Minimum Contacts in a Borderless World: Voice over Internet Protocol and the Coming Implosion of Personal Jurisdiction Theory

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Modern personal jurisdiction theory rests on the twin pillars of state sovereignty and due process. A nonresident's "minimum contacts" with a forum state are treated as the equivalent of her territorial presence in the state and hence justify a state's exercise of sovereignty over her. At the same time, the nonresident's "purposeful availment" of opportunities within the state is seen as implying her agreement to that state's jurisdiction in exchange for the protection of its laws. This theory presumes that a nonresident directs voice communications to known places by dialing a telephone number's area code.

Voice over Internet Protocol ("VoIP") and the borderless communications of the twenty-first century belie this assumption. Area codes will no longer reliably correspond to known locations; individuals can call, and do mischief in, a state without ever realizing that they are contacting that state. With VoIP and its emerging applications, most means of interstate communications — voice, fax, file-sharing, e-mail, and real-time video conferencing — will lack geographic markers.

The U.S. Supreme Court will be forced to choose which value is paramount: state sovereignty or the implied contract approach to due process. In a few cases arising from cellular phone calls, lower courts have privileged the implied contract theory. This effectively returns the law of personal jurisdiction to the nineteenth century formalism of Pennoyer v. Neff *by limiting jurisdiction to*

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defendants' home states in cases arising from harmful communications. This evisceration of state sovereignty is unwarranted. Other means can protect a nonresident defendant from abusive process. Securing state sovereignty over harmful borderless communications promotes a healthy federalism, reconciling seemingly inconsistent centrifugal and centripetal themes in the Supreme Court's jurisprudence.

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INTRODUCTION

Under the "minimum contacts" doctrine, a state's ability to subject nonresidents to its courts' jurisdiction rests on the state's sovereignty over the nonresidents' litigation-related activities within its territory.[1] The Due Process Clause of the Fourteenth Amendment, however, limits a state's adjudicative authority to nonresidents whose purposeful affiliation with the state suggests their implicit agreement to the state's exercise of jurisdiction over them.[2] In practice, the U.S. Supreme Court has crafted its sovereignty and due process doctrines to complement one another: it deems valid the exercise of state sovereignty consonant with due process and defines any attempt to exceed the bounds of state sovereignty as offensive to due process.

Much of this is accomplished through the device of implied contract. In the traditional, circuit-switched telephone system, a New Yorker dialing a phone number with a San Francisco area code[3] indicates her intent to connect with California and her implied agreement to subject herself to California's courts.[4] For more than half a century, the law of personal jurisdiction harmoniously rested on the twin pillars of

[1] *See infra* notes 90-170 and accompanying text (exploring territorial contact requirement of minimum contacts doctrine and its state sovereignty justification).

[2] *See infra* notes 171-93 and accompanying text (describing purposeful availment requirement of minimum contacts doctrine and its implied contract rationale).

[3] *See* ALLIANCE FOR TELECOMMUNICATIONS INDUSTRY SOLUTIONS, NPA ALLOCATION PLAN AND ASSIGNMENT GUIDELINES 5 (2002), https://www.atis.org/atis/docstore/doc_display.asp?ID=312 (explaining that first three digits of phone numbers in ten-digit North American Numbering Plan traditionally correspond to "distinct exclusive geographic areas, commonly referred to as area codes").

[4] *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985) (finding that nonresidents purposefully direct activities to state and thus warrant state's personal jurisdiction over them "by mail[ing] and wir[ing] communications across state lines").

territorial contact and implied contract.[5]

A new and rapidly expanding technology, Voice over Internet Protocol ("VoIP"), tears those two pillars apart. In a trend presaged by cellular phone technology,[6] VoIP and the impending Services over the Internet Protocol ("SoIP")[7] will transmit *all* remote communications — voice, fax, e-mail, file-sharing, and real-time video conferencing — to Internet telephony subscribers at any broadband-accessible location.[8] Whereas AT&T created a tightly controlled telephone system in which phone calls follow dedicated circuits, Internet telephony providers

[5] This Article focuses exclusively on VoIP's impact on questions of specific jurisdiction under the minimum contacts doctrine. Under current theory, the exercise of specific jurisdiction over nonresident defendants hinges on two critical factors: the nonresidents' purposeful connection with the forum state that suggests their enjoyment of the forum's laws and implicit agreement to face litigation there and the nonresidents' litigation-raising activity in the forum. *See, e.g.*, *id.* at 473 n.15, 476. The minimum contacts doctrine also sanctions "general jurisdiction" over a nonresident. This theory permits a forum's courts to hear any cause of action against a nonresident defendant, no matter where the cause of action arises, because the defendant is considered a local player in the state either due to her residence there or, as to a corporation, due to its incorporation in the state or maintenance of its principal place of business there. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 318 (1945); Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1320 (9th Cir. 1998). Because general jurisdiction theory is not predicated on principles of implied contract and litigation-related territorial contact, this Article only addresses specific jurisdiction and the impending schism in its theoretical underpinnings that VoIP-contact cases will provoke.

[6] Cellular phones and call forwarding have served as precursors to VoIP by disconnecting voice communications from presumed, fixed locations. Although a cellular phone's area code signals its owner's location at the time of the phone's purchase, cellular phones are mobile. Thus, calls to cellular phones may be answered in geographic locations that differ from the location suggested by their phone numbers' area codes. VoIP blazes a new trail in disconnecting all of our communications (i.e., voice, fax, e-mail, file-sharing, and real-time video conferencing) from specific locations by eliminating the geographic significance of area codes and by destroying the notion that remote communications will be received in predictable locations. While this Article addresses the implications of cellular phone contacts for the personal jurisdiction doctrine, those contacts alone might not prove fatal to the current regime. This Article focuses on VoIP and its future applications because their complete lack of territoriality inevitably leads to a schism between the territorial contact and implied contract principles in the modern minimum contacts doctrine.

[7] *See infra* notes 63-72 (describing future applications of VoIP known as SoIP).

[8] *See* First Report and Order and Notice of Proposed Rulemaking *In re* IP-Enabled Services and E911 Requirements for IP-Enabled Service Providers, FCC 05-116, at 33 (F.C.C.R. June 3, 2005) [hereinafter FCC Order], *available at* http://www.fcc.gov/cgb/voip911order.pdf (highlighting "lack of geographic restrictions" as central customer benefit of VoIP). VoIP and wireless technologies facilitate multiple forms of collaboration in real time, without regard to geography, distance, or in the near future, even language. *See* THOMAS L. FRIEDMAN, THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY 165-70 (2005); Simon Tuck, *Jobs at Risk if CRTC Regulates VoIP*, GLOBE & MAIL (Toronto), Sept. 22, 2004, at B7 ("[G]eography and borders are irrelevant when it comes to [VoIP] services.").

designed VoIP to overcome the limitations of geography, "not to track it."[9]

VoIP telephone numbers are not physically linked to fixed locations, like a customer's kitchen or office, as they would be in the traditional telephone system.[10] Instead, VoIP numbers attach to people, wherever they may be.[11] Thus, VoIP subscribers can select area codes for their VoIP numbers that have no connection to the actual location of their residence or office and can program their VoIP service to route their calls to numbers in different states simultaneously.[12] As noted by the cofounder of the Internet Telephony Service Providers Association, Internet telephony creates an atmosphere of "the Wild West," where "monitor[ing] borders"[13] is impossible. In a VoIP-connected world, individuals can no longer direct their communications to identifiable places.[14]

Consider this example. A Pennsylvania company uses VoIP phone numbers with New York and New Jersey area codes in the hopes of attracting business there. On the president's desk in Philadelphia rings a

[9] Cheryl A. Tritt, *Telecommunications Future*, *in* 22ND ANNUAL INSTITUTE ON TELECOMMUNICATIONS POLICY & REGULATION 245, 253 (PLI Patents, Copyrights, Trademarks, and Literary Prop. Course Handbook Series No. 3202, 2004) (distinguishing traditional, circuit-switched telephony, which establishes "dedicated circuit between the parties," from VoIP technology, which instead converts voice and fax communications into data packets and sends data all over Internet to be regathered and ordered for recipient's telephone or computer).

[10] *Compare* LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD 31 (2001) (discussing traditional telephone system that connected individuals in fixed locations), *and* WILLIAM MITCHELL, CITY OF BITS: SPACE, PLACE, AND THE INFOBAHN 9 (1995) (asserting that telephone calls and fax transmissions "link specific machines at identifiable locations," such as "telephone on your desk and telephone on my desk"), *with infra* notes 35-62 and accompanying text (exploring geography-defying nature of VoIP).

[11] *See infra* notes 27-62 and accompanying text (describing VoIP technology).

[12] *See* Ian Urbina, *Area Codes, Now Divorced from Their Areas*, N.Y. TIMES, Oct. 1, 2004, at B1 (explaining that Internet telephony has torn area codes from geography, allowing people to have phone numbers with area codes that bear no connection to where subscribers live or work); *see also infra* notes 38-46 (describing VoIP area codes). As Ian Urbina notes: "It used to be safe to assume that dialing 212 made a phone ring in Manhattan. Press 212 these days, and someone may answer in Tokyo." Urbina, *supra*.

[13] Helen Beckett, *Small Firms Go First*, COMPUTER WKLY., May 3, 2005, at 48. As the CEO of Vonage has explained, VoIP aims to decouple communications from localities. Martin Sims, *The Market Will Provide*, INTERMEDIA, Feb. 1, 2005, at 6.

[14] *See* MITCHELL, *supra* note 10, at 4 (explaining that Internet-based instruments sever human interaction from fixed locations); Urbina, *supra* note 12, at B1 (noting that, in contrast to traditional telephone conversations where "[c]allers used to know where they were calling but not necessarily who would pick up," "the reverse is now true," as area codes assigned to cellular and VoIP phones move with user).

phone call to the company's New York phone number from a Michigan resident. If their conversation gives rise to tort and contract claims, where can the company sue the Michigander? The Michigander believed that he contacted a New Yorker based on the telephone number that he dialed, when, in fact, his activities were directed toward Pennsylvania. Although the Michigander's phone call may have caused harm in Pennsylvania, the Michigander had no warning of his involvement with Pennsylvania and did not seek out the benefits and protections of its laws.

Thus, if "purposeful connection" and its implied contract rationale remain a prerequisite for jurisdiction, the Michigander cannot be sued in Pennsylvania for the harm he allegedly did there. The Michigander thought he was contacting New York, yet no New York people, places, or equipment were involved. This leaves New York with no justification for exercising sovereignty over these events and may force the Pennsylvania firm to go to Michigan to sue. The long arm of the law just got a great deal shorter.

This Article demonstrates how the geography-defying nature of VoIP puts the previously harmonious principles underlying the minimum contacts doctrine, territorial contact and implied contract, into irreconcilable conflict. This clash will force the Supreme Court to reconstruct its theory of personal jurisdiction for VoIP-related contacts from the ground up. In the fifteen years since the Court last considered personal jurisdiction, communication technologies have changed radically. Neither the Supreme Court nor scholars have responded to these changes.

This Article seeks to fill that void. If an individual can have contacts with a state while not purposefully availing herself of opportunities in that state, which principle controls? Is the law of personal jurisdiction fundamentally about a state's sovereignty over a nonresident's territorial acts within that state's borders? Or does it derive its core justification from implied contract? One answer allows an individual to be tricked into litigating in a forum she had hoped to avoid; the other deprives a state of the ability to exercise jurisdiction over a nonresident whose litigation-related activity caused harm within that state's territory.

