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A New Litany of Personal Jurisdiction

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A NEW LITANY OF PERSONAL JURISDICTION

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A number of years ago, a quartet of my students, doubtless in the throes of spring fever, created the most popular civil procedure song ever written—"I Wanna Maximize My Minimum Contacts With You!" As I recall, my part in the stellar performance was limited to an occasional pseudo-bass "oh yeah," while the group harmonized at length about "purposeful availing," "presence," and the "stream of commerce." Everyone realized that the desired goal of the maximization was a constitutionally proper assertion of personal jurisdiction. Everyone also realized that certain talismanic phrases were somehow relevant and perhaps necessary to achieving that goal. What was not clear was that anyone realized quite why. Some things never change.

For more than a century, courts have asserted and lawyers have known that an exercise of jurisdiction over a defendant or his property must accord with restrictions imposed upon sovereign authority by the constitutional demand for due process.1 While compliance with due process originally was linked to the power of the state to enforce its judgment against the defendant,2 today such compliance requires only

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1. Pennoyer v. Neff, 95 U.S. 714 (1877). Jurisdictional issues, as in Pennoyer, most frequently arise in the context of a state's attempt to assert such authority over a nonresident defendant. The United States, however, is also restrained by the notion of due process, which here as well requires some aggregate of contacts between itself and the defendant. Citizenship presumptively satisfies the constitutional requirement; thus questions involving federal court jurisdiction arise when the defendant is an alien, see Note, National Contacts as a Basis for In Personam Jurisdiction over Aliens in Federal Question Suits, 70 CALIF. L. REV. 686 (1982), or when a congressional statute or Federal Rule of Civil Procedure limits the otherwise proper scope of that jurisdiction. Fed. R. Civ. P. 4(e), of course, does ordinarily limit the jurisdiction of a federal district court to that which the state in which it sits could statutorily and constitutionally exercise. Thus, whether a jurisdictional dispute originates in state or federal court, its resolution most often involves consideration of the fourteenth amendment's limit on state power.

2. 95 U.S. 714 (1877). Justice Field, having articulated a substantive and inherent limit on state authority, needed to define that limitation with reference to some commonly accepted, though constitutionally unmentioned, legal principle. Not surprisingly, he turned to public law, which then recognized "exclusive jurisdiction and sovereignty over persons and property within [each nation's] territory," and a concomitant total absence of jurisdiction or sovereignty over persons or property outside the national boundaries. Id. at 722. See Perdue, Sin, Scandal and Substantive Due Process: Personal Jurisdiction and Pennoyer Reconsidered, 62 WASH. L. REV. 479 (1987). As a limitation on nation-states, this ap-
that the jurisdictional exercise "comport with 'fair play and substantial justice.'" In turn, fair play and substantial justice require both that the defendant has established "minimum contacts" with the forum and that the exercise of jurisdiction be "reasonable." In their turns, "minimum contacts" requires that there be "some act by which the defendant purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws," and "reasonableness" requires consideration of the practical burdens imposed upon the defendant by litigating in the forum, the interests of the forum in adjudicating the dispute, the plaintiff's interest in obtaining effective relief, and the systemic interest in the efficient resolution of controversies and in the furtherance of substantive social policies. Furthermore, whether the defendant's activities in the forum were continuous or isolated, and whether the claim brought against him is related to those activities, are additional issues relevant to a jurisdictional decision. Out of the resulting jumble of words and phrases there always does come a decision, but the frequency with which the issue arises evidences widespread confusion as to how and why that decision is reached.

Nonetheless, for those in search of something certain in the mass of confusion, the jumble does reveal one abiding jurisdictional truth: the defendant must have "purposefully availed." Unfortunately, here

proach has some appeal: it is systemically unwise to render judgments which cannot or will not, as a matter of comity, be enforced, and any attempt to enforce a judgment within another nation's territory risks war. The approach, however, is no longer the sole basis of international jurisdictional assertions, which today may also be justified by the effect within one nation of actions undertaken elsewhere. See United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945). For discussion, see Gerber, Beyond Balancing: International Law Restraints on the Reach of National Laws, 10 YALE J. INT'L L. 185, 192-202 (1984). Furthermore, the approach's appeal as a limitation upon states bound together in a federal union was never as apparent; a state rendering a judgment need not be able to enforce it through an exercise of its own power or rely on the shifting and unpredictable concept of "comity." Rather, all other states are required to accord that judgment full faith and credit, so that the power of all bolsters the power of the one, as long as whatever restraint imposed upon the rendering forum is satisfied. See Kurland, The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts—From Pennoyer to Denckla: A Review, 25 U. CHI. L. REV. 569, 585 (1958).

6. Asahi, 107 S. Ct. at 1034. The simpler origin of this language can be found in International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945), which directed the court's attention to the "quality and nature of the activity" of the defendant in the state "in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to ensure."
7. Hanson, 357 U.S. at 253. In his dissent in World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980), Justice Brennan cast doubt even upon this surety, suggesting that, just as the concern with power in Pennoyer v. Neff, 95 U.S. 714 (1877), had given way to the Court's current concern with purposeful contacts between the defendant and the forum, current notions ought to give way to a broader concern focused on contacts between the parties, the transaction, and the forum. Thus, when the unilateral, but fully foreseeable, act of the plaintiff brought a product sold by the defendant to the
too the how and why are unclear. Also unfortunately for the reign of certainty, although jurisdiction requires some purposeful activity of the defendant vis-a-vis the forum, the second revealed jurisdictional truth is that such purposeful activity does not always justify jurisdiction.

In order to determine whether a defendant’s activity satisfies the first constitutional hurdle, it is necessary initially to determine why that hurdle exists. This article will, therefore, attempt to justify the focus of the Court on the character of the defendant’s activity and to explain why the required characterization of that activity as purposeful, although necessary, is not jurisdictionally sufficient. Briefly, it will argue that the purposeful nature of the defendant’s act does not ensure the systemic interest either in opposing one state’s intrusions into another’s sovereignty or in the reasonable allocation of judicial business among the states. Such acts do, however, reflect a waiver of the defendant’s constitutional right to remain unconnected to a sovereign, and to be treated by that sovereign as unconnected to it. Since that right may simultaneously be retained and waived with respect to different aspects of the defendant’s life, it is usually necessary as well that the purposeful act be related to the claim brought against the defendant-actor.

The article will then explore in what situations the Court has concluded, and in what situations it should conclude, that the defendant’s forum contact was purposeful and that, therefore, an assertion of jurisdiction on a claim related to that contact is proper. It will suggest that the traditional focus of courts since 1945 on the past physical presence of the defendant or its agents in the forum should be replaced by consideration of the extent to which the defendant participated actively, rather than passively, in creating its relationship with a forum

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8. See infra text accompanying notes 16-33.
10. See infra text accompanying notes 49-70.
11. See infra text accompanying notes 71-87.
actor.\textsuperscript{12} Intentional affiliation with such an actor, no matter where forged, constitutes a waiver of the defendant’s right to remain unconnected with the actor, and that waiver reflects a coextensive waiver of the defendant’s right to remain unconnected with the forum.

I. WHY PURPOSEFUL?

Depending upon which jurisdictional opinion of the Supreme Court is cited, and often also upon which language in any such opinion is quoted, the requirement that jurisdictional assertions comport with due process reflects either the individual right of a defendant to be free from certain exercises of sovereign authority,\textsuperscript{13} or the systemic interest in checking those exercises by any single sovereign in order to protect the interests of coequal sovereigns,\textsuperscript{14} or both.\textsuperscript{15} Logically, then, the purposeful nature of a defendant’s affiliating conduct with the forum attempting to assert jurisdiction must satisfy, in whole or in part, one or both of those goals.

\textit{A. Purposeful Conduct as a Method of Protecting the Sovereign Interests of Other States}

The purposeful character of individual action is, in some situa-

\begin{footnotesize}
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\item See infra text accompanying notes 88-149.
\item Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n.10 (1982) ("The restriction on state sovereign power . . ., however, must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause.").
\item Hanson v. Denckla, 357 U.S. 235, 251 (1958) (restrictions on the personal jurisdiction of state courts "are a consequence of territorial limitations on the power of the respective States").
\item World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-92 (1980) (The concept of minimum contacts performs "two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.").
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tions, clearly relevant to the potential affront to other sovereigns that the jurisdictional assertion by one will cause. An act consciously undertaken in one state, which had consequences only there, would clearly justify an assertion of jurisdiction there over the actor, whether or not he was a citizen of the state in which he had acted. For at least two reasons, the state to which he owed allegiance—the state of which he was a citizen—would recognize the other's right to control his activities there and to compel him to answer there for those activities. Realistically, it could do nothing else in light of the potential power of the other state to seize the defendant and force him to remain until the final resolution of the dispute. Second, its recognition of the other state's authority is an inevitable corollary of its own assertion of authority over those who act and thus cause consequences within its boundaries.

On the other hand, should a state attempt to assert jurisdiction over a nonresident defendant who never acted or caused consequences within the forum, the affront to other sovereigns is equally clear: their authority to hear disputes arising from acts or consequences within their territory would be usurped by one attempting to assert universal control. However, while the purposeful actions of a defendant may thus eliminate potential friction between sovereign states, the extent to which one sovereign may assert jurisdiction, within the confines imposed on state authority by our federal system, is not obviously circumscribed by the characterization of the defendant's action as purposeful—nor has it ever been.

Until 1977, for instance, there was nearly universal agreement that the presence in the forum of property that belonged to the defendant gave the forum authority to assert jurisdiction over the property and to apply it towards payment of the defendant's liability to a plaintiff, as adjudicated by the forum's courts.16 While the presence of tangible property in the state usually evidences a purposeful act by the

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16. The presence of property within the forum, seized at the commencement of the lawsuit, was one basis of jurisdiction recognized by the Pennoyer Court. Its validity was confirmed in Pennington v. Fourth Nat'l Bank, 243 U.S. 269 (1917), in which the Court relied on what it saw as an obvious distinction between the assertion of such jurisdiction and the assertion of jurisdiction over the owner of the property. By 1957, at least one state, California, had become uncomfortable with the failure to consider contacts between at least the parties, the transaction, and the forum when jurisdiction was based upon the presence of property, but for 20 years that concern was not widely shared. See Atkinson v. Superior Court, 49 Cal. 2d 338, 316 P.2d 960 (1957), cert. denied, 357 U.S. 569 (1958). On the Atkinson facts, jurisdiction was traditionally justified by virtue of the presence in California of a debt owed the plaintiffs; there were also sufficient relevant contacts to satisfy due process, assuming that an assertion of such quasi in rem jurisdiction required more than the presence and seizure of the res. It was, therefore, unnecessary for the Supreme Court to review the decision, whatever its then-held view of the sufficiency of property as a basis of jurisdiction, unless it disagreed with the California finding of minimum contacts.
property's owner, the presence of other property may reflect no act, purposeful or otherwise, of the owner. If a debt owed by Jones to Smith is found wherever Jones is found, Smith's property is as peripatetic as is Jones, and its location at any moment is unaffected by Smith's acts.

The Supreme Court, however, no longer finds due process to be satisfied automatically by the mere presence of the defendant's property within the state. Perhaps it is the lack of necessary purposeful activity by the defendant in locating his belongings in the state which is now seen as offensive to the concept of federalism, which in the past was theoretically satisfied by power and which today is not. But it would seem, intuitively as well as logically, that power does satisfy at least traditional systemic concerns: it is difficult to articulate any affront to the sovereign power of one state resulting from another's assertion of control over property found within its boundaries.

Today, however, whatever limitation interstate relations may impose upon jurisdictional assertions, it is clearly not coextensive with territorial power. Rather, the reasonable and orderly distribution of judicial business among the states surfaces as a consequence, or an independent requirement, of proper jurisdictional decisionmaking. This desired distribution reflects recognition of both broader authority in each state than was accepted in the days of the territorial model and the potential effect on the sovereign interests of one state caused by another's assertion of jurisdiction. However, in this model the recognized interests of each sovereign in turn reflect its role in a national community of shared goals. The affront which results from an illegitimate assertion of jurisdiction is not primarily to the sovereignty of another state, but to the national search for fair and effective resolution of disputes.

While the forum within which a defendant purposefully acts may well be an appropriate forum in which to locate litigation against him,
that forum's appropriateness in this sense is not a function of the purposefulness of his actions. The intentional nature of a decision to affiliate oneself with a state reduces the validity of another state's claim of sole sovereign control; it does not necessarily affect the ease with which litigation may proceed there as opposed to elsewhere. Independently of the defendant's intent, objective considerations—such as the location of evidence and witnesses, the amenability of other defendants to service of process, and the familiarity of the court with the applicable substantive law—may affect the desirability of exercising jurisdiction in the forum. 21

In any event, the propriety of restraining a state's assertion of jurisdiction over the defendant because of the effect such an assertion may have upon the sovereignty of other states or upon the states' shared interest in the reasonable allocation of judicial resources is questionable at best. The constitutional source of the restraint, the due process clause of the fourteenth amendment, is a guarantee of an individual right, a fact implicit in the accepted ability of a defendant to waive a jurisdictional objection. 22 True, the Court's initial definition of the substance of that individual right drew upon then-prevailing public law notions of sovereign power, 23 and thus historic fidelity justifies retention of the modern equivalent as at least a part of the current definition. But logic does not.

To the extent that the Constitution contemplates and attempts to resolve tension among the states resulting from the retention by each of judicial autonomy, it relies upon the strictures contained in the full faith and credit clause. 24 By its terms, that clause requires that each state accord full faith and credit not only to the judgments of other states but also to their "public Acts," or statutes. Compliance with that command, through the use of another state's law to resolve a dispute, should exhaust the obligation of the forum to consider the effect its exercise of judicial power might have on other states. The potential


23. See supra note 2; but see Perdue, supra note 2, at 513-14, for an argument that Justice Field, the author of the Court's opinion in Pennoyer, recognized that federalism was not an interest protected by the fourteenth amendment; the "protection" of state sovereignty was thus simply a byproduct of the protection of individual right as commanded by the international framework. See also infra notes 59-63 and accompanying text.

affront is seen as the application of another's law, not the determination of liability in another's court under one's own law. 25

The difficulty, given the interpretation by the Court of this command, is that the obligation so imposed is virtually meaningless. A state is free to ignore the claim of another state that its law should be utilized as long as the forum state can demonstrate the existence of "significant contacts" between the forum and the parties and transaction.26 In determining the "significance" of those contacts, the forum is not obligated to consider them in light of the contacts with other fora. As a practical matter then, only the total absence of contact precludes the constitutional use of forum law.27 If, then, state sovereignty is to be protected effectively, it is necessary to look elsewhere for the source of that protection. It may not be coincidence that the modern case that stated clearly and most strongly the continuing sovereign restraint on jurisdiction, Hanson v. Denckla,28 is also a case in


26. See Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981). The existence of such contacts, which supposedly guarantees that the forum has a constitutionally cognizable interest in the outcome of the litigation, assures that regulation of the parties' conduct under forum law will be neither arbitrary nor fundamentally unfair. Of course, as the Court recognizes, that same restraint is also imposed upon a state's use of its own law by due process, which requires more than an invited basis of personal jurisdiction before sanctioning a deprivation of property. Only Justice Stevens argues that the full faith and credit clause protects other states from forum actions which infringe upon their legitimate interests, and his is a voice crying in the wilderness. Id. at 320-23 (Stevens, J., concurring). For a description of the Court's importation of these concerns into the jurisdictional analysis by virtue of its continued reference to forum interest, see generally Comment, World-Wide Volkswagen, supra note 21.

27. Compare Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) (Kansas precluded from use of Kansas law to determine liability of a nonresident defendant to nonresident plaintiffs for interest on royalties paid for the use of land outside of Kansas) with Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981) (Minnesota free to use Minnesota law to determine the liability of a nonresident insurance company to a resident widow of a nonresident insured who died outside Minnesota). Interestingly, the Court did permit Kansas on the Shutts fact pattern to utilize its own statute of limitations, a decision in accordance with precedent but which emphasizes the scope of a state's freedom to choose its own law. See Sun Oil Co. v. Wortman, 108 S. Ct. 2117 (1988). It is this lack of any meaningful constitutional restraint on state choice of law which cuts most clearly against Professor Stein's recent argument that personal jurisdiction ought to be held proper whenever forum law applies to the dispute. See Stein, supra note 25. Stein recognizes the difficulty, supra note 25, at 752-53 n.259, but to urge the Court to change both doctrines, while perhaps logical, increases the likelihood that neither will change.

which each of two states, Delaware and Florida, applied its own law to determine the validity of a trust, and each was constitutionally free to do so. 29

Of course, no matter how strictly the full faith and credit clause is interpreted, it does not directly protect the common systemic interest in a wise division of judicial business among the states. Whether a state decision to utilize another's law is based upon its own choice of law rules or is constitutionally compelled, the state is not free to refuse to resolve civil disputes merely because they arise under that other law. 30 Yet such disputes, for the kind of objective reasons noted above, frequently are precisely the kind of disputes that would better be resolved in another forum. The common law doctrine of forum non conveniens 31 provides one framework within which a forum with jurisdiction over the defendant and the subject matter may decide that dismissal is nonetheless appropriate, taking into account, among other things, the applicable law. 32 But the framework is weak. 33 Furthermore, depending upon the nature of the jurisdictional restraint im-

29. Similarly, in light of the Court's holding in Allstate, the jurisdictional decision in Rambo v. American Ins. Co., 839 F.2d 1415 (10th Cir. 1988), demonstrated the odd relationship between the two doctrines. On facts very similar to Allstate, the court in Rambo found no jurisdiction over a nonresident defendant; no general jurisdiction was available, and the court noted that only the plaintiff's post-claim residence connected the suit to the forum.

