. William R. Trail & Mark Maney, *Jurisdiction, Venue and Choice of Law in Medical Malpractice Litigation*, 7 J. LEG. MED. 403, 414-18 (1986); accord *CASAD*, *supra* note 94, at § 7.02[2][b].

174. 908 F.2d 75 (6th Cir. 1990), *cert. denied*, 499 U.S. 975 (1991).

175. *Id.* at 80. The Sixth Circuit has adopted one of the looser specific jurisdiction tests, enabling advertising to serve as a basis for specific jurisdiction when the claim is based on an occurrence made possible only by the advertising. See *supra* note 140. A federal district court drew the same conclusion with respect to indirect advertising in *Pijanowski v. Cleveland Clinic Found.*, 635 F. Supp. 1435 (E.D. Mich. 1986). There, a Michigan resident filed a medical malpractice suit in Michigan against an Ohio hospital that had solicited referrals by sending copies of its staff directory and its magazine to Michigan medical professionals, including the plaintiff's personal physician, who had referred the plaintiff to the hospital. The court concluded that this permitted the Michigan courts to exercise personal jurisdiction over the hospital, even though the plaintiff's physician had stated that he did not base the referral on the material sent to him by the hospital. *Id.* at 1436 n.1.

176. 744 F.2d 665 (9th Cir. 1984), *cert. denied*, 470 U.S. 1005 (1985).

local telephone directory, which the telephone company distributed in the adjacent California area.

The Ninth Circuit held that the hospital's contacts with California met the minimum contacts requirement.<sup>177</sup> Concluding that the hospital's advertising in the local telephone directory coupled with its knowledge that the telephone company distributed the directory in the adjacent part of California "distinguish this case from . . . cases [in which] the patient undertook 'unilateral activity' in seeking medical treatment,"<sup>178</sup> the court ruled that California could exercise specific jurisdiction over the hospital in the malpractice suit.<sup>179</sup>

## 2. Without Advertising

The leading decision illustrating that the absence of advertising in the forum state denies that state a basis for personal jurisdiction over an out-of-

177. *Id.* at 668.

178. *Id.* at 668-69. The court conceded that the acceptance of payments from the state and the directory listings did not provide a basis for general jurisdiction over the hospital. *Id.* Also, it conceded that a telephone listing is not enough in itself to provide a basis for specific jurisdiction. *Id.*

Typically, a telephone company's basic charge to business subscribers covers a listing in normal type in both the white and yellow pages of the local directory, while business subscribers must pay extra charges for bold type in the white and yellow pages, display advertisements, and listings in any directory but the local directory. Telephone Interview with Carolyn Finfrock, GTE (Illinois) customer service representative (Jun. 29, 1995). Because telephone companies do not levy a separate charge for the yellow pages listing, most lower courts have not considered it the kind of advertising that makes a business subject to personal jurisdiction. *E.g.*, *Wolf v. Richmond County Hosp. Auth.*, 745 F.2d 904, 910 (4th Cir. 1984), *cert. denied*, 430 U.S. 946 (1985); *Horvath v. Niles*, 802 F. Supp. 146, 151 (W.D. Mich. 1992) (applying Michigan law); *Jackson v. Shepard*, 609 F. Supp. 205, 206-07 (D. Ariz. 1985) (applying Arizona law); *Kennedy v. Ziesmann*, 526 F. Supp. 1328, 1331 (E.D. Ky. 1981); *but see Frazer v. McGowan*, 502 A.2d 905, 910 (Conn. 1985) ("[e]ven though the hospital paid no fee for the listings, it consented to their appearance and it accepted the benefits that flowed therefrom [and thereby] . . . sent a message that was specifically directed to Connecticut residents informing them that [the hospital] stood ready to serve them").

179. *Cabbage*, 744 F.2d at 670. There is no indication in the opinion that the plaintiff had come to the hospital because of its participation in California's medical assistance program or because of the hospital's yellow pages ad. Nevertheless, because these two contacts had enabled the hospital to attract a substantial number of patients from California, the Ninth Circuit concluded that the plaintiff's claim arose out of the hospital's California activity. *Id.*

state health care facility is *Gelineau v. New York University Hospital*.<sup>180</sup> While at a New York hospital, Gelineau received transfusions of tainted blood, which caused him to contract hepatitis, the symptoms of which had first appeared after he returned to his home in New Jersey. He sued the hospital in a federal court in New Jersey.

The court dismissed the suit for lack of personal jurisdiction, despite the hospital's knowledge of Gelineau's New Jersey residency, its knowledge or ability to foresee that he would return to that state, and the suffering he experienced there.<sup>181</sup> The court stressed that "the case . . . focuses on a service, not performed in the forum state but in a foreign state, rendered after the plaintiff voluntarily traveled to the foreign state so that he could benefit from that service."<sup>182</sup> It asserted that "the residence of a recipient of personal services rendered elsewhere is irrelevant and totally incidental to the benefits provided by the defendant at his own location."<sup>183</sup> It then made the following influential statement tying the absence of personal jurisdiction to the absence of solicitation in the forum state:

It is clear that when a client or patient travels to receive professional services without having been solicited . . . , then the client, who originally traveled to seek services apparently not available at home, ought to expect that he will have to travel again if he thereafter complains that the services sought by him in the foreign jurisdiction were therein rendered improperly.<sup>184</sup>

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180. 375 F. Supp. 661 (D.N.J. 1974).

181. *Id.* at 666 & 667 n.7.

182. *Id.* at 667.

183. *Id.*

184. *Id.*; accord *Walters v. St. Elizabeth Hosp. Medical Ctr.*, 543 F. Supp. 559, 560 (W.D. Pa. 1982); *Glover v. Wagner*, 462 F. Supp. 308, 311-12 (D. Neb. 1978). Because solicitation has had such a decisive impact on personal jurisdiction, some lower courts have asked whether medical facilities are conducting other activities that might be considered functionally equivalent to solicitation. The leading decision of this kind is *Kenerson v. Stevenson*, 604 F. Supp. 792 (D. Me. 1985). There, Maine residents brought a medical malpractice suit in Maine against a New Hampshire hospital and other New Hampshire defendants. Maine residents accounted for about eight percent of the hospital's in-patient caseload and a slightly higher percentage of its out-patient caseload. The hospital participated in a regional emergency medical information system protocol, which provided for emergency transfer of patients to the Maine Medical Center and other hospitals. It also received payments from the State of Maine for treatment of Maine residents who qualified for medical assistance. The federal district court held that these acts amounted to "tacit solicitation" in Maine that met the minimum contacts requirement. *Id.* at 795-96; see also *Frazer v. McGowan*, 502 A.2d 905, 909 (Conn. 1985) (concluding that a Rhode Island hospital had solicited in Connecticut by granting admitting privileges to doctors who practiced in

### C. Taverns

Out-of-state taverns once helped minors to avoid drinking age statutes in the same way that out-of-state abortion providers now help minors to avoid parental involvement statutes. In the early 1980s, drinking ages varied among the states. Minors who drove to neighboring states with low drinking ages often became involved in alcohol-related traffic accidents while driving home.<sup>185</sup> In suits against the out-of-state taverns that had served these minors alcohol, courts had to decide whether the taverns had purposefully established minimum contacts with the minors' home state.

The best illustration of this phenomenon is the Illinois Appellate Court's decision in *Wimmer v. Koenigseder*.<sup>186</sup> There, two Illinois minors, who had driven together to Wisconsin to drink, became involved in a traffic accident in Illinois while returning home. At the time of the accident, the drinking age in Wisconsin was eighteen, while in Illinois it was twenty-one. The two Wisconsin taverns that served alcoholic beverages to the minors were both located approximately two-tenths of a mile north of the Illinois-Wisconsin border. Parking lot surveys showed that ninety percent of the vehicles in the taverns' parking lots had Illinois license plates, and the taverns knew most of their customers were from Illinois. In fact, one of the owners had discussed with Illinois police officers the problem of increased drunken driving arrests of Illinois minors returning home from the taverns, and both taverns handed out maps and fliers that directed patrons to back roads in Illinois that were not heavily patrolled by police. The taverns placed advertisements in a monthly Illinois newspaper stressing the fact that they were located "JUST NORTH OF THE ILLINOIS STATE LINE" and that "YOU NEED ONLY BE 18 TO BLAST OFF AT ROCK-IT NORTH."<sup>187</sup> One of the advertisements listed an Illinois telephone number to be used for entertainment bookings.

The court held that the taverns' activity met the minimum contacts requirement.<sup>188</sup> It conceded that the taverns' solicitation by itself did not provide a basis for jurisdiction under the doing business doctrine, or under the

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Connecticut).

