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BAUXITES' "INDIVIDUAL LIBERTY INTEREST" AND THE RIGHT TO CONTROL AMENABILITY TO SUIT IN PERSONAL JURISDICTION ANALYSIS

INTRODUCTION

Traditional analyses of the proper exercise by states of in personam jurisdiction over nonresident defendants have focused on four distinct interests: those of the plaintiff,¹ the forum state,² the defendant³ and

1. A plaintiff is interested in having his suit adjudicated in a convenient forum, usually near his domicile or principal place of business. See *Hanson v. Denckla*, 357 U.S. 235, 259 (1958) (Black, J., dissenting) (arguing that the domicile of the plaintiff was accessible to all parties and therefore was a proper forum); *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223-24 (1957) (discussing relative conveniences of defendant in litigating in the forum and of plaintiff proceeding in a different forum); *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 443, 176 N.E.2d 761, 766 (1961) (court taking into account plaintiff's residency in the forum state); Note, *The Long Arm Shrinks: The Supreme Court and the Problem of the Nonresident Defendant in World-Wide Volkswagen Corp. v. Woodson*, 58 Den. L.J. 667, 677 (1981) (discussing the analysis in *Gray* of the conveniences of the parties). The distance a plaintiff would have to travel if jurisdiction were to be denied is a relevant consideration. *Burstein v. State Bar*, 693 F.2d 511, 522 (5th Cir. 1982); Note, *Fifth Amendment Due Process Limitations on Nationwide Federal Jurisdiction*, 61 B.U.L. Rev. 403, 424 (1981) [hereinafter cited as *Nationwide Jurisdiction*]. A plaintiff is also interested in a location that minimizes the costs of litigation. See *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957) ("When claims were small or moderate individual claimants frequently could not afford the cost of bringing an action in a foreign forum . . ."); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947) (discussing costs of litigation in the context of venue); Woods, *Pennoyer's Demise: Personal Jurisdiction After Shaffer and Kulko and a Modest Prediction Regarding World-Wide Volkswagen Corp. v. Woodson*, 20 Ariz. L. Rev. 861, 892-93 (1978) (minimizing the cost of litigation to the plaintiff may be more important when the defendant is insured); *Nationwide Jurisdiction*, *supra*, at 424 (discussing litigation costs of both the plaintiff and defendant). When a plaintiff sues multiple defendants, his interest may be in suing all of them in the same court. The plaintiff seeks to join all defendants in one suit to avoid inconsistent results or duplicative litigation. See *Henry R. Jahn & Sons v. Superior Court*, 49 Cal. 2d 855, 862, 323 P.2d 437, 441 (1958); Kamp, *Beyond Minimum Contacts: The Supreme Court's New Jurisdictional Theory*, 15 Ga. L. Rev. 19, 46 (1980); see also Jay, "Minimum Contacts" as a Unified Theory of Personal Jurisdiction: A Reappraisal, 59 N.C.L. Rev. 429, 449 (1981) ("Realizing the possibility of multiple defendants pointing the finger at each other, plaintiffs in the [position of those in *World-Wide*] may be forced to a distant forum, thereby accepting the financial consequences.").

2. The forum state is primarily interested in providing resident plaintiffs with a convenient forum, *Shaffer v. Heitner*, 433 U.S. 186, 223 (1977) (Brennan, J., concurring in part, dissenting in part) (discussing ways in which states' interests have been expressed in the past); see Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 Nw. U.L. Rev. 1112, 1139 (1981), and having its body of law effectively protect them, *Shaffer v. Heitner*, 433 U.S. 186, 223 (1977) (Brennan, J., concurring in part, dissenting in part); *Nationwide Jurisdiction*, *supra* note 1, at 419; see Redish, *supra*, at 1139. In appropriate cases the forum's interest also extends to overseeing the disposition of land and personalty within the state. See *Hanson v. Denckla*, 357 U.S. 235, 246 (1958); *Quasha v. Shale Dev. Corp.*, 667 F.2d 483, 486-87 (5th Cir. 1982).

3. A defendant wishes to avoid the costs of litigating in a distant forum, *Kulko v. Superior Court*, 436 U.S. 84, 97 (1978) (noting substantial financial strain that

the "interstate judicial system."⁴ Yet the due process clause of the fourteenth amendment, which governs the exercise by states of personal jurisdiction, has been interpreted to require more than a simple weighing of these interests.⁵

The earliest Supreme Court analysis of jurisdiction after the passage of the fourteenth amendment recognized certain limitations on the sovereign power of the states.⁶ These limitations have been refined into an insistence on an affiliation between a defendant and the forum state.⁷ Originally, the standard of affiliation was actual presence of the defendant or its real property in the forum state.⁸ The growth of corporations made this standard inoperable for two reasons. First, a corporation does not exist in the same sense that a person exists, and therefore, is incapable of "actual presence."⁹ Second, a corporation is a creature of local law and was originally deemed not to have a legal existence apart from the state of its incorporation.¹⁰ Consequently, the Court adopted a standard that evaluated the required affiliation in

would be put on New York defendant by having to litigate in the forum California); see Note, *Long-Arm Jurisdiction in Products Liability Actions: An 'Effect Test' Analysis of World-Wide Volkswagen Corp. v. Woodson*, 45 Alb. L. Rev. 179, 201 (1980) [hereinafter cited as *Effect Test*], and the risk of the application of laws that the defendant did not consult in fashioning his conduct, see *Shaffer v. Heitner*, 433 U.S. 186, 225 (1977) (Brennan, J., concurring in part, dissenting in part); *Woods*, *supra* note 1, at 896; see also von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121, 1174-75 (1966) (discussing, in light of *Hanson v. Denckla*, 357 U.S. 235 (1958), the unfairness that can result when jurisdictional analysis is totally separated from choice of law analysis).

4. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) (interest of the "interstate judicial system" lies in "obtaining the most efficient resolution of controversies"). The efficiency to which the *World-Wide* Court alluded is achieved through the "orderly administration of the laws." *Id.* at 297 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)).

5. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980); *Kulko v. Superior Court*, 436 U.S. 84, 92 (1978); *Hanson v. Denckla*, 357 U.S. 235, 245-46 (1958); see *Pennoyer v. Neff*, 95 U.S. 714, 722-23 (1878).

6. *Pennoyer v. Neff*, 95 U.S. 714, 722 (1878). In *Pennoyer*, the Court relied on the writings of Justice Story on international conflicts of law. *Id.* at 722-23; see J. Story, *Conflicts of Law* ch. 2 (7th ed. 1872). The Court established a system under which "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory," but in which "no State can exercise direct jurisdiction and authority over persons or property without its territory." 95 U.S. at 722.

7. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980) ("[T]he Due Process Clause 'does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations.'") (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)).

8. *Pennoyer v. Neff*, 95 U.S. 714, 722, 723 (1878).

9. F. James & G. Hazard, *Civil Procedure* § 12.14, at 630-31 (2d ed. 1977).

10. See *id.*; C. Wright & A. Miller, *Federal Practice & Procedure* § 1066 (1969).

terms of the defendant's contacts with the forum state, rather than in terms of the defendant's actual presence within the forum's borders.¹¹ The contacts had to be significant enough that forcing the defendant to litigate in the forum state would not "offend 'traditional notions of fair play and substantial justice.'" ¹²

This contacts test, announced in *International Shoe Co. v. Washington*,¹³ made it easier for plaintiffs to obtain jurisdiction over nonresident defendants than did the actual presence test.¹⁴ But the principles of the contacts test—fair play and substantial justice—were so general that state courts could apply them to favor either defendants or plaintiffs.¹⁵ Depending on the number and quality of contacts required to be shown, a plaintiff enjoyed either greater or lesser ease in obtaining jurisdiction, and a defendant, greater or lesser control over its amenability to suit.¹⁶

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

12. *Id.* (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

13. 326 U.S. 310 (1945).