30. If nothing else, at least that much is clear from the clause. Assuming that the state court is one of general jurisdiction, which hears parallel claims arising under its own law, discrimination in the assertion of that jurisdiction because of the source of the claim is unconstitutional. Cf. Testa v. Katt, 330 U.S. 386 (1947), precluding such discrimination against even penal laws of the United States.


32. Gilbert posited the following criteria for determining whether the attempt to utilize a particular court for the resolution of a specific dispute constitutes an imposition upon that court's jurisdiction so as to justify dismissal:

An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability [sic] of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, "vex," "harass," or "oppress" the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.

Factors of public interest also have [a] place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that
posed by the due process clause itself, the doctrine may well be redundant. If the protection of individual rights prevents finding personal jurisdiction in at least every case in which the national interest in reasonable allocation of judicial business would counsel against it, this separate analysis is unnecessary. What, then, are the contours of the protection granted to individuals by the due process clause? How does the finding of purposeful conduct, which fails to define concerns of state sovereignty or further allocative goals, guarantee that those contours will not be exceeded?

B. Purposeful Conduct as a Method of Protecting Individual Rights

The initial formulation of the purposeful requirement, now repeated nearly automatically whenever a jurisdictional issue arises, equates such action by the defendant with benefit to him. By choosing to avail himself of the "privilege" of acting within the forum, he "invokes the benefits and protections" of the forum's laws. Implicit in that chosen benefit is a corresponding burden, the positive demand that he defend his actions before the forum's courts. Thus, the most obvious due process justification for the jurisdictional requirement is some notion of quid pro quo, appealing to basic notions of fairness and exchange.34

However, upon closer examination, the obvious is not particularly persuasive.35 In the first place, the "benefits" that accrue to the defendant frequently derive not from the laws of the forum within which he acts but from the economic relationship thus forged with a forum resident. In these fact patterns, to fall back on the defendant's ability to utilize the forum's courts to enforce his own rights is nonsen-

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Id. at 508-09 (footnotes omitted). The proper invocation of the doctrine provides a "valid excuse" for not hearing a claim which the forum would otherwise be constitutionally required to adjudicate. Missouri ex rel. Southern Ry. v. Mayfield, 340 U.S. 1 (1950).

33. When the doctrine is invoked, decisions as to its applicability most often resemble checklists and mathematical problems in addition. In any event, because the doctrine is discretionary, the trial court will be reversed only for an abuse of its discretion, further limiting the theory's predictive value. See generally Stein, Forum Non Conveniens and the Redundancy of Court-Access Doctrine, 133 U. Pa. L. Rev. 781 (1985); Stewart, Forum Non Conveniens: A Doctrine in Search of a Role, 74 Calif. L. Rev. 1259 (1986).

34. For a clear statement of this rationale, see Afram Export Corp. v. Metallurgiki Halyps, S.A., 772 F.2d 1358, 1362 (7th Cir. 1985). The benefits derived from forum law by the defendant-buyer from a forum exporter of scrap metal were "police and fire protection and perhaps other services for the facilities [of the seller] at which the buyer took possession" and "protection for the visit of the buyer's agent to inspect the goods before shipment." Id. at 1364. See also Greenstein, supra note 15, at 868.

35. For a clear, convincing, and detailed argument that this traditional "exchange rationale" comports with neither contract nor quasi-contract understanding, see Stein, supra note 25, at 734-38.
tical. That ability is a function of the connection between the other party and the forum, entitling the forum to assert jurisdiction over that other party.36 The nature of the defendant's activities in the forum, when he is posited as a hypothetical plaintiff, is simply not relevant to his access to the forum's courts.37 Second, assuming that the

36. See Froning & Deppe, Inc. v. Continental Ill. Nat'l Bank & Trust Co., 695 F.2d 289, 293 (7th Cir. 1982); Lakeside Bridge & Steel Co. v. Mountain State Constr. Co., 597 F.2d 596, 603-04 (7th Cir. 1979), cert. denied, 445 U.S. 907 (1980). But see Quasha v. Shale Dev. Corp., 667 F.2d 483 (5th Cir. 1982), in which enforcement of any decree in favor of the defendant-buyer to enforce a contract with the plaintiff-seller of land in Louisiana would necessarily be sought in Louisiana, whose courts alone could transfer title to local land. There, however, the hypothetical utilization of the forum's courts by the defendant would be not merely possible, but necessary—and the necessity is a reflection of the extent to which the contract involved purposeful connection with the forum. The New York seller-plaintiff did not claim that New York could assert jurisdiction over the nonresident buyer merely because the buyer could sue him there.

Pacific Atlantic Trading Co. v. M/V Main Express, 758 F.2d 1325 (9th Cir. 1985), also refers to the possibility of reciprocal jurisdiction, but there it is the inability of the defendant to sue the plaintiff locally which is used to support a finding of no jurisdiction over the defendant. A West German carrier, sued by a California corporation that had hired it to transport cargo to Malaysia, attempted to sue, as a third-party defendant, the Malaysian recipient and a Malaysian bank. The carrier had released the cargo only upon the defendant's guarantee of indemnity. In denying jurisdiction, the circuit court noted that the indemnity agreement had not created any corresponding obligation of the carrier that the Malaysian defendants could have enforced in California. What is important, however, is not the fact which the defendant will not utilize California's courts; it is that the defendant has no legally cognizable claim against the plaintiff, a fact which indicates the slight degree of contact between the parties. If such a claim did exist, the defendant's lack of related contacts would make it difficult to bring it to the forum state. See also Bond Leather Co. v. Q.T. Shoe Mfg. Co., 764 F.2d 928 (1st Cir. 1985).

It is at least arguable that on most similar fact patterns, the privileges and immunities clause of article IV, § 2 of the Constitution would preclude the forum state from denying access to a nonresident plaintiff on the basis of his nonresidency. In the first place, among the few rights of United States citizenship protected from state interference by the privileges and immunities clause of the fourteenth Amendment, is "free access to . . . courts of justice," presumably of the United States, "in the several States." Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 44 (1867), quoted with approval in Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 79 (1872). If access to the federal judicial system is a privilege of United States citizenship, it logically follows that access to a state's judicial system should be a privilege of state citizenship. Secondly, the purpose of the clause has long been held to be the fusion of many separate states into one nation, Toomer v. Witell, 334 U.S. 385, 395 (1948), forbidding discrimination based upon state citizenship with respect to those rights that are "fundamental" to the promotion of interstate harmony." Supreme Court v. Piper, 470 U.S. 274, 279 (1985). While cases under the privileges and immunities clause successfully challenging state discrimination have dealt with attempts to preclude access to a means of livelihood, compare United Bldg. & Constr. Trades v. Mayor of Camden, 465 U.S. 208 (1984) and Piper with Baldwin v. Fish & Game Comm'n, 436 U.S. 371 (1978), that certainly is not the only privilege which bears on the "vitality of the nation as a single entity." Baldwin, 436 U.S. at 383. The availability of judicial redress is equally necessary to the creation of a national economic unit, Piper, 470 U.S. at 280, and is closely related to the ability to pursue business opportunities in the state.

37. The nature of the plaintiff's connection with the forum is usually considered in the context of the forum court's assertion of jurisdiction over a nonresident defendant. If the plaintiff is a citizen of the forum state, the state has a recognized interest in protecting him from harm and securing relief for him if he is injured by another's actions. Furthermore, if his citizenship in the forum reflects his residence there, it is likely that litigation there will be convenient for him and that at least some of the witnesses and evidence will be located there. In other words, the plaintiff's contacts with the forum are relevant to the existence of suit-state contacts, which in turn determine whether litigating in the chosen
defendant does in fact derive benefit from forum law, the burden which most closely parallels that benefit is the governance of the defendant's conduct according to those laws, not the determination of his liability in the forum's courts.38 For example, a defendant who drives through a state benefits from that state's highway safety laws and is protected by the police, firemen, etc., of the state while he is present there. To subject him to those same substantive laws while he is driving through the state does indeed extract from him a quid pro quo, balancing precisely the benefit he receives against the burden imposed. But to compare the benefit obtained from the state's regulation with the burden of defending in its courts alleged violations of that regulation is to compare apples and oranges. The driver may expect and even accept as proper the jurisdictional result, but it is not possible to justify it by reference to a consciously chosen benefit from the state.39

Of course, a defendant that "purposefully avails itself of the privilege of conducting activities" in the forum may by statute be held to have "consented" to the forum's assertion of jurisdiction in certain circumstances.40 Making the statement, however, only side-steps the

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38. The jurisdictional result in Shaffer v. Heitner, 433 U.S. 186 (1977), demonstrates the Court's understanding of this, even though the Court continued to recite the Hanson v. Denckla, 357 U.S. 235 (1958), formula. In Shaffer, the direct and obvious benefits that accrued to directors of a Delaware corporation by virtue of Delaware law were insufficient to support adjudicative as opposed to legislative jurisdiction. Of course, under the theory of this article, those directors would be subject to Delaware's jurisdiction whether or not they ever acted in the forum. Ordinarily, the agreement to serve in such a capacity results from active negotiation by both parties. Even if, however, the terms of the corporation's offer to a prospective director were made on a "take it or leave it" basis, the affiliation thus offered is not one that the commerce clause is directly designed to foster, see infra note 108, and, in any event, the relationship so forged hardly envisons a passive role for the nonresident director.

39. See General Look, supra note 25, at 736-41, which argues that the state's interest in regulating the defendant's conduct justifies jurisdiction; a benefit-burden analysis, it is argued, is appropriate only in the context of general, not specific, jurisdiction.

question. This "consent" is wholly fictional, resulting from legislative fiat rather than informed choice. It is not a logical result of the action undertaken and fails to address the imbalance between action and result.41

41. This kind of "consent" received the imprimatur of the Court early in this century in Hess v. Pawloski, 274 U.S. 352 (1927). A Massachusetts statute equated driving in the state with the appointment of a state official as the driver's agent for service of process with respect to claims arising out of that activity by a nonresident. Jurisdiction was held constitutionally proper, although why, in an era which failed to recognize minimum contacts between the defendant and the forum as constitutionally sufficient, was anything but clear. Presumably, in order to elicit such consent, the state must be able to prohibit the defendant's conduct if he fails to grant it, but in most instances the privileges and immunities clauses, see supra note 36, and the dormant commerce clause would make such a prohibition unconstitutional.

After the Court adopted the concept of minimum contacts, the instances in which an appeal to such legislated consent were necessary declined drastically. The act of the defendant that resulted in the consent was almost inevitably an act by which he had "purposefully availed," and the consent was limited to causes of action related to or arising out of those actions. Presumably recognizing the fictitious nature of the consent, courts focused on reality—with one unfortunate exception and one logical one.

In Shaffer v. Heitner, 433 U.S. 186 (1977), a majority of the Court found that officers and directors of a Delaware corporation lacked minimum contacts with Delaware, apparently at least in part because Delaware's statute did not base jurisdiction upon their corporate status. Shortly thereafter, Delaware law was amended to include a consent provision: accepting a directorship of a Delaware corporation now constitutes consent to the appointment of either the local corporate agent or the Secretary of State as the director's agent for service of process with respect to claims arising out of alleged violations of the director's duties. Del. Code Ann. tit. 10, § 3114 (Supp. 1986). If previously a director who did not act within the state was constitutionally protected from an assertion of jurisdiction, it is not obvious how this statute changes that result. No contact between the director and the state is added, nor does the nature of the director's activity outside the state change. As a practical matter, the new state statute might be more likely to come to the director's attention than the sequestration statute in Shaffer. However, the foreseeability of jurisdiction is necessarily the foreseeability of constitutionally assertable jurisdiction, not of any attempt by the forum to claim it. See World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980). Cf. Eli Lilly & Co. v. Home Ins. Co., 794 F.2d 710, 720 (D.C. Cir. 1986); Raffaele v. Compagnie Generale Maritime, 707 F.2d 395, 397 (9th Cir. 1983). In both of these latter cases, the defendant's awareness of potentially proper assertions of jurisdiction, in hypothetical suits originated by other plaintiffs in the forum, was found to make the jurisdiction actually asserted "foreseeable."

The statute accurately reflects Delaware's interest in locating the litigation there, an interest which the majority in Shaffer questioned in the absence of such a statute. Cf. Pittsburgh Terminal Corp. v. Mid Allegheny Corp., 831 F.2d 522 (4th Cir. 1987); American Freedom Train Found. v. Spurney, 747 F.2d 1069 (1st Cir. 1984). But, like the statute itself, that interest also fails to change the quantity or quality of the defendant's forum contacts. See Shaffer, 433 U.S. at 226-27 (Brennan, J., concurring and dissenting); see also infra note 101.

In contrast to the illogical implication in Shaffer is the Court's opinion in Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982), which properly based a finding of jurisdiction upon consent. There, defendants who contested jurisdiction had failed to comply with the court's discovery orders, which were issued to enable the plaintiff to obtain evidence with respect to the defendants' contacts with the forum. Pursuant to Fed. R. Civ. P. 37, the lower court ordered that the defendants be found subject to its jurisdiction; the Supreme Court affirmed. True, the consent was implied from an act or series of acts of the defendants. But that implication parallels the implication of consent to the substantive laws of the state governing conduct that arises when a nonresident acts within the forum. See supra note 38 and accompanying text. By requesting the trial court to dismiss the suit for lack of personal jurisdiction, rather than defaulting, the defendants agreed to accept (or
By choosing to act within the forum, however, the defendant does choose to affiliate himself to some degree with a sovereign entity. Absent that choice, he may assert a right to remain unconnected with the entity, and to be treated by that entity as unconnected to it—a right which is waived by his purposeful conduct. Case law recognition of this right is implicit in the oft-repeated refrain that a state lacks the authority to assert jurisdiction over a defendant who has no contacts, ties, or relationship with the state. The state’s lack of authority simply reflects the defendant’s right to be free from certain assertions of such authority—his right to be, and to be treated as, unconnected.42

The source of this right of “unconnectedness” rests on two premises, each inherent in the United States structure of government. One is the continuing constitutional relevance of state lines, which mark off one sovereign from another and which, therefore, still define the entity with which a party may choose to remain unconnected. An expansive understanding of federal regulatory authority, unrestricted as a practical matter by any constitutionally compelled recognition of areas of activity left solely to state control, has substantially reduced the importance of these lines in other contexts.43 That understanding does not reduce their importance in the jurisdictional context, however. The ability of each state to create and control its own judiciary, one inherent attribute of sovereignty, was perhaps the attribute least affected by the adoption of the Constitution;44 the independence of those judiciaries has not been radically altered in the intervening two hundred years.45 Whether continued recognition of their independence

appeal) that court’s finding and, necessarily, to abide by its rules relevant to the court’s determination. The “quid” balances the “quo” and follows from it. But activity outside the courtroom does not balance litigation burdens, nor do those burdens flow naturally from such activity.

42. For a brief, though important, academic recognition of this right, see Maltz, Unravelling the Conundrum of the Law of Personal Jurisdiction: A Comment on Asahi Metal Industry Co. v. Superior Court of California, 1987 Duke L.J. 669, 683 (1987).


44. Only the full faith and credit clause of the Constitution, article IV, § 1, and the supremacy clause, article VI, directly limit the freedom of state judiciaries.

45. Most of the constitutional restraints on state judiciaries involve the procedural aspects of criminal trials. The due process clause of the fourteenth amendment also imposes jurisdictional restraints on the reach of a state court. Congress, acting in pursuance of its delegated powers, may either restrict the subject matter jurisdiction of state courts by making federal subject matter jurisdiction exclusive, or expand it by compelling state courts to hear federal claims. Testa v. Katt, 330 U.S 386 (1947).

The presumption of concurrent state and federal jurisdiction over issues of federal law is, however, well-settled. See Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473 (1981). The courts appear reluctant to infer congressional rebuttal of that presumption—more reluctant, for instance, than they are to find that state regulatory law has been preempted by federal statutes. Institutionally, this reluctance would seem appropriate. The effect a federal regulatory law will have on the diverse regulations of the several states is not clearly apparent to Congress, nor is the effect of those state regulations on the federal law necessarily known to it. On the other hand, the existence of concurrent state jurisdiction is
and source of authority in state sovereignty is either wise or necessary in today's age of rapid transportation, multi-state activities and increasing national control is not the issue. That recognition is mandated by history and can be refused only if the concept of a nation of states is abrogated by constitutional amendment.

The second premise underlying an individual's right to remain unconnected with, and to be treated as unconnected to, a sovereign is equally basic to our governmental structure. That the legitimacy of all governmental authority derives from the "consent" of those governed is a political truism, even though the most minimal reflection reveals that only rarely, if ever, does everyone subject to any exercise of that authority agree with the exercise. "Consent" in this sense cannot imply the right to refuse to accept regulation or regulated consequences; there is no freedom to "opt out." Rather, consent is derived from the right to participate in the decision-making process, so that the authority which is exercised over those governed is exercised by them. Those not within the polity, those without the right to participate in the creation and control of its authority, those who are "unconnected," cannot be subject to its authority, whether regulatory or judicial.