185. PRESIDENTIAL COMMISSION ON DRUNK DRIVING, FINAL REPORT 11 (Nov. 1983). Eventually, Congress used its spending power to encourage the states to adopt a uniform drinking age, directing the Secretary of Transportation to withhold a percentage of otherwise allocable federal highway funds from states in which that age is less than twenty-one. 23 U.S.C. § 158 (1984). The Supreme Court upheld this exercise of the spending power in *South Dakota v. Dole*, 483 U.S. 203 (1987).

186. 470 N.E.2d 326 (Ill. App. Ct. 1984), *rev'd on other grounds*, 484 N.E.2d 1088 (Ill. 1985).

187. *Id.* at 328.

188. *Id.* at 331.

Illinois long arm statute.<sup>189</sup> Nevertheless, it found sufficient additional contacts because of the large portion of the taverns' business accounted for by Illinois residents, the foreseeability of accidents in Illinois resulting from the sale of alcohol to Illinois minors, the discussions in Illinois with Illinois police officers, the distribution of maps and fliers showing Illinois patrons how to avoid police contact, and the entertainment bookings that the taverns presumably had made in Illinois using the Illinois telephone number listed in the one ad.<sup>190</sup>

The court distinguished several decisions favorable to out-of-state taverns, including *West American Insurance Co. v. Westin, Inc.*,<sup>191</sup> where the Minnesota Supreme Court had concluded that a tavern does not establish minimum contacts with the forum state merely by locating its business in close proximity to that state, serving a substantial number of that state's residents, and having the ability to foresee that some of them will become involved in alcohol-related traffic accidents in the forum state.<sup>192</sup> According to the Minnesota Supreme Court, this interstate travel counts as the driver's unilateral activity.<sup>193</sup> According to the Illinois Appellate Court, however, interstate travel does not count as the driver's unilateral activity when the tavern is advertising in the forum state and is conducting other activities directed at that state.<sup>194</sup>

This distinction drawn by the Illinois Appellate Court mirrors the distinction that has been drawn by other courts in suits in which a difference in drinking ages was not a factor in the drinking that caused the accident.<sup>195</sup> Most lower courts have concluded that whether an out-of-state tavern has minimum contacts with the forum state depends on whether it solicits in that state.<sup>196</sup> However, two lower courts have held that out-of-state taverns lacked minimum contacts with the forum state despite having advertised there.

189. *Id.* at 330.

190. *Id.* at 328. Though it had not been alleged that the plaintiff was aware of the defendant's advertising, the court found a sufficient link between the defendant's total activity and the plaintiff's claim. *Id.* at 330.

191. 337 N.W.2d 676 (Minn. 1983).

192. *Id.* at 680.

193. *Id.* at 681.

194. *Wimmer*, 470 N.E.2d at 331-32.

195. For a succinct summary of the many lower court decisions involving out-of-state taverns, see *CASAD*, *supra* note 94, at § 7.02[2][b].

196. *E.g.*, *Dunaway v. Fellous*, 610 N.E.2d 1245, 1248 (Ill. 1993) (insufficient contacts without solicitation); *Lawson v. Darrington*, 416 N.W.2d 841, 844-45 (Minn. Ct. App. 1987) (solicitation and other activity created sufficient contacts); *Defoe v. Lawson*, 389 N.W.2d 757, 759 (Minn. Ct. App. 1986) (same).



*Mozdy v. Lopez*<sup>197</sup> involved two Canadian taverns located near the Michigan border. The taverns featured nude dancing, a type of entertainment not offered in Michigan, and they served a substantial number of Michigan residents. One of the taverns had advertised in a Detroit newspaper during the month of the accident, but that advertising had not influenced the driver and his companions to go to that tavern. The other tavern started advertising in Detroit only after the accident. The Michigan Court of Appeals said "personal jurisdiction may not be exercised on the basis of advertising campaigns regarding services to be performed out of state where the effect of the advertisements causes Michigan residents to leave the state."<sup>198</sup> Later, the court said the two taverns also lacked minimum contacts with Michigan because there was no link between the taverns' advertising and the plaintiff's claim.<sup>199</sup>

*Frieling v. Malowest, Inc.*<sup>200</sup> involved a Texas night club located near the Oklahoma border. The night club advertised on Texas radio stations whose broadcasts spilled over into Oklahoma. Characterizing the spill over of the night club's advertising into Oklahoma as a fortuitous and attenuated contact with that state, the court said that the night club had not purposefully availed itself of the benefits and protections of Oklahoma law by advertising on these Texas stations.<sup>201</sup> This statement suggests that the court might have reached a different conclusion if the night club had advertised on Oklahoma radio stations. Such a distinction would be difficult to justify in many instances, but it might have been justified in this instance due to an insufficient factual record. The opinion does not indicate how many Oklahoma residents listened to the Texas stations, whether the night club knew of the size of the stations' Oklahoma audience, and how many Oklahoma residents were served by the night club. The opinion's silence on these points suggests that the plaintiff might have failed to develop the kind of factual record that would justify treating advertising on Texas radio stations as advertising directed in substantial part at Oklahoma residents. The opinion also does not say that the radio advertising influenced the plaintiff's decision

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197. 494 N.W.2d 866 (Mich. Ct. App. 1993).

198. *Id.* at 868. The court cited a decision in which the Michigan Supreme Court had concluded that a Wyoming dude ranch did not have minimum contacts with Michigan in a personal injury suit brought on behalf of a Michigan girl who had suffered personal injury while at the ranch. The ranch had advertised in a nationally distributed AAA regional tour guide, which a AAA agent in Michigan had reviewed with the girl's parents before they called the ranch to make a reservation.

199. *Id.* at 868-89.

200. 814 F. Supp. 75 (W.D. Okla. 1993).

201. *Id.* at 76.

to go to the night club, which suggests that the plaintiff might have left yet another important gap in the factual record.

#### *D. Summary*

Generally, lower courts are concluding that advertising within the forum state provides a basis for personal jurisdiction over abortion providers and similar out-of-state businesses. It is unclear whether the courts think that advertising is a basis for specific jurisdiction or general jurisdiction. It is clear, however, that the courts think advertising can be a basis for personal jurisdiction even when it has nothing to do with the merits of the lawsuit.

### IV. THE FIRST AMENDMENT ARGUMENT AGAINST TREATING ADVERTISING AS A BASIS FOR JURISDICTION

The Supreme Court once took the position that the First Amendment does not protect commercial speech.<sup>202</sup> However, in a 1975 decision, *Bigelow v. Virginia*,<sup>203</sup> it held that a newspaper had a First Amendment right to carry an advertisement by an out-of-state abortion referral agency.<sup>204</sup> The following year, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,<sup>205</sup> it struck down a state statute that had stopped pharmacists from advertising the prices of prescription drugs. In the latter decision, the Supreme Court announced that under the First Amendment, "commercial speech, like other varieties, is protected."<sup>206</sup>

#### *A. The Initial Hurdle*

To prevail on a pure First Amendment argument, an abortion provider must first establish that a state's use of advertising as a basis for personal jurisdiction should be treated as a form of commercial speech regulation. This use differs from the traditional forms of commercial speech regulation considered in *Bigelow* and *Virginia State Board of Pharmacy*. In those decisions, the state was prohibiting certain kinds of advertising and threatened violators with various forms of punishment, including a fine, a jail sentence, or the loss of a state license.<sup>207</sup> When a state merely uses advertising as a

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202. See *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942).

203. 421 U.S. 809 (1975).

204. *Id.* at 821-25.

205. 425 U.S. 748 (1976).

206. *Id.* at 770.

207. *Bigelow*, 421 U.S. at 813-14 (advertising of abortion services was punishable as a misdemeanor; newspaper publisher sentenced to pay a \$500 fine); *Virginia State*

basis for personal jurisdiction, the state is not prohibiting advertising by out-of-state businesses, and it is not threatening them with these forms of punishment.

Nevertheless, the use of advertising as a basis for personal jurisdiction can create the same problem that is created by traditional forms of commercial speech regulation. According to the Supreme Court, commercial speech merits First Amendment protection largely because the free flow of commercial information is indispensable in making private economic decisions in a predominantly free enterprise economy.<sup>208</sup> The use of advertising as a basis for personal jurisdiction tends to restrict the flow of commercial information from out-of-state businesses to consumers, because it adds to the legal risks faced by these businesses.

Many out-of-state businesses will conclude that the extra revenue gained by advertising in the state outweighs the added legal risks. For these businesses, treating advertising as a basis for personal jurisdiction has roughly the same effect as a tax on their advertising. They will allow for the legal risks in the price that they charge, but they will not stop advertising, so consumers still will receive the same information.