Part I describes how VoIP creates a borderless world of communications that differs from the controlled architecture of the traditional telephone system. It looks at VoIP's underlying technology, its defining features, and its geography-defying nature. It concludes by describing SoIP, which will expand the nature and ease of VoIP communications, likely enhancing VoIP's popularity and ultimately

destroying the notion of location-specific communications.

Part II dissects the concepts that have traditionally provided normative support for the minimum contacts doctrine — a nonresident's territorial contact and implied contract. It explores how, when the Court designed the minimum contacts doctrine, individuals at a distance contacted each other from known locations, through the mail or the telephone. This ensured that a defendant would establish her in-forum presence in the same state she impliedly agreed to contact. In cases arising from mobile communications, the concepts of territorial contact and implied contract directly conflict due to a nonresident caller's inability to identify, and thus to consent to have contact with, the particular state where the cellular phone user received the nonresident's call. This conflict has driven some state courts to the extreme step of declaring all calls to cellular phone users jurisdictionally insignificant, no matter the harm those calls inflict.

Part III demonstrates how VoIP communications will ripen this clash of principles and offers a possible solution to that conflict. It contends that, because VoIP area codes are not designed to reflect subscribers' geographic locations, the twin principles of territorial contact and implied contract inevitably will clash. If the personal jurisdiction doctrine fundamentally concerns an implied private agreement between a nonresident and the forum, the state will be stripped of its adjudicatory authority over a nonresident's calls to VoIP subscribers within its borders. In effect, personal jurisdiction law will revert to the formalism of *Pennoyer v. Neff*[15] that the Court rejected six decades ago. On the other hand, if the minimum contacts theory primarily serves to guarantee a state's sovereign authority over activities within its territory, a nonresident may be sued in a forum she had no reason to know she had contacted.

Part III urges that the implied contract rationale of the purposefulness inquiry cannot and should not be sustained in a VoIP-connected world. The alternative would be for the law of personal jurisdiction to abandon efforts to fairly allocate state adjudicative authority over interstate activities causing harm within a state's borders in favor of the elimination of that authority in cases arising from VoIP communications. This part contends that a nonresident's due process rights can be secured without sacrificing a state's judicial authority. This can be accomplished by assessing the state's regulatory interest in the nonresident's litigation-related forum activity to ensure the reasonableness of the state's exercise

[15] 95 U.S. 714 (1877).

of judicial jurisdiction over the nonresident. Part III concludes by arguing that such a reconstituted minimum contacts doctrine would protect a nonresident defendant's due process rights while honoring a state's sovereignty over that defendant's communications transmitted to its territory.

I. VOIP: COMMUNICATIONS IN A BORDERLESS WORLD

The Supreme Court developed its current personal jurisdiction doctrine at a time when communications over the traditional, circuit-switched telephone system connected individuals in fixed and identifiable geographic locations. This part describes that system and how, in the fifteen years since the Supreme Court last ruled on personal jurisdiction, communication technologies have undergone revolutionary change with the adoption of cellular phones and the emergence of VoIP technology. If individuals and businesses increasingly trade in their traditional telephones to enjoy the low cost, efficiency, and future applications of VoIP as analysts predict, all of the ways in which we establish a virtual presence in far-flung places — voice, fax, e-mail, file-sharing, and real-time video — will lack geographic markers. With VoIP, only people matter.

A. The Traditional Telephone System

Although Alexander Graham Bell invented the telephone in 1876, AT&T did not succeed in building a long-distance telephone network that reached half of American households until the 1950s.[16] In the traditional system that AT&T established, Plain Old Telephone Service ("POTS"), telephones transmit voices over underground or aboveground wiring and cables to the Public Switched Telephone Network ("PSTN").[17] PSTN employs a circuit-switching technology that connects the calling

[16] *See* ANITA LOUISE MCCORMICK, THE INVENTION OF THE TELEGRAPH AND THE TELEPHONE IN AMERICAN HISTORY 79-88 (2004) (describing Alexander Graham Bell's 1876 invention of telephone and development of telephone system by companies Bell founded). By the 1960s, the telephone system linked 85% of American homes. LESSIG, *supra* note 10, at 29.

[17] STEPHEN J. BIGELOW ET AL., UNDERSTANDING TELEPHONE ELECTRONICS 4-8 (4th ed. 2001). The PSTN began as a human-operated, analog switching system with operators connecting calls using cords attached to a switchboard. *See* NATHAN J. MULLER, DESKTOP ENCYCLOPEDIA OF TELECOMMUNICATIONS 737 (2d ed. 2000). Over the years, the system turned to electromechanical switching, eliminating the need for operators to connect every call. *Id.* Today, the switching system is completely electronic and digital. *Id.*

phone to the called phone.[18] Connections between callers are maintained over copper wires or fiber-optic cables.[19] This system persists today, little changed from when AT&T designed it in the first part of the last century. On the traditional telephone network, it is usually possible to determine the "jurisdiction of the traffic on a call-by-call basis" because the carrier provides a "physical connection to the end user and can determine where the user is located."[20]

In the PSTN, area codes indicate a telephone or fax user's specific geographic location.[21] In the 1990s, the North American Numbering Plan

[18] MULLER, *supra* note 17, at 736.

[19] *See* Konrad L. Trope, *Voiceover Internet Protocol: The Revolution in America's Telecommunications Restructuring Infrastructure*, *in* 25TH ANNUAL INSTITUTE ON COMPUTER & INTERNET LAW 55, 59-60, 72 (PLI Patents, Copyrights, Trademarks, and Literary Prop. Course Handbook Series No. 5994, 2005) (noting that analog telephone calls "require voice signals from each conversation to flow on a single circuit").

[20] Petition for Vonage Holdings Corp. for Declaratory Ruling Concerning an Order of the Minn. Public Utilities Comm'n, No. P6214/C-03-108, at 28 (Sept. 22, 2003), *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6515182877. In the PSTN, every phone call is switched through a series of telephone company central offices until a dedicated path connects the calling and called parties. *See* Jeff Smith, *Qwest Rolls Out Internet Phone Service*, ROCKY MTN. NEWS (Denver), May 10, 2005, at 1B. This path, or circuit, "stays in place for the duration of the conversation." MULLER, *supra* note 17, at 736. Although the telephone network has been digitized in certain regions, the fiber optic cables that have replaced the copper wires in the analog system connect callers and recipients with the same circuit-switching technology. JOSEPH A. PECAR & DAVID A. GARBIN, THE NEW MCGRAW-HILL TELECOM FACTBOOK 187 (2d ed. 2000). Describing the traditional, circuit-switched telephone system, Professor Lessig noted that "when you called someone in Paris, a circuit was opened between you and Paris . . . . You could trace the line of copper that linked you to Paris; along that line of copper, all your conversation would travel." LESSIG, *supra* note 10, at 31; *see also* Tom Farley, *Digital Wireless Basics*, http://www.privateline.com/PCS/history11.htm (last visited Jan. 20, 2006) (analogizing PSTN system to railroad, noting that "[i]t's like having a dedicated railroad track with only one train, your call, permitted on the track at a time").

[21] *See* Wikipedia, North American Numbering Plan, http://en.wikipedia.org/wiki/North_American_Numbering_Plan (last visited Feb. 14, 2006). AT&T designed the North American Numbering Plan ("NANP") in 1947 to facilitate direct dialing between individuals in different regions in the country without the assistance of an operator. *Id.* Particular geographic regions were assigned new or additional area codes to ensure that populated regions of the country had ample available telephone numbers to distribute to telephone subscribers. *Id.* The NANP originally assigned 86 area codes; each area code corresponded to a specific geographic region in the country. *Id.* The most populated areas received area code numbers that took the shortest time to dial on rotary phones (e.g., New York City was assigned 212, a total of 5 clicks on the rotary phone, whereas Vermont received 802, which amounted to 20 clicks). *Id.*; *see* Urbina, *supra* note 12 (describing that when area codes were invented, all 86 original area codes covered "single continuous regions" with 914 as only exception since it "encompassed two parts of downstate New York separated by Queens and the Bronx: Westchester County and the area now served by 845, and Nassau and Suffolk Counties").

Interestingly, the local Bell telephone companies initially used the names of

Administrator assigned new area codes to densely populated geographic regions to accommodate the increasing demand for available phone numbers.[22] All of the new area codes corresponded to geographic locations, except for toll-free area codes and fee-for-service codes.[23] Cellular phone companies also assign geographic area codes to their phones based on their subscribers' residence or office on the date they purchased their mobile phones.[24]

telephone subscribers, not numbers, to guide the switchboards. *See* JOHN BROOKS, TELEPHONE: THE FIRST HUNDRED YEARS 74 (1976). The companies only replaced the names with numbers in 1879 to prevent mistakes by substitute telephone operators who were not familiar with the names of the callers and the jacks assigned to them on the switchboard. *Id.* (explaining that, in 1879, local epidemic struck town of Lowell, Massachusetts, prompting town physician to urge local Bell company management to change telephone subscribers' designation from their names to numbers so that if town's four telephone operators fell ill, switchboard service would not be paralyzed due to substitute operators who did not know names that corresponded with each of 200 jacks). The local Bell company management initially objected to switching the identification of its subscribers from names to numbers because it believed that "customers would consider their designation by numbers to be beneath their dignity." *Id.*

[22] *See* Wikipedia, *supra* note 21. From 1984 to 1994, only nine new area codes were added to the NANP. *See* Urbina, *supra* note 12, at B1. Today, many U.S. cities have more than one area code, either by splitting the city into different areas or by providing more than one code for the same geographical area. *Id*. For example, the NANP initially assigned 212 as the area code for telephone subscribers in New York City, but added two more area codes, 917 and 646, to accommodate consumer demand. *Id.*

[23] *See* Wikipedia, *supra* note 21. Toll-free numbers like 800, 877, and 866 "are not issued to actual areas." *Id.*

[24] The NANP system does not maintain "separate, non-geographic area codes" for cellular phones as do most European countries. *Id.* Because cellular phones receive the same "locality-specific codes as landlines," cellular phone users are billed at the same rate as traditional telephones. *Id.* But unlike traditional telephones, cellular phones are mobile, wireless devices that operate as sophisticated radios, transmitting signals via a network of transmitters and antennae over limited geographic areas or "cells." Lana Mobydeen, *Reach Out and Touch Someone: Cellular Phones Health, Safety and Reasonable Regulation*, 16 J.L. & HEALTH 373, 375 (2001). Calls made over cellular phones are transmitted to a mobile telephone switching office, which then connects calls to local telephone companies that route them to a long distance carrier or the ultimate recipient. *Id.* at 375-76. As cellular customers move from one geographic location to another, the call is passed from "cell" to "cell" without service interruption. ROBERT A. STEUERNAGEL, THE CELLULAR CONNECTION 10-12 (4th ed. 2000). Thus, individuals calling cellular phones have no assurance about the actual location of the cellular phone users they call since a cellular phone's area code only suggests the location of the cellular phone subscriber at the time she purchased the phone, not where she travels at any given time. *See* Allan Saxe, *Can You Hear Me Now?*, FORT WORTH STAR-TELEGRAM, June 7, 2004, at B9, *available at* 2004 WLNR 1812040.