46. Even Justice Brennan, who more than any other member of the Court calls for an expansion of constitutional jurisdiction, recognizes the continued inevitable relevance of state boundaries. In World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 309 (1980), his dissent clearly equates due process and the convenience of the defendant: "Certainly, I cannot see how a defendant's right to due process is violated if the defendant suffers no inconvenience." And yet he soon thereafter agreed that contacts between the parties, the forum, and the litigation must exist. Id. at 310 (emphasis deleted and added). It would seem easy enough to posit a defendant, living close to a state border, who would suffer no obvious inconvenience from being forced to litigate a dispute in his neighboring state, even if the only contact with the forum were the plaintiff's citizenship. Distance, of course, is not the only measure of inconvenience, although it is an obvious and frequently mentioned one. The ability to compel the attendance at trial of reluctant witnesses, for example, may be necessary to the fair and expeditious resolution of a dispute; an Illinois defendant in an Indiana court located a block from his home would not be able to secure the required process for other Illinois witnesses. But this too is a function of the continued importance to state authority of state lines.

47. This concept of participation as the basis for legitimizing exercises of governmental authority is most readily reflected in cases dealing with regulation. Thus, for example, national regulation of areas of concern to states is justified by the role of the states in the federal legislative process, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985), and state regulation of or affecting interstate commerce is questioned at least in part because of the burdens such regulation imposes upon nonresidents without access to the political process. South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177 (1938). Its relevance in jurisdictional decisions has been recognized occasionally by lower courts. See, e.g., Madison Consulting Group v. South Carolina, 752 F.2d 1193, 1208 n.5 (7th Cir. 1985) (Swygert, Senior C.J., concurring). For a contrary argument, see Stein, supra note 25, at 736-38, arguing that a model dependent on the "private ordering" of defendant-state relationships unduly restricts state sovereignty.

Perdue argues that the individual's interest in freedom from an unrelated sovereign is not an inter-
This right to remain unconnected, like other rights of an individual vis-a-vis a sovereign, can be waived.\textsuperscript{48} The act that constitutes the waiver must be an act in which the individual chooses to engage—hence the jurisdictional concern with the "purposefulness" of a defendant's conduct. But the equivalency of the act and the waiver is objectively, not subjectively determined—hence the lack of jurisdictional concern with the actual wishes or idiosyncratic expectations of a defendant who has acted purposefully within a forum. If a reasonable person would perceive the choice to act, made by the defendant, as a waiver of the defendant's right to remain unconnected with the forum, the defendant's assertion of a different perception will be to no avail.

\textbf{C. The Scope of the Waiver: The Relation of Purposeful Conduct to the Claim}

This posited congruity between the purposeful act and the waiver of an otherwise existing right requires consideration of the relationship between the act and the claim being asserted in the sovereign's courts against the defendant-actor. The right to remain unconnected with the forum is a right with respect to all aspects of the defendant's life; the act by which he waives that right ordinarily relates to less than the entirety of his life. Only when the defendant is a citizen or domiciliary of the forum is he sufficiently connected with it that no claim of separateness from its judiciary is tenable. The citizen by definition participates in the creation of the government which now asserts its control over him. The domiciliary, by residing within the state without an intention to leave it, connects himself to the state in a fashion indistinguishable from that of a citizen; his inability to participate in the govern-

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\textsuperscript{48} That individual constitutional rights can be waived is what distinguishes those rights from other constitutional provisions designed to protect other interests. For instance, the limitations which article III places on the subject matter jurisdiction of the federal courts serve institutional goals unrelated to individual rights and are unaffected by the consent of parties to the litigation.
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erning process is offset by his choice to live within the boundaries of the sovereign.\textsuperscript{49}

When the defendant is neither a citizen nor a domiciliary of the state, however, his purposeful act does not logically connect him to the state with respect to any activity or consequences of activity distinct from that purposeful act.\textsuperscript{50} In other words, the right to remain unconnected with a sovereign may be simultaneously waived and retained with respect to different aspects of one's activities. It is then necessary to ask whether the defendant's purposeful act-waiver is related to the claim brought against him. If it is, then the connection between the defendant and the forum and the jurisdictional assertion is symmetrical; if it is not, the connection is asymmetrical—and suspect.\textsuperscript{51}

\textsuperscript{49} In current jurisdictional terminology, the citizen or domiciliary of a state has continuous and systematic contact with the state sufficient to sustain an assertion of "general" jurisdiction over him. See Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984).

The corporate defendant, of course, never participates in the same way as an individual does in the creation of government. However, the corporate citizen is itself created by that government and cannot logically argue a right to remain unconnected to it. Furthermore, at its "domicile," or principal place of business, the corporation occupies a position closely analogous to the individual domiciliary. Only in these two states is general jurisdiction over the corporation properly asserted—its "residence" in other states, in which it is "doing business," is insufficient. See infra note 69.

\textsuperscript{50} Saylor v. Dyniewski, 836 F.2d 341 (7th Cir. 1988), makes this point neatly. There, jurisdiction in an Illinois district court over an Indiana defendant in a claim brought by Illinois plaintiffs arising out of an accident in Indiana was denied. The plaintiff had argued that, since at the time of the accident the defendant was returning from transacting business in Illinois, jurisdiction was proper. The court, rightfully, disagreed.

\textsuperscript{51} Absent a relationship between the act of the defendant and the claim brought against him, it must be constitutionally proper to assert general jurisdiction over him. And absent citizenship or domicile in the forum, that constitutionality is unclear. Only when no other forum was available, in Perkins v. Benguet Consolidated Mining Co., 342 U.S. 342 (1952), has the Supreme Court upheld such jurisdiction. After Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984), it is at least clear that not all continuous and systematic contact with a state is sufficient, no matter how purposeful or beneficial. Whether the result there was dependent upon the defendant's lack of a permanent office or license to do business in the state is not known. For an argument that general jurisdiction ordinarily should not be available, see Twitchell, The Myth of General Jurisdiction, 101 Harv. L. Rev. 610 (1988), and Stewart, supra note 33, at 1286-94. But see Provident Nat'l Bank v. California Fed. Sav. & Loan Ass'n, 819 F.2d 434 (3rd Cir. 1987) (general jurisdiction constitutionally proper when the defendant's forum business is at the heart of the defendant's enterprise); Holt Oil & Gas Corp. v. Harvey, 801 F.2d 777, 779 (5th Cir. 1986) (general jurisdiction proper because of "constant and extensive personal and business connections . . . throughout [defendant's] adult life," despite the fact that the contract on which the claim was brought has insufficient contacts with the forum), cert. denied, 107 S. Ct. 1892 (1987); Dowless v. Warren-Rupp Houdaillees, Inc., 800 F.2d 1305 (4th Cir. 1986) (constitutional jurisdictional analysis confined to noting the unrelated but continuous sale and use of the defendant's products in the forum); Beacon Enter., Inc. v. Menzies, 715 F.2d 757, 763 (2d Cir. 1983) ("substantial solicitation plus" constitutes "doing business," and thus "presence," and justifies general jurisdiction under N.Y. Civ. Prac. L. & R. § 301 (McKinney 1972)). The most impressive academic justification for such broader availability of general jurisdiction is General Look, supra note 25, in which the authors justify general adjudicative jurisdiction when the defendant either has a unique affiliation with the forum or has engaged in sufficient continuous and systematic intrastate activities to be fairly relegated to the forum's political process.
When, in 1945, the Supreme Court first explicitly recognized the constitutional propriety of an assertion of jurisdiction based upon the activities of the defendant rather than the physical power of the state,\(^{52}\) it also recognized that the relationship between those activities and the plaintiff’s claim was a relevant and potentially determinative consideration.\(^{53}\) That recognition is currently subsumed in the Court’s requirement that jurisdictional assertions be “reasonable.”\(^{54}\)

While the change in word formula may not result in changed determinations, it does unnecessarily obscure the process by which those

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53. Id. at 317-18.
54. This current jurisdictional formula of the Supreme Court is similar to one used by the Ninth Circuit for a number of years. In order for an assertion of jurisdiction over a nonresident defendant to be constitutionally proper, the Ninth Circuit requires that the defendant have purposefully availed itself of the privilege of conducting activities in the forum (what the Court now refers to as a finding of minimum contacts) related to the cause of action, and that the assertion of jurisdiction be reasonable. See, e.g., Lake v. Lake, 817 F.2d 1416 (9th Cir. 1987); Pacific Atl. Trading Co. v. The M/V Main Express, 758 F.2d 1325 (9th Cir. 1985); Pacwest Int’l, Inc. v. Commercial Bank of Kuwait, S.A.K., 757 F.2d 1058 (9th Cir. 1985); Insurance Co. of N. Am. v. Marina Salina Cruz, 649 F.2d 1266 (9th Cir. 1981); Data Disc, Inc. v. Systems Technology Assoc., 557 F.2d 1280 (9th Cir. 1977). See also In-Flight Devices Corp. v. Van Dusen Air, Inc., 466 F.2d 220 (6th Cir. 1972), for an earlier formulation in a different circuit of a very similar test. The Ninth Circuit’s opinions have never recognized the inevitable congruity between the second and third requirements, and, in effect, occasionally assumed the first two and rested a jurisdictional dismissal on the unreasonableness of the forum. Pacint’l, Inc., 757 F.2d at 1058. But see Southern Machine Co. v. Mohasco Indus., Inc., 401 F.2d 374, 384 (6th Cir. 1968).

Compounding the analytical morass was the perceived dual relevance of “purposeful availment”—it was both the sine qua non of a jurisdictional assertion and, as “the extent of the purposeful interjection into the forum state,” 757 F.2d at 1065, the first of seven factors considered by the court in determining reasonableness. The latter consideration did not necessarily focus on the extent to which the defendant’s forum related acts could fairly be characterized as continuous, but rather took into account their purposeful, as opposed to fortuitous, character. Why it was thought useful to consider the same thing twice is unclear—except, of course, to the extent courts did not consider the nature of the defendant’s acts independently of the reasonableness of jurisdiction.

For an argument that at least some of these factors considered under the rubric of reasonableness—particularly the interest of the plaintiff and the forum in locating the litigation there—should instead be considered in determining whether the defendant should foresee an assertion of jurisdiction over it (ala World-Wide Volkswagen), see Comment, Minimum Contacts in Contract Cases: A Forward-Looking Reevaluation, 58 Notre Dame L. Rev. 635 (1983). See also Stephens, The Single Contract in Minimum Contacts: Justice Brennan “Has It His Way,” 28 WM. & MARY L. REV. 89 (1986); Comment, 17 Rutgers L.J. 683 (1986).

The Seventh Circuit has adopted, pursuant to its understanding of Supreme Court opinions prior to Asahi Metal Indus. Co. v. Superior Court, 107 S. Ct. 1026 (1987), a broad-ranging “reasonableness” test which focuses not only on the defendant’s conduct, but also on the forum’s interest and the degree to which litigation there would be convenient. Again, no direct attention is paid to the relationship between the defendant’s activity and the claim. See Madison Consulting Group v. South Carolina, 752 F.2d 1193 (7th Cir. 1985). When that issue is raised, it is in the context of determining the applicability of a long-arm statute. See Jacobs/Kahan & Co. v. Marsh, 740 F.2d 587 (7th Cir. 1984); Deluxe Ice Cream Co. v. R.C.H. Tool Corp., 726 F.2d 1209, 1215-16 (7th Cir. 1984); United States Ry. Equip. Co. v. Port Huron & D. R.R., 495 F.2d 1127 (7th Cir. 1974). See also Marino v. Hyatt Corp., 793 F.2d 427 (1st Cir. 1986); Hahn v. Vermont Law School, 698 F.2d 48, 51 (1st Cir. 1983). For an odd twist to the common statutory requirement that the defendant’s act be related to the claim, see Dowless v. Warren-Rupp Houdailles, Inc., 800 F.2d 1305, 1307 (4th Cir. 1986).
determinations are reached and the considerations that properly underlie them. For instance, writing for the Court in *Asahi Metal Industry Co. v. Superior Court*, Justice O'Connor found that due process would be offended were California to assert jurisdiction over a foreign third-party defendant, sued by another foreign manufacturer seeking indemnification with respect to a products liability claim brought against it, arising out of an accident in California. All members of the Court agreed that such an assertion would be unreasonable, although only four members of the Court held that the foreign third-party defendant had not acted purposefully vis-a-vis the forum.

In discussing the unreasonableness of jurisdiction in the forum, Justice O'Connor focused on "[t]he unique burdens placed upon one who must defend oneself in a foreign legal system;" the slight interest of the plaintiff (the individual injured in California, who had already settled his claims with the defendants he had sued, which did not include the petitioner) and of the forum in the transaction; and the interests, both procedural and substantive, of other nations in the resolution of the dispute. No part of the opinion focused on the relationship—or lack of relationship—between the activity of Asahi in California (placing its products into a stream of commerce which included the state) and the claim brought there against it. Yet all of the difficulties identified by the Court that would have been caused by an assertion of jurisdiction arose from the fact that the claim for indemnification did not arise out of the placement of the product in any stream of commerce. Rather, that claim arose from the contractual relationship between Asahi and the third-party plaintiff, a relationship distinct from the commercial relationship Asahi had arguably purposefully forged with California. Because the connection between Asahi and the state was not related to the claim, no reasonable understanding of the scope of Asahi's waiver of its right to remain unconnected to the state encompassed the instant litigation. And because the claim was not related to the waiver, any assertion of jurisdiction by California, a disinterested forum, potentially would have offended the interests of those fora in which activities related to the claim actually had occurred. But to the extent that the Court raised such potential inter-sovereign conflict as a reason to deny jurisdiction, it misapprehended this thrust of the due process clause and, moreover, engaged in unnecessary analysis. An assertion of jurisdiction over a claim related to

56. Id. at 1034.
57. Id.
58. The due process clause also prevents a state from utilizing its laws to resolve a dispute with which it has no connection. *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930). Since this is the same
the defendant's purposeful act-waiver neither unduly offends other
sovereigns, nor unduly burdens the national interest in the reasonable
allocation of judicial resources.

Assume that at issue in *Asahi* had been the assertion of juris-
diction over Asahi in a products liability suit, brought as a result of an
accident in California allegedly caused by the negligent foreign manu-
facture of a part incorporated into a larger product and sold to a con-
sumer in the state through the ordinary channels of distribution.59
The arguably purposeful act of Asahi—placing a negligently manufac-
tured part into a stream of commerce that included California, where
it was purchased by and caused injury to a consumer—clearly would
be related to the hypothetical claim. The waiver thus demonstrated
would encompass a choice to be connected to the forum with respect
to the consequences of the purposeful placement of the product there.
California has a recognized and legitimate interest in protecting those
who purchase unsafe products and are, as a result, injured in the
state.60 That other sovereigns, in particular Asahi's home nation, also
are interested in the defendant-actor and its activities would not de-
crease California's interest, and California's assertion of jurisdiction
would not be perceived as unduly offensive to the interests of other
sovereigns.61 Finally, the relationship between the defendant's act,
vis-a-vis the forum, and the claim would guarantee that the national
interest in the reasonable allocation of judicial business would not be
hampered by the forum's jurisdictional assertion; it is inevitable that at
least some of the witnesses and evidence will be located there.62 These

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59. See, e.g., *Mason v. F. Lli Luigi & Franco dal Maschio Fu G.B.*, 832 F.2d 383 (7th Cir. 1987),
in which the court distinguishes *Asahi* on precisely this ground.


61. See *supra* notes 26-27 and accompanying text.

62. If both the purchase of the product and the injury did not occur in the forum, jurisdiction is
much more problematic. If the purchase occurred elsewhere, it is difficult to see how the manufacturer
could be held to have intentionally waived its right to remain unconnected with the forum with respect
to the consequences flowing from the sale of the specific product. Its presence in the forum provided no
economic benefit, either intentional or knowing, to the manufacturer. If no other identical products are
sold in the forum, the lack of benefit is obvious; even if the forum is part of the market intentionally
served by the manufacturer, the economic benefit thus provided is not clearly related to the presence
of the specific product which caused injury. Only in the latter situation might jurisdiction be justified, if it
could persuasively be said that the manufacturer had waived its right to remain unconnected to the
forum with respect to all consequences of its manufacture of the general product. *But see Giotis v.
Apollo of the Ozarks, Inc.*, 800 F.2d 660 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 1303 (1987), in which
jurisdiction was upheld over a foreign manufacturer of fireworks that could not legally be purchased in
the state in which injury occurred.