However, some out-of-state businesses will conclude that the extra revenue is outweighed by the added legal risks. In our illustration, for example, the abortion providers would almost certainly reach this conclusion. Treating advertising as a basis for personal jurisdiction may have the same practical effect on an abortion provider as a ban on the provider's advertising. Because such treatment tends to restrict the flow of commercial information, there is reason to insist that a state justify it, just as a state would have to justify the use of a traditional form of commercial speech regulation.

### *B. The First Amendment Test*

Commercial speech receives a lesser degree of First Amendment protection than is received by other protected forms of speech.<sup>209</sup> "Intermediate" scrutiny, rather than "strict" scrutiny, applies to commercial speech.<sup>210</sup> This intermediate scrutiny occurs within the framework set forth

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*Board of Pharmacy*, 425 U.S. at 750, 752 (advertising of drug prices was defined as unprofessional conduct; pharmacists were subject to a civil monetary penalty or to license revocation or suspension).

208. *Virginia State Board of Pharmacy*, 425 U.S. at 765.

209. *United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696, 2703 (1993).

210. *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371, 2375 (1995) (inner quotation marks omitted).

in *Central Hudson Gas & Electric Company v. Public Serv. Comm'n of New York*.<sup>211</sup> Recently, the Supreme Court described that framework as follows:

Under *Central Hudson*, the government may freely regulate commercial speech that concerns unlawful activity or is misleading. . . . Commercial speech that falls into neither of those categories . . . may be regulated if the government satisfies a test consisting of three related prongs: first, the government must assert a substantial interest in support of its regulation; second, the government must demonstrate that the restriction on commercial speech directly and materially advances that interest; and third, the regulation must be narrowly drawn. . . .<sup>212</sup>

### 1. The Unlawful Activity and Misleading Advertising Exceptions

The unlawful activity exception seldom applies to the advertising that a state seeks to treat as a basis for personal jurisdiction. Nearly always, the advertising concerns an activity that is lawful in both the state where the activity occurs and the state where the advertising appears. For example, hospitals, clinics and other health care providers usually advertise medical services that are permitted by all states.

Occasionally, a state may seek to base personal jurisdiction on advertising that concerns an activity that is lawful in the state where the activity occurs but unlawful in the state where the advertising appears. In the illustration considered here, for example, the neighboring state does not require parental involvement in abortions performed for minors, but the home state does. A provider located in the neighboring state might advertise in the home state that it does not require parental involvement.

The Supreme Court has made it clear that an activity must be unlawful in the state where it occurs, not the state where it is advertised, to come within the unlawful activity exception. In *Bigelow*, the abortion referral agency was offering a service that was lawful in the state where it was located, but unlawful in the state where the newspaper published its advertisement. In upholding the newspaper's right to publish the ad, the Supreme Court said a state "may not, under the guise of exercising internal police powers, bar a citizen of another State from disseminating information about an activity that is legal in that State."<sup>213</sup>

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211. 447 U.S. 557 (1980).

212. *Went For It, Inc.*, 115 S. Ct. at 2376. The Supreme Court recently rejected an argument that *Central Hudson* imposes too strict a standard for commercial speech that promotes socially harmful activities like alcohol consumption. *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1589 n.2 (1995).

213. *Bigelow*, 421 U.S. at 824-25.

The misleading advertising exception is also seldom applicable to the advertising that a state seeks to treat as a basis for jurisdiction. For example, in an ordinary medical malpractice suit against an out-of-state hospital, the plaintiff does not allege that the hospital's advertising was misleading. Similarly, an abortion provider located in the neighboring state would not be misleading consumers if the provider advertised its policy of not requiring parental involvement.

Occasionally, a state may seek to base personal jurisdiction on misleading advertising. For example, in *State v. Baxter Chrysler Plymouth, Inc.*,<sup>214</sup> Nebraska car dealers were advertising in an Omaha newspaper that had substantial circulation in Iowa. The Iowa Attorney General sued the car dealers in Iowa alleging that the advertisements were deceptive within the meaning of the Iowa consumer fraud and consumer credit statutes. The Iowa Supreme Court concluded that the car dealers' advertising in Iowa provided a basis for personal jurisdiction.<sup>215</sup> Clearly, *Central Hudson* permits this result because it permits states to ban misleading commercial speech.<sup>216</sup>

## 2. The Three-Prong Test

When the unlawful activity and misleading advertising exceptions do not apply, a state's regulation of commercial speech is subject to the three-prong *Central Hudson* test. How this test applies to an attempt to use advertising as a basis for personal jurisdiction seems to depend partly on how the test would apply to an attempt to ban this advertising. The two questions differ, of course, but a state has a stronger argument for using advertising as a basis for personal jurisdiction when the state could, but chooses not to, ban it.

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214. 456 N.W.2d 371 (Iowa 1990).

215. *Id.* at 377.

216. When a state uses misleading advertising as a basis for personal jurisdiction in a deceptive advertising suit, the liability issue seems to overlap with the jurisdiction issue. In *Baxter Chrysler Plymouth*, for example, it seems that the Iowa Attorney General would have had to prove that the advertising was misleading—the liability issue—in order to establish the Iowa courts' power to exercise personal jurisdiction over the Nebraska car dealers. 456 N.W.2d 371, 377 (Iowa 1990). However, this apparent overlap between the liability and personal jurisdiction issues is nothing new. Many states have long arm statutes providing that the commission of a "tortious" act within the state is a basis for personal jurisdiction. Courts have interpreted these long arm provisions to require (1) conduct within the state, and (2) a complaint stating a cause of action in tort based on this conduct. *E.g.*, *Nelson v. Miller*, 143 N.E.2d 673, 680-81 (Ill. 1957). Similarly, the Iowa Supreme Court required (1) advertising within the state, and (2) a complaint stating a cause of action based on this advertising. If such a complaint later turns out to be unsupported by the proof, the defendant wins on the liability issue, not on the jurisdiction issue.

### a. Socially Harmful Activities

Because certain commercial activities cause great social harm, the Supreme Court has said that the government has an additional option in regulating these activities. It can regulate them (a) in a strong way by prohibiting them, (b) in a weak way by legalizing them and relying on "counterspeech" to reduce consumer demand, or (c) in an "intermediate" way by legalizing them and relying on strict advertising restrictions to reduce consumer demand.<sup>217</sup> This category of activities is ill-defined, but it seems to include casino gambling, lotteries, the sale of alcoholic beverages and tobacco products, and other vice activities.<sup>218</sup>

This category must be narrow, because the government is reversing the usual assumption in commercial speech cases. When it stops all (or nearly all) truthful advertising concerning a lawful commercial activity, the government is assuming that consumers will benefit from less information about that activity.<sup>219</sup> Usually, it must proceed on the assumption that consumers benefit from more information about commercial activities.<sup>220</sup>

While the *Central Hudson* test would permit a state to ban advertising in order to reduce consumer demand for one of these socially harmful activities, the test also permits the state to treat the advertising as a basis for personal jurisdiction. By hypothesis, the state has a substantial interest in preventing the harm that is traceable to the consumer demand created by the advertising. Likewise, the state must have a substantial interest in treating the advertising as a basis for personal jurisdiction so that its courts can provide convenient redress for the harm when it occurs. Such treatment advances the state's interest to a lesser extent than would an advertising ban, but it has a less restrictive effect on commercial speech than does an advertising ban. Hence, the fit between ends and means should be at least as good as it would be if the state banned the advertising, which, by hypothesis, it could.

217. *Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328, 346-47 (1986).

218. *Id.* at 344. Advertising restrictions do not automatically pass the three-prong *Central Hudson* test merely because they involve vice activities. The great social harm caused by these activities enables the government to articulate a substantial interest in reducing consumer demand, which satisfies the first prong. However, the government still might adopt an overall regulatory scheme that is so irrational that a particular restriction might not advance this interest, which violates the second prong, or might not be narrowly tailored to advance the interest, which violates the third prong. See *Coors Brewing Co.*, 115 S. Ct. at 1590-92 (striking a federal restriction on including the alcohol content on malt-beverage labels unless required by state law).

219. Erwin Chemerinsky, *Commercial Speech: What Degree of Protection?*, TRIAL, Aug. 1993, at 68.

220. *Id.*; see *Virginia State Bd of Pharmacy*, 425 U.S. at 765.