B. VoIP

1. What Is VoIP?

VoIP and the cellular phone technology that preceded it fundamentally change our communications.[25] Before VoIP and the widespread adoption of cellular phones, the PSTN exclusively carried voice communications, while the Internet separately connected computers to facilitate the sharing of data applications like e-mail, spreadsheets, pictures, music, and e-commerce.[26] But VoIP technology brings together voice, fax, and data communications in a single device, routing them over the Internet to intended recipients.[27]

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[25] Although VoIP telephony was invented nearly 10 years ago, it "penetrated mass consumer consciousness" in 2004 when the availability of high-speed Internet access made VoIP telephony services fast, cheap, and reliable. *See* Glyn Moody, *VoIP on the Line*, NETCRAFT, June 14, 2004, http://news.netcraft.com/archives/2004/06/index.html ("[i]n the early years of the Internet as a mass medium, the average user's dial-up connection was too slow" for voice to be clearly transmitted over Internet and "variable net reliability meant that packets were often delayed or dropped, leading to chopped speech, audio artifacts and noticeable delays"); Ellen Muraskin, *An Explosive Year for VoIP*, EWEEK.COM, Nov. 25, 2004, *available at* http://www.eweek.com/article2/0,1759,1730777,00.asp. This past year, the number of VoIP providers has greatly increased. *See* Ken Belson, *Cable's New Pitch: Reach Out and Touch Someone*, N.Y. TIMES, May 8, 2005, at A5 (noting that traditional phone companies like Verizon, AT&T, and SBC Communications are developing Internet-based phone services); Muraskin, *supra*. The Federal Communications Commission's ("FCC's") "hands-off policy on VoIP regulation" also encouraged more providers to enter the marketplace this year. *Id.*; *see In re* Vonage Holdings Corp., 19 F.C.C.R. 22,404, 22,425 (2004) (deeming state regulation of VoIP services preempted by Telecommunications Act of 1996, which gave FCC exclusive jurisdiction over information services like VoIP). The FCC has explained that its ruling "clears the way for increased investment and innovation in services like Vonage's to the benefit of American consumers." *Id.* at 22,405.

[26] *See* Ron Vidal, *Enhancing 911: How VoIP Technology Can Improve Public Safety*, TELECOMM. MAG., Sept. 2004, at 1, *available at* http://www.level3.com/userimages/dotcom/pdf/Enhancing_911_White_Paper.pdf.

[27] *See* Daniel Terdiman, *Internet Phones Arrive at Home (And Some Need No Computer)*, N.Y. TIMES, May 5, 2005, at C9 (describing how VoIP technology allows telephone conversations to be made across Internet rather than exclusively over regular phone lines); *see also* Scott Kirsner, *Hold the Phone*, FAST CO., Mar. 2004, at 96, *available at* http://pf.fastcompany.com/magazine/80/telephony.html (noting that Internet-based phones can display webpages on their screens, allowing companies to publish data to their employees' phones); Neil Randall, *CNET Review of AT&T CallVantage*, CNET.COM, Mar. 22, 2005, http://reviews.cnet.com/AT_T_CallVantage/4505-9238_7-30923419-2.html?tag=glance (explaining that AT&T's CallVantage VoIP service allows subscribers to send faxes over VoIP phones); Texas Instruments, VoIP Solutions: Overview Webpage, http://focus.ti.com/docs/apps/catalog/overview/overview.jhtml? templateId=975&path=templatedata/cm/level1/data/bband_voip_ovw (last visited Feb. 12, 2006) (advertising Texas Instrument's VoIP software as enabling equipment manufacturers to develop products that send real-time voice, fax, and data over packet networks).

VoIP technology operates by converting analog signals (e.g., voice or fax) into digital data packets[28] and by transmitting the data to a recipient over the Internet Protocol ("IP") network.[29] VoIP subscribers send faxes, make unlimited local and long-distance phone calls, and send data for a low monthly fee[30] through their personal computers and laptops,[31]

[28] Dan Gillmore, *Give Swedish Firms Credit for VoIP Underlying Software*, SAN JOSE MERCURY NEWS, June 13, 2004, at 1F. Whereas the circuit-switched telephone system keeps a dedicated line open between two callers over copper wires or fiber-optic cables, VoIP's packet-switching system breaks data into small packets, attaching an IP-address to each packet that tells the network the data packet's final destination. *See* Jeff Tyson & Robert Valdes, *How VoIP Works*, http://computer.howstuffworks.com/ip-telephony.htm (last visited Jan. 18, 2006). While the packets may travel different paths to their final destination, the receiving computer or phone reassembles the data packets into their original state for the recipient. *Id.*

[29] S*ee* Lawrence B. Solum & Minn Chung, *The Layers Principle: Internet Architecture and the Law*, 79 NOTRE DAME L. REV. 815, 840 (2004) (describing IP layer of Internet). IP describes the way in which packets of data (i.e., small groups of bits and bytes) are sent and received over the Internet. *See* Russell Shaw, *Say Hello to VoIP*, TECHLIVING, Apr. 20, 2005, at 56, *available at* http://www.techliving.com/article/829.html (explaining that data-packet transfer over IP occurs in same way with voice and fax as it does when downloading webpage or sending and receiving e-mails). The IP network moves data packets without geo-location information, "reveal[ing] nothing about the user . . . and very little about the data exchanged." LAWRENCE L. LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 32 (1999). The geographic location of the sender and recipient is not "known by the system or knowable by us in looking at the data." *Id.* at 32. Such a minimalistic design ensures network efficiency. *Id.* at 33. Professor Lawrence Lessig aptly summarizes the design of IP as "a carnival funhouse, with the lights dimmed to darkness and voices coming from around you but from people you do not know and from places you cannot identify." *Id.*

[30] *See* Belson, *supra* note 25, at A5. Fees vary depending on the services purchased by the user. For example, AT&T CallVantage subscribers pay $29.99 per month for unlimited local and long distance calls. *See* Randall, *supra* note 27. Vonage's Premium Unlimited Plan costs $24.99 per month for unlimited calls anywhere in the United States and Canada, voicemail, caller ID, call forwarding, and 3-way calling. *See* Vonage Homepage, http://www.vonage.com (last visited Jan. 18, 2006); *see also* Texas Instruments, *supra* note 27 (explaining that VoIP services offered by Texas Instruments eliminates per-minute long-distance fees associated with traditional, circuit-switched telephone service).

[31] VoIP subscribers can make phone calls over their computers in two ways. First, VoIP providers like Vonage provide their customers with VoIP software that enables users to place calls from their computers so long as they have a headset, a microphone, and a connection to the Internet. *See* Tyson & Valdes, *supra* note 28. Second, companies like Skype offer free software that connects voice communications over PCs that use Skype software. *See* Skype, Hello. We're Skype and We've Got Something We'd Like to Share with You Webpage, http://www.skype.com/products/ (last visited Jan. 18, 2006). Subscribers talk into microphones or headsets attached to their computers, and the Skype software digitizes the analog voice signals into data packets and distributes the data over the Internet to end-users. *Id.* Users cannot call out to numbers with NANP area codes unless they have signed up for additional paid plans like SkypeOut that allow subscribers to call those numbers on a per-minute basis. *Id.* In addition to voice telephony, the Skype software permits subscribers to share files and send instant messages. *Id.*; *see* Craig Ellison,

traditional telephones,[32] and IP-enabled or wireless phones.[33]

2. The Borderless Nature of VoIP Communications

As VoIP telephone numbers are tied to subscribers, VoIP transmits voice, fax, and data communications without regard to geography by enabling subscribers to select any desired area code for their phone numbers.[34] VoIP subscribers also may bring their office and home phone numbers with them wherever they travel.[35] VoIP technology removes the barriers of location imposed on voice and fax communications in the traditional telephone system[36] by allowing subscribers to send faxes and make phone calls contingent only on high-speed Internet availability.[37]

Talk Is Cheaper, PC MAG., Feb. 8, 2005, at 108 (describing Skype's computer telephony service).

[32] Tyson & Valdes, *supra* note 28. After signing up with VoIP providers, subscribers need a high-speed Internet connection, a telephone adapter, and a conventional analog phone to activate their VoIP service. *See* Ellison, *supra* note 31, at 108.

[33] Tyson & Valdes, *supra* note 28. An IP phone looks just like a normal phone with a handset and cradle but is connected to the Internet by an RJ-45 Ethernet connector. *Id.*; *see also* Terdiman, *supra* note 27, at C9 (explaining that IP phones work by connecting Ethernet cable from broadband source into RJ-45 Ethernet IP phone and another Ethernet cable from IP to PC). Wi-Fi IP phones are also available, allowing subscribing callers to make VoIP calls from any Wi-Fi hot spot. *See* FRIEDMAN, *supra* note 8, at 165 (discussing how VoIP permits users to talk, fax, and share files over their phones, computers, and personal digital assistants while bypassing traditional phone system when user has access to broadband); UTStarcom, F1000G Specsheet, http://www.utstar.com/Document_Library/0554.pdf (last visited Mar. 19, 2006) (describing UTstar F1000G Wi-Fi mobile handset, which has three-way calling, call rejecting/redial/mute, call waiting, call transfer, and call forwarding, among other services).

[34] *See infra* notes 38-46 and accompanying text.

[35] *See* Kirsner, *supra* note 27 (explaining that VoIP "lets workers bring their own phone extensions to branch offices and hotel rooms").

[36] *See* MCI, MCI Advantage: Technical Diagram, http://global.mci.com/us/enterprise/voice/voip/index.xml (last visited Jan. 18, 2006) (trumpeting mobility, efficiency, and affordability of VoIP services in comparison to "Old World" circuit-switched telephony where people needed three or more networks for data and voice communication, including data/IP network, long-distance provider, and local call provider, and where closed architecture of traditional telephone system foreclosed kind of mobility now available with VoIP, and noting that traditional telephone providers charged extra for any moves, additions, or changes to existing structure that VoIP providers do not).

[37] High-speed access to the Internet is often referred to as "broadband," a term which means a "higher-speed transmission of data over an 'always-on' connection." Enrico C. Soriano et al., *Internet Developments: A Look at Key Issues Currently Shaping Broadband Deployment and Regulation*, *in* 21ST ANNUAL INSTITUTE ON TELECOMMUNICATIONS POLICY & REGULATION 2003, at 177 (PLI Patents, Copyrights, Trademarks, and Literary Prop., Course Handbook Series No. G0-015D, 2003); *see* Robert W. Crandall et al., *Universal Broadband Access: Implementing President Bush's Vision*, *in* 22ND ANNUAL INSTITUTE ON TELECOMMUNICATIONS POLICY & REGULATION 2004, at 523 (PLI Patents, Copyrights,

a. Area Codes No Longer Signal Geographic Locations

Unlike the traditional telephone system, VoIP area codes are not designed to reflect subscribers' physical locations. When replacing traditional telephones with VoIP, subscribers need not retain local area codes on their phone numbers. This is because VoIP phone numbers correspond to the subscribers themselves and to their portable Analog Telephone Adapters ("ATAs"),[38] not to the location of their residences or offices.[39] As such, VoIP users may select any available area codes[40] for their ATAs and purchase additional "virtual" numbers that route calls to their ATAs.[41] Thus, a VoIP area code has no geographic significance with regard to a subscriber's location.