If the product was purchased in the forum, the forum is clearly the source of the defendant's
economic benefit. If injury occurs elsewhere, however, the consequences of the defendant's negligence
are felt outside the forum, and the suit-state contacts are thereby diminished. *Cf. Petroleum Helicop-
kinds of suit-state contacts, to which the Court frequently also adverts in determining the "reasonableness" of jurisdiction, are completely absent only when the claim is not related to the defendant's forum-related conduct. 63

Of course, whether a claim is "related" to identified activity is not always obvious. 64 If the act of the defendant directly gives rise to the plaintiff's claim, the "related" nature is clear to all. A claim that the defendant's negligent driving in the forum caused a collision there with a vehicle driven by the plaintiff is a claim which "arises out of" the defendant's forum-related act. That act constitutes the defendant's waiver of his right to remain unconnected to the forum with respect to the forum consequences which flow from the act, and an assertion of jurisdiction by the forum is universally agreed to be proper. 65

A cause of action may, however, also be "related" to the defendant's forum conduct where that conduct forms part of the overall relationship between the plaintiff and the defendant, even though the claim brought against the defendant actually arose because of activities that took place outside the forum. In such an instance, the propriety of a jurisdictional assertion depends, as always, upon the scope of the waiver attributed to the defendant by virtue of his forum conduct. A defendant who commits a single act in the forum with respect to a relationship with a forum actor has not necessarily waived his right to remain unconnected to the forum with respect to other aspects of that

63. For a rare recognition that, if the claim against the defendant arises from or is connected with his purposeful activity, any concern with "reasonableness" is redundant, see Southwire Co. v. TransWorld Metals & Co., 735 F.2d 440, 445 (11th Cir. 1984). See also American Greetings Corp. v. Cohn, 839 F.2d 1164, 1170 (6th Cir. 1988); Stone v. Chung P'ei Chemical Indus. Co., 790 F.2d 20 (2d Cir. 1986); Bean Dredging Corp. v. Dredge Technology Corp., 744 F.2d 1081 (3rd Cir. 1984).

64. See the ongoing academic dialogue between Professors Brilmayer and Twitchell, reflected in Twitchell, The Myth of General Jurisdiction, 101 HARV. L. REV. 610 (1988) (arguing that assertions of dispute-specific jurisdiction may be proper if a forum act by the defendant is "connected" to the claim), and Brilmayer, Related Contacts and Personal Jurisdiction, 101 HARV. L. REV. 1444 (1988) (maintaining her position that specific jurisdiction requires an occurrence in the forum of "substantive legal relevance"). See also Twitchell, A Rejoinder to Professor Brilmayer, 101 HARV. L. REV. 1465 (1988).

65. See, e.g., Olsen by Sheldon v. Mexico, 729 F.2d 641 (9th Cir.), cert. denied, 469 U.S. 917 (1984). In such an instance, the forum inevitably has at least some ties to the litigation, even if another forum would be a more reasonable choice. And even if concerns of federalism are properly relevant to the jurisdictional inquiry, they demand only some ties to the litigation. See, e.g., Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984), in which the distribution by the defendant of a libel in the forum sustained jurisdiction in a claim for resulting damages, even though the focus of the publication and the injury were elsewhere. Cf. Moncrief v. Lexington Herald-Leader Co., 807 F.2d 217 (D.C. Cir. 1986), rejecting jurisdiction on a parallel fact pattern on statutory grounds. Some suit-state contacts may be required, but they need not be the best available contacts.
relationship, if the claim does not directly arise out of that act. 66 This conclusion follows from the general principle that a defendant who acts in a forum with respect to one aspect of his life does not thereby waive his right to remain unconnected to that forum with respect to all other aspects of his life. On the other hand, just as a citizen or domiciliary of a forum has forged a relationship with that forum which justifies the conclusion that he has waived his right to remain unconnected with it for all purposes, so too a defendant’s forum activities with respect to his relationship with a forum actor may be sufficient to support the conclusion that he has waived his right to remain unconnected to the forum with respect to all aspects of that relationship. 67 Since no claim is litigated in a vacuum, in the latter situation forum activity will inevitably be relevant to, though not determinative of, liability; suit-state contacts, aside from evidence of damages to the forum-actor plaintiff, will be present and federalism concerns again satisfied. The general, as opposed to specific, nature of the defendant’s intentional affiliation thus determines the scope of the waiver, the relatedness of the claim, and the constitutionality of jurisdiction. 68

The defendant’s purposeful conduct is properly the sine qua non


67. See, e.g., Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); Afram Export Corp. v. Metallurgiki Halyps, S.A., 772 F.2d 1358 (7th Cir. 1985); D.J. Inv., Inc. v. Metzler Motorcycle Tire Agent Gregg, Inc., 754 F.2d 542 (5th Cir. 1985); Republic Int’l Corp. v. Amco Engineers, Inc., 516 F.2d 161 (9th Cir. 1975).

68. Of course, the distinction between the specific and the general “relationship waiver” is not always clear, nor can its determination be mechanical. See Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984) (Brennan, J., dissenting). But, because the distinction is of constitutional magnitude, state definitions of state statutory requirements that a claim be “related” to a forum act cannot be assumed to be relevant or appropriate to the inquiry. Such definitions must ordinarily be complied with before jurisdiction is found because of Fed. R. Civ. P. 4, see supra note 1; however, compliance is solely a function of state law, and states are free to interpret their statutory language as they see fit. See, e.g., Helicopteros, 638 S.W.2d 870, 872 (Tex. 1983), in which the Texas Supreme Court simply dismissed the “related” restriction when it believed due process to be satisfied in its absence. Cf. Jacobs/Kahan & Co. v. Marsh, 740 F.2d 587, 591 (7th Cir. 1984), finding both the Illinois “relatedness” requirement and due process to be satisfied; the claim “[aid in the wake” of an Illinois business transaction, and that transaction, in light of its relation to the parties’ entire course of dealing, was found sufficient to sustain jurisdiction. In Jacobs/Kahan, the defendant partially negotiated and executed a contract in Illinois, pursuant to which the plaintiff was to obtain a lease from K-Mart for property of the California defendant in California. However, the claim was for breach of a subsequent extension of that contract, under which the plaintiff was to procure a different kind of lease; the facts do not indicate any physical “Illinois connection” with the subsequent agreement other than the continued Illinois presence of the plaintiff. Part II of this article, infra, argues that the sufficiency of the plaintiff’s citizenship depends upon the interactive, as opposed to passive, nature of the relationship forged by the defendant with the plaintiff. See also Young v. Colgate-Palmolive Co., 790 F.2d 567, 570 (7th Cir. 1986) (“While the term ‘arising from’ is liberally construed by Illinois courts, the contacts must still have some relation to the cause of action; [t]he minimum relationship required is that the plaintiff’s suit be one which lies in the wake of the commercial activities by which the defendant submitted to the
of an assertion of jurisdiction over him because it constitutes a waiver of his right to remain unconnected with the sovereign. But it is also necessary, absent citizenship or domicile of the defendant in the forum, that the purposeful conduct be related to the claim brought there, to assure that the defendant is not being unfairly connected to the forum. This relationship between the defendant's conduct and the claim also guarantees that the forum is a "reasonable" one in the systemic sense; it is, therefore, unnecessary as well as doctrinally questionable to address that systemic concern separately in the jurisdictional analysis.

II. HOW PURPOSEFUL?

The Supreme Court's initial and oft-repeated formulation of the requirement that the connection between the forum and a defendant result from the purposeful conduct of the defendant assumed that the defendant, itself or through its agents, had actually acted within the boundaries of the forum state. In Hanson v. Denckla, it was of "the privilege of conducting activities" in the forum that the defendant had "purposefully avail[ed]" itself. The characterization of the defendant's action as the chosen invocation of a "privilege," however, is misleading and frequently constitutionally dubious, assuming that the defendant is a citizen of the United States.

A. A Critique of the Jurisdictional Litany

The vast majority of jurisdictionally relevant actions of individual defendants could not be prevented by a state, even though the state may attach legal consequences to them, either because of the consti-

jurisdiction of the Illinois courts'" (citations omitted)); Consolidated Laboratories, Inc. v. Shandon Scientific Co., 384 F.2d 797 (7th Cir. 1967).

69. Of course, if the defendant is fairly connected to the forum with respect to all aspects of his life by virtue of his citizenship or domicile, and the suit brought against him there arose out of acts undertaken elsewhere, there may well be few if any suit-state contacts other than his status in resulting litigation. But that need not make the forum systemically unreasonable. The relationship between a sovereign and its citizens is a two-way street, and the burden imposed upon the sovereign judiciary when claims are brought there against its citizens is anything but unsupported. See generally Stewart, supra note 33, at 1282-86.

70. But see Madison Consulting Group v. South Carolina, 752 F.2d 1193, 1208 n.5 (7th Cir. 1985) (Swygert, Senior C.J., concurring). Judge Swygert argues that the Supreme Court's oft-repeated formulation in International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945), that the defendant's contacts be evaluated "in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure," necessitates separate consideration of the concerns of federalism in the jurisdictional analysis. However, his analysis of how those concerns are properly met involves consideration of when a defendant may "fairly" be subject to a state's coercive power—a consideration at the heart of the analysis suggested here.


72. Any "significant" contact between the state, the parties, and the underlying transaction ("sig-
tutional command that a state extend to citizens of other states the privileges and immunities that it extends to its own citizens or because of restrictions on state regulations imposed by the fourteenth amendment, such as the inability of a state to infringe unduly upon an individual's right to travel. Similarly, jurisdictionally relevant actions by U.S. corporations, ordinarily involving access to markets in the forum state, are usually protected from state preclusion by the implications of the commerce clause, designed to promote the free flow of commerce across state lines. If the defendant, acting in the forum, is exercising a "privilege," the implication is that the grantor of the privilege, the state, may withhold it and, therefore, may condition its exercise upon the agreement of the defendant to the state's assertion of jurisdiction. This argument, of course, closely parallels the pre-1945 case law that expanded "consent" as a basis of jurisdiction, in an attempt to retain the language of Pennoyer v. Neff while at the same time accommodating then-current reality. And it suffers the same logical flaws as did that case law.

However, it is clearly true that a defendant who does act within a state's boundaries thereby purposefully connects himself to the territory's sovereign and, with respect to the resulting effects there of legal consequence, to its courts. It is also clearly true today that, in some instances, a defendant who never in fact enters the forum is nonetheless being determined without reference to other contacts with other fora) justifies use of state law. An act of the defendant in the state related to the claim brought against it would inevitably be sufficient to satisfy the constraints imposed upon a state's use of its own law, by both the due process and full faith and credit clauses. See supra notes 26-27; Stewart, supra note 33, at 1317-21.

73. U.S. Const. art. IV, § 2. Acts by nonresidents, such as entering into a contract to be performed in whole or in part in the state or owning property in the state, could certainly not be prevented by the state based upon the actor's lack of state citizenship.

74. See Edwards v. California, 314 U.S. 160 (1941). The commission of a tortious act within the state, for instance, is frequently and most obviously the result of negligent behavior by the defendant while present in the state; the state at best could only attempt to prevent the defendant's presence, a choice precluded by the defendant's national citizenship and/or by the commerce clause. See infra note 100.


76. 95 U.S. 714 (1877).

77. See Kurland, supra note 2.

78. See, e.g., Republic Int'l Corp. v. Amco Engineers, Inc., 516 F.2d 161 (9th Cir. 1975). Jurisdiction over defendants whose forum activities result in tortious injury in the forum clearly fits this model, as does jurisdiction over defendants who own property in the forum with respect to claims related to that property. For an odd use of this realization, see Sales Serv. Inc. v. Daewoo Int'l (America) Corp., 719 F.2d 971 (8th Cir. 1983), in which the plaintiff's activities in the forum as the defendant's consultant constituted the defendant's purposeful availment there.
less sufficiently purposefully connected with it to justify certain assertions of jurisdiction. Such a defendant has not, in any rational sense of the words, "conducted activities in the forum," whether such conduct constitutes the exercise of a "privilege" or not. Moreover, as noted previously, whatever meaningful benefits he has obtained from the forum may well not derive from the forum's laws. The *Hanson* formula is simply not satisfied. Nevertheless, due process may be. To intentionally seek economic benefit from a relationship with a citizen or citizens of the forum obviously constitutes a purposeful affiliation with forum actors. If such an affiliation itself constitutes an affiliation with the sovereign, then the defendant has waived his right to remain unconnected with the sovereign, to the extent of the affiliation so forged.

In one sense, the equation of affiliation with a citizen and affiliation with that citizen's sovereign is a jurisdictional assumption of the post-*Pennoyer* world. The relevant contacts that a defendant creates are almost inevitably not with the sovereign as such, but with those who live within its boundaries. For the most part, jurisdictional analyses have focused upon the contacts between the defendant and the forum actor that actually occurred in the forum, thus blurring the distinction between affiliation with a forum actor and affiliation with the physical territory of the forum. At the same time, however, courts have recognized the constitutionality of certain jurisdictional assertions over defendants who have had no physical contact with the forum, undercutting the logic of their reliance on such contact in other instances. Furthermore, it is the defendant's contact with a forum actor in the forum, not his contact with the physical territory of the forum alone, which is of jurisdictional significance. The validity of

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79. See supra notes 35-37 and accompanying text.
80. See infra note 134 and accompanying text. Traditionally, contact undertaken solely outside the forum with a forum resident is not jurisdictionally sufficient. Cases that distinguish contacts with the sovereign from those with forum residents seem to assume that the relationship between the parties is independent of the plaintiff's residence, rather than that there must be some relationship between the sovereign as such and the defendant. See, e.g., Small v. Sheba Investors, Inc., 811 F.2d 1163 (7th Cir. 1987); Inst'l Food Mktg. Assocs. v. Golden State Strawberries, Inc., 747 F.2d 448 (8th Cir. 1984); Mountain Feeds, Inc. v. Agro Impex, S.A., 677 F.2d 651 (8th Cir. 1982).
81. See infra notes 88-104 and accompanying text.
82. See R.L. Lipton Distrib. v. Dribeck Importers, Inc., 811 F.2d 967 (6th Cir. 1987), in which the sole importer of a product which the plaintiff sold in the forum was not amenable to jurisdiction. The claim arose from the termination of a franchise agreement entered into between the plaintiff and a third party who, as an independent contractor of the defendants, acted as the exclusive distributor of the product in the forum. Since the defendant exercised little if any control over the third party's actions, its contacts with the forum could not be attributed to the defendant. The fact that the defendant, through promotional mailings to and occasional meetings with the plaintiff, clearly was aware that its products were being sold by the plaintiff in the forum was insufficient to sustain jurisdiction when the defendant did not control the choice of the forum actor. Chosen affiliation with the forum per se
the assumption depends upon the actual importance of a defendant's physical contact with the forum in determining the existence of his waiver of his right to remain unconnected with it.

Intentional affiliation with a forum actor, no matter where physically undertaken, indirectly connects the defendant to the forum actor's sovereign. Innumerable references to the sovereign's interest in providing a forum for resolving disputes involving its citizens, and in regulating the activities of nonresidents that affect its citizens, reflect the courts' realization that what affects the forum actor affects the forum sovereign.\(^{83}\) The federal structure of our government ordinarily prevents each state sovereign from "protecting" its citizens by forbidding potentially harmful contact between them and citizens of other states.\(^{84}\) But a defendant who undertakes such contact does intrude upon the citizen-sovereign relationship. In so doing, he waives his right to remain unconnected to both the citizen and the sovereign.\(^{85}\) Support for this conclusion is found as well in the theoretical underpinnings of the defendant's right. The sovereign is not an entity distinct from its citizens; rather, it is created by them to exercise their governing authority. Affiliation with one member of the entity is as

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\(^{83}\) See generally Stewart, supra note 33, at 1272-79.

\(^{84}\) See supra notes 73-75 and accompanying text.

\(^{85}\) For an argument that this congruity was only recently accepted by the Court, see Greenstein, supra note 15. According to the author, Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985), expanded "purposeful availment" to encompass purposeful affiliation with a forum actor, an "expansion" which the Court had previously rejected in Kulko v. Superior Court, 436 U.S. 84 (1978), there requiring that the defendant have made a "choice of forum" rather than a "choice of partner." Arguably, however, the difficulty in Kulko was not the distinction between forum and partner but the total lack of the defendant's participation in the decision of the partner to change her locale after the relevant relationship between the parties had been created. Furthermore, to the extent that the Court had previously expressed approval of the "stream of commerce" theory of jurisdiction, see infra note 88 and accompanying text, it had approved of a jurisdictional assertion over a defendant never physically present in the forum—over a defendant, in other words, whose affiliation was with the forum plaintiff.
much affiliation with the entity as is physical affiliation with the territory the members control.

It is the definition of purposeful affiliation with a forum actor and, therefore, with the forum, with which the courts have struggled since 1945. Cases in which jurisdictional issues arise do not involve defendants being sued in the forum because of the direct consequences of their physical presence there. Rather, the issues arise either when the defendant has not been physically present in the forum or when his physical presence has not been the direct cause from which the plaintiff's claim arose. Presumably on the theory that, “If I can't describe it, I can draw a picture of it,” numerous cases “analyze” the facts by merely repeating them along with the classic litany, and by concluding that the conglomerate does or does not constitute “purposeful availing.” 86 Others compare the picture presented with other pictures, in which the results are known, and count up points of similarity and dissimilarity. 87 Since jurisdictional inquiries are inevitably fact-specific, these approaches are understandable, but they are not particularly illuminating. If, however, one focuses on the reason for concern with the purposeful or intentional nature of the defendant's activity, as reflecting his waiver of his right to remain unconnected to forum actors and thus to the forum, it may be possible to “describe” as well as “draw” the jurisdictional picture.