14. See *McGee v. International Life Ins. Co.*, 355 U.S. 220, 222-23 (1957) (noting trend toward expanding the scope of state court jurisdiction); Louis, *The Grasp of Long Arm Jurisdiction Finally Exceeds its Reach: A Comment on World-Wide Volkswagen Corp. v. Woodson and Rush v. Savchuk*, 58 N.C.L. Rev. 407, 407-08 (1980) (noting unparalleled expansion of state judicial jurisdiction after *International Shoe*); Note, *Retracting the Long Arm: World-Wide Volkswagen Corp. v. Woodson and Rush v. Savchuk*, 22 B.C.L. Rev. 385, 386 (1981) ("This test [of *International Shoe*] greatly extended the reach of state judicial power.") [hereinafter cited as *Retracting the Long Arm*]; *Nationwide Jurisdiction*, *supra* note 1, at 407 ("[T]he Court recognized the need to expand the scope of state court jurisdiction, and abandoned *Pennoyer's* jurisdictional requirements of presence and consent."); Note, *World-Wide Volkswagen Corp. v. Woodson: A Limit to the Expansion of Long-Arm Jurisdiction*, 69 Calif. L. Rev. 611, 611 (1981) ("Beginning with [*International Shoe*] this concept of physical power over property yielded to an expanded view of the ability of the states to exercise personal jurisdiction . . .") [hereinafter cited as *Long-Arm Jurisdiction*].

15. *Retracting the Long Arm*, *supra* note 14, at 390 (in light of *Hanson and McGee*, courts using contacts test did what they thought was fair under the circumstances); *Long-Arm Jurisdiction*, *supra* note 14, at 615-16 (discussing the "perplexing minimum contacts standard" and the inconsistent state court results after *Hanson and McGee*); Note, *The Long-Arm Reach of the Courts Under the Effect Test After Kulko v. Superior Court*, 65 Va. L. Rev. 175, 179-81 (1979) (discussing varied application of the contacts test in products liability cases) [hereinafter cited as *Reach of the Courts*].

16. In the space of six months the Court decided two cases in which the number and quality of contacts demanded varied greatly. In *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957), the Court applied a contacts analysis that accorded great weight to the interest of the forum state. *Id.* at 223; see Comment, *Federalism, Due Process, and Minimum Contacts: World-Wide Volkswagen Corp. v. Woodson*, 80 Colum. L. Rev. 1341, 1345-46 (1980) [hereinafter cited as *Federalism*]. The Court sustained jurisdiction over the defendant insurer whose only contact with the plaintiff claimant and the forum state was its correspondence concerning the plaintiff's claim under a life insurance policy. 355 U.S. at 221-22. To justify the forum's exercise of jurisdiction the Court referred to a statute of the forum state in which the state

After *International Shoe*, some courts allowed the exercise of jurisdiction if a defendant's contacts were a mere "foreseeable" consequence of its activities.¹⁷ Courts using this standard reasoned that the controlling interests in the analysis are those of the plaintiff and the forum state in adjudicating the controversy in the state where the injury occurred.¹⁸ Other courts required a higher quality of contacts, and exercised jurisdiction only when a defendant's contacts were the result of its "purposeful availment" of the benefits and protections of the forum's laws.¹⁹ Courts using this standard reasoned

expressed a specific interest in providing a forum for claims against out-of-state insurance companies such as the defendant. *Id.* at 223; see *Hanson v. Denckla*, 357 U.S. 235, 252 (1958) (Court noting special statute in *McGee* as basis for distinguishing facts before it from those in *McGee*). The analysis in *McGee* de-emphasized the quantity and quality of contacts: There was only one transaction, and its purposefulness was never explored. 355 U.S. at 221-22.

Six months after its decision in *McGee*, the Court did concentrate on the quality and quantity of the defendant's contacts with the forum state. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958); see *Federalism*, *supra*, at 1351. The Court's analysis was favorable to defendants because it required that all contacts represent efforts of the defendant to purposefully avail itself of the benefits and protections of doing business in the forum state. *Id.*; see *Long-Arm Jurisdiction*, *supra* note 14, at 615.

17. See, e.g., *Ajax Realty Corp. v. J.F. Zook, Inc.*, 493 F.2d 818, 822-23 (4th Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *Sheridan v. Cadet Chem. Corp.*, 25 Conn. Supp. 17, 22-23, 195 A.2d 766, 768-69 (Super. Ct. 1963); *Andersen v. National Presto Indus.*, 257 Iowa 911, 918-19, 135 N.W.2d 639, 643 (1965); *Cole v. Doe*, 77 Mich. App. 138, 143, 258 N.W.2d 165, 168 (1977); *Ehlers v. U.S. Heating & Cooling Mfg. Corp.*, 267 Minn. 56, 61-62, 124 N.W.2d 824, 827 (1963); *Roy v. North Am. Newspaper Alliance Inc.*, 106 N.H. 92, 97-98, 205 A.2d 844, 847-48 (1964); see also *Currie, The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. Ill. L.F. 533; *Louis*, *supra* note 14, at 408, 425; *Retracting the Long Arm*, *supra* note 14, at 391; *Reach of the Courts*, *supra* note 15, at 179-80.

18. See, e.g., *Aftanase v. Economy Baler Co.*, 343 F.2d 187, 197 (8th Cir. 1965); *Rosen v. Savant Instruments, Inc.*, 264 F. Supp. 232, 234-36 (E.D.N.Y. 1967); *Hearne v. Dow-Badische Chem. Co.*, 224 F. Supp. 90, 99-100 (S.D. Tex. 1963); *American Type Founders Co. v. Mueller Color Plate Co.*, 171 F. Supp. 249, 252 (E.D. Wis. 1959); *Sheridan v. Cadet Chem. Corp.*, 25 Conn. Supp. 17, 21, 195 A.2d 766, 768 (Super. Ct. 1963); *Hull v. Gamblin*, 241 A.2d 739, 742-43 (D.C. 1968); *Andersen v. National Presto Indus.*, 257 Iowa 911, 919, 135 N.W.2d 639, 643 (1965); *Foye v. Consolidated Baling Mach. Co.*, 229 A.2d 196, 200 (Me. 1967); *Woods v. Edgewater Amusement Park*, 381 Mich. 559, 568-69, 165 N.W.2d 12, 16-17 (1969); *Cole v. Doe*, 77 Mich. App. 138, 143, 258 N.W.2d 165, 168 (1977); *Dahlberg Co. v. Western Hearing Aid Center, Ltd.*, 259 Minn. 330, 334-35, 107 N.W.2d 381, 384, *cert. denied*, 366 U.S. 961 (1961); *Roy v. North Am. Newspaper Alliance, Inc.*, 106 N.H. 92, 97-98, 205 A.2d 844, 847-48 (1964); *Reach of the Courts*, *supra* note 15, at 179-80.