Vonage, a cutting-edge VoIP provider, explains that area codes provide subscribers with a virtual presence in different states "without the substantial overhead."[42] This enables customers or friends sharing a subscriber's area code to call the subscriber cheaply.[43] It also helps attract customers to businesses.[44] For example, a company located in

Trademarks, and Literary Prop., Course Handbook Series No. 3202, 2004).

[38] An ATA is an analog-to-digital converter that takes the analog signal from a traditional phone and converts it to digital data for transmission over the Internet. Tyson & Valdes, *supra* note 28. The ATA facilitates the packet-switching at the heart of VoIP technology. *Id.* If the recipient of a call uses a traditional telephone, VoIP technology reassembles the data packets and converts them back to analog form. *Id.*; *see* Ellen Muraskin, *Service Touts VoIP Perk — Without the Hardware*, EWEEK.COM, Nov. 18, 2004, http://www.eweek.com/article2/0,1759,1729497,00.asp (describing VoIP service offered by CallWave that intercepts calls made to subscribers' existing phone numbers and forwards calls over Internet instead of over PSTN).

[39] *See* Ellison, *supra* note 31, at 108.

[40] *Id.*; *see* Vonage, Listing of Available Area Codes Webpage, http://www.vonage.com/avail.php (last visited July 18, 2005) (explaining that with Vonage, users "are no longer tied to [a] 'local area code'" and may choose any area code from its list). As Vonage highlights: "Even if you live in New York, you can have a California number." *Id.*; *see* Randall, *supra* note 27 (noting that AT&T's CallVantage subscribers can select from up to 39 area codes).

[41] Ellison, *supra* note 31, at 108; *see* Vonage, Virtual Phone Number Webpage, http://www.vonage.com/features.php?feature=virtual_phone_number (last visted Jan. 18, 2006) (describing Vonage's virtual phone number service).

[42] Vonage, *supra* note 41. Vonage asks consumers to "imagine having business cards with New York, London, and Mexico City satellite office numbers" for less than $5.00 per month each. *Id.*

[43] *Id.*; *see also* Randall, *supra* note 27 (describing virtual number service offered by AT&T's CallVantage, called Simple Reach Numbers, as giving subscribers second number outside their area codes so that callers in those areas covered by second number, such as relatives or business partners, can make local phone calls to subscribers).

[44] Offering customers the opportunity to use local area codes makes it cheaper for customers to call businesses outside of their home states, since the customers avoid long-distance charges in calling them. *See Vonage Launch Underlines Importance of Numbering*

Durham, North Carolina, may purchase VoIP phone numbers with Chicago and Los Angeles area codes in the hopes of generating business there.[45] That company might also buy another VoIP number with a 212 area code to ensure its listing in New York City's *Yellow Pages*.[46] Because VoIP area codes are assigned to people and their ATAs, not to locations, VoIP technology removes the geographic marker from the communications it transmits. VoIP represents a radical departure from the controlled, traditional telephone system where area codes signal the location of telephone and fax users.

b. The Mobility of VoIP

VoIP's mobility renders the notion of location-specific communications meaningless because VoIP subscribers bring their VoIP numbers with them wherever they travel so long as they have access to broadband.[47] For example, a VoIP subscriber from Texas who plugs her ATA into a hotel telephone in Beijing, China, and logs onto the Internet can make and receive phone calls in China as if she were at home.[48] As the CEO of Vonage explains, the "whole basis" of VoIP is "mobility."[49] But such portability, a critical feature of VoIP technology, precludes VoIP providers from ascertaining the precise location of their subscribers.[50]

Policy, POL'Y TRACKER, Mar. 13, 2005, http://www.policytracker.com/headlines.php [hereinafter *Vonage Launch*].

[45] *See* Ellison, *supra* note 31, at 108.

[46] *See* FRIEDMAN, *supra* note 8, at 166. However, decoupling telephone numbers from geographic regions risks consumer fraud. *See Vonage Launch*, *supra* note 44. For example, it becomes "cheap and easy for a small company to give the false impression that it has offices all over the country." *Id.*

[47] *See* Vonage, Take Vonage with You Webpage, http://www.vonage.com/features.php?feature=traveling (last visited Jan. 18, 2006) (explaining that Vonage subscribers can "[t]ake Vonage wherever [they] go" so long as subscribers have their ATAs and broadband Internet connection). Vonage explains that "[w]hen visiting family, going on vacation or traveling for business, [a subscriber] can make and receive calls from one convenient Vonage number." *Id.* Moreover, a Vonage customer using a Wi-Fi handset designed by UTStarcom has access to its phone service so long as the subscriber talks in a Wi-Fi network. Wilson Rothman, *Over There? Call for Less*, TIME, Apr. 25, 2005, at A3, *available at* http://www.vonage.com/corporate/press_news.php?PR=2005_04_25_0.

[48] *See* John C. Dvorak, *Free Phone Calls*, PC MAG.COM, July 29, 2003, http://www.pcmag.com/article2/0,4149,1206172,00.asp. John Dvorak, a reporter for *PC Magazine*, explained that while traveling to New York from California, he connected his ATA to his hotel phone and his laptop and "[v]oilá! A dial tone," as if he was at home in California. *Id.* Dvorak received his home phone calls in his hotel room in New York, thousands of miles from his home. *Id.*

[49] *See Vonage Launch*, *supra* note 44.

[50] *See* FCC Order, *supra* note 8, at 33. As the FCC has explained, and as the VoIP industry has applauded, portable VoIP services are offered "independent of geography."

The serious problems VoIP providers have had connecting their subscribers[51] to geographically-appropriate 911 Emergency Response Centers or Public Safety Access Points ("PSAPs") demonstrates the inability to ascertain the geographic location of VoIP communications.[52] This is because 911 calls are routed based on the calling number's area code, which accurately reflects a traditional telephone user's geographic location but not a VoIP subscriber's locale.[53] The Federal Communications Commission ("FCC") has attempted to mitigate this problem by requiring VoIP providers to connect their subscribers to PSAPs covering the geographic areas that the subscribers have reported as their locations.[54] VoIP providers must notify subscribers that they have a duty to inform and to update their VoIP providers about their precise locations to ensure the proper routing of 911 calls.[55]

The FCC's Order, however, provides an imperfect solution to the 911 problem since the proper routing of VoIP 911 calls is not automatic.[56] It depends on a VoIP subscriber's vigilant updating of her location information with her VoIP provider.[57] If a VoIP subscriber travels outside of her reported locale and neglects to update her location information with her VoIP provider, that subscriber's 911 calls will not

Id. Thus, VoIP providers cannot discern their subscribers' geographic locations. *Id*.

[51] *Id.* at 15; *see, e.g.*, Carol Wilson, *E911 Decision Adds More Fuel to Voice-over-IP Blaze*, TELEPHONY, May 23, 2005, at 8 (discussing problems raised by FCC's requirement that VoIP providers connect users to appropriate emergency service stations).

[52] *See* FCC Order, *supra* note 8, at 22. PSAPs differ from 911 Emergency Response Centers ("E-911") in that callers must tell PSAP personnel their location, whereas traditional E-911 providers automatically receive location information from traditional telephone service providers based on the calling telephone number's area code. *See* Vonage, Vonage Provides 911 Webpage, http://www.vonage.com/features.php?feature=911 (last visited Jan. 18, 2006).

[53] *See* FCC Order, *supra* note 8, at 15 (explaining that 911 problem stems from inability of VoIP providers to "discern from where their customers are accessing the VoIP service" given VoIP's portability).

[54] *See id.* at 22. The FCC Order requires local phone companies to give VoIP providers access to their E-911 networks. *Id*.

[55] *Id.* at 32.

[56] *Id.* (noting that it is not "technologically feasible for providers of interconnected VoIP services to automatically determine location of their [subscribers] without [their subscribers'] active cooperation").

[57] *Id.* The FCC ruled that VoIP providers must give their subscribers "one or more methods of updating [their] information regarding [their] physical location" to ensure that VoIP providers always have the most current information about their subscribers' locations. *Id.*; *see* Vonage, *supra* note 52 (explaining that subscribers who move or travel must provide their new location to Vonage through their web account to ensure that their 911 calls are sent to appropriate PSAPs).

be connected to the geographically-appropriate PSAP.[58] Because VoIP technology does not pinpoint a caller's location, a fail-safe 911 solution is unavailable.[59] The 911 problem shows that VoIP technology defies the location-identifying norm of the traditional, circuit-switched telephone system. As Part III demonstrates, the borderless nature of VoIP will pose serious problems for the modern personal jurisdiction doctrine as well.

c. VoIP's Routing Features

VoIP eliminates the predictability of the location of calls to VoIP subscribers in a variety of ways. VoIP technology, for example, allows subscribers to receive calls in multiple locations at once.[60] Thus, a VoIP subscriber from California, who owns additional residences in Colorado and Idaho, can program her VoIP phone number to ring simultaneously at both of her vacation homes during a winter trip.[61] VoIP also enables subscribers to forward their VoIP numbers to multiple phones, resulting

[58] Indeed, VoIP subscribers' lack of reliable access to PSAPs has been blamed for a number of critical injuries and deaths. *See* Donny Jackson, *Public Safety Gets Its Wish*, MOBILE RADIO TECH., June 1, 2005, at 6 (describing incident in February 2005 when teen could not connect to 911 via her VoIP phone after her parents were shot by intruder, and noting another situation in March 2005 when three-month old baby died because her mother's 911 call from her VoIP phone was routed to answering machine). Thus, a VoIP subscriber who tells his VoIP provider that he lives in Arizona may call 911 while on a trip to Boston. However, his 911 call will be routed to a PSAP in Arizona where his VoIP provider believes he is located, not where he is hurt and needs help. *See* David Pace, *Internet Phone Companies Must Provide 911 Service*, INTELLIGENCER (Wheeling, W. Va.), May 20, 2005, at 6A.

[59] *See* Press Release, Vonage, Vonage Completes Successful "Enhanced 911" Trial for VoIP Users with Rhode Island Public Safety (Oct. 14, 2004), *available at* http://www.vonage.com/media/pdf/pr_10_14911intrado_04.pdf (describing innovations that permit Vonage to provide Rhode Island's E-911 services with caller's location and callback number, but that information provided to 911 is only accurate if caller is actually in geographic location on file with Vonage). Cellular providers have only recently provided uniform E-911 service to subscribers pursuant to an FCC ruling requiring cellular phone providers to do so no later than December 31, 2005. *See* 911 Service, 47 C.F.R. § 20.18 (2004). Unlike VoIP providers who lack the ability to pinpoint their subscribers' precise geographic locations, cellular companies can locate their customers geographically using satellite-based global positioning technologies and by tracking signals from cellular towers. Thus, they are able to comply with the FCC's 911 Order. *See* Recent Development, *Who Knows Where You've Been?: Privacy Concerns Regarding the Use of Cellular Phones as Personal Locators*, 18 HARV. J.L. & TECH. 307, 308-09 (2004).

[60] *See* Ellison, *supra* note 31, at 110-11 (describing services offered by AT&T's CallVantage and Lingo's VoIP services).

[61] *See* Mark Gibbs, *Avoiding the Death of a Thousand Pecks*, NETWORK WORLD, June 27, 2005, at 92, *available at* http://www.networkworld.com/columnists/2005/062705backspin.html (describing service provided by VoIP provider Vonage that allows its subscribers to have incoming calls ring simultaneously or sequentially at different designated phone numbers).

in endless routing possibilities.[62] Thus, telephone calls to VoIP subscribers end up in locations callers have no reason to know or anticipate, further illustrating the inability to pinpoint the geographic location of VoIP communications.