B. Purposeful Affiliation Without Presence v. Merely Conscious Affiliation

One of the most common situations in which a defendant, never actually present in the forum, may nonetheless be sued there is epitomized by an Illinois Supreme Court case, Gray v. American Radiator & Standard Sanitary Corp. 88 The manufacturer of a product part is sued in the state in which the completed product was purchased at retail by a resident of the state subsequently injured there, allegedly because of the defendant's negligent design or manufacture. Jurisdiction is sought to be justified on a theory now known familiarly as “the stream of commerce.” Lacking any direct affiliation with the plaintiff-consumer, the defendant is argued to have benefited indirectly from the market served by the wholesalers of the completed product—the wider that market, the more product parts are required and the greater the economic return to the manufacturer. Although the purchase

87. See e.g., Madison Consulting Group v. South Carolina, 752 F.2d 1193 (7th Cir. 1985).
88. 22 Ill. 2d 432, 176 N.E.2d 761 (1961).
price of the part is paid by another in the chain of manufacture and distribution, the ultimate source of the profit is the consumer in the forum in which the completed product is sold, and, therefore, there is an indirect affiliation with a forum actor.

The difficult issue presented by an assertion of jurisdiction on this fact pattern is whether such an indirect affiliation may properly be characterized as "purposeful," or intentional. Three members of the current Court recently found that mere awareness on the part of a nonresident defendant that its product will enter the forum through the stream of commerce does not constitute purposeful availment of that market.\(^89\) Additional evidence, in their view, would be necessary before the affiliation could properly be characterized as intentional and, therefore, jurisdictionally sufficient.

The Justices' four examples of what such additional evidence might be all may require specific identification of the forum as a target market, rather than identification of the forum as an indistinguishable part of a larger targeted market. Designing a product "for the market in the forum State,"\(^90\) for instance, assumes that either the state regulates the product or that the state purchasers of the product demonstrably require unique attributes of the product. The latter assumption is intuitively untenable; the former, if true in one state, might well be true in others. In that case, while a manufacturer might design its product differently for each part of its targeted market, it might also design the product to meet the most stringent specifications. In the latter situation, only the state imposing those specifications obviously would be intentionally served by the defendant. Advertising in the forum, the second example,\(^91\) and "establishing channels for providing regular advice to customers in the forum,"\(^92\) the third, are even less clearly defined and practically more troublesome. For example, neither advertisements in national publications

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\(^89\) Justice O'Connor was joined by Chief Justice Rehnquist and Justices Scalia and Powell in this narrow reading of the theory in Asahi Metal Indus. Co. v. Superior Court, 107 S. Ct. 1026 (1987). To some extent, this position was foreshadowed in Prejean v. Sonatrach Inc., 652 F.2d 1260 (5th Cir. 1981), in which the degree of defendant's "purposeful creation" of the forum contact was seen to change with the degree of control the defendant exercised over the distribution system. In turn, the extent of such purposefulness and the substantiality of the forum impact determined the relevance of other unrelated contacts with the forum. Other cases in which circuit courts had crafted the position adopted by Justice O'Connor are cited in her opinion. Asahi, 107 S. Ct. at 1032-33. This approach should be contrasted not only with that of the Asahi concurring Justices, see infra notes 100-101, but also with the classic stream analysis, in which the defendant's failure to attempt to constrict the stream suffices to make its use of it intentional, even though the defendant exercises no control over the distribution network. See Bean Dredging Corp. v. Dredge Technology Corp., 744 F.2d 1081 (5th Cir. 1984).

\(^90\) Asahi, 107 S. Ct. at 1033.

\(^91\) Id.

\(^92\) Id.
that reach the forum nor the establishment of a toll-free "800" number is a forum-specific activity.\textsuperscript{93} But in any event, it is highly unlikely that any but the manufacturer of the final product would engage in such activity. The final example, utilization of a sales agent\textsuperscript{94} in the forum, is again activity presumably undertaken only by the last manufacturer in the chain, and might obviate the need for use of the theory vis-a-vis that defendant.

Although it is certainly possible that the evidence of activity by a defendant that constitutes its targeting of the forum market would entail activities of the defendant or its agent literally "in" the forum, such is presumably not required. Just as it is possible to create an intentional and jurisdictionally sufficient impact in the forum wholly through activities outside it,\textsuperscript{95} so too it is possible, for example, to create a product designed to market specifications without physically entering the market.\textsuperscript{96}

If the forum in which the product was sold and caused injury must itself have been specifically targeted by the defendant, rather than simply being part of a larger market that the defendant knowingly served, the purposefulness of the affiliation, and thus the defendant's waiver of its right to remain unconnected with the forum, is obvious.\textsuperscript{97} It would seem, however, that even if the forum was an indistinguishable part of a larger market specifically targeted by the defendant, the purposefulness of the targeting and consequent waiver are equally obvious. The position of the Justices who would require evidence beyond the mere use of a stream of commerce to deem the act "purposeful" would not preclude this conclusion, although it is not a conclusion that necessarily follows from their examples discussed above.\textsuperscript{98} The defendant who targets a multi-faceted market participates more directly in the placement of its products in each facet of the market than the defendant who merely permits another to place its products there. Logically, that participation ought to suffice.

What is not obvious is whether the defendant who sells a part to the manufacturer of a product, knowing that that manufacturer's targeted market increases its sale of parts, has intentionally affiliated

\textsuperscript{93} Interestingly, at least one case suggests that, outside the stream of commerce, national advertising might be insufficient to establish purposeful availment, at least when the contract which forms the basis of the plaintiff's claim was initiated by the plaintiff. Loumar v. Smith, 698 F.2d 759 (5th Cir. 1983). \textit{See also} Wines v. Lake Havasu Boat Mfg., 846 F.2d 40 (8th Cir. 1988).

\textsuperscript{94} \textit{Asahi}, 107 S. Ct. at 1033.

\textsuperscript{95} \textit{See} Caldor v. Jones, 465 U.S. 783 (1984); infra note 142 and accompanying text; \textit{see also} Honeywell, Inc. v. Metz Apparatwerke, 509 F.2d 1137 (7th Cir. 1975).

\textsuperscript{96} \textit{See} Mason v. F. Lii Luigi & Franco dal Maschio Fu G.B., 832 F.2d 383 (7th Cir. 1987).

\textsuperscript{97} \textit{See, e.g.}, Taubler v. Giraud, 655 F.2d 991, 994 (9th Cir. 1981).

\textsuperscript{98} \textit{See supra} text accompanying notes 90-94.
itself with the market. The position of three of the current Justices is that such an indirect affiliation is insufficient;\textsuperscript{99} four others find that the "regular and anticipated flow" of the products, known to the participant in the process of manufacture and distribution, provides sufficient economic and legal benefit to that participant to justify jurisdiction;\textsuperscript{100} and another Justice would determine the purposeful nature of the defendant's affiliation with reference to the volume, value, and hazardous character of the parts sold in the forum.\textsuperscript{101}

\textsuperscript{99} Asahi Metal Indus. Co. v. Superior Court, 107 S. Ct. 1026 (1987); see supra text accompanying notes 89-94.

\textsuperscript{100} Asahi, 107 S. Ct. at 1035 (Brennan, J., concurring with Blackmun, White and Marshall).

The regularity of the flow of a defendant's products into the forum is a factor recognized elsewhere as jurisdictionally significant, although exactly why it is significant is not explained. See Raffaele v. Compagnie Generale Maritime, 707 F.2d 395 (9th Cir. 1983); Vencedor Mfg. Co. v. Gouger Indus., 557 F.2d 886 (1st Cir. 1977); Comment, \textit{Long Arm Jurisdiction, supra} note 7. See also Rossman v. State Farm Mut. Auto Ins. Co., 832 F.2d 282 (4th Cir. 1987); Eli Lilly & Co. v. Home Ins. Co., 794 F.2d 710 (D.C. Cir. 1986), cert. denied, 107 S. Ct. 940 (1987); Puerto Rico v. SS Zoe Colocotroni, 628 F.2d 652 (1st Cir. 1980), cert. denied, 450 U.S. 912 (1981); American & Foreign Ins. Ass'n v. Commercial Ins. Co., 375 F.2d 980 (1st Cir. 1978) (all finding insurance companies subject to jurisdiction in fora where products manufactured by their insureds were found regularly). True, the affiliation of the defendant with the forum is thereby increased, and if the flow is anticipated, that affiliation is knowing. But the conclusion that it is therefore purposeful is not obvious. See also Bean Dredging Corp. v. Dredge Technology Corp., 744 F.2d 1081 (5th Cir. 1984); Nelson by Carson v. Park Indus., Inc., 717 F.2d 1120, 1126 (7th Cir. 1983) (the regular and anticipated flow of products into the forum was found jurisdictionally sufficient because the defendant could therefore "reasonably anticipate being subject to suit" there—a totally circular argument), cert. denied, 465 U.S. 1024 (1984). And at least a focus upon anticipated regular contact avoids the definitional difficulties raised by a consideration of volume and value, or "substantiality." See \textit{infra} note 101.

Perhaps the assumption is that, if a defendant's products regularly find their way into the forum and if the defendant anticipates their presence there, the nature of the defendant's business can fairly be characterized as negating any objectively reasonable expectation of freedom from foreign assertions of jurisdiction. \textit{Compare} Mississippi Interstate Express, Inc. v. Transpo, Inc., 681 F.2d 1003 (5th Cir. 1982) (in which the nature of the defendant's business, brokering interstate trucking services, was relied on in part to justify jurisdiction over it in the home forum of one trucking firm with which it had contracted) with Hydrokinetics, Inc. v. Alaska Mechanical, Inc., 700 F.2d 1026 (5th Cir. 1983), cert. denied, 466 U.S. 962 (1984) and Proning & Deppe, Inc. v. Continental Ill. Nat'l Bank & Trust Co., 695 F.2d 289 (7th Cir. 1982) (in which the essentially local nature of the defendants' businesses was relied on in part to deny jurisdiction). At first blush, it does seem logical that the local or nonlocal nature of a defendant's day-to-day business is jurisdictionally relevant. But the difficulty is twofold. First, as the Court has discovered in other contexts, the line between local and nonlocal concerns is, as a practical matter, impossible to draw; it would be no easier here than it was in the context of the dormant commerce clause or the tenth amendment. Second, in the stream of commerce context, the characterization of the defendant's activities as nonlocal because of the regular and anticipated flow of its products into the forum is simply unpersuasive. Unlike the \textit{Mississippi Interstate defendant}, which actively participated in directing the flow of nonlocal commerce, the part manufacturer at the beginning of the jurisdictional chain is local in all traditional senses of the word—its activities all take place in specified fora and by hypothesis it has no control over the destination of that which it there manufactures.

\textsuperscript{101} Asahi, 107 S. Ct. at 1038 (Stevens, J., concurring with Blackmun and White, JJ.).

The opinion does not indicate why any of the three noted factors is or should be relevant to the purposeful character of the defendant's affiliation with the forum. The first two, the volume and value of parts manufactured by the defendant found in the forum, appear to reflect a concern with the substantiality of the contact, a concern ordinarily expressed in cases in which the defendant's contact is
The increased economic benefit that accrues to a manufacturer as its market expands is clear. But knowing acceptance of that benefit, even when bolstered by the indirect benefit accrued from the forum’s laws “that regulate and facilitate commercial activity,” need not logically constitute a waiver of the manufacturer’s right to remain unconnected with forum consumers and, therefore, with the forum. There is an indirect affiliation with the forum, but in order to constitute a waiver that affiliation must be intentional. Alone, knowledge of the affiliation resulting from the acts of another is presumably insuffi-

unrelated to the claim brought against it. See supra note 51. Their jurisdictional relevance is dubious; only if they demonstrate actual extensive contacts between the defendant and the forum are they ever arguably determinative when the claim is unrelated, and only then as well do they actually bolster a jurisdictional finding even when the claim is related to one of the parts found within the forum. See, e.g., Aaron Ferer & Sons Co. v. Diversified Metals Corp., 564 F.2d 1211 (8th Cir. 1977). Certainly, a high volume and value of sales in the forum do make the defendant’s knowledge of its affiliation with the forum more likely; they do not necessarily increase either the intentional nature of that affiliation or the convenience of litigating there. In any event, it is difficult if not impossible to know at what point “volume and value” become “sufficient” to satisfy those who search for them, since they only mirror other concerns. It should not be surprising, then, that courts’ use of these factors (in the contract rather than the tort context, where they until now have appeared most frequently) is often completely conclusory. See, e.g., Ajax Realty Corp. v. J.F. Zook, Inc., 493 F.2d 818 (4th Cir. 1972) ($37,000 purchase price “substantial,” although it reflected only 0.005% of total sales), cert. denied, 411 U.S. 966 (1973); Electro-Craft Corp. v. Maxwell Elec. Corp., 417 F.2d 365 (8th Cir. 1969) (a transaction involving 278 pieces over 21 days with a value in excess of $132,000 is “significant”). For an odd argument that dollar volume nonetheless ought to be the ordinarily determinative factor in the contract context, see Note, Asserting In Personam Jurisdiction Over Parties to a Contract: Burger King Corp. v. Rudzewicz, 31 ST. LOUIS U.L.J. 453 (1987). Cf. Note, Minimum Contacts in Single Contract Cases: Burger King Has Its Way, 1986 B.Y.U. L. REV. 505, in which the author argues that a contract with a “substantial connection” to the forum begins with deliberate affiliation with the forum by the defendant—a more jurisdictionally logical, if circular, use of the term.

The third factor Justice Stevens would consider, the hazardous nature of the defendant’s product, also does nothing to aid in determining whether the defendant’s affiliation with the forum was purposeful. Presumably, it is thought to be relevant because, if the product is dangerous, the state’s interest in protecting its citizens is more clearly implicated. Thus, broader assertions of jurisdiction are justifiable, utilizing a stream of commerce analysis, in product liability cases than would be proper in commercial contexts where the alleged harm is purely economic. See Young v. Colgate-Palmolive Co., 790 F.2d 567 (7th Cir. 1986); Pacific Artl. Trading Co. v. M/V Main Express, 758 F.2d 1325, 1330 n.1 (9th Cir. 1985); Lakeside Bridge & Steel Co. v. Mountain State Constr. Co., 597 F.2d 596 (7th Cir. 1979), cert. denied, 445 U.S. 907 (1980). However, if the propriety of jurisdictional assertions depends upon the intentional nature of the defendant’s affiliation with the forum, the degree of the forum’s interest in asserting jurisdiction is alone irrelevant, a fact recognized in Comment, Long Arm Jurisdiction, supra note 7. Only if that interest, for example, results in the imposition of standards that products distributed in the forum must meet, and which the defendant designs its product to meet, does it become jurisdictionally significant. See supra note 89 and accompanying text. In any event, Justice Stevens’s assumption that some products which have allegedly caused injury in the forum are not properly characterized as “hazardous” is questionable—a flannel shirt, as opposed to an automobile, may not seem inherently dangerous, but if it is highly flammable, the danger it presents, though not immediately apparent, may be just as great.

With respect to Justice Stevens’s approach, see generally Dessem, Personal Jurisdiction After Asahi: The Other (International) Shoe Drops, 55 TENN. L. REV. 41 (1987).

cient here, as it is in other contexts, to satisfy due process. For example, the fact that a defendant might reasonably foresee an impact in another forum caused by its local activities does not sustain jurisdiction, whether that foreseeability results from the nature of the product involved or from the unilateral decision of one with whom the defendant has created a local relationship. Such foreseeability is, of course, inevitably present when the defendant has intentionally affiliated itself with a forum actor, but the foreseeability does not inevitably reflect intent.

Consider the summer roadside vendor of raspberries, grown in his own plot next to the street. Approached by a wandering representative of Smuckers, who offers to purchase his entire crop for a ten percent discount, the vendor agrees, believing that individual sales would dispose of only seventy-five percent of the crop and that, therefore, acceptance of the offer would be to his economic benefit. If the produce had been negligently sprayed with cyanide, and if, as a result, a consumer of jam made from the raspberries and sold by Smuckers was injured, the impact in the consumer's state was reasonably foreseeable to the vendor. The vendor, however, did nothing more than passively accept a proffered economic benefit. He was aware that Smuckers


104. Hanson v. Denckla, 357 U.S. 235 (1958). Courts which continue to focus on the activity, or lack thereof, of the defendant in the forum utilize Hanson to explain why contracted-for activity by the plaintiff in the forum is insufficient to support jurisdiction in the forum over the defendant, provided that the contract does not require the activity to occur there. See infra note 135.

105. The passivity of a party, at least in the contract context, is well-recognized as a relevant if not determinative factor in assessing the constitutionality of an attempted jurisdictional assertion. In a hypothetical suit by Smuckers against the raspberry vendor, it is almost universally accepted that jurisdiction would not lie in Smuckers's home state—not because the vendor never was actually present there but because the vendor was a totally passive party. See Austad Co. v. Pennie & Edmonds, 823 F.2d 223 (8th Cir. 1987); Nicholas v. Buchanan, 806 F.2d 305 (1st Cir. 1986); Banton Indus., Inc. v. Dmatic Die & Tool Co., 801 F.2d 1283 (11th Cir. 1986); Borg-Warner Acceptance Corp. v. Lovett & Tharpe, Inc., 786 F.2d 1055 (11th Cir. 1986); Chung v. NANA Dev. Corp., 783 F.2d 1124 (4th Cir.), cert. denied, 479 U.S. 940 (1986); Patterson v. Dietze, Inc., 764 F.2d 1145 (5th Cir. 1985); Bond Leather Co. v. Q.T. Shoe Mfg. Co, 764 F.2d 928 (1st Cir. 1985); Jadair, Inc. v. Walt Keeler Co., 679 F.2d 131 (7th Cir.), cert. denied, 459 U.S. 944 (1982); Premier Corp. v. Newsom, 620 F.2d 219 (10th Cir. 1980); Thos. P. Gonzalez Corp. v. Consejo Nacional de Produccion de Costa Rica, 614 F.2d 1247 (9th Cir. 1980).