19. See, e.g., *Southern Mach. Co. v. Mohasco Indus.*, 401 F.2d 374, 381 (6th Cir. 1968); *Uppgren v. Executive Aviation Servs., Inc.*, 304 F. Supp. 165, 169-71 (D. Minn. 1969); *Khalaf v. Bankers & Shippers Ins. Co.*, 62 Mich. App. 678, 681-82, 233 N.W.2d 696, 697-98 (1975), *aff'd*, 404 Mich. 134, 273 N.W.2d 811 (1978); *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.*, 15 N.Y.2d 443, 458, 209 N.E.2d

that due process considerations place a limit on the scope of the forum's jurisdictional power to protect its interests and those of the plaintiff.²⁰

Apparently concerned with state courts' use of the "foreseeability" standard, the Supreme Court in 1980, in *World-Wide Volkswagen Corp. v. Woodson*,²¹ adopted a contacts test that applied the higher quality "purposeful availment" standard.²² Using this standard in the test, the Court held that the long arm statute of the forum state, Oklahoma, did not reach the New York defendants: The retail sale in New York of a car that later caused injury in Oklahoma did not amount to a purposeful availment of the laws of the state into which the car was driven.²³ By limiting the reach of the forum's long arm statute, the Court imposed restraints on the sovereign power of the forum state.²⁴ The Court stated that the purpose of imposing these restraints on the forum state was to preserve the principles of "interstate federalism."²⁵

68, 76, 261 N.Y.S.2d 8, 19, *cert. denied*, 382 U.S. 905 (1965); *W.B. Dunavant & Co. v. Perkins*, 498 S.W.2d 905, 909 (Tenn. 1973); *O'Brien v. Comstock Foods, Inc.*, 123 Vt. 461, 464-65, 194 A.2d 568, 570-71 (1963).

20. See *supra* note 19.

21. 444 U.S. 286 (1980).

22. See *id.* at 294, 297. In *World-Wide* the Court discussed the relaxation of the limits on state court jurisdiction before and after *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957), and concluded that interstate federalism principles prevent the exercise of jurisdiction even when all the other interests would otherwise favor the exercise of jurisdiction. 444 U.S. at 292-93, 294. The Court sought to arrive at a result that was generally fair but which was based on an approach that was "sufficiently clear and workable [so] that the states, despite their contrary self-interest, would effectively be bound by it or could easily be held to it." Louis, *supra* note 14, at 409; see also *Federalism*, *supra* note 16, at 1357 (suggesting that Court's measures were intended to curb what it perceived as the unrestricted use of foreseeability criteria in contacts analysis); *Long-Arm Jurisdiction*, *supra* note 14, at 611 (discussing how Court's higher standard "further limited the ability of the state courts to exercise jurisdiction").

23. 444 U.S. at 295-97.

24. *Id.* at 294; *Hendrickson v. Reg O Co.*, 657 F.2d 9, 14 (3d Cir. 1981); see Louis, *supra* note 14, at 409 (noting that "[b]y 1975, state long arm jurisdiction and choice-of-law doctrine had enjoyed three decades of unimpeded growth towards, and arguably sometimes beyond, the limits of due process"). But see Jay, *supra* note 1, at 457-58 (state courts were more constrained than suggested by Professor Louis). Regardless of the dimensions of this growth, the majority of the Court in *World-Wide* perceived that state courts were going too far in products liability cases. See 444 U.S. at 295-96 (discussing permissiveness of foreseeability standard); *Federalism*, *supra* note 16, at 1357 ("The Court was clearly concerned that unrestricted use of the foreseeability criterion would subject sellers of goods to an extremely wide scope of in personam jurisdiction.").

25. 444 U.S. at 294 ("[T]he Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment."); see *Federalism*, *supra* note 16, at 1355 (Court's "definition of the federalism limitation of due process is phrased in terms of implied reciprocal restric-

In footnote ten of *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*,²⁶ however, the Court stated that “[t]he restriction on state sovereign power described in *World-Wide Volkswagen Corp.* . . . must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause.”²⁷ This removal of interstate federalism as a justification for using the “purposeful availment” standard in the contacts analysis has led some courts to revert to a contacts analysis that favors the interests of plaintiffs and forum states.²⁸ This analysis weighs all the remaining interests, but fails to appreciate the constitutional function that a defendant’s individual liberty interest, recognized in *Bauxites*, has in contacts analysis.²⁹

This Note argues that a defendant’s individual liberty and property interests shield it from undue burdens of litigating in a distant forum and allow it to control its amenability to suit in that forum. Examining the rise and fall of federalism in contacts analysis, Part I shows how *Bauxites* replaces the interests of “interstate federalism” with the “individual liberty interest” of the defendant. It further demonstrates that the effective means of protecting the relevant constitutional interests after *Bauxites* lies in the retention of the “purposeful availment” standard in the contacts analysis. Part II sets forth a proposed contacts analysis that is consistent with *Bauxites*,

tions on the power of sister states, a consequence of the territorial divisions among them.”). In his dissent, Justice Brennan contended that “the Court is allowing defendants to assert the sovereign rights of their home states.” 444 U.S. at 311-12 (Brennan, J., dissenting).

26. 102 S. Ct. 2099 (1982).

27. *Id.* at 2105 n.10.

28. See *Burstein v. State Bar*, 693 F.2d 511, 523 (5th Cir. 1982) (court evaluating contacts in terms of fairness but jurisdiction not allowed). Some courts are apparently retreating from the sovereignty analysis, yet not citing to *Bauxites*. *Vishay Intertech., Inc. v. Delta Int’l Corp.*, 696 F.2d 1062, 1068-69 (4th Cir. 1982) (court expressing greater concern for fairness than for purposeful availment); *Cives Corp. v. American Elec. Power Co.*, 550 F. Supp. 1155, 1157-58 (D. Me. 1982) (court applying interest analysis derived from *World-Wide*; threshold evaluation of defendant’s contacts reduced to one factor of inquiry into overall reasonableness).

29. Courts reverting to an interest analysis present the Supreme Court with the same problem that prompted its decision in *World-Wide*: the zealotry with which state courts assert state interests. See *Louis*, *supra* note 14, at 431-32. The requirements of personal jurisdiction, however, involve not only a weighing of the relevant interests but also a limitation on the power of the forum state. See *supra* note 5 and accompanying text. The contacts test of *World-Wide* performed these two related functions by protecting the defendant from an inconvenient forum and by ensuring that states do not exceed “the limits imposed on them . . . as coequal sovereigns in a federal system.” *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980). This same power restraint will continue to exist after *Bauxites* in order to preserve a defendant’s individual liberty interest. *Insurance Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 102 S. Ct. 2099, 2105 n.10 (1982). Therefore, the test requires more than a simple weighing of conveniences.

illustrates the practical application of the analysis, and reveals the flaws of analyses currently used by courts and proposed by commentators.

I. THE DIFFERING JUSTIFICATIONS FOR USE OF THE PURPOSEFUL AVAILMENT STANDARD IN CONTACTS ANALYSIS

A. World-Wide: The "Interstate Federalism" Justification

The Court in *World-Wide Volkswagen Corp. v. Woodson*³⁰ interpreted the due process clause of the fourteenth amendment to restrict states' exercise of in personam jurisdiction only to defendants who had "purposefully availed" themselves of the forum's laws.³¹ This high quality of affiliation between the defendant and the forum was considered necessary primarily to preserve the balance of power shared by the states in the federal system.³² "The sovereignty of each State," according to the Court, "implied a limitation on the sovereignty of all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment."³³ This principle of "interstate federalism"³⁴ dominated the resulting jurisdictional analysis conducted by the Court.³⁵

In *World-Wide* the Court announced a contacts test that had two steps. In the first step, a court would have to determine whether the defendant had purposefully affiliated itself with the forum state.³⁶ Absent such purposeful availment, a court would lack the power to hear the case and the analysis would end.³⁷ If, on the other hand, a

30. 444 U.S. 286 (1980).