3. SoIP: VoIP's Future

SoIP,[63] the future applications of VoIP, will erase the limitations of geography beyond voice and fax communications, revolutionizing the way in which people and businesses establish a virtual presence in far-away locations. In a movement called "network convergence,"[64] Internet telephony providers are developing applications that will allow IP-enabled telephones to receive and send phone calls, faxes, e-mails, data files, and high-quality real-time videos.[65] This will allow VoIP subscribers to talk and swap files simultaneously and to leave voice messages along with document attachments.[66] Another SoIP in development, "unified messaging," will permit subscribers to receive their VoIP communications in the most convenient manner to the VoIP user at the time of reception.[67]

Not only will VoIP efficiently carry all of our communications, it will do so from a single point of contact. Companies are rapidly developing more integrated services known as "fixed mobile convergence" that will allow VoIP users to have one device for all of their communications.[68] As

[62] *See* Ellison, *supra* note 31, at 112.

[63] FRIEDMAN, *supra* note 8, at 166.

[64] "Network convergence" refers to the goal of integrating data, voice, and video over a single network infrastructure, which would improve efficiency, flexibility, and cost through a "single infrastructure and cabling plant for data, voice, and video." Michael J. Vincent, Presence: The Case for Adopting a Converged Network 3 (Apr. 2005) (unpublished whitepaper), *available at* http://www.ins.com/downloads/whitepapers/ins_wp_converged_network_0405.pdf.

[65] Dan McLean, *e-Insider: VoIP Pointing Way Toward Complete Convergence*, GLOBE & MAIL (Toronto), Apr. 28, 2005, at B10 (describing emerging business applications of VoIP that allow doctors to collaborate from remote locations through multimedia links).

[66] *Id.*

[67] *See* Computacenter, Network Convergence 9-10 (Nov. 2003) (unpublished whitepaper), *available at* http://www.cw360ms.com/research/whitepapers/Network%20convergence%20white%20paper%20Final.pdf (explaining that unified messaging technology allows voice messages to be translated into e-mails while recipient is in meeting or, when same person is out in field, retrieves voicemail as e-mail and delivers it to that person's mobile personal digital assistant); *see also* Kirsner, *supra* note 27 (explaining that when vice president of VoIP innovator Avaya, Jorge Blanco, commutes to work "he listens to his unread e-mails, spoken by voice synthesizer, and [to his] unheard voice mails").

[68] *See* Tim Greene, *Mobile VoIP Set to Roam Even Wider*, NETWORK WORLD, Jan. 17, 2005, at 24; *see also Mobile Pipeline, Blackberry to Get Enterprise Wireless VoIP*, INTERNET WK., June

Sanjay Jhawar of BridgePort explains, "fixed-mobile convergence" permits highly mobile professionals to bring together their office phone, mobile phone, and e-mail addresses to a single point of contact that is accessible at all times.[69] For example, Avaya and Motorola have developed a dual-mode phone, a hybrid device that enables individuals to move seamlessly between office Wi-Fi, public wireless hotspots,[70] and cellular networks.[71] Thus, when the emerging SoIP technologies come to the market, individuals will conduct their business and personal affairs from a single IP-enabled device — sharing and commenting on work files, talking to friends, e-mailing business partners, and faxing materials — wherever broadband or wireless hotspots exist without regard to their location.[72]

15, 2005, http://www.internetweek.cmp.com/showArticle.jhtml?articleID=164303433 (explaining that technology companies Research In Motion and Avaya are working to add wireless VoIP capabilities to Research In Motion's Blackberry device so that consumers can communicate more effectively).

[69] *See* Jeff Vance, *When Wi-Fi Meets Cellular*, NETWORK WORLD, Mar. 14, 2005, at 46, *available at* http://www.networkworld.com/techinsider/2005/031405tiwireless3.html.

[70] Voiceover WiFi refers to VoIP wireless phones and VoIP softphone software on a wireless PC. *See* Greene, *supra* note 68, at 24. Experts project that by the end of 2007 there will be a total of about 182,000 hot spots worldwide with over 60,600 of them in the United States. *Id.* This development will make use of VoIP wireless phones more likely in the future. *Id.*

[71] *See* Vance, *supra* note 69, at 46. The dual-mode phone functions as a VoIP phone in the office and, as the user moves out of the office, acts as a cellular phone. *Id.* A wireless gateway "manages the handoff between the two networks," while the IP telephony software permits features commonly associated with desk phones, like conferencing. *Id.* The handset can access data and voice applications on both networks. *Id.* Thus, a "doctor starting a phone conversation in the hospital via Wi-Fi could walk out of the building, get in a car, and drive away but continue the call because the network flipped it over to a cellular network." Greene, *supra* note 68, at 24.

[72] VoIP and the emerging SoIP innovations enable employees to work virtually from "wherever they are — whether at home, the airport, a customer site, or an overseas field office." Joanne Cummings, *Masters of the Virtual World*, NETWORK WORLD, Apr. 25, 2005, at 76, *available at* http://www.networkworld.com/nw200/2005/042505virtualvendors.html; *see* David Kirkpatrick, *Gates and Ozzie: How to Escape E-mail Hell*, FORTUNE, June 27, 2005, at 169 (discussing how 21st century technologies fundamentally change way we work and live). Microsoft's Ray Ozzie remarked that:

> Every place you can identify a boundary — from a national boundary, to boundaries between federal, state, and local, to boundaries between home and work — something is causing it to blur. We have as an industry traditionally built technology to serve those boundaried entities. What excites me is that we can mold technologies into a form that matches the changing nature of business and work.

Id. at 172.

VoIP also will play a significant role in our future communications given its superior performance in times of national crisis.[73] For example, a VoIP subscription enabled the Mayor of New Orleans to reach President Bush after Hurricane Katrina ravaged the city's traditional telephone lines and cell towers.[74] The current efforts in Mississippi and Louisiana to restore communication services in the aftermath of Hurricane Katrina are relying heavily on wireless services in light of the considerable damage to the fiber-optic cable lines of the traditional telephone providers.[75]

The accessibility of VoIP, coupled with its innovative features, low cost, speed, and efficiency,[76] will undoubtedly result in VoIP's widespread use in the future.[77] Whereas twentieth century individuals

[73] Christopher Rhoads, *Cut off: At Center of Crisis, City Officials Faced Struggle to Keep in Touch*, WALL ST. J., Sept. 9, 2005, at A1.

[74] *Id.* (explaining that New Orleans mayor and his team of city leaders had no way to communicate with outside world for two days after Hurricane Katrina hit city, until member of mayor's technology team realized that he had set up Internet phone account with Vonage that he could use to connect with outside world once emergency power returned to Hyatt hotel where they sought shelter). On August 31, 2005, the mayor's team made its first outside call in two days and reached President Bush. *Id.*

[75] Dibya Sarkar, *Congress Seeks Improved Disaster Communications*, FED. COMP. WK., Sept. 26, 2005, *available at* http://www.vonage.com/corporate/press_news.php?PR=2005_09_26_0 (noting that BellSouth plans to rebuild communications systems in ravaged Gulf Coast areas with VoIP and fiber-optic systems); Carol Wilson, *Long Road to Recovery Begins After Gulf Coast Hurricane*, TELEPHONY, Sept. 19, 2005, *available at* 2005 WLNR 14837178.

[76] *See* Kirsner, *supra* note 27 (explaining that VoIP subscribers using wireless phones make and receive calls without airtime costs of cellular phone usage). Just as VoIP users avoid airtime costs for cellular phone usage, VoIP users also avoid the per-call costs of long-distance communication in their monthly call packages. *Id.*; *see also* Trope, *supra* note 19, at 64 (asserting that because "VoIP service is free from most, if not all, state and federal regulation taxes and tariffs" that are imposed on traditional telephony providers, VoIP service is usually 10% to 30% less expensive than traditional PSTN service). According to Mike Volpi, Cisco's Senior Vice President for routing technology, VoIP changes the telephony industry from making money from "distance or how long you talk" to doing so based upon "value [created] around voice communication." FRIEDMAN, *supra* note 8, at 166. Volpi explained that, in the future, the "voice will be free; it's what you enable customers to do around it that will differentiate companies." *Id.*

[77] *See also* Matthew Friedman, *VoIP Market Projected to Hit $4 Billion*, INTERNET WK., July 20, 2005, http://internetweek.cmp.com/showArticle.jhtml?articleID=166401191 (explaining that VoIP in North America is "on the brink of a phenomenal growth spurt over the next six years" when VoIP revenues will likely reach $4.07 billion, up 1300% from $295.1 million in revenues in 2004); *cf. Mobile, VoIP Replacing Traditional Voice Service, Researcher Says*, MOBILE PIPELINE, June 22, 2005, http://www.techbuilder.org/news/164901850 (explaining that analysts predict that by 2010, 60% of households in Western Europe will abandon their landlines for VoIP or cellular service). *Compare* Trope, *supra* note 19, at 65 (noting predictions by experts that VoIP use could increase from its current level to 40% of consumer market by 2008, and arguing that VoIP's popularity suggests

and businesses communicated with far-flung places through a myriad of media, including the mail, the traditional telephone, the cellular phone, and the computer, individuals in the twenty-first century using VoIP and SoIP technologies will radically change that scenario. In the future, all of the ways in which individuals and businesses establish a virtual presence outside their home fora — e-mail, voice, fax, file-sharing, and real-time video — will increasingly occur over VoIP-enabled devices that have no geographic markers.

Because our national economy is driven largely by the interstate connections we establish over modern communication technologies, VoIP will increasingly affect commerce. As a result, litigation and issues of extraterritorial jurisdiction in the twenty-first century will increasingly involve VoIP communications. The next part will consider the application of the modern law of personal jurisdiction to borderless communications. As the following sections demonstrate, the profound technological changes ushered in by VoIP and SoIP will undermine the very premises of the Court's existing minimum contacts doctrine.

II. THE TRADITIONALLY HARMONIOUS PRINCIPLES OF TERRITORIAL CONTACT AND IMPLIED CONTRACT CLASH IN BORDERLESS COMMUNICATION CASES

The modern minimum contacts doctrine rests on the twin normative pillars of state sovereignty, springing from a nonresident's territorial conduct in the state, and implied contract, derived from a nonresident's

impending restructuring of telecommunications infrastructure of United States), *with* Belson, *supra* note 25, at A5 (comparing 180 million wire-line users and 173 million cellphone users with 1.5 million VoIP subscribers in early 2005). Former FCC Chairman Michael Powell has called VoIP a "killer application," *FCC Chief in VoIP Warning*, FIN. TIMES LONDON, May 5, 2004, at 28, that will "turn the telephone industry on its head and remake it[] into something that consumers are going to find enormously valuable." Chris Walsh, *VoIP Hailed as the Future: FCC Chairman Predicts Net-Based Calling to Spur Phone Industry Revolution*, ROCKY MTN. NEWS (Denver), May 5, 2004, at 4B.