Cases which distinguish between buyers and sellers in this context, asserting that jurisdiction is more often found or somehow easier to find vis-a-vis the latter than the former, do so because of a presumption (clearly not always true) that the buyer is more apt to be passive than the seller. See, e.g., Afram Export Corp. v. Metallurgiki Halyps, S.A., 772 F.2d 1358 (7th Cir. 1985); In-Flight Devices Corp. v. Van Dusen Air, Inc., 466 F.2d 220 (6th Cir. 1972). But see Aaron Ferer & Sons Co. v. Diversified Metals Corp., 564 F.2d 1211, 1214 (8th Cir. 1977), in which the court characterized solicitation by a nonresident buyer for the delivery of goods to it outside the forum as a "more minimal" contact than solicitation by a nonresident seller for the shipment of goods into the forum.

Of course, to presume buyer passivity does not guarantee it on any given fact pattern. It is certainly possible, particularly when corporate merchants are involved, that neither party is passive. See
was able to offer him that benefit because of its nationwide market and that his fruit could well end up in any part of Smucker's's market. On one level, his conduct was intentional or purposeful—he could have refused Smucker's's offer. 106 But his acceptance of its offer apparently is not by itself sufficient to convince any member of the Court that his affiliation with the consumer's state was purposeful and that, therefore, an exercise of jurisdiction over him by that state court would be constitutionally proper. 107 Nor should it be. Waiver of an existing right calls for more affirmative action than that which the economic unity of the United States both presupposes and fosters. Any other conclusion would severely impinge upon that goal of economic unity,

Madison Consulting Group v. South Carolina, 752 F.2d 1193, 1206 (7th Cir. 1985) (Swygert, Senior C.J., concurring). The jurisdictional question then becomes the degree of active participation by the defendant, in the formation of its relationship with a forum actor, which is necessary to support the conclusion that the defendant has waived its right to remain unconnected to the forum with respect to claims arising out of that relationship. See infra notes 116-38 and accompanying text.

106. Inevitably, one feels, there are at least a few intimations in the case law that the decision to deal with a nonresident connects the resident party to the nonresident's forum in some jurisdictionally significant fashion. The clearest statement to that effect is found in Southern Mach. Co. v. Mohasco Indus., Inc., 401 F.2d 374, 382 (6th Cir. 1968), in which the court, after noting the defendant's decision to deal with the Tennessee plaintiff in New York, stated, "[I]t cannot diminish the purposefulness of [the defendant]'s choice that 'like the maker of [a] better mousetrap, [it] is fortunate enough to get the business without active solicitation . . . ."" (citation omitted). The opinion goes on to justify jurisdiction, given the realistic impact on forum commerce resulting from business operations set in motion by the defendant and the foreseeability of consequences there. The Supreme Court has since discredited this rationale in World-Wide Volkswagen. Whether jurisdiction on the Mohasco facts would be proper under current Court precedent is unclear; parallels to Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985), exist, although the contract specified that New York law was to govern. Cf. Sterling Nat'l Bank & Trust Co. v. Fidelity Mortgage Investors, 510 F.2d 870 (2d Cir. 1975); Product Promotions, Inc. v. Cousteau, 495 F.2d 483 (5th Cir. 1974).

A more interesting, if less conclusive, attack on the need for more than knowledge on the part of the defendant of the plaintiff's residence is found in Brand v. Menlove Dodge, 796 F.2d 1070 (9th Cir. 1986). The court first concluded that, since the defendant did not send its product to the forum, although it did know that it would be resold from there, it did not direct its activities purposefully at the forum. Such purposeful direction, the court held, would have raised a presumption that jurisdiction in the forum would be "reasonable," a presumption not now available to the plaintiff. Nonetheless, the defendant's specific knowledge of the effect of its activities in California would support jurisdiction if actual, rather than presumed, considerations of reasonableness dictated. On the facts the court concluded they did not and therefore dismissed the case. Assuming that the court's understanding of Burger King (which, interestingly, it applied without comment in a suit for fraud and negligence; see infra note 110 and accompanying text) is accurate, it is doctrinally unclear how that case supports the leap from the result of purposeful direction to the result of no such direction. Nothing there, or later in Asahi, supports the conclusion that purposefulness is unnecessary if jurisdiction is "reasonable." The approach of the court most closely parallels the second part of Justice Brennan's dissent in World-Wide Volkswagen, but that position has never commanded a majority of the Court. See supra note 7.

107. No evidence indicates that the vendor in any way targeted any nonlocal market; the flow of his goods into the larger market was neither regular nor anticipated; and neither the nature, volume, nor value of the product would supplement the single use of the stream created by Smuckers. Cf. Stranahan Gear Co. v. NL Indus., 800 F.2d 53, 59 (3rd Cir. 1986) (nonresident buyer from nonresident distributor not subject to jurisdiction in manufacturer's state; buyer had not departed from "the passive . . . role").
as individuals who feared highly inconvenient litigation in distant fora refused to deal with nonresidents. The tension that is the inevitable byproduct of a union of sovereign states compels the distinction between conscious and intentional affiliation, in order to make meaningful both the constitutionally guaranteed access of buyers and sellers to local markets and the constitutionally mandated sovereignty of each state's judicial system.108

However, if the vendor and Smuckers thereafter agreed that some specified portion of the vendor’s crop would be purchased annually by Smuckers, and a similar set of events occurred as a result of later sales, the vendor’s jurisdictional defense is much more problematic. The “regular and anticipated flow” of the raspberries throughout Smuckers’s market would, in the minds of four Justices, place the vendor in Smuckers’s “stream of commerce” and justify jurisdiction. Three would find the pattern of sales insufficient. And one, considering the volume, value, and hazardous character of the fruit sold, would presumably agree that an assertion of jurisdiction would not be constitutionally proper.

C. Drawing the Line Between Intentional and Conscious Affiliation: How Active is the Nonresident Actor?

If the single, unsolicited sale by the hypothetical raspberry vendor does not constitute his waiver of the right to remain unconnected with the purchaser’s market, the degree of additional contact between the purchaser and seller necessary to support such a waiver necessitates consideration of factors more commonly addressed in cases such as Burger King Corp. v. Rudzewicz.109 In other words, tort and contract jurisdictional analyses are not nearly as distinct inquiries as case law might indicate110—purposeful affiliation, with a market or an actor in that market, is necessary in both contexts and is demonstrated in both by the same kinds of nonresident defendant conduct.

108. Acceptance of such an offer by a foreign raspberry grower, however, could result in a different jurisdictional determination. In large measure, the distinction between conscious and intentional affiliation is necessitated by the defendant’s parallel rights to participate in a national market and to remain unconnected to, and be treated as unconnected by, state sovereigns within that market. The foreign seller may lay claim to the second, but not the first, right. Therefore, less action on his part may be required to constitute waiver of that second right; the knowing acceptance of a preferred benefit might well sustain jurisdiction over him on a claim related to that acceptance.


110. Some cases do, in fact, recognize the close relationship between the jurisdictional questions, although the recognition is usually of the relevance of a stream of commerce analysis to issues of jurisdiction in claims for breach of contract, warranties, etc. See, e.g., Petroleum Helicopters, Inc. v. Avco Corp., 804 F.2d 1367 (5th Cir. 1986); Taubler v. Giraud, 655 F.2d 991 (9th Cir. 1981); Vencedor Mfg. Co. v. Gouger Indus., 557 F.2d 886 (1st Cir. 1977); Consolidated Laboratories, Inc., v. Shandon Scientific Co., 384 F.2d 797 (7th Cir. 1967). See also Giotis v. Apollo of the Ozarks, Inc., 800 F.2d 660
In *Burger King*, the Court found that a franchisee who had not actually acted in the forum in any jurisdictionally significant way, who had not utilized any stream of commerce, and who had not intentionally caused any constitutionally cognizable impact in the forum was nonetheless subject to the forum’s jurisdiction with respect to a claim for breach of contract brought by a local franchisor. The conclusion rested not upon the entering into a contract with a forum actor—that alone was clearly held insufficient—111—but rather upon the facts of negotiation, contract terms, and the resulting contemplated and actual course of dealing between the parties.112 In combination, consideration of these factors revealed a total waiver of the defendant’s right to remain unconnected to the forum with respect to the contractual relationship; therefore, although the actions giving rise to the claim occurred in the franchisee’s home state, the forum’s assertion of jurisdiction did not offend due process.

If the majority’s view of the facts is correct,113 *Burger King* would seem to be a relatively easy case. A sophisticated individual negotiated with a forum actor to obtain a benefit, the terms of which he agreed were to be governed by forum law and the retention of which involved close and long-term supervision by the forum actor of his nonforum activities. That he did not “conduct activities” in the forum neither impermissibly lessens his contact with it nor makes his affilia-

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111. 471 U.S. at 478.
112. *Id.* at 479.
113. See the dissent of Justices Stevens and White, *id.* at 487-90, quoting the decision of the court of appeals. The alternative view of the facts differs from the majority’s in two ways: the degree of actual participation by the franchisee in setting the terms of its affiliation with the franchisor, and the perceived role of the franchisor’s Michigan, as opposed to home, office. The first of these differences is obviously of crucial importance to the jurisdictional analysis proposed in the text. The second is not. Assuming that the Michigan office did not misrepresent itself as the source of decisional authority, the fact that Michigan rather than Florida was the physical site of negotiation does not change the nature of the entity with which affiliation was negotiated—and it is that which is jurisdictionally determinative. *Cf.* infra note 134.
tion other than intentional. The difficulty, of course, arises when only some of the factors present in that case are to be found. Intentional affiliation, like "minimum contacts" or "purposeful availings," is not a self-defining phrase, nor is the extent of the waiver reflected by such affiliation always apparent.

In the contract context, lower courts have long identified a wide variety of specific factors, the presence or absence of which is assumed to be determinative of jurisdiction. While the Supreme Court consistently warns against the adoption of "mechanical" tests, it also consistently recognizes the need for predictability of jurisdictional results—a need which, as a practical matter, does require that at least the most commonly found facts call forth the same conclusions. The resulting jurisdictional inquiry is no more "mechanical" than that involved when, for instance, the act of a defendant in the forum allegedly results in injury there—the answer to the inquiry is obvious, but it flows from the unspoken agreement that the defendant's intentional presence in the forum constitutes a waiver of his right to remain unconnected to the forum with respect to the consequences of his presence there. The jurisdictional importance of the factors identified by the courts is likewise a function of the extent to which they do, or do not, reflect a similar waiver.

One of the most frequently considered factors in breach of contract suits is whether the nonresident defendant initiated or solicited the economic relationship with the plaintiff created by the contract. If he did, the jurisdictional inquiry usually comes to an end and jurisdiction is asserted, even if the actions giving rise to the claim are unrelated to the solicitation. Assume, for example, that the

114. Its explicit rejection of such tests began in International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945), and continues today, as the Court includes in its rhetoric a warning that reasonableness depends upon "an evaluation of several factors." Asahi Metal Indus. Co. v. Superior Court, 107 S. Ct. 1026, 1033 (1987).

115. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980). Of course, a contract can include a forum selection clause which, if freely negotiated and reasonable, is enforceable and, if exclusive, clearly is predictive. See Clay, Quest for a Bright Line Personal Jurisdiction Rule in Contract Disputes—Burger King Corp. v. Rudzewicz, 61 Wash. L. Rev. 703 (1986). But the absence or unenforceability of such a clause places the parties in the same position as the parties in a negligence suit, and the predictability of jurisdiction finally depends on the Court's willingness to articulate its actual concerns and apply those concerns consistently.

116. See, e.g., InterFirst Bank Clifton v. Fernandez, 844 F.2d 279 (nonresident purchaser of airplane solicited sale of airplane, which was later returned to and sold in forum; contract provided for use of forum law), modified on other grounds, 853 F.2d 292 (5th Cir. 1988); First City Bank v. Air Capital Aircraft Sales, 820 F.2d 1127 (10th Cir. 1987) (initiation of relationship by nonresident defendant cited first in a string of facts which together the court conclusorily stated equal "minimum contacts"); Bally Export Corp. v. Balicar, Ltd., 804 F.2d 398 (7th Cir. 1986) (plaintiff manufacturer of gambling devices sued nonresident defendants for purchase price; contract initiated by one defendant; only other possible contact with forum was possible place of contracting); Micromedia v. Automated Broadcast Controls,
manufacturer of a product advertises in a forum newspaper. In re-

799 F.2d 230 (5th Cir. 1986) (forum purchaser permitted to sue nonresident seller; conclusory opinion reveals that seller bid for the contract and thus initiated the relationship); Hall's Specialties, Inc. v. Schupbach, 758 F.2d 214 (7th Cir. 1985) (jurisdiction over nonresident seller denied because its forum advertisement was not knowingly placed in the forum by defendant; had its placement been intentional, jurisdiction would have been upheld); Madison Consulting Group v. South Carolina, 752 F.2d 1193 (7th Cir. 1985) (jurisdiction upheld because defendant initiated the contact with a forum resident); Pedelahore v. Astropark, Inc., 745 F.2d 346 (5th Cir. 1984) (plaintiff injured at out-of-state amusement park permitted to sue in home forum; all activity by defendant in forum related to solicitation); Cabbage v. Merchent, 744 F.2d 665 (9th Cir. 1984) (nonresident doctor solicited business in forum), cert. denied, 470 U.S. 1005 (1985); Gates Learjet Corp. v. Jensen, 743 F.2d 1325 (9th Cir. 1984), (forum manufacturer-distributor sued nonresident corporation; jurisdiction upheld because the defendant had solicited the contractual relationship in the forum and because the contract provided for the use of forum law), cert. denied, 471 U.S. 1066 (1985); Hahn v. Vermont Law School, 698 F.2d 48 (1st Cir. 1983) (law school subject to jurisdiction in student's home state, where it had solicited applications); Neiman v. Rudolf Wolff & Co., 619 F.2d 1189 (7th Cir.) (solicitation in forum of investors in foreign transactions sustains jurisdiction), cert. denied, 449 U.S. 920 (1980); King v. Harley Chevrolet Co., 462 F.2d 63, 68 (6th Cir. 1972) (defendant had a realistic impact on the commerce of the forum; its continual forum advertising and the resultant foreseeability of forum consequences constituted "purposeful availing"). But see Johnston v. Frank E. Basil, Inc., 802 F.2d 418 (11th Cir. 1986); Sea Lift, Inc. v. Refinadora Costarricense de Petroleo, S.A., 792 F.2d 989 (11th Cir. 1986); Mountaire Feeds, Inc., v. Agro Impex, S.A., 677 F.2d 651 (8th Cir. 1982). The Sea Lift court held that solicitation constitutes purposeful availing, and so supports jurisdiction, only when the parties establish a continuing relationship or when the plaintiff's performance is to be undertaken in the forum. The Mountaire court found this factor unpersuasive. Why either additional fact should be necessary or helpful is unclear. Neither adds to the intentional character of the forum affiliation; the absence of both does not detract from the intentional character of the solicitation.

See also Vencedor Mfg. Co. v. Goulger Indus., 557 F.2d 886 (1st Cir. 1977), in which the court distinguishes two Supreme Court cases, McGee v. Int'l Life Ins. Co., 355 U.S. 220 (1957), and Hanson v. Denckla, 357 U.S. 235 (1958), on the grounds that the McGee defendant solicited the plaintiffs' business. But see Pedi Bares, Inc. v. P & C Food Mkt., Inc., 567 F.2d 933 (10th Cir. 1977), distinguishing the two cases on the grounds that the cause of action in Hanson v. Denckla, 357 U.S. 235 (1958), did not arise out of the defendant's contacts with the forum.

117. The effect of advertising in a national (or, presumably, regional) periodical which is sold in the forum is more problematic. Charia v. Cigarette Racing Team, Inc., 583 F.2d 184, 187 (5th Cir. 1978), cert. denied, 451 U.S. 910 (1981), flatly rejects such solicitation as jurisdictionally significant. Cf. Loumar v. Smith, 698 F.2d 759 (5th Cir. 1983). Utilizing the analysis suggested in the text, Charia at least seems to have been wrongly decided. The defendant had contracted to build a boat for the plaintiff; the nature of the undertaking was such that it may be assumed that neither party to the contract was the principal party to the contract was the passive. The court's opinion, in traditional fashion, focused on the physical location of the parties' activities. National advertising and argued completion of the contract in the forum were the only in-state "acts" by the defendant, other than sending the boat to the plaintiff; the latter was also dismissed as insignificant because the purchase was F.O.B. the place of the manufacture. The only potential problem with the forum's assertion of jurisdiction was a contract choice of law provision specifying the use of the law of the defendant's state. However, while such a provision may increase the likelihood that the specified state may assert jurisdiction, see infra note 128 and accompanying text, it does not logically negate jurisdiction in nonspecified fora. Neiman v. Rudolf Wolff & Co., 619 F.2d 1189 (7th Cir.), cert denied, 449 U.S. 920 (1980). The defendant in Charia had intentionally affiliated itself with the forum plaintiff, and jurisdiction over it within the forum was as constitutionally proper as would have been an assertion of jurisdiction over the active purchaser in the defendant's home state.