31. *See id.* at 297 (Court citing to that portion of *Hanson v. Denckla*, 357 U.S. 235, 253 (1958), which equated a defendant's activities within a forum state with the invocation of the protections afforded by that state's laws).

32. The Court in *World-Wide* linked interstate federalism concerns to the requirement of some affiliation between the defendant and the forum state. 444 U.S. at 294. The Court defined the quality of this affiliation in terms of purposeful availment. *Id.* at 297 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)); *see Federalism, supra* note 16, at 1349-50; *Retracting the Long Arm, supra* note 14, at 398.

33. 444 U.S. at 293. The Court indicated that these sovereign power limitations inhered in the federal system, which envisions states retaining most of their sovereign attributes.

34. *Id.*

35. *Id.* at 291, 292-94.

36. *See id.* at 297. *See supra* note 31 (discussing the relationship between the purposeful availment standard and the principle of interstate federalism). The purposeful availment standard has been described by the Court as a means of "ensuring the 'orderly administration of the laws,' " and as an instrument for providing defendants with guidance in tailoring their conduct to avoid amenability to suit. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)).

37. Without acknowledging the constitutional justification for a threshold determination of the forum's jurisdictional power, *see Retracting the Long Arm, supra*

court were to find that the defendant had purposefully affiliated itself with the forum state, the court would have the power to hear the case.³⁸ It would not necessarily be able to exercise jurisdiction, however, until it had conducted the second step of the analysis. In that step, it would have to assess the burdens of litigation on the parties³⁹ by balancing the defendant's inconvenience in litigating in the forum with the inconvenience to the plaintiff of litigating in an alternative forum.⁴⁰ In conducting this step of the analysis, courts have seemingly presumed the propriety of exercising jurisdiction unless the burden on the defendant would be substantial.⁴¹

The primacy of the interstate federalism principle, acting as the justification for the threshold "power" step⁴² in the analysis, was emphasized by the Court:

Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.⁴³

Thus, any restraint on the power of the forum state would be the product of a court's protection of the principle of "interstate federalism."⁴⁴

note 14, at 386-87 (author recognizing this threshold determination as the purposeful availment inquiry and further stating that "[i]f this factor was not satisfied, all other inquiries [become] immaterial"), a court could resolve all jurisdictional questions in terms of fairness or reasonableness.

38. See 444 U.S. at 297-98.

39. Arguably the burdens on a defendant that both the majority and dissenting opinions describe can be characterized as impairments of property interests. See *id.* at 292; *id.* at 301 (Brennan, J., dissenting).

40. See *id.* at 291-92; Louis, *supra* note 14, at 407, 421, 430.

41. See, e.g., *Leney v. Plum Grove Bank*, 670 F.2d 878, 881 (10th Cir. 1982) (court finding substantial burdens on the defendant); *Quasha v. Shale Dev. Corp.*, 667 F.2d 483, 487 (5th Cir. 1982) (court expressing doubt that defendant's domicile was more convenient for defendant to litigate in than the forum); *Insurance Co. of N.Am. v. Marina Salina Cruz*, 649 F.2d 1266, 1271-72 (9th Cir. 1982) (court denying jurisdiction because of substantial burdens on the defendant).

42. See *Retracting the Long Arm*, *supra* note 14, at 386-87. "Where a contact between the defendant and the forum is weak, concern for the maintenance of a genuinely federal system of government may foreclose jurisdiction irrespective of other fairness interests." *Id.* at 398; Jay, *supra* note 1, at 438; Louis, *supra* note 14, at 407.

43. 444 U.S. at 294.

44. See Jay, *supra* note 1, at 441 (describing application of the analysis in *World-Wide* as "directed entirely toward the 'sovereignty' limitation"); *Retracting the Long Arm*, *supra* note 14, at 386-87 (arguing that courts must first determine whether a finding of jurisdiction would offend principles of "interstate federalism"). In some

Although this analysis focused on the interests of sovereigns, its results directly affected the individual interests at stake. It established a restraint on the power of the forum state that allowed a defendant to tailor its conduct to avoid amenability to suit.⁴⁵ Arguably, a defendant's control over amenability to suit was not a mere by-product of the power restraints on the states that were imposed to further the interests of interstate federalism. Rather, concern for preserving this control dictated the imposition of these restraints, and the furtherance of the interests of interstate federalism merely justified the imposition.⁴⁶

Regardless of the reason for imposing restraints on the forum's power, the overall effect of the analysis in *World-Wide* was to place the closely allied interests of the defendant and interstate federalism ahead of those of a plaintiff and forum.⁴⁷ Consequently, the analysis foreclosed the option that had been available to state courts since *International Shoe Co. v. Washington*⁴⁸ of applying a contacts test to protect the interests of plaintiffs and forums instead of those of the defendant.⁴⁹

B. Bauxites: *The "Individual Liberty Interest" Justification*

The reaction to the jurisdiction analysis in *World-Wide* was immediate and varied. Commentators questioned both the need for

cases, courts seem to rely heavily on principles of fairness or reasonableness to find no jurisdiction even though the defendant has engaged in activities that are apparently purposeful availments. See *Loney v. Plum Grove Bank*, 670 F.2d 878, 881 (10th Cir. 1982); *Insurance Co. of N. Am. v. Marina Salina Cruz*, 649 F.2d 1266, 1271 (9th Cir. 1981). Additionally, jurisdiction may be refused if the forum state has no demonstrable interest in hearing the case. See *Keeton v. Hustler Magazine, Inc.*, 682 F.2d 33, 36 (1st Cir. 1982), *cert. granted*, 103 S. Ct. 813 (1983).

45. The Court found that this restraint on the power of the forum state was mandated by the due process clause. 444 U.S. at 294. The Court concluded: "The Due Process Clause, by ensuring the 'orderly administration of the laws,' . . . gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Id.* at 297 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)).

46. See *Retracting the Long Arm*, *supra* note 14, at 386-87 (arguing that federalism standard was implemented to combat defendants' inability to predict where they might be held amenable to suit).

47. See *Louis*, *supra* note 14, at 430 & n.161 (pointing out the difference between the majority's analysis in *World-Wide* and the dissent's interest analysis is the relative importance assigned to factors and interests); *Federalism*, *supra* note 16, at 1357, 1361 (noting that federalism interest is higher than that of a forum state, and then aligning it with a defendant's interest); *Retracting the Long Arm*, *supra* note 14, at 387, 405 (noting shift in *World-Wide* from an equal weighing of interests to a threshold inquiry made in the name of federalism and for the benefit of defendant).

48. 326 U.S. 310 (1945).

49. See *supra* note 17 for examples of courts using this option.

such a pro-defendant contacts test⁵⁰ and the constitutional foundation on which it rested.⁵¹ The sharpest criticism focused on the lack of any constitutional or historical justification for including the concept of interstate federalism in the due process inquiry.⁵²

The federal circuit courts, for unstated reasons, did not discuss the concepts of sovereignty,⁵³ but did apply the "purposeful availment"

50. *Effect Test*, *supra* note 3, at 204-05 (foreseeability would have adequately protected the defendant); Note, *Personal Jurisdiction: Refinement in Light of Rush v. Savchuk and World-Wide Volkswagen v. Woodson*, 32 *Baylor L. Rev.* 303, 312 (1980) (arguing that the interstate federalism element of the in personam test would make a violation of the test tantamount to a judgment rendered without subject matter jurisdiction) [hereinafter cited as *Refinement*]; *Long-Arm Jurisdiction*, *supra* note 14, at 622 (restrictive approach does not take into account the decreased burdens on a defendant due to modern transportation and communication systems).