Indeed, providers of traditional telephone services like the regional Bells, long-distance providers, and cable companies are following the lead of private companies by offering VoIP services. Muraskin, *supra* note 25; *see* Belson, *supra* note 25 (explaining that traditional phone companies like Verizon, AT&T, and SBC Communications are developing their own Internet-based phone services). Not surprisingly, however, the traditional Bell companies that are tied to their millions of miles of copper phone lines "are loath to get into the digital phone market for fear of cannibalizing their core product." *Id.* Instead, many Bells are trying to keep customers by packaging their traditional phone lines with cheap broadband connections, cellular service, and video programming from satellite television providers. *Id.*

purposeful contact with the forum.[78] Concepts of territoriality in the law of personal jurisdiction emerged in the nineteenth century when the Supreme Court limited state adjudicative power to people and property located within a state's borders.[79] The minimum contacts doctrine adopted in the middle of the last century[80] expanded the notion of territoriality justifying a state's judicial authority to include nonresidents who conducted litigation-raising activity in the state.[81] A nonresident's constructive presence[82] in the state, established by the nonresident's litigation-related local activity, secured the state's "sovereign power to try" nonresidents in its courts.[83]

[78] *See* Burnham v. Superior Court of Cal., 495 U.S. 604, 619 (1990) (plurality opinion) (Scalia, J.) (explaining that minimum contacts doctrine operates by analogy to concepts of presence); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985) ("[T]he constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum state.").

[79] Pennoyer v. Neff, 95 U.S. 714, 722 (1877); Rogers v. Coleman, 3 Ky. (Hard.) 422, 426-27 (1808).

[80] Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

[81] *See Burnham*, 495 U.S. at 618 (plurality opinion) (Scalia, J.) (holding that, following *International Shoe*, "defendant's litigation-related 'minimum contacts'" with forum could "take the place of physical presence as the basis for jurisdiction"); ESAB Group, Inc. v. Centricut, Inc., 126 F.3d 617, 623 (4th Cir. 1997) (stating that minimum contacts jurisprudence has developed as "surrogate for [physical] presence in the state because a state's sovereignty remains territorial and its judicial power extends over only those persons, property, and activities in its borders"); Allan R. Stein, *The Unexceptional Problem of Jurisdiction in Cyberspace*, 32 INT'L L. 1167, 1169-70 (1998) (explaining that modern articulation of personal jurisdiction doctrine "continued to be tied to [a] place, but [is] measured by a more complex relationship with the defendant than simply the location of his body").

[82] This Article uses the terms "constructive presence," "territorial contact," and "territorial conduct" to refer to a nonresident's litigation-raising activity within a state's territory, a critical prerequisite to a state's exercise of judicial jurisdiction over a nonresident under the minimum contacts doctrine. I invoke the concept of "constructive presence" because the Supreme Court, in its adoption of the minimum contacts doctrine in *International Shoe*, relied upon notions of presence in articulating the quality of a nonresident's in-state conduct that would warrant judicial jurisdiction. *See* text accompanying notes 106-12. Also, the Supreme Court in its most recent personal jurisdiction decision, *Burnham*, conceptualized the minimum contacts doctrine as one developed by analogy to concepts of presence. *See* text accompanying note 123. This Article views the terms "constructive presence," "territorial contact," and "territorial conduct" as useful rhetorical devices to identify a nonresident's in-state activity, the cornerstone of the minimum contacts doctrine. *See Burger King*, 471 U.S. at 474-76. Others might decline to use the term "constructive presence," preferring "sufficient contacts" or the like. Although legitimate reasons exist to employ different terms to refer to the defendant's in-state, litigation-related activity, this Article conceives the above-mentioned terms as useful devices, leaving resolution of any weakness in using them for another day.

[83] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980).

The implied contract theory of the modern personal jurisdiction doctrine reflects due process limits on a state's exercise of its adjudicative authority.[84] Under that theory, a state's exercise of its judicial authority over a nonresident would be reasonable and hence comport with due process if the nonresident purposefully connected with, and implicitly subjected herself to, that state's authority.[85] The due process analysis, in that regard, reflects an implied agreement between the defendant and the forum.[86]

In designing the purposefulness inquiry in the mid to late twentieth century, the Court appropriately presupposed that telephone technology connects individuals in identifiable locations.[87] In cases involving traditional telephone contacts, the concepts of territorial contact and implied contract were in sync because nonresidents purposefully connected with particular fora based on the area codes of the telephone numbers they called.

In the fifteen years since the Supreme Court last ruled on personal jurisdiction,[88] however, communication technologies have changed radically. In the 1990s, cellular phone technology disconnected voice communications from fixed locations, allowing individuals to make and receive calls outside the geographic regions covered by their phones' area codes. Thus, the traditionally consonant notions of territorial contact and implied contract clashed when a phone number's area code failed to signal the forum a nonresident actually contacted when calling a cellular phone user. In such circumstances, a nonresident could not impliedly agree to face jurisdiction in a particular forum, leading some courts to find that calls to cellular phone users lacked jurisdictional

[84] *See id.* at 297-98.

[85] *See Burger King*, 471 U.S. at 475.

[86] *See* Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 721 (1987).

[87] *Burger King*, 471 U.S. at 476 (holding that given "inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines," physical presence within state is not required to justify personal jurisdiction so long as defendant "purposefully directed" his actions to forum residents).

[88] In 1990, the Supreme Court addressed the validity of tag jurisdiction. Burnham v. Superior Court of Cal., 495 U.S. 604, 618 (1990) (plurality opinion) (Scalia, J.) (upholding jurisdiction over nonresident defendant on grounds that defendant was physically served with process while visiting forum state). But the Court last specifically ruled on the specific jurisdiction theory of the minimum contacts doctrine in the 1980s. *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 115 (1987); *Burger King*, 471 U.S. at 475.

import, no matter the harmful communications such calls transmitted to a forum state.[89]

A. Twin Pillars: Territorial Sovereignty and Implied Contract in the Theory of Personal Jurisdiction

This subpart traces the central organizing principles of the law of personal jurisdiction: territoriality and implied contract. It explores the sovereignty concerns underlying the constructive presence inquiry and the due process protections provided by the implied contract theory. Section 1 shows how territorialist concepts developed in personal jurisdiction law and then looks at the significance of a nonresident's territorial conduct in the modern minimum contacts doctrine. Section 2 describes the implied contract rationale of the purposefulness inquiry in the minimum contacts doctrine.

1. State Sovereignty: The Significance of Territoriality in the Minimum Contacts Doctrine

An abiding feature of the law of personal jurisdiction[90] is that a defendant's activity within a forum's borders warrants the exercise of that state's adjudicative authority over the defendant.[91] Although territoriality concepts appeared in jurisdiction decisions as early as

[89] *See infra* notes 242-57 (describing jurisdictional rulings involving cellular phone contacts).

[90] Part II focuses on the significance of territoriality, implied contract, and "fair play and substantial justice" in the minimum contacts doctrine. For a comprehensive explanation of the evolution of the law of personal jurisdiction, see Robert J. Condlin, *"Defendant Veto" or "Totality of the Circumstances?": It's Time for the Supreme Court to Straighten out the Personal Jurisdiction Standard Once Again*, 54 CATH. U. L. REV. 53 (2004).

[91] *See Burnham*, 495 U.S. at 609, 620 (plurality opinion) (Scalia, J.) (finding that personal jurisdiction theory adheres to "the principles traditionally followed by American courts in marking out the territorial limits of each State's authority," using defendant's activities in forum as "substitute" for physical presence); *id.* at 637 (Brennan, J., concurring) ("[O]ur common understanding *now*, fortified by a century of judicial practice, is that jurisdiction is often a function of geography."); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980) ("[W]e have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution."); *see also* Lea Brilmayer, *Consent, Contract, and Territory*, 74 MINN. L. REV. 1, 6 (1989) (arguing that Court's personal jurisdiction doctrine hinges on notions of territorial sovereignty over nonresidents' acts within its borders); Stein, *supra* note 86, at 689 (explaining that law of personal jurisdiction ultimately addresses allocation of sovereign authority); Arthur M. Weisburd, *Territorial Authority and Personal Jurisdiction*, 63 WASH. U. L.Q. 377, 404 (1985) (explaining that basic principle of personal jurisdiction law is that state's authority is limited to controlling transactions, things, or people connected to its territory).

1808,[92] the Supreme Court made it clear personal jurisdiction was a function of a state's boundaries in its landmark 1877 *Pennoyer v. Neff* decision.[93] The Court decided *Pennoyer* at a time when individuals largely conducted their business affairs locally and rarely traveled between states.[94]

In *Pennoyer*, an Oregon state court asserted jurisdiction over, and issued a default judgment against, a nonresident, defendant Neff, where the only notice plaintiff provided the defendant was by publication.[95] Neff claimed that the federal court had no obligation to give full faith and credit to the state court's judgment given Oregon's lack of jurisdiction over him.[96] Justice Field, writing for the *Pennoyer* Court, agreed.[97] The Court ruled that a state's adjudicatory authority extended only to nonresidents physically served in the state's borders or to nonresidents whose in-state property had been attached at the outset of the litigation.[98] The Court reasoned that because every state possesses exclusive jurisdiction and sovereignty over persons and property within its borders, "no State can exercise direct jurisdiction and authority over

[92] *See* D'Arcy v. Ketchum, 52 U.S. 165, 174-75 (1851) (refusing to recognize New York judgment against Louisiana resident because, under "well-established rules of international law," New York court abused its power by rendering judgment over Louisiana resident who had not been personally served in New York and who owned no property there); Mills v. Duryee, 11 U.S. 481, 485-86 (1813) (Johnson, J., dissenting) ("[J]urisdiction cannot be justly exercised by a state over property not within the reach of its process, or over persons not owing them allegiance or not subjected to their jurisdiction by being found within their limits."); Rogers v. Coleman, 3 Ky. (Hard.) 422, 426-27 (1808) (explaining that court's jurisdiction attaches when person or property falls within sphere of state's authority); *see also* Terry S. Kogan, *A Neo-Federalist Tale of Personal Jurisdiction*, 63 S. CAL. L. REV. 257, 273-74 (1990) (explaining that early history of state court decisions concerning personal jurisdiction reveals courts' concern with issues of interstate sovereignty, reflecting competing visions of Federalists and Antifederalists in post-Revolutionary era); Roger H. Transgrud, *The Federal Common Law of Personal Jurisdiction*, 57 GEO. WASH. L. REV. 849, 871 (1989) (explaining that before adoption of Fourteenth Amendment in 1868, Supreme Court had developed federal common law rules defining state court's personal jurisdiction over nonresidents based on territorial concepts drawn from principles of public international law).

[93] 95 U.S. 714, 722 (1877); *see* Philip B. Kurland, *The Supreme Court, the Due Process Clause, and the In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569, 570 (1958) (explaining that *Pennoyer* stands as source of modern law of personal jurisdiction).

[94] Hanson v. Denckla, 357 U.S. 235, 260 (1958) (Black, J., dissenting); *see* MITCHELL, *supra* note 10, at 165-66 (describing that communications in pre-industrial communities were largely limited to towns where people lived).

[95] Pennoyer v. Neff, 95 U.S. 714, 720 (1877).

[96] *See id.* at 721-22.

[97] *Id.* at 733.