However, the fact that Charia was wrongly decided on its facts does not compel the conclusion that national advertising is necessarily sufficient alone to support jurisdiction over the advertiser. But the conclusion seems correct nonetheless. The defendant is intentionally seeking to affiliate itself with those who reside in the targeted market. The fact that that market is geographically large is the defend-
response to the advertisement, a forum resident orders the product, and his "offer" is accepted by the manufacturer in its state of residence and shipped to the purchaser F.O.B. its state of manufacture. Upon receipt, the purchaser notes some sort of flaw in the product and contacts the manufacturer, but fails to obtain a replacement. The purchaser then brings suit in the purchaser's state for breach of warranty. The manufacturer did intentionally act in the forum, but the claim is not for false or misleading advertising. (Nor is it for failure to pay the newspaper that ran the advertisements or for libel—the only other claims that would literally "arise out of" the act in the forum.) If the advertisements appeared regularly, it would presumably be proper to characterize the defendant's activities in the state as continuous and systematic, but that fails meaningfully to advance the inquiry. Only if the fact of solicitation constitutes chosen affiliation with the forum with respect to resulting economic relationships with forum actors is an assertion of jurisdiction on these facts justifiable. The hypothetical defendant successfully attempted to draw to itself business from the forum; it created the condition which resulted in the multistate transaction. The consequences of that transaction were felt in the forum. While the Supreme Court has held that foreseeability of forum effect does not alone constitute the necessary purposefulness of affiliation, it is certainly relevant to the scope of admittedly purposeful affiliation. The manufacturer cannot credibly claim that the only affiliation it sought was exhausted when the purchaser saw its advertisement; it sought the purchase and waived its right to remain unconnected to the forum with respect to that purchase and its consequences. The position of the manufacturer parallels that of the manufacturer of a product distributed through a stream of commerce who advertises in the forum where the product is purchased and allegedly causes tortious injury—a manufacturer the entire Court agree is subject to forum jurisdiction.

If solicitation is, therefore, properly jurisdictionally determinative, it becomes necessary to decide whether a defendant can be said to have solicited an economic benefit from a forum in which he does not actually act. Obviously, the Hanson formula, which refers to "activities within the forum," is not satisfied, but, as noted previously, that need not preclude a constitutional assertion of jurisdiction. As

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118. See infra notes 123, 126.
121. See supra note 88 and accompanying text.
sume that the hypothetical manufacturer erects billboards in its home state facing across the state line. The act constituting the solicitation of forum business thus does not occur in the forum. Nonetheless, the intentional attempt to draw business from the forum, the resulting economic benefit from contact with a forum actor outside the forum, and the logical degree of chosen affiliation with the forum remain unchanged. Clearly, what constitutes solicitation may be a difficult question of fact, but it ought not necessarily be limited to in-state activities.

Consider next the purchaser of the manufacturer's product. If, because of his belief that the product is faulty or for any other reason, he fails to pay the manufacturer upon its receipt, he may well be sued by the manufacturer in the manufacturer's home state for breach of contract. Not having originally solicited the contract, jurisdiction over the purchaser depends upon other factors. The manufacturer would argue that the contract between them was formed in the forum, where the purchaser's offer was accepted, and that, since title to the product passed to the purchaser in the forum, the purchaser invoked the benefits and protections of the forum law. Furthermore, the purchaser was to perform his contractual obligation—payment to the manufacturer—in the forum. These contacts do reflect an affiliation between the purchaser and the forum, and the claim is in some sense more closely related to the first and third contacts than was true of the purchaser's claim against the manufacturer; it is the failure of the purchaser to perform his forum obligation, undertaken in the forum,

122. Numerous cases upholding a state's assertion of jurisdiction refer to the execution of the contract there in discussing whether or not the defendant "purposefully availed." See, e.g., First City Bank v. Air Capitol Aircraft Sales, 820 F.2d 1127, 1131 (10th Cir. 1987); Jacobs/Kahan & Co. v. Marsh, 740 F.2d 587, 592 (7th Cir. 1984); In re Oil Spill by Amoco Cadiz, 699 F.2d 909, 915 (7th Cir. 1983); Southwest Offset, Inc. v. Hudco Pub. Co., 622 F.2d 149, 152 (5th Cir. 1980); Data Disc, Inc. v. Systems Tech. Assoc., 557 F.2d 1280, 1288 (9th Cir. 1977); Product Promotions, Inc. v. Couteau, 495 F.2d 483, 495 (5th Cir. 1974); Liquid Carriers Corp. v. American Marine Corp., 375 F.2d 951, 954 (2d Cir. 1967).

123. Cases recognizing the relevance of place of delivery of title (F.O.B.) to the jurisdictional analysis include Decker Coal Co. v. Commonwealth Edison Co., 805 F.2d 834, 839-41 (9th Cir. 1986), and Agrashell, Inc. v. Bernard Sirotta Co., 344 F.2d 583, 588-89 (2d Cir. 1965). See also Comment, Risk of Loss and State Long Arm Jurisdiction: Obligations Fashioned by the Delivery Term in an Article 2 Sales Contract, 17 Hous. L. Rev. 573, 596-613 (1980) [hereinafter Comment, Risk of Loss and Jurisdiction]. Absent actual actions by the defendant in the forum, acceptance by the defendant of title to property located in the forum, even when it is to be shipped immediately to the defendant's home state, most clearly satisfies the literal language of Hanson concerning the invocation of the benefits and protections of forum law. The property, like the person, may claim police and fire protection, etc., because the property is in the forum—and the benefit of that protection obviously accrues to the absent owner of the property.

124. See, e.g., Ganis Corp. v. Jackson, 822 F.2d 194, 198 (1st Cir. 1987); J. Walker & Sons v. DeMert & Dougherty, Inc., 821 F.2d 399, 404-05 (7th Cir. 1987); Jacobs/Kahan & Co. v. Marsh, 740 F.2d 587, 591 (7th Cir. 1984).

125. With respect to the second contact, see supra note 123.
that gives rise to the suit. However, the affiliation is passive and, therefore, jurisdictionally insufficient.\textsuperscript{126} Mere acceptance of proffered affiliation alone does not waive the purchaser's right to remain unconnected to the forum, a fact recognized in the Court's refusal to hold that a contract with a forum resident alone sustains jurisdiction. Both the manufacturer and the purchaser benefit from the constitutionally protected access of each to the other.\textsuperscript{127} But the posited purchaser is only reacting to the manufacturer's choice to take advantage of its right of access. The affiliating contacts between the purchaser and the forum exist because of the manufacturer's structuring of their relationship, not because of independent choices made by the purchaser. If conscious contact with a forum actor is ever distinct from intentional contact, it is a defendant such as this who reaps the benefit of the distinction. Just as the raspberry vendor who only agrees to accept Smuckers' offer to purchase is not thereby subject to jurisdiction where-

\textsuperscript{126} In Comment, \textit{Risk of Loss and Jurisdiction}, supra note 123, the author clearly recognizes the importance of the nature of the parties' relationship, but at the same time fails to alter meaningfully the inquiry in accordance with that recognition. The comment maintains that, if a nonresident seller ships goods F.O.B. the buyer's home state, jurisdiction over the seller there should be asserted; if, on the other hand, the goods are shipped to a nonresident buyer F.O.B. the seller's home state, jurisdiction there over the buyer is less clear, although the contact should be seen as "persuasive" (as opposed to "dispositive"). \textit{Id.} at 613. This difference in result is justified in large measure because the seller is assumed ordinarily to be the aggressive party, responsible for most contract terms. But why the assumption should replace inquiry is not obvious—complete certainty of jurisdictional result is a pleasant good, but it ought not be achieved at the expense of constitutionally honest analysis.

None of the cases cited \textit{supra} in notes 122-24 relies exclusively upon any combination of these three contacts with the exception of Agrashell, Inc. \textit{v.} Bernard Sirotta Co., 344 F.2d 583 (2d Cir. 1965), in which jurisdiction was thought to depend upon the place of delivery. However, that court discounted other activities of the defendant that the dissent found relevant and determinative, including solicitation by the defendant of its contract with a forum actor. On the other hand, many cases discount the jurisdictional relevance of these contacts, refusing to utilize any of them to sustain jurisdiction. See, e.g., Sea Lift, Inc. \textit{v.} Refinadora Costarricense de Petroleo, S.A., 792 F.2d 989, 993 (11th Cir. 1986) (neither forum execution nor payment sufficient); Afram Export Corp. \textit{v.} Metallurgiki Halyps, S.A., 772 F.2d 1358, 1364-65 (7th Cir. 1985) (delivery in forum alone not sufficient); Stuart \textit{v.} Spademan, 772 F.2d 1185, 1193-94 (5th Cir. 1985) (payment in the forum entitled to little weight and therefore insufficient); Colonial Leasing Co. \textit{v.} Pugh Bros. Garage, 735 F.2d 380, 383 (9th Cir. 1984); C & H Transp. Co. \textit{v.} Jensen & Reynolds Constr. Co., 719 F.2d 1267 (5th Cir. 1983) (payment in forum not significant), \textit{cert. denied}, 466 U.S. 945 (1984); Hydrokinetics, Inc. \textit{v.} Alaska Mechanical, Inc., 700 F.2d 1026 (5th Cir. 1983) (neither execution of contract nor payment in forum sufficient), \textit{cert. denied}, 466 U.S. 962 (1984); Scullin Steel Co. \textit{v.} National Ry. Utilization Corp., 676 F.2d 309 (8th Cir. 1982) (neither forum delivery nor payment sufficient); Lakeside Bridge & Steel Co. \textit{v.} Mountain State Constr., 597 F.2d 596, 603-04 (7th Cir. 1979) (neither execution of contract nor delivery in forum sufficient), \textit{cert. denied}, 445 U.S. 907 (1980); Charia \textit{v.} Cigarette Racing Team, Inc., 583 F.2d 184, 188 (5th Cir. 1978) (execution of contract in forum not sufficient); Vencedor Mfg. Co. \textit{v.} Gouger Indus., 557 F.2d 886, 890-91 (1st Cir. 1977) (neither place of contracting nor place of delivery determinative).

\textsuperscript{127} The manufacturer, as well as any party involved in the distribution and sale of its products, benefits from guaranteed access to a nationwide market, which increases the potential number of purchasers of its products and thus its potential profit. The purchaser, on the other hand, benefits from its ability to pick and choose between competing sources of the same or similar products; competition breeds both lower prices and better goods. \textit{Cf. supra} note 108.
ever his contaminated raspberries are ultimately purchased and cause injury, so too the passive purchaser is not subject to jurisdiction in the manufacturer's forum.

A contract term that might be thought to be of greater significance than those relating to place of execution, exchange of title, or payment is one specifying the use of forum law to resolve disputes arising under the contract. While maintaining its long-held position that a judicial determination of choice of law is distinct from a jurisdictional determination, the Court has given weight to a defendant's acceptance of a contractually imposed choice.\textsuperscript{128} Such a clause inevitably invokes the benefits and protections of forum law in a way much more obvious than the usual unstated reliance upon those laws by a defendant who acts within the state. But if the defendant here too has only accepted proffered terms, the resulting affiliation is no more purposeful than the affiliation based upon the place of the contract's execution or other terms.

The importance of the defendant's passivity justifies the importance attached in many cases to the course of negotiation. A purchaser or seller who enters the forum to negotiate with the other is usually subject to the forum's jurisdiction with respect to claims arising out of the relationship,\textsuperscript{129} even if those claims do not directly relate

\textsuperscript{128} Burger King Corp. v. Rudzewicz, 471 U.S. 462, 481-82 (1985). That the Court's approach was not universally foreseen is reflected in some prior lower court decisions discounting such provisions. See, e.g., Time Share Vacation Club v. Atlantic Resorts, Ltd., 735 F.2d 61, 65 (3rd Cir. 1984); Iowa Elec. Light & Power Co. v. Atlas Corp., 603 F.2d 1301, 1304 (8th Cir. 1979), cert. denied, 445 U.S. 911 (1980). Cf. Neiman v. Rudolf Wolff & Co., Ltd., 619 F.2d 1189 (7th Cir. 1980) (contractual provision choosing nonforum law held not to defeat forum jurisdiction). But see D.J. Investments, Inc. v. Metzeler Motorcycle Tire Agent Gregg, Inc., 754 F.2d 542, 548-49 (5th Cir. 1985) (failure to provide against forum suit by contractual choice of nonforum law supports finding of purposeful availment in forum). However, other lower courts had recognized the jurisdictional relevance of the provision. See Hydronetics, Inc. v. Alaska Mechanical, Inc., 700 F.2d 1026, 1029 (9th Cir. 1983) (denial of jurisdiction in seller's forum supported in part by contract provision choosing the law of the buyer's state), cert. denied, 466 U.S. 962 (1984).

\textsuperscript{129} See, e.g., Williams Elec. Co. v. Honeywell, Inc., 847 F.2d 741, 743-44 (11th Cir. 1988); Jacobs/Kahan & Co. v. Marsh, 740 F.2d 587, 590-91 (7th Cir. 1984); Deluxe Ice Cream Co. v. R.C.H. Tool Corp., 726 F.2d 1209, 1215-16 (7th Cir. 1984); Wisconsin Elec. Mfg. Co. v. Pennant Prod., Inc., 619 F.2d 676, 677-78 (7th Cir. 1980); Data Disc, Inc. v. Systems Tech. Assoc., 557 F.2d 1280, 1287-88 (9th Cir. 1977); Liquid Carriers Corp. v. American Marine Corp., 375 F.2d 951, 955-56 (2d Cir. 1967). Scovill Mfg. Co. v. Dateline Elec. Co., 461 F.2d 897 (7th Cir. 1972), is one of the clearest examples of the perceived importance of the place of negotiation. Jurisdiction over a British manufacturer in an Illinois federal district court was upheld because the initial solicitation and negotiation of the contract between it and the Connecticut plaintiff had occurred at a housewares show in Chicago. Viewed under the analysis suggested in the text, the decision, although clearly traditional, oddly appears incorrect. Jurisdiction should have been held proper in Connecticut, but to permit it to be asserted in Illinois is analogous to permitting jurisdiction to be asserted over a defendant who advertises in a national publication at the home office of the publication. In both instances the locale of the solicitation is fortuitous; the defendant is attempting to forge business relationships with the recipients of the "advertisement" and it is the recipient's home forum with which it waives its right to remain unconnected with respect.
to the forum negotiations. As in the case of a manufacturer who acts in the forum to solicit purchasers of its product, however, the presence of the defendant in the forum, although the usual focus of court opinions, is not the significant fact. Rather, it is the active participation by the defendant in the creation of his relationship with a forum actor that is determinative. The affiliation, no matter by whom originally sought, is defined by both parties, each of whom objectively must understand that he is purposefully forging an affiliation with an actor from another forum. The waiver of the defendant’s right to remain unconnected with the plaintiff’s forum results from the defendant’s active, participatory waiver of his right to remain unconnected with the plaintiff, a forum actor—a waiver which can occur outside as easily as within the forum.

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130. Such a claim, as for intentional misrepresentation, is one for which the forum in which the negotiations occurred could properly assert jurisdiction over the defendant irrespective of the plaintiff’s home state. No state need permit nonresidents to cause injury to others within its boundaries. Furthermore, the logic of the textual argument begins with the proposition that a defendant waives his right to remain unconnected to the forum with respect to the direct consequences of his intentional presence there. See D.J. Investments, Inc. v. Metzeler Motorcycle Tire Agent Gregg, Inc., 754 F.2d 542, 547-49 (5th Cir. 1985).

131. See cases cited supra note 129. See also Watlow Elec. Mfg. Co. v. Patch Rubber Co., 838 F.2d 999, 1001-02 (8th Cir. 1988); Cutco Indus., Inc. v. Naughton, 806 F.2d 361 (2d Cir. 1986); Jadair, Inc. v. Walt Keesler Co., 679 F.2d 131 (7th Cir.), cert. denied, 459 U.S. 944 (1982); Scullin Steel Co. v. National Ry. Utilization Corp., 676 F.2d 309 (8th Cir. 1982); Agrashell, Inc. v. Bernard Sirotta Co., 344 F.2d 583 (2d Cir. 1965).

132. See Hirsch v. Blue Cross, Blue Shield, 800 F.2d 1474 (9th Cir. 1986); Flynt Distrib. Co. v. Harvey, 734 F.2d 1389 (9th Cir. 1984); In-Flight Devices Corp. v. Van Dusen Air, Inc., 466 F.2d 220 (6th Cir. 1972); Electro-Craft Corp. v. Maxwell Elec. Corp., 417 F.2d 365 (8th Cir. 1969).

133. But see Barnstone v. Congregation Am Echad, 574 F.2d 286 (5th Cir. 1978), in which jurisdiction over a Maine defendant was denied in the home forum of an architect whom it had initially contacted, with whom it had negotiated, and to whom it awarded a commission to build a temple in Maine, although it knew that initial drawings and models would be made in the architect’s home state. The result in the case is oddly appealing, perhaps because the architect’s aunt had made a sizeable contribution to the defendant, thus explaining why the plaintiff was contacted in the first instance. The case is both questioned and distinguished in Mississippi Interstate Express, Inc. v. Transpo, Inc., 681 F.2d 1003, 1008-10 (5th Cir. 1982), and I am willing to argue it was wrongly decided, appealing though it is. A defendant who intentionally reaches into another forum to bring to it an asset available only from that forum does intentionally affiliate itself with the forum. See also McGiinity v. Shell Chemical Co., 845 F.2d 802 (9th Cir. 1988), and Hydrokinetics, Inc. v. Alaska Mechanical, Inc., 700 F.2d 1026 (5th Cir. 1983), cert. denied, 466 U.S. 962 (1984), in which the courts’ refusals to assert jurisdiction over active nonresidents are much less appealing and equally wrong.