Treating advertising as a basis for personal jurisdiction in suits against out-of-state taverns provides a familiar illustration of the point under consideration here. Because the sale of alcoholic beverages is a socially harmful activity, *Central Hudson* might permit a state to ban advertising by taverns and other liquor businesses. The state would have a substantial interest in reducing the harm caused by liquor sales, a ban on advertising by taverns and other liquor businesses would advance this interest and the fit between ends and means might be good enough. If so, it follows that a state also should be able to treat advertising as a basis for personal jurisdiction in suits against out-of-state taverns.<sup>221</sup>

### b. Ordinary Commercial Activities

The three-prong *Central Hudson* test does not seem to permit a state to treat advertising as a basis for personal jurisdiction over out-of-state businesses that conduct ordinary commercial activities, though this conclusion is far from clear. With respect to the first prong of the test, the state has a general interest in preventing harm to its citizens from ordinary commercial activities while its citizens are in other states.<sup>222</sup> However, ordinary commercial activities threaten this interest much less than the socially harmful activities that have received exceptional treatment in commercial speech decisions. Because the threat is lower, the state lacks a substantial interest in reducing consumer demand for these activities by imposing advertising restrictions. So the state must follow the usual method of preventing harm to its citizens while they are outside of the state: "It may seek to disseminate information so as to enable its citizens to make better informed decisions when they leave."<sup>223</sup>

Treating advertising as a basis for personal jurisdiction involves the state's interest in providing redress for harm to its citizens, not the state's interest in preventing such harm. Yet, the interest in providing redress seems no more substantial than the interest in taking preventive measures. Moreover, a state seems quite capable of informing its citizens—if they do not already

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221. A pro-life state might argue that abortion providers, like taverns, cause great social harm. However, the Supreme Court decided in *Bigelow* that a state may not ban advertising of abortion related services. So, abortion providers cannot be equated with taverns for First Amendment purposes. *Bigelow* does leave one point open that might be significant here. The newspaper ad in *Bigelow* was not aimed specifically at minors, while some of the advertising done by some abortion providers clearly is, such as an advertisement stating that the provider does not require parental consent. Thus far, the Supreme Court has not considered whether a state's interest in protecting the parent-child relationship might justify some restriction on advertising of this kind.

222. See *Bigelow*, 421 U.S. at 824.

223. *Id.*

know it—that it is harder to obtain redress from out-of-state businesses than from local businesses. So, under the first prong of *Central Hudson*, a state cannot justify treating advertising of ordinary commercial activities as a basis for personal jurisdiction.

The second prong of *Central Hudson* does not apply if the state's justification fails under the first prong. However, the second prong creates no additional obstacle. A state's treatment of advertising as a basis for personal jurisdiction directly and materially advances the state's interest in providing convenient redress. Though it does not enable the state to provide convenient redress against businesses that do not advertise in the state, it does advance the state's interest with respect to businesses that do.

The third prong of *Central Hudson* also does not apply if the state's justification fails under the first prong. Unlike the second prong, however, the third prong might create an additional obstacle. This prong requires that a restriction on commercial advertising be narrowly drawn. Treating advertising as a basis for personal jurisdiction cannot be considered a narrowly drawn restriction in suits involving harm that cannot be traced to the increased consumer demand created by that advertising. When such tracing is possible, the state's treatment of advertising as a basis for personal jurisdiction still is a broadly drawn restriction in the sense that it affects all advertising by all out-of-state businesses and leaves them with no alternative means of getting their message to consumers while avoiding the restriction.

This total coverage of all forms of advertising differs completely from the kind of restrictions on advertising of ordinary commercial activities that have been approved by the Supreme Court. Consider, for example, the narrow restriction on lawyer advertising approved in the Supreme Court's recent decision in *Florida Bar v. Went For It, Inc.*<sup>224</sup> Florida had imposed a third day ban on direct written solicitations to an injured person or his or her family regarding personal injury or wrongful death lawsuits. The state had left this particular channel open for all but this brief time period, and it had left open ample alternative channels of communication, such as radio and television advertising, billboard advertising, and yellow pages advertising.<sup>225</sup> However, when a state treats advertising as a basis for personal jurisdiction, the state covers all time periods and all channels of communication.

### *C. Giving Weight To First Amendment Considerations*

Despite the fact that treating advertising as a basis for personal jurisdiction discourages advertising by out-of-state businesses—and, indeed, would almost certainly eliminate advertising by out-of-state abortion providers

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224. 115 S. Ct. 2371 (1995).

225. *Id.* at 2380-81.



in the circumstances considered here—the Supreme Court still might not consider it a form of commercial speech regulation. If it does not, the three-prong *Central Hudson* test will not apply and the pure First Amendment argument will fail. If the argument fails for this reason, however, First Amendment considerations still might add weight to a more traditional argument for not letting states treat advertising as a basis for personal jurisdiction.

In 1907, the Supreme Court adopted the "mere solicitation" rule, which made advertising and other forms of solicitation an insufficient basis for personal jurisdiction.<sup>226</sup> This rule predated by nearly seventy years the recognition in the mid-1970s that the First Amendment protects commercial speech. However, some of the considerations that supported the mere solicitation rule might have something in common with First Amendment considerations, so that First Amendment considerations might add weight to the argument for preserving part of this rule.

Similarly, First Amendment considerations might be taken into account in interpreting the unilateral activity rule. The First Amendment requires the government to assume that consumers ordinarily benefit from more commercial speech, not less commercial speech. This assumption is required because consumer autonomy has value under the First Amendment, and commercial speech helps make consumers more autonomous. If consumer autonomy also has value in the personal jurisdiction field, it makes sense to interpret the unilateral activity rule in a manner designed to encourage advertising by out-of-state businesses, not to discourage it.

The main hurdle to taking First Amendment considerations into account in the personal jurisdiction field is presented by the Supreme Court's opinion in *Calder v. Jones*.<sup>227</sup> The defendants named in that suit included the reporter and the editor of an article that had appeared in a national magazine. The Supreme Court rejected the defendants' argument that they lacked minimum contacts with the plaintiff's home state.<sup>228</sup> In response to a further argument based on the potential chilling effect if reporters and editors must defend the content of their articles in distant states, the Court said it "reject[ed] the suggestion that First Amendment concerns enter into the jurisdictional analysis."<sup>229</sup>

The Supreme Court gave two reasons for rejecting this suggestion. First, it said, "the infusion of such considerations would needlessly complicate an

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226. *Green v. Chicago, Burlington & Quincy Ry.*, 205 U.S. 530, 533-34 (1907).

227. 465 U.S. 783 (1984).

228. *Id.* at 788-90.

229. *Id.* at 790; accord *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 780 n.12 (1984) ("we reject categorically the suggestion that invisible radiations from the First Amendment may defeat jurisdiction otherwise proper under the Due Process Clause").

already imprecise inquiry.<sup>230</sup> Second, it added, "the potential chill on protected First Amendment activity stemming from libel and defamation actions is already taken into account in the constitutional limitations on the substantive law governing such suits . . . [so that] reintroduc[ing] those concerns at the jurisdictional stage would be a form of double counting."<sup>231</sup> While these points made sense in *Calder*, neither point is relevant here.

Taking First Amendment considerations into account in the manner suggested here would not needlessly complicate the jurisdictional inquiry. To the contrary, it would make personal jurisdiction turn on the answer to a simple question: Has the plaintiff alleged that the defendant's advertising was misleading, concerned an unlawful activity, or concerned a socially harmful activity that has received less protective treatment in commercial speech decisions? The answer will be "no" in almost all cases. It does not needlessly complicate the jurisdictional inquiry to say, based on First Amendment considerations, that a state cannot treat advertising as a basis for personal jurisdiction unless the plaintiff makes one of these allegations.

Introducing First Amendment consideration in this way also does not involve double counting. Advertising has no relevance to the substantive merit of the suits affected by this rule. In the illustration considered here, for example, advertising has no relevance to the substantive merit of a suit against an abortion provider for violating a parental involvement requirement. Obviously, the jurisdictional stage is the only stage at which account can be taken of First Amendment considerations in a suit where advertising has no substantive relevance. So, *Calder* really should not stand in the way of giving weight to First Amendment considerations in a more traditional jurisdiction argument.

## V. THE FEDERALISM ARGUMENT AGAINST TREATING ADVERTISING AS A BASIS FOR JURISDICTION

Limits on the reach of state authority serve two distinct, but overlapping, interests.<sup>232</sup> These limits preserve the rights of sister states to decide matters that legitimately lie within their exclusive spheres of authority. These limits also preserve the rights of persons to be left alone by states that have no legitimate authority over them.

These two interests usually coincide. Upholding a state's right against intrusion by a sister state usually preserves the right of its citizens to be left alone by the intruding state. Similarly, upholding the right of a citizen to be left alone by another state usually preserves the right of that citizen's state to

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230. *Calder*, 465 U.S. at 790.

231. *Id.*

232. BRILMAYER, *supra* note 26, at 135, 271.

decide the matter. In some circumstances the two interests diverge.<sup>233</sup> However, the two interests coincide so often that the arguments for preventing intrusion on these interests are likely to share a common theory of political legitimacy.