51. Braveman, *Interstate Federalism And Personal Jurisdiction*, 33 *Syracuse L. Rev.* 533, 554 (1982) (noting great inconsistency in allowing a sovereign interest to be waived by the defendant's voluntary appearance in the forum state action); Redish, *supra* note 2, at 1120-33 (pointing out that *Pennoyer v. Neff*, 95 U.S. 714 (1878), was not based on precedent, and interstate federalism principles are not found in the fourteenth amendment).

52. See Redish, *supra* note 2, at 1120-33.

53. *First Nat'l Bank v. J.W. Brewer Tire Co.*, 680 F.2d 1123 (6th Cir. 1982) (*per curiam*); *Halstead Hosp. Inc. v. Northern Bank Note Co.*, 680 F.2d 1307 (10th Cir. 1982); *Jadair, Inc. v. Walt Keeler Co.*, 679 F.2d 131 (7th Cir.), *cert. denied*, 103 S. Ct. 258 (1982); *Carty v. Beech Aircraft Corp.*, 679 F.2d 1051 (3d Cir. 1982); *Mountaire Feeds, Inc. v. Agro Impex, S.A.*, 677 F.2d 651 (8th Cir. 1982); *Leney v. Plum Grove Bank*, 670 F.2d 878 (10th Cir. 1982); *Quasha v. Shale Dev. Corp.*, 667 F.2d 483 (5th Cir. 1982); *Shanks v. Westland Equip. & Parts Co.*, 668 F.2d 1165 (10th Cir. 1982); *Kimbrel v. Neiman-Marcus*, 665 F.2d 480 (4th Cir. 1981); *Schwilm v. Holbrook*, 661 F.2d 12 (3d Cir. 1981); *Kransco Mfg. Inc. v. Markwitz*, 656 F.2d 1376 (9th Cir. 1981); *Austin v. North Am. Forest Prods.*, 656 F.2d 1076 (5th Cir. 1981); *Prejean v. Sonatrach Inc.*, 652 F.2d 1260 (5th Cir. 1981); *Hendrickson v. Reg O Co.*, 657 F.2d 9 (3d Cir. 1981); *Willis v. Willis*, 655 F.2d 1333 (D.C. Cir. 1981); *Koster v. Automark Indus.*, 640 F.2d 77 (7th Cir. 1981); *Nu-Way Sys. v. Belmont Mktg., Inc.*, 635 F.2d 617 (7th Cir. 1980); *Plant Food Co-op v. Wolfkill Feed & Fertilizer Corp.*, 633 F.2d 155 (9th Cir. 1980); *Wisconsin Elec. Mfg. Co. v. Pennant Prods.*, 619 F.2d 676 (7th Cir. 1980).

In some cases involving foreign defendants, courts naturally have not discussed "interstate federalism," but have applied the purposeful availment standard in the contacts test nonetheless. *Taubler v. Giraud*, 655 F.2d 991 (9th Cir. 1981); *Puerto Rico v. The S.S. Zoe Colocotroni*, 628 F.2d 652 (1st cir. 1980), *cert. denied*, 450 U.S. 912 (1981); *Nova Biomedical Corp. v. Moller*, 629 F.2d 190 (1st Cir. 1980); *Neiman v. Rudolf Wolff & Co.*, 619 F.2d 1189 (7th Cir.), *cert. denied*, 449 U.S. 920 (1980).

Two federal circuit courts have discussed sovereignty or interstate federalism elements as relevant. *Paolino v. Channel Home Centers*, 668 F.2d 721, 724 (3d Cir. 1981); *Insurance Co. of N. Am. v. Marina Salina Cruz*, 649 F.2d 1266, 1272 (9th Cir. 1981). In *Paolino*, the court reasoned that because both the defendant's state and the plaintiff's state recognized trade secrets, neither would be offended by the adjudication of the suit in the other's courts. 668 F.2d at 724. In *Insurance Co. of N. Am.*, the court concluded that "foreign nations present a higher sovereignty barrier than that between two states within our union." 649 F.2d at 1272.

standard.⁵⁴ Although the lower courts were applying the practical aspects of the test correctly, and were achieving its underlying purpose,⁵⁵ the Supreme Court was forced to examine the constitutional justification upon which the *World-Wide* contacts test was based.

In *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*,⁵⁶ the defendant attempted to escape jurisdiction by not cooperating with a jurisdictional discovery order.⁵⁷ The specific problem presented to the Court was whether the defendant, by not cooperating with the court order, had waived its right to object to jurisdiction, thereby justifying the forum's exercise of in personam jurisdiction over it.⁵⁸

The inclusion of the interstate federalism principle in personal jurisdiction analysis had created an unforeseen dilemma:

[I]f the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement: Individual actions cannot change the powers of sovereignty, although the individual can subject himself to powers from which he may otherwise be protected.⁵⁹

Recognizing this dilemma, the Court had no alternative but to remove the principle from the contacts analysis. It did so by stating: "[The due process clause] is the only source of the personal jurisdiction requirement and the clause itself makes no mention of federalism concerns."⁶⁰

In two Third Circuit cases, federalism concerns were discussed but found to be irrelevant. *Horne v. Adolf Coors Co.*, 684 F.2d 255, 259 (3d Cir. 1982) (federal statute involves no interstate federalism concerns); *Jaffee v. United States*, 663 F.2d 1226, 1267 (3d Cir. 1981) (Gibbons, J., dissenting) (remarking on the unlikelihood "that any state's law could have controlled defendant's conduct or that any state would be interested in protecting defendants from liability for constitutional torts"), *cert. denied*, 456 U.S. 972 (1982).

54. See, e.g., *First Nat'l Bank v. J.W. Brewer Tire Co.*, 680 F.2d 1123, 1126 (6th Cir. 1982) (per curiam); *Halstead Hosp., Inc. v. Northern Bank Note Co.*, 680 F.2d 1307, 1310 (10th Cir. 1982); *Jadair, Inc. v. Walt Keeler Co.*, 679 F.2d 131, 133-34 (7th Cir.), *cert. denied*, 103 S. Ct. 258 (1982); *Carty v. Beech Aircraft Corp.*, 679 F.2d 1051, 1061 (3d Cir. 1982); *Mountaire Feeds, Inc. v. Agro Impex, S.A.*, 677 F.2d 651, 654-55 (8th Cir. 1982); *Quasha v. Shale Dev. Corp.*, 667 F.2d 483, 486 (5th Cir. 1982); *Kimbrel v. Neiman-Marcus*, 665 F.2d 480, 482 (4th Cir. 1981); *Puerto Rico v. The S.S. Zoe Colocotroni*, 628 F.2d 652, 669-70 (1st Cir. 1980), *cert. denied*, 450 U.S. 912 (1981).

55. By restricting the assertion of jurisdiction by state courts, see *supra* note 45, courts were allowing defendants to tailor their conduct to avoid jurisdiction.

56. 102 S. Ct. 2099 (1982).

57. *Id.* at 2102, 2104.

58. *Id.* at 2101-2103.

59. *Id.* at 2105 n.10.

60. *Id.*

Thus, in its closer examination of the due process clause, the Court in *Bauxites* found what it deemed the genuine justification for restraining a forum's exercise of in personam jurisdiction over a defendant—the defendant's own "individual liberty interest."⁶¹ By removing the 104-year-old sovereignty concepts from the jurisdiction analysis,⁶² the Court made in personam jurisdiction truly personal.