134. Koster v. Automark Indus., Inc., 640 F.2d 77 (7th Cir. 1981), raises a potentially difficult and undiscussed problem. The issue in the case was the propriety of a jurisdictional assertion in the Netherlands over a defendant doing business in Illinois. The defendant had initiated the contact with the Netherlands plaintiff, and the contract was negotiated in Italy, pursuant to which the defendant was to purchase goods to be manufactured by the plaintiff in Switzerland. The plaintiff brought suit in the
In addition to the course of negotiation and contract terms, the Burger King Court identified the contemplated and actual course of dealing between the parties as jurisdictionally relevant, finding in the length and value of the parties' relationship and in the degree of forum control over nonforum activities additional justifications for a jurisdictional assertion.\textsuperscript{135} Alone, the length and value of the contemplated affiliation do not seem particularly helpful. The purchaser of a hundred thousand dollars worth of widgets from the same manufacturer every year for ten years is not inevitably less passive than the purchaser of a single widget valued at five dollars. The former purchaser resembles a raspberry vendor whose product is annually purchased by Smuckers—the economic benefit of the affiliation increases, but why that matters is unclear. However, it is more likely that a defendant

\textsuperscript{135} A factor perhaps more frequently identified in lower court cases that also forms a part of the parties' "course of dealing" is the plaintiff's forum performance. If that performance is contractually required to occur there, it is thought to tie the defendant to the forum in a jurisdictionally significant way. See Decker Coal Co. v. Commonwealth Edison Co., 805 F.2d 834 (9th Cir. 1986); Gold Kist, Inc. v. Baskin-Robbins Ice Cream Co., 623 F.2d 375 (5th Cir. 1980); Biltmore Moving & Storage Co. v. Shell Oil Co., 606 F.2d 202 (7th Cir. 1979). If, however, the plaintiff's performance, although factually inevitably in the forum, is not required to be there, such performance is not jurisdictionally sufficient. See Borg-Warner Acceptance Corp. v. Lovett & Tharpe, Inc., 786 F.2d 1055 (11th Cir. 1986); Time Share Vacation Club v. Atlantic Resorts, Ltd., 735 F.2d 61 (3d Cir. 1984); Scullin Steel v. National Ry. Utilization Corp., 676 F.2d 309 (8th Cir. 1982); Nu-Way Systems v. Belmont Mktg., Inc., 635 F.2d 617 (7th Cir. 1980); Premier Corp. v. Newsom, 620 F.2d 219 (10th Cir. 1980). The distinction is relevant only if forum activity by the defendant is a jurisdictional prerequisite; if the contract requires the plaintiff to perform in the forum, its activities there may be seen as analogous to activities undertaken there by an agent of the defendant.
whose contact with the forum actor is both regular and substantial will be able to influence the terms of its contract than would a defendant whose contact is singular and has little economic impact upon the plaintiff. Only to the extent that such influence can be found does the jurisdictional matrix change, as the defendant moves from reactive to active player in the contractual affiliation.

If the defendant passively accepted a benefit conditioned upon forum control of his nonforum activities, the effect of his acceptance on the jurisdictional matrix is equally dubious. Traditionally, supervision by one party of another's activities has been considered by courts when the forum in which the supervised activities took place has attempted to assert jurisdiction over the nonresident, supervising defendant. In those situations, the defendant has purposefully affiliated itself with the forum at least with respect to claims arising out of its supervision. Whether such supervision alone constitutes affiliation with respect to all aspects of the supervised relationship is more problematic. However, it is difficult to envision the supervision without other purposeful affiliating acts by the defendant. Although supervision may constitute the only act of the defendant literally in the forum, cases in which supervision is cited inevitably also involve defendants who solicited or actively participated in defining their affiliations with the forum actor, thus increasing the scope of their waiver of their right to remain unconnected with the forum.

When the defendant is the party supervised, however, evidence of additional purposeful affiliation with the supervising party may be lacking. The supervision does increase, and increase substantially, the degree of affiliation, but the issue is whether it changes the nature of that affiliation from conscious to purposeful. That it does so is not immediately apparent. If supervision is thought to consist, for example, of the establishment of set rules and regulations under which the defendant contracts to operate, perhaps buttressed by occasional inspections or required reports, the defendant's role remains almost as passive as it was in the unnegotiated acceptance of the affiliation. To the extent that the defendant is itself required to submit reports to the forum actor, the submission of an intentionally false report would constitute purposeful affiliation with respect to that report and so sustain the forum's assertion of jurisdiction on a claim arising from its submission. But the reasonable scope of that affiliation does not encompass

136. See, e.g., Ealing Corp. v. Harrods Ltd., 790 F.2d 978 (1st Cir. 1986); Whittaker Corp. v. United Aircraft Corp., 482 F.2d 1079 (1st Cir. 1973); Fisons Ltd. v. United States, 458 F.2d 1241 (7th Cir. 1972), cert. denied, 405 U.S. 1041 (1973); Atwood Hatcheries v. Heisdorf & Nelson Farms, 357 F.2d 847 (5th Cir. 1966).
the entire relationship, and hence other claims against the primarily passive defendant could not be brought in the supervisor's forum.

On the other hand, a contractual provision of supervision might reflect a much more interactive relationship between the parties. The nonresident defendant who contracts to design and build a unique product for a forum actor, with the design subject to the other's approval and the building subject to the other's "supervision," may well be anything but a passive party during the course of the contract. Such a defendant may more accurately resemble the defendant active in negotiating the initial terms of its affiliation; at the least, the affiliation is then fairly characterized as purposeful with respect to the nonforum, supervised activities of the defendant. The contemplated and actual course of dealings between the parties is relevant, therefore, for the same reason the course of negotiations prior to the execution of the contract is relevant—it reveals the extent to which the nonresident defendant is an active, rather than passive, participant in its conscious affiliation with a forum actor. The physical location of its active participation does not affect the jurisdictional result.

D. Refining the Intentional Affiliation Concept: Long-Term Passive Activity and Unintended Forum Consequences

Since the introduction of a hypothetical raspberry vendor, I have argued that the distinction between active and passive defendants reflects the distinction between intentional and conscious forum affiliation, and is, therefore, the touchstone of personal jurisdiction. But as noted in that introduction, at least some members of the Court appar-

137. See T.M. Hylwa, M.D., Inc. v. Palka, 823 F.2d 310 (9th Cir. 1987); J. Walker & Sons v. DeMert & Dougherty, Inc., 821 F.2d 399 (7th Cir. 1987); Mississippi Interstate Express, Inc. v. Transpo, Inc., 681 F.2d 1003 (5th Cir. 1982); Pedi Bares, Inc. v. P&C Food Markets, 567 F.2d 933 (10th Cir. 1977). Cf. Southwire v. Trans-World Metals & Co., Ltd., 735 F.2d 440 (11th Cir. 1984), in which the court declined to find jurisdiction based upon the parties' prior course of dealing, when the claim did not arise out of that course, but viewed actual connected visits "in the light of" that course of dealing. The Southwire opinion is not particularly clear, but it stumbles across the correct jurisdictional result. The entire course of dealing reflects a waiver by the British defendant of its right to remain unconnected to the forum with respect to metal trading with the plaintiff.

138. That Burger King did not sufficiently clarify the unimportance of the physical location of defendant's act is evidenced by subsequent cases. For example, in Stuart v. Spademan, 772 F.2d 1185 (5th Cir. 1985), the court focused almost exclusively on the scattered facts which it deemed potentially relevant because of the alleged tie they revealed between the defendant and the forum, and rejected each in isolation as jurisdictionally of little weight. Nowhere in the opinion is consideration given to the interactive nature of the parties' relationship or to the extent that the interaction revealed an intentional choice on the part of each to become involved with the other. Cf. Haisten v. Grass Valley Medical Reimbursement Fund, Ltd., 784 F.2d 1392 (9th Cir. 1986) (court clearly recognizes that physical activity within the forum is no longer a jurisdictional prerequisite); Nicholas v. Buchanan, 806 F.2d 305 (1st Cir. 1986) (because of an apparent continuing focus on physical location, the propriety of jurisdiction, there denied, is unclear), cert. denied, 107 S. Ct. 2466 (1988).
ently would be willing to entertain the notion that, if the vendor’s relationship with Smuckers was ongoing, even though passive, jurisdiction properly could be asserted over the vendor by a forum within Smuckers’ market, in which the vendor’s fruit was purchased and caused injury. Parallel logic would indicate that jurisdiction also would be proper over a passive party to a long-term contract in the other party’s home state—a conclusion that does not follow from the discussion to date. In either the tort or the contract context, the propriety of such an assertion is dependent upon the jurisdictional relevance of continuing conscious, but not purposeful, affiliation.

The situation in which the forum’s jurisdictional authority is most intuitively appealing is one similar to Burger King, in which a defendant has passively affiliated himself with a nationally known entity based in the forum. The nationwide nature of the forum-actor’s business is of direct economic benefit to that defendant (as compared to the indirect benefit the raspberry vendor obtains from Smuckers’s equally diffuse market). Willing to become publicly identified with a clearly nonlocal entity, the defendant’s plea of its own continued local nature rings hollow. The jurisdictional difficulty, however, is that the beneficial affiliation is not a function of the forum-actor’s location but rather springs from the presence of other franchisees of the same franchisor across the country. If acceptance of this direct benefit could logically be considered a constitutionally adequate substitute for interactive affiliation, jurisdiction might properly be asserted over the defendant in a forum where a product sold by him has caused injury, but not necessarily in the franchisor’s home state. However, the Supreme Court has already clearly rejected the benefit bestowed on each constituent part of a national network by the others as jurisdictionally sufficient. In any event, the forum location of the franchisor is simply not the source of the benefit—and so the passive franchisee’s affiliation with that forum is not in nature distinct from that of the passive purchaser or seller of a single product from or to the forum. The continuity of the relationship must change the nature

139. Of course, the claim of the national franchisor that it remains a local entity would ring even more hollow. See Lanier v. American Bd. of Endodontics, 843 F.2d 901 (6th Cir. 1988), in which the court rejected the jurisdictional defense of an organization that certified dental specialists; the local plaintiff claimed that she had been denied certification because of her sex. Although the opinion focuses on the physical ties between the application process and the forum, the result is clearly justified by the intentional affiliation of the defendant with the applicant, whether such affiliation is thought to have occurred in the forum or at the defendant’s nonforum headquarters. Cf. Health Care Equalization Comm. v. Iowa Medical Soc'y, 851 F.2d 1020 (8th Cir. 1988), in which jurisdiction was denied in a claim against a defendant with members in the forum; the claim was unrelated to that membership.

of the affiliation in order to demonstrate a waiver of the defendant's
ing the forum—and, alone, it does not.\footnote{141}

Intentional affiliation, then, ordinarily results from active participa-
tion in setting the terms of the affiliation, either directly with the
forum-actor or indirectly with one whose market includes the forum.
The extent of such participation and, therefore, of the intentional affilia-
tion, determines the scope of the defendant's waiver of his right to
remain unconnected to the forum and thus defines the universe of
claims that can be brought there against him. The physical site at
which the affiliation is forged is not necessarily relevant, although with
respect to direct consequences of acts of the defendant physically pre-

sently in the forum, intentional affiliation is inevitable.

Interestingly, such intentional affiliation may also occur without
the agreement of any forum actor, as well as without the defendant
ever actually acting in the forum. One need not be offered affiliation to
claim it, a fact most clearly illustrated by the hoary hypothetical uti-
li zed by analogy to explain the jurisdictional result in \textit{Caldor v.
Jones}.\footnote{142} An individual standing in Illinois who shoots someone
across the border in Indiana intentionally affiliates himself with Indi-
a to the extent his intentional act in Illinois causes consequences in
Indiana. However, both the hypothetical and the facts of \textit{Caldor}
present the easiest case. The defendant acted intentionally when he shot
the gun; he intentionally caused an effect in Indiana; and the inten-
tionally caused effect was intentionally legally injurious.\footnote{143} Other fact pat-

\footnote{141. For a policy, as opposed to constitutional, argument that jurisdiction over passive purchasers
should not be asserted because it would discourage foreign purchases of domestic products, see Whittaker
Corp. v. United Aircraft Corp., 482 F.2d 1079 (1st Cir. 1973). The same policy argument would
also counsel against an assertion of jurisdiction over nonresident passive sellers—the assertion would
discourage acceptance of domestic orders. Both results, of course, fly in the face of the goal of the


143. \textit{See also} Lake v. Lake, 817 F.2d 1416 (9th Cir. 1987) (defendant intentionally obtained an ex
parte order in another state, intending to utilize the order in the forum to obtain custody of child living
in the forum with his father); First Am. First, Inc. v. National Ass'n of Bank Women, 802 F.2d 1511
(4th Cir. 1986) (business defamation of resident); Ealing Corp. v. Harrods Ltd., 790 F.2d 978 (1st Cir.
1986) (fraudulent misrepresentation); Vishay Intertechnology, Inc. v. Delta Int'l Corp., 696 F.2d 1062
(4th Cir. 1982) (fraudulent misrepresentation); Brown v. Flowers Indus., Inc., 688 F.2d 328 (5th Cir.
1982) (defamation), \textit{cert. denied}, 460 U.S. 1023 (1983); Whittaker Corp. v. United Aircraft Corp., 482
\textit{But see} Wallace v. Herron, 778 F.2d 391 (7th Cir. 1985), \textit{cert. denied}, 475 U.S. 1122 (1986), in which
the court refused to accept \textit{Caldor} as implying that jurisdiction is always properly asserted against a
nonresident defendant who commits an intentional tort against a resident plaintiff. There, however, the
alleged tort, malicious prosecution, had occurred outside the forum and, unlike libel, the injurious effect
was also felt outside the forum. \textit{See also} Southmark Corp. v. Life Investors, Inc., 851 F.2d 763 (5th Cir.
1988), in which the court refused to permit the plaintiff, with its principal place of business in the
terns share only certain similarities and so raise continuing jurisdictional questions. Certainly the sine qua non here must be the intentional nature of the act that causes the effect. If the defendant's gun goes off accidentally, there is no intended affiliation, nor is there if the defendant attempts to hit a tree in Illinois and instead hits someone in Indiana. On the other hand, if the defendant intends to hit a tree in Indiana and instead hits a bird-watcher, the negligent injury was not the intended effect of what was an intended affiliation. Its jurisdictional significance depends upon whether the causation of injury must be intentional, which in turn depends upon the scope of the defendant's waiver of his right to remain unconnected with Indiana. At the least, that waiver must encompass the direct consequences of the intentional act, even if those consequences were not themselves intended when the act was undertaken. This parallels the logic of subjecting the driver of a car to the jurisdiction of the forum in which his negligent driving caused injury, a direct though unintended consequence of an intentional affiliating act.

CONCLUSION

The time has clearly come to abandon the rhetoric of Hanson v. Denckla.\(^{144}\) For over thirty years, courts analyzing personal jurisdiction have been preoccupied with this search for "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."\(^{145}\) True, when in International Shoe Co. v. Washington\(^{146}\) the Supreme Court abandoned prior jurisdictional limits based upon territorial power to enforce a judgment, it did focus upon the authority of a forum to attach jurisdictional consequences to past activities of a defendant there. Such authority continues to exist today, but the universe of situations in which jurisdiction may constitutionally be asserted is not limited to those situations. This the Court has recognized in Caldor,\(^{147}\) in Burger King,\(^{148}\) and, to some extent, in Asahi.\(^{149}\) Any continued attempt to maintain that a defendant must purposefully avail himself of the privilege of conducting activities in the forum, or that he must somehow benefit from the protection he is

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footnote:\(^{144}\) 357 U.S. 235 (1958).
^{145}\) Id. at 253.
^{146}\) 326 U.S. 310 (1945).
^{148}\) Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985).
afforded by the forum's laws when he does act there, is as strained a use of language as was the fictitious "consent" defendants were said, before *International Shoe*, to have given to jurisdiction over claims arising from their past actions in the forum.

Purposeful or intentional affiliation with a forum actor or market is what due process requires in order to conclude that a defendant has waived his right to remain unconnected with the forum. Consideration of the relationship between the claim brought and the acts constituting that affiliation is required to determine whether the defendant's waiver reasonably encompasses the specific jurisdictional assertion. These two issues, not "minimum contacts" as a synonym for "purposeful availing" and "fairness" as a mask for "relatedness," should be articulated and applied by courts confronting jurisdictional challenges. To place them in the limelight will not dispel all the shadows—grey areas will inevitably remain, involving factual arguments about whether a given defendant was active or passive in the formulation and conduct of his affiliation, and legal arguments about the proper scope of the waiver reflected by a specific act that constitutes intentional affiliation. But to identify these as the jurisdictionally relevant questions will conform substance to form and make it possible to describe jurisdictional results rather than merely to draw them. The jurisdictional music has changed. So too must the litany.