Having states bound together in a federation does not by itself indicate how political legitimacy will be understood within the federation. At one extreme, states might be bound together so loosely that their courts might relate to each other like state courts did under the Articles of Confederation. At the other extreme, states might be bound together so tightly that their courts might relate to each other like the courts of different counties within a single state. In the United States, the political theory that most naturally defines the legitimate reach of state authority is the concepts of federalism that were developed during the founding years and that have been further developed in later years in light of subsequent experience.

### A. *The Full Faith and Credit Clause*

The problem of setting limits on the reach of state authority relative to other states and to the citizens of other states received limited attention at the Constitutional Convention, because the Convention focused primarily on the problem of setting limits on the reach of national government authority relative to the states and to the people. However, the Full Faith and Credit Clause did address to some extent the relationship between the states and between a state and citizens of other states. This Clause reads as follows:

Full faith and credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.<sup>234</sup>

The intended meaning of this Clause is clear in some respects but is obscure in others. The first sentence describes something that "shall" be done in each state, and thus is self-executing. However, the precise meaning of the obligation described in that sentence is unclear.<sup>235</sup> The second sentence

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233. For example, a state might decide not to resist another state's intrusion, perhaps hoping for cooperation from that state on some other issue. Also, a person might decide not to insist on being left alone, or a person insisting on being left alone might be claiming to be subject to another country's authority rather than another state's authority. BRILMAYER, *supra* note 26, at 271 (making the same point using a resident of Antarctica, which has no government).

234. U.S. CONST., art. IV, § 1.

235. Compare Ralph U. Whitten, *The Constitutional Limitations On State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit*

gives Congress the power, among other things, to prescribe the "Effect" that states must give to sister-state acts, records, and judicial proceedings. Scholars agree that this power includes the power to establish rules of personal jurisdiction for the state courts.<sup>236</sup>

Based on the theory of reserved rights ultimately stated in the Tenth Amendment, this Clause might be understood, by negative implication, in the following way. In part, the people were protecting their interest in being left alone by the courts and legislatures of other states. This interest was to be protected in the same way as before, relying on states to protect their citizens by refusing to assist other states when the other states exceeded their legitimate authority. However, the protection given to this interest was subject to certain important exceptions. As before, state courts might voluntarily recognize and give effect to sister-state judgments. Indeed, the first sentence of the Clause might have made part of this practice mandatory, or even added to this practice. Most important of all, the final words of the second sentence of the Clause gave Congress the power to require state courts to give far greater effect than before to sister-state laws and judgments, thereby putting other interests ahead of the people's interest in being left alone by other states. In fact, unless a broad meaning is assigned to the first sentence, the Clause essentially assigns to Congress, not the Supreme Court, the important task of deciding if and how legislative authority and judicial authority need to be reallocated among the states in order to form a more perfect union.

Like the Convention, the ratification debates focused primarily on the reach of national government authority relative to the states and the people. The opponents of the Constitution attacked it most importantly on the ground that the proposed national government posed a threat to the people's liberties, which, they claimed, were better protected by state and local governments.<sup>237</sup> Madison responded with his famous argument that the people's liberties are most threatened by the tyranny of a majority faction, and that factional tyranny is more likely to develop in state legislatures than in the Congress, since the states are more homogeneous than the nation as a whole.<sup>238</sup>

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*And Due Process Clauses (Part One)*, 14 CREIGHTON L. REV. 499, 542-55 (1981) (the Clause is best read to require, of its own force, only that sister-state judgments must be received in evidence) with Kurt H. Nadelmann, *Full Faith and Credit To Judgments and Public Acts: A Historical-Analytical Reappraisal*, 56 MICH. L. REV. 33, 62-71 (1957) (the Clause requires, of its own force, that sister-state judgments must be given conclusive effect).

236. E.g., Ralph U. Whitten, *The Constitutional Limitations On State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit And Due Process Clauses (Part Two)*, 14 CREIGHTON L. REV. 735, 851 (1981).

237. McConnell, *supra* note 4, at 1500.

238. THE FEDERALIST NO. 10 (James Madison).

Madison presented this argument not in favor of a consolidated national government, but in favor of the federalist solution of dual sovereignty, with two distinct governments, federal and state, controlling each other.<sup>239</sup>

Just as Madison's argument cautions against relying too much on the states to protect the people's liberties, the argument implies that the people's liberties will remain better protected if limits are maintained on a state's authority relative to the citizens of other states. Many writers have noted that factional tyranny may be less likely to develop in the Congress than in the state legislatures, but that factional tyranny at the national level is more dangerous because it has nationwide effect.<sup>240</sup> However, if states were to have unlimited power relative to the citizens of other states, factional tyranny would be just as dangerous at the state level as at the national level, and, as Madison argued, it would be more likely to develop at the state level.

### B. *The Full Faith and Credit Act*

Congress promptly exercised part of its power under the Full Faith and Credit Clause by enacting the Full Faith and Credit Act.<sup>241</sup> This Act established a procedure for admitting state court records and judicial proceedings.<sup>242</sup> It then specified that these records and judicial proceedings upon admission shall have such faith and credit as they have in the courts of the rendering state.<sup>243</sup>

Like the Clause itself, the Act raised questions about the precise meaning of the obligation it described and the circumstances in which states had this obligation. The lower courts concluded, nearly unanimously, that the Full Faith and Credit Clause and the Full Faith and Credit Act required states to give effect to a sister-state judgment only if it was rendered by a court that had jurisdiction over the defendant.<sup>244</sup> In 1850, the Supreme Court confirmed this lack of jurisdiction exception.<sup>245</sup> Essentially, this exception enabled a defendant to default in another state, wait until the plaintiff tried to enforce the judgment in the defendant's home state, and then object that the judgment was void for lack of jurisdiction.

To rule on the defendant's lack of jurisdiction objection, the courts had to decide what rules of jurisdiction applied under the Full Faith and Credit

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239. THE FEDERALIST NO. 51 (James Madison).

240. McConnell, *supra* note 4, at 1503.

241. Act of May 26, 1790, ch. 11, 1 Stat. 122.

242. *Id.*

243. *Id.*

244. Weinstein, *supra* note 66, at 9-10, 14 n.65.

245. D'Arcy v. Ketchum, 52 U.S. (11 How.) 165, 176 (1850).

Clause and the Full Faith and Credit Act. Federal law governed this question.<sup>246</sup> Because it did, the Supreme Court had a role in protecting defendants from theories of jurisdiction that exceeded the perceived limit of a state's legitimate authority.<sup>247</sup>

The jurisdiction rule most associated with the Full Faith and Credit Act decisions is the service of process rule. This rule made service of process within the forum state both necessary and sufficient to establish personal jurisdiction over a nonresident individual.<sup>248</sup> Both halves of this rule built on the same premise that rules of state court jurisdiction are a consequence of territorial limits on state authority.

Scholars disagree on the historical moment when this premise was accepted and when the service of process rule became firmly established. Several decades ago, Professors Ehrenzweig and Hazard argued that territoriality did not become firmly established in American jurisdiction law until 1877.<sup>249</sup> However, the more recent work of Professors Weinstein and Kogan demonstrates that, from the early days of the Republic, and long before 1877, the courts viewed limitations on state court jurisdiction as a consequence of territorial limitations on state authority.<sup>250</sup> Professor Weinstein further demonstrates that the service of process rule had gained acceptance long before 1877.<sup>251</sup>

### C. *The Due Process Controversy*

Most of the controversy about limiting state court jurisdiction on a territorial basis surrounds the Supreme Court's decision in *Pennoyer v. Neff*.<sup>252</sup> The Supreme Court decided the case in 1877, shortly after the ratification of the Fourteenth Amendment. The case presented a full faith and credit issue, and the case arose before the ratification of the Fourteenth Amendment. Nevertheless, after referring to the lack of jurisdiction exception developed in full faith and credit decisions, the Supreme Court made the

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246. Roger H. Trangsrud, *The Federal Common Law of Personal Jurisdiction*, 57 GEO. WASH. L. REV. 849, 863-67 (1989).

247. *Id.*

248. Weinstein, *supra* note 66, at 3.

249. Albert A. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289 (1956); Geoffrey Hazard, *A General Theory of State Court Jurisdiction*, 1965 SUP. CT. REV. 241.

250. Weinstein, *supra* note 66, at 58; Terry S. Kogan, *A Neo-Federalist Tale of Personal Jurisdiction*, 63 S. CAL. L. REV. 257, 274-98 (1990).