II. A PROPER CONTACTS ANALYSIS AFTER *BAUXITES*: ITS THEORY, APPLICATION AND SUPERIORITY TO OTHER JURISDICTION ANALYSES

Now that the Court has changed the justification for the purposeful availment standard, questions arise as to the proper practical application of the contacts analysis. These questions can be answered only after examining the meaning of "individual liberty interest."

A. *Theory of the Bauxites Contacts Analysis: Individual Liberty Interest*

The individual liberty interest has never been defined in the context of in personam jurisdiction.⁶³ It can best be understood by examining the implications of the role it now has of imposing the same power restraints that were imposed by the interstate federalism principle in *World-Wide*.⁶⁴ The power restraints inherent in the *World-Wide*

61. *Id.* at 2104 & n.10.

62. The concepts of sovereignty and territoriality were first applied to due process jurisdictional analysis in *Pennyroyer v. Neff*, 95 U.S. 714 (1878). In *Bauxites*, the Court apparently deemed it necessary to remove "interstate federalism" notions from the analysis in order to reach the conclusion that the defendant had constructively waived his right not to be subjected to the jurisdiction of the forum state court. 102 S. Ct. at 2105 & n.10; see Braveman, *supra* note 51, at 554 (discussing the inconsistency of the sovereignty component of personal jurisdiction in light of a defendant's ability to waive personal jurisdiction). Thus, because the removal of sovereignty was necessary to the Court's holding, the Court's discussion of the point represents more than dicta. It should be noted that interstate federalism principles continue as a relevant concern in choice of law analysis, which is not limited to the due process clause. See Note, *Removing the Cloak of Personal Jurisdiction From Choice of Law Analysis: Pendent Jurisdiction and Nationwide Service of Process*, 51 Fordham L. Rev. 127, 157 (1982).

63. The term "individual liberty interest" does not appear in any of the Court's in personam jurisdiction cases. It has appeared, however, in other contexts. *Youngberg v. Romeo*, 102 S. Ct. 2452, 2458 (1982) (mentally retarded individual, involuntarily committed to state institution, does not lose "all substantive liberty interests under the Fourteenth Amendment"); *id. passim*; *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 25-26 (1981) ("interest in personal liberty" is implicated in appointing counsel for indigent if latter stands to lose his physical liberty); *cf. Addington v. Texas*, 441 U.S. 418, 425-27 (1979) (Court establishing higher standard of proof in civil commitment proceedings to prevent individual's "loss of liberty").

64. *Insurance Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 102 S. Ct. at 2105 n.10 ("The restriction on state sovereign power described in [*World-wide*],

analysis protected the interests of interstate federalism, and the defendant's right to control its amenability to suit was a by-product thereof.⁶⁵ When the Court removed interstate federalism as a justification, the interests of the co-equal sovereigns disappeared. The defendant's right to control, however, was dependent only on the continued existence of the power restraints. By continuing to impose these power restraints with the constitutional justification of individual liberty, the Court preserved the defendant's right to control its amenability to suit. The defendant's right is therefore now protected from infringement not as a by-product of a sovereign's right but directly by the individual's own constitutional interest.

The individual liberty interest encompasses the right to control one's conduct to avoid amenability to suit. This control can exist only when the results of a contacts analysis are predictable.⁶⁶ Because the purposeful availment standard is satisfied only when the defendant has taken affirmative steps toward affiliating itself with the forum state, the results of a contacts test using this standard are the most predictable from the vantage of the prospective defendant trying to tailor its conduct to avoid amenability to suit.⁶⁷

Thus, the two-step format of contacts analysis that the Court announced in *World-Wide* remains intact after *Bauxites*.⁶⁸ The individual liberty interest justifies the preservation of the threshold inquiry into the defendant's purposeful availment. In fact, the *Bauxites* Court expressly stated that restraints on the sovereign power of forum states that may result from conducting this inquiry should continue.⁶⁹ The second step of the analysis—the inquiry into the burdens of litigation—was unaffected by *Bauxites*.⁷⁰ Nevertheless,

must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause.”).

65. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980); see *Mountaire Feeds, Inc. v. Agro Impex, S.A.*, 677 F.2d 651, 655 n.4 (8th Cir. 1982) (discussing the predictability afforded by the purposeful availment standard); *Erlanger Mills v. Cohoes Fibre Mills*, 239 F.2d 502, 507 (4th Cir. 1956) (dismissing jurisdiction based only on a foreseeable contact because it would lead to the destruction of the orderly and fair administration of the laws).

66. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

67. See *Louis*, *supra* note 14, at 431 (describing the purposeful availment standard as part of a “mechanical approach [that] will usually produce the right result, or will at least produce few very wrong and unfair ones”). But see *Mountaire Feeds, Inc. v. Agro Impex, S.A.*, 677 F.2d 651, 655 n.4 (8th Cir. 1982) (questioning the correlation among due process clause, predictability and purposeful availment).

68. See *Insurance Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 102 S. Ct. 2099, 2104 n.10 (1982) (Court reiterating the two-prong test announced in *World-Wide*).

69. *Id.* at 2105 n.10.

70. After recognizing that restrictions on the judicial power of the states function to preserve a defendant's individual liberty interest, the Court reaffirmed the principles of *International Shoe* as the foundation of the personal jurisdictional requirement. *Id.* at 2104-2105.

Bauxites' alteration of the theoretical underpinnings of the analysis' threshold "power" step may, in certain cases, lead a court applying the analysis to results different from those that would be reached under the *World-Wide* analysis.

B. *Application of the Bauxites Contacts Analysis*

Courts applying a *Bauxites* contacts analysis in products liability cases like *World-Wide* should still find that jurisdiction does not exist.⁷¹ The *Bauxites* analysis may direct the exercise of jurisdiction, however, in cases in which the *World-Wide* analysis would not—cases in which a defendant's contacts are attributable to a contract.

In both kinds of cases, a court should determine, in its threshold inquiry, whether the defendant's actions represent a purposeful affiliation with the forum state.⁷² Bearing in mind that this insistence on purposeful availment is intended to protect the defendant's individual liberty interest, the court should concentrate on the defendant's ability to control the activities that are alleged to constitute purposeful availment.⁷³ A court should find that activities are no longer purposeful at the point when the defendant loses control over them.

In products liability cases with fact patterns similar to the one in *World-Wide*, the defendant possesses control over the product up until the first retail sale.⁷⁴ Until that point the defendant has knowledge of the movement of the product and the opportunity to direct that movement by contract.⁷⁵ After the first retail sale, it is the consumer, not the defendant, who directs the movement of the product.⁷⁶ Therefore, if the purchasing consumer moves with the product to a state with which the defendant has no contacts, and is injured therein by the product, the consumer should not be able to obtain jurisdiction over the defendant in that state. A court's assertion of jurisdiction in such a case would deprive the defendant of the individual liberty it likely exercised when establishing the chain of distribution of its product. A consumer would have to return to the

71. See *supra* text accompanying note 23.

72. See *supra* text accompanying note 36.

73. See *supra* notes 45-46.

74. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98 (1980).

75. See *Shanks v. Westland Equip. & Parts Co.*, 668 F.2d 1165, 1167 (10th Cir. 1982); *Plant Food Co-op v. Wolfkill Feed & Fertilizer Corp.*, 633 F.2d 155, 159 (9th Cir. 1980); *Puerto Rico v. The S.S. Zoe Colocotroni*, 628 F.2d 652, 669-70 (1st Cir. 1980), *cert. denied*, 450 U.S. 912 (1981); *Oswalt v. Scripto, Inc.*, 616 F.2d 191, 199-200 (5th Cir. 1980).