[98] *Id.* The Court also recognized personal jurisdiction over a nonresident defendant who consented to the court's jurisdiction. *Id.*

persons or property without its territory."[99]

Pennoyer reflected the territorial conception of jurisdiction in cases like *D'Arcy v. Ketchum*[100] that limited state judicial authority to people and property within a state's borders.[101] The *Pennoyer* Court, in dictum,[102] tied these principles to the Fourteenth Amendment, finding that proceedings in a court "to determine the personal rights and obligations" of parties over whom the court lacks jurisdiction do not "constitute due process of law."[103] The Court defined the jurisdictional right protected by the Due Process Clause as the individual's right to be free from illegitimate assertions of state authority.[104]

The twentieth century's sea change in transportation and communication technologies[105] prompted the Court in *International Shoe*

[99] *Id.* at 722, 733. The Court, citing Justice Story's treatise on the conflict of laws, explained that because the several states possess equal authority and the independence of one state "implies the exclusion of power from all others," a state's exertion of power beyond its borders "is a mere nullity" and "incapable of binding such persons or property in any other tribunals." *Id.* at 722-23.

[100] 52 U.S. 165 (1851).

[101] LEA BRILMAYER, AN INTRODUCTION TO JURISDICTION IN THE AMERICAN FEDERAL SYSTEM 25 (1986).

[102] The Court's discussion of the Due Process Clause constituted dictum because the Fourteenth Amendment, whose Due Process Clause (unlike that in the Fifth Amendment) applied to the states, had not yet been ratified at the time of the state-court judgment against Neff. BRILMAYER, *supra* note 101, at 25 n.26.

[103] *Pennoyer*, 95 U.S. at 733-34 ("As stated by Cooley in his Treatise on Constitutional Limitations . . . for any other purpose than to subject the property of a nonresident to valid claims against him in the State, 'due process of law would require appearance or personal service before the defendant could be personally bound by any judgment rendered.'"); *see* Geoffrey C. Hazard, Jr., *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 258-62 (contending that Justice Story, who based his writing on work of Dutch jurist Huber, influenced basic organization and intellectual structure of Court's decision in *Pennoyer*); Kogan, *supra* note 92, at 300 (arguing that Justice Field, while influenced by Justice Story's explanation of international sovereignty, "metamorphosed" personal jurisdiction doctrine from doctrine of international law to doctrine of personal rights protected by Constitution against overreaching of states).

[104] *Pennoyer*, 95 U.S. at 733; *see* Kogan, *supra* note 92, at 298, 337 (explaining that, in *Pennoyer*, "Justice Field viewed the personal jurisdiction doctrine as one important means by which federal courts could police the states with respect to upholding the civil rights of American citizens" protected by Reconstruction Amendments).

[105] *See* Hanson v. Denckla, 357 U.S. 235, 250-51 (1958) (noting that Court shifted from rigid rule of *Pennoyer* to flexible minimum contacts inquiry to account for technological progress of 20th century that "increased the flow of commerce between the States" and thus amplified need for jurisdiction over nonresidents); McGee v. Int'l Life Ins. Co., 355 U.S. 220, 222 (1957) (attributing expansion of extraterritorial jurisdiction in *International Shoe* to great changes in modern transportation and communication in 20th century that fundamentally changed national economy).

Co. v. Washington[106] to expand forum-court jurisdiction beyond people and property located in a state's borders to include nonresidents whose forum activities gave rise to the litigation.[107] Although geography remained the central "organizing principle" in the personal jurisdiction analysis,[108] *International Shoe* replaced the strict physical presence requirement of *Pennoyer* with the flexible "minimum contacts" approach.[109] Under the minimum contacts doctrine, the Court focused on whether the "quality and nature" of the defendant's litigation-related activities in the forum warranted the state's judicial authority.[110]

The *International Shoe* Court began by reaffirming that the Due Process Clause of the Fourteenth Amendment protects nonresidents from the binding judgment of fora lacking jurisdiction over them.[111] The Court further held, however, that a court could acquire jurisdiction over nonresident defendants on the basis of their litigation-raising "contacts, ties, or relations" with the forum state.[112] Under the minimum contacts doctrine, a court's exercise of jurisdiction over a nonresident comports with due process so long as the nonresident's activity in the forum state gave rise to the lawsuit and maintenance of the suit would not "offend 'traditional notions of fair play and substantial justice.'"[113]

With *International Shoe*, the Court shifted from the strict territorial paradigm of *Pennoyer* to a "neoterritorialist"[114] approach based upon the "quality" and "nature" of a nonresident's litigation-related acts in the state.[115] This shift, however, was a measured one. In describing the activities that would meet or fall short of the "quality and nature" inquiry, the Court continued to rely upon the concept of territorial

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[106] 326 U.S. 310 (1945).

[107] *Id.* at 316.

[108] Stein, *supra* note 81, at 1169.

[109] *Int'l Shoe*, 326 U.S. at 316-17 (holding that jurisdiction would be appropriate under minimum contacts approach despite fact that defendant had not been served within state and consent to suit could not be implied as *Pennoyer* approach requires).

[110] *Id.* at 319.

[111] *Id.* at 316.

[112] *Id.* at 319.

[113] *Id.*

[114] Stein, *supra* note 81, at 1169-70; *see* Lesnick v. Hollingsworth & Vose Co., 35 F.3d 939, 943 (4th Cir. 1994) (following *International Shoe*, "[a] state's jurisdictional power remains territorial, to be exercised within its boundaries over persons, property and *activities* there").

[115] *Int'l Shoe*, 326 U.S. at 319 (holding that "Whether due process is satisfied must depend rather upon the quality and nature of the activity [in the forum] in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure.").

"presence."[116] The Court, identifying the type of contact that would squarely merit jurisdiction over a nonresident, explained that "[p]resence" is not "doubted" where the defendant's "continuous and systematic" activities in the forum "give rise to the liabilities sued on."[117] Conversely, jurisdiction would offend due process if a nonresident had only a "casual presence" in the forum or conducted "single or isolated" activities in a state that lacked a connection to the lawsuit.[118]

Personal jurisdiction law, to date, finds its principal justification in territorialist[119] concepts.[120] By predicating a state court's exercise of specific jurisdiction[121] on a nonresident's litigation-raising activity in the state, the Supreme Court has made clear that the minimum contacts doctrine is geographically prescribed. Justice Scalia, in *Burnham v.*

[116] *Id.* at 316-17; *see also* Kogan, *supra* note 92, at 351 (arguing that *International Shoe* adopted conceptual structure of *Pennoyer* by relying on notions of presence but suggested that changing times required that concept be more broadly construed than mere physical location). Professor Kogan remarked that *International Shoe* did not abandon *Pennoyer*'s requirement of presence, but "merely said that the concept must be renovated to suit the circumstances of modern society." *Id.* at 352.

[117] *Int'l Shoe*, 326 U.S. at 317.

[118] *Id.*

[119] *See* BRILMAYER, *supra* note 101, at 31.

[120] Courts variously refer to a nonresident defendant's litigation-raising acts in the forum as "affiliating circumstances," "surrogates for presence," and conduct establishing a "substantial connection" with the forum. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295 (1980) (refusing to find jurisdiction over defendants in Oklahoma due to absence of any "affiliating circumstances" by defendants with forum to justify state's adjudicatory power over them); ESAB Group., Inc. v. Centricut, Inc., 126 F.3d 617, 623 (4th Cir. 1997) (explaining that "the jurisprudence of minimum contacts has developed as a surrogate for presence"); *see* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474, 487 (1985) (upholding jurisdiction over Michigan defendant in Florida based on his "substantial connection" with Florida); *see also* Vetrotex Certainteed Corp. v. Consol. Fiber Glass Prods. Co., 75 F.3d 147, 151-52 (3d Cir. 1996) (finding that Pennsylvania lacked jurisdiction over corporate defendant in breach of contract action where defendant performed no conduct in Pennsylvania that warranted state's exercise of adjudicative authority because defendant's solicitation and negotiations of contract occurred in California, none of defendant's personnel ever visited Pennsylvania, defendant delivered its products to California, and only contact defendant had with Pennsylvania constituted informational calls it made to plaintiff that had no impact on negotiation or execution of contract); Mesalic v. Fiberfloat Corp., 897 F.2d 696, 700-01 (3d Cir. 1990) (upholding personal jurisdiction over defendant in New Jersey given defendant's extensive contact with plaintiff in New Jersey concerning contract at heart of the lawsuit, including his sending written correspondence to plaintiff's New Jersey residence, calling plaintiff at his New Jersey residence, delivering boat to plaintiff in New Jersey, and coming to New Jersey to repair boat); Beck v. D'Amour, 923 F. Supp. 196, 200-02 (D. Utah 1996) (refusing to find jurisdiction over defendant in Utah in stock conversion action because tort of conversion and injury occurred in Thailand where defendant looted contested funds and because defendant conducted no acts relevant to litigation in Utah).

[121] *See supra* note 5 (describing specific jurisdiction theory addressed in this Article).

Superior Court of California,[122] affirmed the abiding significance of territory in current personal jurisdiction law by describing the minimum contacts doctrine as one "developed by *analogy* to physical presence."[123]

Professor Lea Brilmayer[124] views a nonresident's litigation-related activity within a state as invoking that state's "territorial sovereignty."[125] A nonresident's forum contacts "count"[126] and thus justify the exercise of judicial jurisdiction because a state has the right to regulate a nonresident's activity within its borders.[127] When basing judicial

[122] 495 U.S. 604 (1990) (plurality opinion) (Scalia, J.).

[123] *Id.* at 618-19 (plurality opinion) (Scalia, J.) (stating, "as *International Shoe* suggests, the defendant's litigation-related 'minimum contacts' may take the place of physical presence as the basis for jurisdiction" because "minimum contacts" standard was developed as a "substitute" for physical presence requirement of *Pennoyer*). As *Lesnick* held:

> [W]hile *International Shoe* expands upon the notion of "presence" to provide flexibility to accommodate the increased flow of commerce between the states, the standard for imposing jurisdiction over persons outside the state has remained one that depends on a measure of the person's activity *in the state* coupled with the constraint that the state's exercise of such power would not offend traditional notions of fair play.

Lesnick v. Hollingsworth & Vose Co., 35 F.3d 939, 942 (4th Cir. 1994) (citation omitted); *see also* Steven R. Greenberger, *Justice Scalia's Due Process Traditionalism Applied to Territorial Jurisdiction: The Illusion of Adjudication Without Judgment*, 33 B.C. L. REV. 981, 1025 (1992) (remarking that in *Burnham* plurality, Justice Scalia articulates that "presence is the paradigm of all jurisdiction").

[124] Wendy Perdue, *Aliens, the Internet, and "Purposeful Availment": A Reassessment of Fifth Amendment Limits on Personal Jurisdiction*, 98 NW. U. L. REV. 455, 457 (2004) ("[P]ersonal jurisdiction limits are based on a view about the limits of state sovereignty."); Allan R. Stein, *Personal Jurisdiction and the Internet: Seeing Due Process Through the Lens of Regulatory Precision*, 98 NW. U. L. REV. 411, 416 (2004) (explaining that "defendant's individual due process right to be free from illegitimate authority is a perfect vehicle to protect state sovereignty"); Weisburd, *supra* note 91, at 383 (arguing that personal jurisdiction law is deduced from "general federalism-related territorial limitations on state sovereignty").

[125] *See* Brilmayer, *supra* note 91, at 28. Professor Arthur Weisburd persuasively analogizes the territorial concepts underlying a state's judicial authority over nonresidents to the territorially driven understanding of a state's power to tax and to prosecute criminals. Weisburd, *supra* note 91, at 391-98. For Professor Weisburd, the due process limits on a state's judicial jurisdiction, tax jurisdiction, and subject-matter jurisdiction in criminal matters all "trace back to the common basic principles that the sovereignty of other states limits a state's authority and that a state's authority extends only to that which affects its territory." *Id.* at 402. Thus, "[l]ocal presence of at least part of transactions, conduct or events is not merely sufficient, but is necessary to permit the state to assert [personal] jurisdiction." *Id.* at 404.