251. Weinstein, *supra* note 66, at 7-18.

252. 95 U.S. 714 (1877).

following statement about the relevance of these decisions under the Due Process Clause of the Fourteenth Amendment:

Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom the court has no jurisdiction do not constitute due process of law.<sup>253</sup>

The great importance of *Pennoyer v. Neff* is that it linked the jurisdiction test under the Due Process Clause with the jurisdiction test under the Full Faith and Credit Clause.<sup>254</sup> The linking of these two tests had the immediate practical effect of giving a defendant a second way to make a personal jurisdiction objection. As before, the defendant could default and raise lack of jurisdiction as a defense when the plaintiff asked for extrastate recognition of the judgment. Or, the defendant could appear in the first state's courts and attack their jurisdiction directly under the same jurisdiction rules. Because the rules developed under the Full Faith and Credit Clause and the Full Faith and Credit Act had built on the premise that limitations on state court jurisdiction were a consequence of territorial limitations on state authority, the linking of the two tests had the further effect of making the territorial premise relevant after *Pennoyer* under the Due Process Clause.

In recent years, scholars have debated whether it was legitimate to transfer this premise from cases involving the Full Faith and Credit Clause to cases involving the Due Process Clause. One view is that "the only concern of a principled due process jurisdictional analysis should be the avoidance of inconvenience to the defendant."<sup>255</sup> According to this view, in the evolution of due process analysis prior to the adoption of the Fourteenth Amendment, and in the Fourteenth Amendment ratification debates, "there is not a shred of evidence that ... due process analysis incorporated federalism considerations."<sup>256</sup> The opposing view is that the meaning of the Due Process Clause must be determined partly by reference to "the structure established by the body of the Constitution" under which "the legitimacy of an assertion of state authority . . . inevitably reflects this federal structure and its implication that certain matters entrusted to one state (or in some cases

253. *Id.* at 733.

254. Kurland, *supra* note 84, at 585. Technically, the test developed in the full faith and credit decisions was developed under both the Full Faith and Credit Clause and the Full Faith and Credit Act, but the text will refer just to the Clause.

255. Redish, *supra* note 68, at 1137.

256. Redish, *supra* note 68, at 1121; *accord* Whitten, *supra* note 235, at 799-804.

several states) are simply not the business of other states."<sup>257</sup> Under that view, the jurisdiction rules that flow from the Due Process Clause became linked to the rules created under the Full Faith and Credit Clause due to the substantial overlap, noted earlier, between a state's interest in not having its sovereign functions encroached upon by other states and a person's interest in not being subjected to the governmental authority of other states.<sup>258</sup>

These opposing views raise larger questions of constitutional interpretation which remain unresolved, and which this Article leaves unresolved. Nevertheless, the following point is clear: Whether the Supreme Court was right or wrong to link the jurisdiction rules that apply under the Full Faith and Credit Clause with the jurisdiction rules that apply under the Due Process Clause, the Supreme Court is not about to break that link. So, even if the territorial premise were considered foreign to the Due Process Clause, the following question still would remain: Should the personal jurisdiction rules that will apply under both of these Clauses be built on the premises that are compatible with each of these Clauses or just the premises that are compatible with one of these Clauses? In the kind of case considered here, it is especially inappropriate to ignore premises compatible with the Full Faith and Credit Clause, when this Clause supplies the driving force for our personal jurisdiction rules.

To illustrate this point, suppose that the Constitution contained the Due Process Clause, but not the Full Faith and Credit Clause, and abortion providers faced suits brought by minors and their parents in the home state's courts. Obviously, the providers would ignore these suits. Because the providers would have no property in the home state, the judgments would have no impact on them there. And, the neighboring state would have no obligation to give full faith and credit to these judgments, enabling its courts to refuse enforcement on several grounds, including the fact that the judgments would be based on a cause of action that would violate the neighboring state's public policy. So, in this scenario, the providers would never invoke their due process rights, because they would have no reason to appear in the home state's courts.

Suppose, instead, that the Supreme Court were to break the link between the two sets of jurisdiction rules. Then, the providers would focus first and

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257. Weinstein, *supra* note 66, at 60.

258. Weinstein, *supra* note 66, at 60-61; Allen R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEXAS L. REV. 689, 706-10 (1987). Professor Weinstein regards the overlap between the person's interest and his home state's interest to be an after-the-fact explanation of *Pennoyer*; and despite the overlap, he believes that the jurisdiction rules flowing from the Due Process Clause should differ from those flowing from the Full Faith and Credit Clause. Weinstein, *supra* note 66, at 60-61.



foremost on the full faith and credit rules. They would ask, for example, whether these rules treat advertising as a basis for personal jurisdiction. If the full faith and credit rules did not, the providers would continue to advertise in the home state, would ignore suits brought against them in that state's courts, and would never have occasion to invoke their due process rights. Only if the full faith and credit rules treated advertising as a basis for personal jurisdiction would the providers concern themselves with how advertising is treated under the due process rules of jurisdiction. So, since territoriality has had a proper place in full faith and credit analysis from the founding years, the controversy over whether territoriality also has a proper place in due process analysis should not be permitted to affect the kind of case considered here.

#### D. *The "Mere Solicitation" Rule*

Foreign corporations, as Professor Kurland has said, "have proved more difficult [than domestic corporations] to fit into the concepts which underlie the principles of personal jurisdiction relating to individual[s]."<sup>259</sup> In developing jurisdiction rules that made provision for suits against foreign corporations, the Supreme Court first relied on the consent theory, then added the presence theory, and later merged the two theories into the doing business concept.<sup>260</sup> These developments began before the ratification of the Fourteenth Amendment,<sup>261</sup> and the Supreme Court referred to them briefly in *Pennoyer*.<sup>262</sup> However, the "mere solicitation" rule post-dates both the ratification and that decision.

In 1887, a federal court recognized this rule in *Carpenter v. Westinghouse Air-Brake Co.*<sup>263</sup> In this case, a Pennsylvania corporation was sued in Iowa for patent infringement. The corporation had no place of business in that state. It had sent its officers and a train of cars there for the purpose of exhibiting its brake, but it had not made any contracts there for the sale of the brake. The court held that this act of "mere advertisemen[t]" did not bring the corporation within the Iowa statute that provided for service of process in suits against foreign corporations.<sup>264</sup> The court explained:

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259. Kurland, *supra* note 84, at 577.

260. Kurland, *supra* note 84, at 578.

261. See *Lafayette Ins. Co. v. French*, 59 U.S. (18 How.) 404 (1855) (consent thesis).

262. *Pennoyer*, 95 U.S. at 735.

263. 32 F. 434 (C.C.S.D. Iowa 1887).

264. *Id.* at 436.

If we say that the mere matter of advertising a business is the introduction of that business in the state, it would follow that every corporation located elsewhere that should send its circulars into the state, send newspapers with its advertisement, would be engaged in its business in that state, and to be found there for purposes of suit.

The true rule is that the corporation does not come into the state, is not found in any state, unless in some way it establishes an office or agency for the transaction of the business for which it is organized, and when that is done, it has no right to say it is not found within the state. Unless it goes to that extent it may say: "I have not entered into or become a part of the citizenship or an inhabitant of that state."<sup>265</sup>

In this passage, the court was attempting, as Professor Kurland has said, to fit foreign corporations into concepts of jurisdiction developed for individuals. It was asking when a foreign corporation should be considered to be "found" within a state, as an individual might be found there. It was asking when a foreign corporation should be considered to have become "part of the citizenship" or an "inhabitant" of a state, as an individual might be found to be part of the citizenship or an inhabitant of a state. It said the true rule required establishment of an office or agency for the transaction "of the business for which it was organized," which implied that a foreign corporation might establish an office or agency without being considered equivalent to a citizen or inhabitant, provided the operation of the office or agency could be considered incidental to the corporation's primary business.<sup>266</sup>

A modern reader with modern debates in mind might wish the court had explained why a foreign corporation should not be subject to suit in states where it only has sent its circulars or has advertised in newspapers. Did the court think those states would be exceeding commonly accepted limits on a

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265. *Id.* at 436. The plaintiff's counsel made the modern-sounding argument that the very wrong complained of was the display and operation of the air brake in Iowa. If the corporation came into the state for the purpose of doing a wrong, so counsel's argument went, it should be deemed to have come into the state for the purpose of subjecting itself to suit for the wrong done. Because this argument did not fit the concepts of jurisdiction that had been developed before that time for individuals, the court rejected it for that reason, and for the further reason that Iowa had no statute permitting service of process on a corporation's agents in these circumstances. *Id.* at 436-37.