76. See 444 U.S. at 296; *Puerto Rico v. The S.S. Zoe Colocotroni*, 628 F.2d 652, 667-68 (1st Cir. 1980), *cert. denied*, 450 U.S. 912 (1981); *Louis*, *supra* note 14, at 417.

place of purchase or to another suitable forum in order to obtain jurisdiction over the defendant. Another suitable forum would be a state with which the defendant conducts systematic and continuous relations.⁷⁷ In such a forum, the defendant avails itself of substantial benefits and should anticipate having to litigate there.⁷⁸

The premeditated business decisions at issue in most contract cases evince a high level of control over the entire transaction. Unlike the defendants in products liability cases, the defendants in contract cases know the identity of the plaintiff and the state in which it is located.⁷⁹ In this context, contacts in furtherance of a contract should be viewed as purposeful and thus sufficient predicates for the exercise of in personam jurisdiction by a foreign forum, but only on a cause of action related to the contract.⁸⁰ Courts need not evaluate, as they did under the *World-Wide* analysis, the wide variety of factors that were looked to in order to establish the existence of purposeful availment.⁸¹

77. See *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445-47 (1952); *Carty v. Beech Aircraft Corp.*, 679 F.2d 1051 (3d Cir. 1982); *Paolino v. Channel Home Centers*, 668 F.2d 721, 724 (3d Cir. 1981); *Prejean v. Sonatrach, Inc.*, 652 F.2d 1260, 1269 (5th Cir. 1981); *Nova Biomedical Corp. v. Moller*, 629 F.2d 190, 193 n.5 (1st Cir. 1980); *Woods*, *supra* note 1, at 866.

78. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980); *Shanks v. Westland Equip. & Parts Co.*, 668 F.2d 1165, 1168 (10th Cir. 1982).

79. See *Mountaire Feeds, Inc. v. Agro Impex, S.A.*, 677 F.2d 651, 655-56 (8th Cir. 1982); *Quasha v. Shale Dev. Corp.*, 667 F.2d 483, 486 (5th Cir. 1982); *Kimbrel v. Neiman-Marcus*, 665 F.2d 480, 481 (4th Cir. 1981); *Neiman v. Rudolf Wolff & Co.*, 619 F.2d 1189, 1191 (7th Cir.), *cert. denied*, 449 U.S. 920 (1980).

80. The purposeful availment requirement would preserve the same power restraints as *World-Wide*, and function to preserve individual liberty. See *Insurance Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 102 S. Ct. 2099, 2105 n.10 (1982). The analysis of the burdens of litigating is still the second step of a contacts analysis. See *id.* The single contact must be related to the litigation, or the whole concept of control would be rendered meaningless.

81. Factors that were used by the courts after *World-Wide* to classify the defendant's activity as purposeful included: the subject matter of the contract, *see, e.g.*, *Laney v. Plum Grove Bank*, 670 F.2d 878, 881 (10th Cir. 1982) (no purposeful availment by the defendant bank given the mobile character of a letter of credit); *Quasha v. Shale Dev. Corp.*, 667 F.2d 483, 487 (5th Cir. 1982) (purposeful availment in defendant's purchase of land in light of future regulation of ownership by local laws); *Schwilm v. Holbrook*, 661 F.2d 12, 15 (3d Cir. 1981) (no purposeful availment; "Unlike a commercial enterprise, which may tailor its business to avoid dealing with out of state customers, a physician, and especially one on a hospital emergency room staff, is obliged to treat whoever requires medical attention."), the place where it was negotiated, *see Kimbrel v. Neiman-Marcus*, 665 F.2d 480, 482 (4th Cir. 1981) (jurisdiction upheld; negotiations and delivery not performed in forum state, but other contacts found to support jurisdiction); *Wisconsin Elec. Mfg. Co. v. Pennant Prods.*, 619 F.2d 676, 677 (7th Cir. 1980) (jurisdiction upheld; sending of agents into the forum state deemed sufficient contact to justify exercise of jurisdiction over principal), the means of communication used, *see Mountaire Feeds, Inc. v. Agro Impex, S.A.*, 677 F.2d 651, 655 (8th Cir. 1982) (jurisdiction denied; all business contacts either by phone or through the mails), and the relative aggressive-

Rather, courts should examine the few factors that would indicate that the control normally present in contract cases did not exist. For example, a court should determine whether the defendant is one who by occupation or status cannot choose the parties with whom it deals.⁸² Similarly, fraud or mistake would constitute other relevant factors indicating a defendant's lack of control over the contract or knowledge of the true identity of the other contracting party.⁸³

If a court finds that the defendant possessed the requisite degree of control over the activities in question, it must still proceed to the second step of the analysis, in which it is to assess the burdens of litigation on the respective parties.⁸⁴ Evaluation of these burdens entails a comparison of the cost of litigation with the defendant's ability to fund that cost.⁸⁵ In cases dealing with large corporate entities, the cost of litigation in comparison to their vast resources would almost never be found to present a burden.⁸⁶ In these cases the exercise of jurisdiction would be proper. When the defendant's financial resources would be greatly strained by having to meet the costs of litigation in the chosen forum, a court should investigate the feasibility of litigation in an alternative forum less burdensome to the defendant.⁸⁷

ness of the parties in negotiating the contract, *compare* Schwilm v. Holbrook, 661 F.2d 12, 15 (3d Cir. 1981) (jurisdiction denied; local practice of doctor not involving solicitation of out-of-state patients) *with* Neiman v. Rudolf Wolff & Co., 619 F.2d 1189, 1193 (7th Cir.) (jurisdiction upheld; affirmative efforts of defendant to serve markets for its products in other states), *cert. denied*, 449 U.S. 920 (1980).

82. See *Burstein v. State Bar*, 693 F.2d 511, 517-19 (5th Cir. 1982) (State Bar Association, which allowed all candidates to take the bar exam, not purposefully availing itself of plaintiff's state by sending her exam results there); *Schwilm v. Holbrook*, 661 F.2d 12, 13 (3d Cir. 1981) (hospital physician transferring out of state patient to his domicile not purposefully availing himself of that state).

83. Unilateral mistake may result in a contract with a resident of a state different from that contemplated by the contracting party. See *Potucek v. Cordeleria Lourdes*, 310 F.2d 527, 528-29 (10th Cir. 1962), *cert. denied*, 372 U.S. 930 (1963); *Lunn & Sweet Co. v. Wolfman*, 256 Mass. 436, 437-38, 153 N.E. 893, 893 (1926).

84. See *supra* notes 40-41 and accompanying text.

85. See *Kulko v. Superior Court*, 436 U.S. 84, 97-98 (1978); *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957); *Woods*, *supra* note 1, at 892.

86. The litigation burdens imposed on large corporate entities are not discussed in the majority of cases. *But see* *Leney v. Plum Grove Bank*, 670 F.2d 878, 881 (10th Cir. 1982) (citing mobile character of letters of credit and the volume in which they are issued as reasons for denying jurisdiction); *Insurance Co. of N. Am. v. Marina Salina Cruz*, 649 F.2d 1266, 1271-72 (9th Cir. 1981) (citing lack of direct transportation routes and need for translation of testimony as burdens to defendant Mexican shipbuilders in Alaskan forum).

87. See *Burstein v. State Bar*, 693 F.2d 511, 522 (5th Cir. 1982); *Insurance Co. of N. Am. v. Marina Salina Cruz*, 649 F.2d 1266, 1271-72 (9th Cir. 1981); *Woods*, *supra* note 1, at 892.