266. *Accord* Maxwell v. Atchison, T. & S. F. R. Co., 34 F. 286, 287 (C.C. Mich. 1888) ("the general rule appears now to be well settled that a foreign corporation may be sued within any jurisdiction wherein it carries on an *important* part of its business") (italics added); Krakowski v. White Sulphur Springs, Inc., 161 N.Y.S. 193, 194 (N.Y. App. Div. 1916) ("[t]he business of advertising and getting custom . . . is a *mere incidental* to the operation of a hotel and health resort, and is not a *substantive part of the primary* business for which the defendant was incorporated") (italics added).

state's territorial authority and thereby denying the foreign corporation's right to be left alone by those states? Did the court think those states would be subjecting the foreign corporation to unreasonable inconvenience? Though frustrating to the modern reader, the court's silence on these points is typical. The courts of that time commonly justified not treating solicitation as a basis for jurisdiction simply by pointing out that the opposing rule would make foreign corporations liable to suit in any state where they might send a traveling salesman, circus rider, or drummer to solicit patronage.<sup>267</sup> Apparently, the judges considered these results so far beyond belief that their contemporaries required no explanation.

While reconstructing unexpressed reasons can be hazardous, common sense suggests that the judges, if pressed to explain these results, would have explained them in terms of both the limits on the states' territorial authority and the risk of unreasonable inconvenience. The courts were attempting to fit foreign corporations into concepts of personal jurisdiction developed for individuals, and the concepts developed for individuals involved both of these notions. In fact, the judges probably would have offered the territorial explanation first, since the "mere solicitation" rule began to win acceptance in the lower courts barely a decade after the Supreme Court had stressed in *Pennoyer* that personal jurisdiction rules are a consequence of territorial limits on state authority.

The "mere solicitation" rule often covered a far more permanent and substantial connection with the forum state than merely advertising in newspapers circulated in the state or sending a traveling salesman through the state from time to time. For example, when railroads solicited freight and passengers in states where they had no trackage, they often rented local offices, hired local agents, and had the agents give customers prepaid orders for tickets in return for their money.<sup>268</sup> By limiting the agents to issuing prepaid orders instead of tickets, the railroads could say, technically, that they were merely soliciting in the forum state, when, in substance, more was happening there. Similarly, when manufacturers solicited sales in states where they had no plants or offices, they might hire local sales agents, reimburse them for renting sample display rooms, have them transmit orders for acceptance outside of the state, ship merchandise F.O.B. shipping point but destined for delivery in the state, and take payment for the merchandise outside of the state.<sup>269</sup> By using these arrangements for accepting orders,

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267. *E.g.*, *Wall v. Chesapeake & O. Ry. Co.*, 95 F. 398, 401 (7th Cir. 1899); *Boardman v. S. S. McClure Co.*, 123 F. 614, 615 (C.C.D. Minn. 1903); *Maxwell*, 34 F. at 290.

268. *See, e.g.*, *Green v. Chicago, B. & Q. Ry. Co.*, 205 U.S. 530, 532-33 (1907); *N.K. Fairbank & Co. v. Cincinnati, N. O. & T. P. Ry. Co.*, 54 F. 420 (7th Cir. 1892).

269. *See, e.g.*, *International Shoe*, 326 U.S. at 313-14.

shipping merchandise, and taking payment, the manufacturers, like the railroads, could say, technically, that they were merely soliciting in the forum state, when, in substance, more was happening there.

The Supreme Court adopted the mere solicitation rule in 1907 in *Green v. Chicago, Burlington & Quincy Ry.*<sup>270</sup> In this case, a railroad that operated westward from Chicago had a local office and a local agent in Philadelphia for soliciting freight and passenger traffic. The Supreme Court said the railroad obviously was doing a considerable business of a kind there, and it noted that two lower courts had found this kind of business sufficient under state jurisdiction statutes.<sup>271</sup> However, it concluded that the business was "in substance nothing more than that of solicitation" which, contrary to those decisions, but in line with several lower federal court decisions, did not constitute "doing business" in the sense required to make the railroad subject to personal jurisdiction.<sup>272</sup>

This decision meant that the "doing business" test required something more than continuous solicitation, but it left open what additional activity was required. Seven years later, the Supreme Court developed the "solicitation plus" rule in *International Harvester v. Kentucky*.<sup>273</sup> It upheld jurisdiction based on solicitation plus shipping machines into the state and granting agents authority to receive payment there. Thus, the "mere solicitation" rule covered some business arrangements involving a permanent and substantial connection that seemed to differ very little from those covered by the "solicitation plus" rule. This led courts to draw fine lines in personal jurisdiction decisions involving foreign corporations in the remaining decades leading up to *International Shoe*.<sup>274</sup>

From this brief history, it is apparent that the mere solicitation rule does not have the same historical pedigree as the service of process rule that the Supreme Court examined through the lens of history and upheld in *Burnham v. Superior Court*.<sup>275</sup> It had no crucial role in forging a union out of the separate states. It post-dated the enactment of the Fourteenth Amendment. It probably reflected concepts of territoriality, but not in the same clear way that the service of process rule had.

Nevertheless, the core of the mere solicitation rule does seem to have met a strongly felt need at that time. At the edges of the rule, there was sharp disagreement, which is not surprising, as corporations were arranging the conduct of their business to push the rule as far as they could. However, there

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270. 205 U.S. 530 (1907).

271. *Id.* at 533.

272. *Id.* at 533-34.

273. 234 U.S. 579, 585-86 (1914).

274. Kurland, *supra* note 84, at 584-85.

275. 495 U.S. 604 (1990).

seems to have been no dissent from the core idea that pure advertising did not provide a basis for personal jurisdiction when it was unaccompanied by further activity and had nothing to do with the merits of the lawsuit. In fact, this point was considered so obvious that, as noted before, the judges felt no need to explain it.

### E. Today's Issues

The Supreme Court indicated in *International Shoe* that the minimum contacts test requires contacts sufficient to satisfy "traditional notions of fair play and substantial justice."<sup>276</sup> This statement is paradoxical if misunderstood. The old rules of personal jurisdiction reflect traditional notions of fair play and substantial justice, yet the Supreme Court did not adopt the minimum contacts test for the sole purpose of giving a better rationale for the old rules. It also adopted this test for the purpose of setting aside some of the old rules that had limited the states' personal jurisdiction power.

Properly understood, this statement is not paradoxical. The old rules of personal jurisdiction fit into a legal framework of basic requirements and ground rules that had been developed with two considerations in mind: (1) notions of fair play and substantial justice, and (2) the social conditions of an earlier time. Changed social conditions led the Supreme Court to adopt a new legal framework with new requirements and ground rules. Old rules that were incompatible with the new framework would be modified or set aside. Nevertheless, the notions of fair play and substantial justice that underlay the old rules would be honored and would be relevant on questions of incompatibility.

Since *International Shoe*, the Supreme Court has hacked away the controversial edges of the "mere solicitation" rule. In *Quill*, for example, upon reviewing the old tax jurisdiction rules in light of developments in the personal jurisdiction field, it eliminated the need under the Due Process Clause for advertising to be accompanied by some physical presence in the forum state.<sup>277</sup> However, when the question is not whether the edges of the rule must go, but whether the core of the rule also must go, courts should ask whether the core of the rule has lost all support in the modern conceptual framework and whether it serves no continuing need.

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276. *International Shoe*, 326 U.S. at 316 (inner quotation marks omitted).

277. *Quill Corp. v. North Dakota*, 504 U.S. 298, 308-09 (1992).

## 1. The Modern Conceptual Framework

The core of the "mere solicitation" rule can be preserved by interpreting the modern "unilateral activity" rule in the manner suggested in the second part of this Article. The suggested interpretation assumed that it is consistent with the modern conceptual framework to take federal liberty into account in establishing limits on the state's personal jurisdiction power.

This assumption is consistent with the modern conceptual framework. Under the Full Faith and Credit Clause, which provides the driving force behind our personal jurisdiction rules in the circumstances considered here, modern concepts of federalism are a source to use to define the legitimate reach of a state's sovereign power relative to other states and their citizens. And, federal liberty is one of the fundamental concepts of modern federalism.

The assumption that it is appropriate to take federal liberty into account must be regarded as highly controversial in light of the Supreme Court's footnote in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*<sup>278</sup> and the ongoing effort by some scholars to convince the Supreme Court to substitute convenience for territoriality as the touchstone of personal jurisdiction.<sup>279</sup> However, three points can be made in defense of this assumption. First, only Justice Brennan expressed support for a fundamental rethinking of personal jurisdiction.<sup>280</sup> Even he indicated that he would not abandon territoriality, and he has now retired. Second, notions of convenience alone (without sovereignty) cannot provide a sufficient explanation for substantial parts of the modern conceptual framework, including basic theories of consent, general jurisdiction, and specific jurisdiction.<sup>281</sup> So, if this assumption is unjustified, the core of the "mere solicitation" rule here is far from the only jurisdiction rule that is in jeopardy. Third, during the past thirteen years, no radical readjustment in the content of the personal jurisdiction rules has resulted from the Supreme Court's *Insurance Corp. of Ireland* footnote.<sup>282</sup>

Whether federal liberty should be taken into account in the manner suggested here depends on the further assumption that the kind of mobility that matters is not limited to a permanent change of residence from one state to another. This assumption is also highly controversial. During the debates over whether a state can apply its abortion restrictions to its citizens' extraterritorial behavior, Professor Regan argued that a state's authority over its citizens does not end when they are temporarily absent, while Professor

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278. 456 U.S. 694, 703 n.10 (1982); see text accompanying *supra* notes 111-12.

279. See *supra* note 68.

280. *World-Wide Volkswagen*, 444 U.S. at 311-12.

281. BRILMAYER, *supra* note 26, at 296.

282. Weinstein, *supra* note 66, at 56-57.

Brilmayer argued that territoriality trumps residence in these circumstances.<sup>283</sup> At first glance, it seems that if Regan wins this debate, the assumption required here must be invalid.

However, it is possible to concede Regan's principle and still limit its effect. If a state retains authority over its own citizens during their absence, the retention of this authority does not imply that the state also gains authority over the out-of-state businesses with which its citizens deal while outside of the state. Rather, it implies that the state can proceed against its own citizens. To proceed against citizens who have violated its law, the state must be able to identify the violators, and must be willing to punish them. In most circumstances, the state will have a hard time identifying the violators, and may not want to punish them. In the illustration considered here, for example, the home state will find it hard to identify minors who have obtained out-of-state abortions, and the state is likely to feel that it is inappropriate to punish the minors. So, perhaps it is by protecting out-of-state businesses from the state's personal jurisdiction that the effect of the residence principle is limited, thereby preserving federal liberty in situations where the kind of mobility involved is only a temporary change of location from one state to another.

Though these two assumptions are controversial, the fundamental point of the first part of this Article was that the list of required assumptions cannot be made shorter, and the assumptions cannot be made easier, merely by jumping out of the field of personal jurisdiction and into the field of conflict of laws. For example, if federalism and limited state sovereignty truly were concepts which are utterly foreign to the Due Process Clause, these concepts would not magically cease to be foreign just because a state's conflict of laws power is at stake. In fact, the assumptions become harder to make because the Supreme Court has given the states more overall leeway in the conflict of laws field.

## 2. Continuing Need

Some scholars argue that, whether or not it once was defensible to take federalism and limited state sovereignty into account, it has become indefensible today.<sup>284</sup> The United States has become a very different place, so the argument goes, and the sovereign jealousies among the states have greatly diminished since the Constitution's framing.<sup>285</sup> That is true, of

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283. Donald H. Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865, 1906-13 (1987); Brilmayer, *supra* note 21, at 877-889.

284. Redish, *supra* note 68, at 1136.

285. Redish, *supra* note 68, at 1136.

course, but of limited significance. The argument assumes that the only problem of federalism that ever could matter is the problem that mattered most in the antebellum years when these sovereign jealousies had to be overcome in building a new union.

In fact, the illustration considered here demonstrates that the problem of faction examined by Madison still merits examination today. Suppose the Supreme Court were to announce tomorrow that it is constitutional for a state to extend its parental involvement requirement to its minors' out-of-state abortions and to extend its courts' personal jurisdiction over the abortion providers. Madison's thought tells us that a pro-life faction in some state is likely to take advantage of this announcement. So, circumstances, modern concepts of federalism which build on Madison's thought and subsequent experience have something relevant to say about the continuing need for territorial limits on a state's personal jurisdiction power. Federal liberty remains important, and it is enhanced if out-of-state businesses are free to tell people how they might benefit from it. Hence, the core of the "mere solicitation" rule serves a continuing need.

The cost of preserving the core of this rule, measured in terms of its impact on individual fairness, has not become unacceptably high. Just as modern transportation and communications have reduced the inconvenience that interstate litigation causes defendants, they have reduced the inconvenience that it causes plaintiffs. No doubt, some plaintiffs will find it uneconomical to return to a state to which they once traveled for the purpose of suing a business that they once dealt with while there. However, this problem exists even if the business has done no advertising in the plaintiff's home state. The most that can be said is that advertising adds to the problem by convincing more people that it is more often in their best interest to travel to other states. When they do, however, they know that they are crossing state boundaries, and they know in a general way that these boundaries have great legal significance. The fact that they saw an advertisement before leaving does not decrease their knowledge in either respect.

The cost of preserving the core of the rule, measured in terms of its impact on the administration of justice, also has not become unacceptably high. Many scholars lament the fact that the minimum contacts test has failed to yield clear personal jurisdiction rules, leading to wasteful battles over jurisdiction.<sup>286</sup> In this respect, a rule that advertising within the forum state provides a basis for personal jurisdiction is easy to administer, and that may explain part of its attraction to some lower courts.

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286. *E.g.*, Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From Pennoyer to Burnham and Back Again*, 24 U.C. DAVIS L. REV. 19, 101-03 (1990).



However, the rule advocated here is only slightly harder to administer. Under it, a court must ask only whether the defendant's advertising was misleading, concerned an unlawful activity, or concerned a socially harmful activity that has been given less protective treatment in commercial speech decisions. Almost no judicial resources are required to examine a complaint for these allegations.

Moreover, the slightly greater clarity of the opposing rule does not guarantee a favorable impact on the administration of justice. Like any jurisdiction rule that will add to a plaintiff's forum shopping options, the rule that advertising provides a basis for personal jurisdiction will be exploited in ways that will lead to more *forum non conveniens* and venue transfer motions. It is impossible to predict any overall savings in judicial resources in these circumstances.

### F. Summary

Personal jurisdiction rules designed to apply under both the Full Faith and Credit Clause and the Due Process Clause should take into account the need to protect the people's liberties by maintaining limits on a state's legitimate authority within our federal system. Congress has the power to conclude that other needs have become more important than this need, but Congress has made no such decision. So, in deciding which of the old personal jurisdiction rules should survive in modified form under *International Shoe*, concepts of federalism that relate directly to the preservation of the people's liberties should be included among the traditional notions of fair play and substantial justice that *International Shoe* seeks to preserve.

In particular, the unilateral activity rule should be interpreted so as to preserve the liberty that comes from diversity coupled with mobility. Lower courts have done this to some extent. By treating a consumer's interstate travel as unilateral activity, they have put out-of-state businesses beyond a state's reach if the business does not use advertising to influence the consumer's decision to travel. However, lower courts have undercut federal liberty by treating advertising as a basis for personal jurisdiction. It is odd as a matter of common sense—and fundamentally wrong from a First Amendment perspective—that this positive feature of our federal system should be put at risk simply because out-of-state businesses seek to tell consumers how they might benefit from it. It has become common to make unfavorable comparisons between our personal jurisdiction rules and some of the broader personal jurisdiction rules used in Europe. However, this comparison is not entirely fair. The EEC Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters specifies in Article 27(1) that a judgment shall not be recognized "if such recognition is

contrary to public policy in the State in which recognition is sought."<sup>287</sup> Nonrecognition on this ground has been forbidden in the United States under the Full Faith and Credit Act since the Supreme Court's 1908 decision in *Fauntleroy v. Lum*<sup>288</sup>

This important point should remind us that personal jurisdiction rules fit within a larger framework that also includes judgment recognition rules and conflict of laws rules. There is much to be said for building into at least one of these three sets of rules some safety valve that operates in favor of federal liberty when sharp conflicts develop among the states on important social issues. In the United States, the main safety valve has been built into our personal jurisdiction rules. Because Congress is unlikely to amend the Full Faith and Credit Act to create a new safety valve in our judgment recognition or conflict of laws rules, it is no small matter to let states treat advertising as a basis for personal jurisdiction. Doing so will make the main safety valve less effective, with no backup valve in place.

## VI. CONCLUSION

This Article has argued that the lower courts have been too quick to treat advertising as a basis for personal jurisdiction over out-of-state businesses that deal with their customers outside of the forum state. Such treatment is justified in suits against taverns in view of the less protective treatment given to liquor advertising in commercial speech decisions. However, such treatment is unjustified in suits against abortion providers, health care facilities, and businesses engaged in ordinary commercial activities. Whether a state can treat advertising as a basis for personal jurisdiction in suits of the latter kind raises First Amendment and federalism issues which, in this writer's judgment, are fundamental. That these issues should have escaped the courts' attention is perhaps the ultimate disappointment.

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287. CONVENTION ON JURISDICTION AND ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS [EEC 1968 BRUSSELS CONVENTION] art. 27(1).

288. 210 U.S. 230 (1908).