C. *The Inferiority of Other Jurisdictional Analyses*

Dissatisfaction with the Court's reliance on interstate federalism in the *World-Wide* analysis prompted some courts and commentators to use and propose alternative jurisdiction analyses.⁸⁸ These analyses fall into two categories: a fairness analysis⁸⁹ and a burdens analysis.⁹⁰ The fairness analysis typically explores such factors as the burdens of litigation on the parties,⁹¹ the interest of the forum state in the litigation,⁹² the convenience of the forum,⁹³ and the availability of an alternative forum.⁹⁴ The burdens analysis examines whether the defendant suffers any "meaningful inconvenience" in having to litigate in the forum chosen by the plaintiff.⁹⁵

Neither analysis effectively protects an individual's due process liberty interest. The major problem with the fairness analysis is that it tends to be too subjective.⁹⁶ By factoring a state's sovereign interest into the threshold step of the jurisdiction analysis, the defendant's

88. See *Burstein v. State Bar*, 693 F.2d 511, 522-23 (5th Cir. 1982) (reducing purposeful availment standard to one consisting of many factors to be considered in a fairness analysis); *Alchemie Int'l, Inc. v. Metal World, Inc.*, 523 F. Supp. 1039, 1046-54 (D.N.J. 1981) (using the state interest principles of *McGee* after *World-Wide* in a fairness analysis); Clermont, *Restating Territorial Jurisdiction and Venue For State and Federal Courts*, 66 Cornell L. Rev. 411, 447-48 (1981) (advocating the rejection of the *World-Wide* analysis and the use of a test of reasonableness of jurisdiction); McDougal, *Judicial Jurisdiction: From a Contacts to an Interest Analysis*, 35 Vand. L. Rev. 1 *passim* (1982) (examining inadequacy of purposeful availment/minimum contacts approach; endorsing an interests analysis as the better jurisdictional approach); Ratner, *Procedural Due Process and Jurisdiction to Adjudicate: (a) Effective-Litigation Values vs. The Territorial Imperative (b) The Uniform Child Custody Jurisdiction Act*, 75 Nw. U. L. Rev. 363, 371-72 (1980) (criticizing the *World-Wide* Court for its failure to examine factors relevant to fairness); Redish, *supra* note 2, at 1137-44 (proposing a burdens analysis).

89. For the most comprehensive discussion of a fairness analysis, see Woods, *supra* note 1, at 890-98. See also *Burstein v. State Bar*, 693 F.2d 511, 523 (5th Cir. 1982) (applying a fairness analysis after *Bauxites*); McDougal, *supra* note 88, at 10-11 (describing the various fairness factors and the problem with the vagueness of the term fairness).

90. Redish, *supra* note 2, at 1137-42.

91. See *Burstein v. State Bar*, 693 F.2d 511, 522 (5th Cir. 1982); *Alchemie Int'l, Inc. v. Metal World, Inc.*, 523 F. Supp. 1039, 1052-53 (D.N.J. 1981); McDougal, *supra* note 88, at 11.

92. See *Burstein v. State Bar*, 693 F.2d 511, 522-23 (5th Cir. 1982); *Alchemie Int'l, Inc. v. Metal World, Inc.*, 523 F. Supp. 1039, 1048 (D.N.J. 1981); McDougal, *supra* note 88, at 17-19; Redish, *supra* note 2, at 1139-41.

93. *Burstein v. State Bar*, 693 F.2d 511, 522-23 (5th Cir. 1982); *Alchemie Int'l, Inc. v. Metal World, Inc.*, 523 F. Supp. 1039, 1053 (D.N.J. 1981); McDougal, *supra* note 88, at 11; see Redish, *supra* note 2, at 1141.

94. See *Burstein v. State Bar*, 693 F.2d 511, 522 (5th Cir. 1982); *Schwilm v. Holbrook*, 661 F.2d 12, 15 (3d Cir. 1981).

95. Redish, *supra* note 2, at 1138.

96. Louis, *supra* note 14, at 432.

rights become too heavily dependent on the whim of the forum.⁹⁷ Uncertainty results from a multitude of courts defining the protean term "fairness,"⁹⁸ and then attempting to balance the fairness factors in various ways.⁹⁹ A common law that could be adequately anticipated cannot result from the use of a test that balances interests, without constitutional guidance, to achieve fairness.¹⁰⁰

Some fairness analyses require a minimum power basis,¹⁰¹ that being some affiliation of the defendant with the forum state.¹⁰² Under this kind of analysis, however, a "foreseeable" contact is sufficient predicate for the exercise of in personam jurisdiction.¹⁰³ Even when courts using this analysis inquire into the purposefulness of the defendant's contacts, this is but one of many factors considered.¹⁰⁴

The burdens analysis also impairs a defendant's individual liberty interest by allowing the assertion of jurisdiction whenever a defendant is not "meaningfully inconvenienced."¹⁰⁵ This approach would allow a state to hold a defendant amenable to suit in that state although the defendant has had no affiliation with the state.¹⁰⁶ Even if a defendant were to demonstrate "meaningful inconvenience," it could still be subjected to suit in the forum with which it has no contacts if either the forum state asserts an interest in the litigation¹⁰⁷ or the plaintiff asserts that to sue the defendant elsewhere would be too difficult.¹⁰⁸

97. *Id.* at 431-32; see Lewis, *The "Forum State Interest" Factor in Personal Jurisdiction Adjudication: Home-Court Horses Hauling Constitutional Carts*, 33 Mercer L. Rev. 769, 818-19 (1982) (criticizing Professor Redish's approach).

98. See McDougal, *supra* note 88, at 10.

99. Louis, *supra* note 14, at 432.

100. McDougal, *supra* note 88, at 10 (noting that courts deal with relevant criteria inconsistently and in a confusing manner); see Louis, *supra* note 14, at 432 (a broader balancing approach "complicates the review of any decision reached because of the multitude of relevant factors to be weighed, and thereby makes each decision reached potentially distinguishable from any other").

101. See *Burstein v. State Bar*, 693 F.2d 511, 521 (5th Cir. 1982); *Alchemie Int'l, Inc. v. Metal World, Inc.*, 523 F. Supp. 1039, 1044 (D.N.J. 1981).

102. See *Burstein v. State Bar*, 693 F.2d 511, 522-23 (5th Cir. 1982) (court reducing purposeful availment standard to one of many factors to consider); *Alchemie Int'l, Inc. v. Metal World, Inc.*, 523 F. Supp. 1039, 1052 (D.N.J. 1981) (forum state's interest can be used to overcome the purposeful availment standard); see also *Tyson v. Whitaker & Son*, 407 A.2d 1, 5 (Me. 1979) (purposeful availment standard cannot be read literally).

103. See *supra* note 102.

104. See *Burstein v. State Bar*, 693 F.2d 511, 522-23 (5th Cir. 1982).

105. Redish, *supra* note 2, at 1138.

106. See *id.*

107. The state's interest must be of such magnitude that the state would apply its law to the controversy. This would not be conclusive if a more convenient forum would apply the state's law, and the law in question is neither novel nor unresolved. *Id.* note 2, at 1139-41.

108. *Id.* at 1138 ("A court should first consider the relative burdens a denial of jurisdiction would impose upon the plaintiff.") (emphasis in original).

CONCLUSION

Personal jurisdiction analysis after *Bauxites* must focus clearly on protecting a defendant's property and individual liberty interests. The Supreme Court has provided an appropriate vehicle for protecting these interests in the form of a purposeful avilment contacts test. In application, this test should protect the defendant from the burdens of distant litigation, and also should afford the defendant the ability to tailor its conduct to avoid amenability to suit in foreign jurisdictions.

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