[126] The phraseology "how contacts count" comes from the title of Professor Lea Brilmayer's seminal 1980 article, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77.

[127] *Id.* at 87. Professor Brilmayer explains that "[t]he two bases of jurisdiction — unrelated and related contacts — . . . constitute alternative aspects of a State's sovereignty,

jurisdiction on a nonresident's contacts with the forum, the state "merely requir[es] the defendant to bear the costs arising out of [his] occurrences in the forum."[128] Under this theory, the minimum contacts doctrine expanded a state's "internal regulatory authority" to include nonresidents who conducted litigation-raising activity there.[129]

This interpretation finds strong support in *World-Wide Volkswagen Corp. v. Woodson*.[130] In *World-Wide Volkswagen*, the Court held that the Due Process Clause limits a state's sovereign adjudicative powers and that such limits cannot be satisfied by showing that it would not be inconvenient for the nonresident to defend itself in the forum.[131] The Court explained that because due process restrictions "are a consequence of territorial limitations on the power of the respective States," the Due Process Clause "does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations."[132] For the *World-Wide Volkswagen* Court, a nonresident's minimum contacts implicated the

namely, self governance and territoriality." *Id.* On the one hand, a defendant's systematic unrelated activity in a state, like being domiciled, being incorporated, or doing business in a state, suggests that the person or corporate entity is "enough of an 'insider'" so that he may safely be relegated to the state's political processes. *Id.* On the other hand, jurisdiction based on a defendant's litigation-raising activity in the forum stems from a "regulatory and territorial justification." *Id.* Under that theory, the state uses the defendant's in-state conduct to gauge whether such conduct warrants state judicial regulation. *Id.* at 88; *see also* Stein, *supra* note 86, at 761 (explaining that jurisdictional rules define "when and how a state may command obedience from an individual").

[128] Brilmayer, *supra* note 126, at 87.

[129] Stein, *supra* note 86, at 696 (contending that, since *Pennoyer*, Court has expanded jurisdiction from strict territorialism to recognizing acts that warrant state's adjudicative authority based on relationship formed by individual with state). The minimum contacts doctrine signaled that the sphere of a state's legitimate authority "must be determined by subtler standards than the defendant's current location" as required by *Pennoyer*. *Id.* at 710.

[130] 444 U.S. 286, 294 (1980).

[131] *Id.* The Court explained that even though the "progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome," the trend in technology does not herald the demise of all restrictions on the personal jurisdiction of state courts because such restrictions are "more than a guarantee of immunity" from inconvenient litigation." *Id.*

[132] *Id.* Professor Wendy Purdue describes *World-Wide Volkswagen* as reflecting two critical points: "[F]irst, that personal jurisdiction limits are based on a view about the limits of state sovereignty; and second, that purposeful availment is the correct measure of state sovereignty within our federal system." Perdue, *supra* note 124, at 457. Professor Perdue argues, and this Article agrees, that "[i]t is important to differentiate between these two propositions because one can readily accept the first while rejecting the second." *Id.*; *see infra* Part III.C (arguing that purposefulness and its implied contract approach can be eliminated from personal jurisdiction law and other means provided to ensure that state's exercise of its judicial authority is reasonable).

sovereign state's "right to regulate activities" [133] within its borders.[134] The Court reasoned that the "Framers . . . intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts."[135] As the Court explained: "[T]he reasonableness of asserting jurisdiction over the defendant must be assessed 'in the context of our federal system of government.'"[136]

The question of whether state sovereignty remained an essential feature of personal jurisdiction was notably implicated in *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*.[137] There, Justice White, writing for the majority, found that the defendant had waived his personal jurisdiction defense by failing to respond to court-ordered discovery on the issue.[138] The Court, in its decision, considered the defendant's argument that the due process rights implicated by the personal jurisdiction doctrine were akin to Article III's guarantees with regard to subject-matter jurisdiction that could not be waived.[139] The Court found the defendant's argument unavailing: whereas subject-matter jurisdiction exclusively concerns a federal court's power to hear a case regardless of a litigant's interests, restrictions on "state sovereign power" in personal jurisdiction matters stem from an "individual's liberty interest preserved by the Due Process Clause" that an individual may waive.[140] With this reasoning, the *Insurance Corp.* majority made clear that the right to resist unconstitutional assertions of personal jurisdiction rests with the individual, not the states vis-à-vis each other.

Justice Powell's concurring opinion, however, warned that the *Insurance Corp.* majority had suggested a sweeping revision of the

[133] *See* Brilmayer, *supra* note 126, at 85 (arguing that *World-Wide Volkswagen* illustrates "regulatory and territorial justification" of minimum contacts doctrine); Stein, *supra* note 124, at 412 ("[The] individual liberty interest of defendants protected by [*World-Wide Volkswagen*] is ultimately measured by whether a state is acting within its legitimate sphere of sovereign authority."); Weisburd, *supra* note 91, at 405 (exploring how *World-Wide Volkswagen* supports view that personal jurisdiction law stems from "limits on state sovereignty inherent in the United States governmental structure").

[134] Lea Brilmayer, *Jurisdictional Due Process and Political Theory*, 39 U. FLA. L. REV. 293, 294-96 (1987) (explaining that adjudicative jurisdiction fundamentally concerns state's right to exercise coercive power over individual or dispute); Perdue, *supra* note 124, at 457.

[135] *World-Wide Volkswagen*, 444 U.S. at 294.

[136] *Id.* at 293-94. The Court explained that "we have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution." *Id.* at 293.

[137] 456 U.S. 694, 695, 702-03 (1982).

[138] *Id.* at 703-04.

[139] *Id.*

[140] *Id.* at 702, 703 n.10.

modern personal jurisdiction doctrine by replacing the minimum contacts requirement with an exclusive focus on "abstract notions of fair play."[141] The majority disagreed.[142] Justice White, relying on *World-Wide Volkswagen*,[143] responded that "[c]ontrary to the suggestion of Justice Powell, our holding does not alter the requirement that there be 'minimum contacts' between the nonresident defendant and the forum state."[144] The majority instead explained that the *World-Wide Volkswagen* principle that personal jurisdiction reflects the "character of state sovereignty" is "ultimately . . . a function" of a nonresident's due process rights and thus can be waived by the nonresident.[145] For that reason, minimum contacts "can be established when a defendant fails to comply with court-ordered discovery" on the contested issue of personal jurisdiction.[146]

Justice White's majority decision did not eliminate a sovereign state's judicial authority over a nonresident's acts within its borders. Rather, it held that the due process protections afforded nonresidents by the minimum contacts doctrine belong to those nonresidents and are waiveable by them.[147] Thus, the sovereignty theory underlying personal jurisdiction law remained intact after *Insurance Corp.* — whether a state's exercise of personal jurisdiction over a nonresident exceeded the state's judicial authority.[148] *Insurance Corp.* simply clarified that the right to

[141] *Id.* at 710, 714 (Powell, J., concurring).

[142] *Id.* at 703 n.10.

[143] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-92 (1980). Professor Weisburd persuasively argues that *Insurance Corp.*'s reliance on *World-Wide Volkswagen* undermines any suggestion that *Insurance Corp.* implied that personal jurisdiction law no longer concerns "territorial sovereignty." Weisburd, *supra* note 91, at 412-13. For Professor Weisburd, if the Court meant to eliminate state sovereignty from the personal jurisdiction calculus, "one would expect its footnote to characterize the *World-Wide* [*Volkswagen*] rationale as incorrect" since *World-Wide Volkswagen* held that sovereignty concerns compel the minimum contacts inquiry. *Id.* at 413. Because *Insurance Corp.* reaffirmed the *World-Wide Volkswagen* minimum contacts test, *Insurance Corp.* cannot be read to sever sovereignty considerations from the minimum contacts doctrine. *Id.*

[144] *Ins. Corp.*, 456 U.S. at 703 n.10.

[145] *Id.*

[146] *Id.*

[147] *Id.*

[148] Perdue, *supra* note 124, at 458 (rejecting suggestion that *Insurance Corp.* undermined notion that "personal jurisdiction is doctrine that allocates sovereignty"); Stein, *supra* note 86, at 712 (arguing that *Insurance Corp.* did not disturb Court's approach on how to measure legitimacy of state's exercise of judicial authority under minimum contacts doctrine and regulatory theory underlying contacts inquiry, but instead found that right to resist unauthorized jurisdiction rests with individual, not states); Weisburd, *supra* note 91, at 415 (arguing that *Insurance Corp.* did not say that personal jurisdiction does not flow from sovereignty limitations but rather that "once [the court] has gone through process of

resist a state's unauthorized exercise of jurisdiction belongs to individuals, not to the states.[149]

Supreme Court decisions following *Insurance Corp.* affirm the sovereignty theory underlying the territorial contact inquiry of the minimum contacts doctrine.[150] In *Burger King v. Rudzewicz*,[151] the Court, describing the significance of a defendant's purposeful forum contacts, explained that "parties who 'reach out beyond one state and create continuing relationships and obligations with citizens of another state' are subject to regulation and sanction in the other state for the consequences of their activities."[152] Territorial sovereignty thus remains a central feature of the personal jurisdiction doctrine.[153]

State sovereignty principles similarly animate the Supreme Court's rulings on the constitutionality of state punitive damages awards under the Due Process Clause.[154] Notions of territorial sovereignty prominently appeared in *BMW v. Gore.*[155] There, the Court explained that a state may award punitive damages if such awards advance the state's legitimate interest in punishing and deterring unlawful conduct.[156] State punitive damages awards, however, would offend due process and its protection against "arbitrariness" if such "award[s] can fairly be categorized as 'grossly excessive' in relation to [a state's] interests."[157] For the Court,

determining the limitations that sovereignty imposes on personal jurisdiction, the rules that one deduces remain merely personal rights, waiveable by the persons involved"). *But see* Robert H. Abrams & Paul R. Dimond, *Toward a Constitutional Framework for the Control of State Court Jurisdiction*, 69 MINN. L. REV. 75, 81, 83-86 (1984) (describing *Ins. Corp.* as critical departure from "previous articulations of due process requirements" concerning significance of state sovereignty).

[149] Stein, *supra* note 124, at 415.

[150] *See, e.g.*, Burnham v. Superior Court of Cal., 495 U.S. 604, 618 (1990) (plurality opinion) (Scalia, J.) (finding that current minimum contacts doctrine permits defendant's "litigation-related 'minimum contacts' to take the place of physical presence" as basis for state's jurisdictional authority over defendant); *id.* at 637 (Brennan, J., concurring) ("[The] state has power to exercise judicial jurisdiction over an individual who is present within its territory unless the individual's relationship to the state is so attenuated as to make the exercise of jurisdiction unreasonable." (quotation marks omitted)).

[151] 471 U.S. 462 (1985).

[152] *Id.* at 473 (quoting Traveler's Health Ass'n v. Virginia, 339 U.S. 643, 647 (1950)); *see also* Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 776 (1984) ("[I]t is beyond dispute that [a state] has a significant interest in redressing injuries that actually occur within the State.").

[153] Busch v. Buchman, 11 F.3d 1255, 1258 (5th Cir. 1994).

[154] State Farm Mutual Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416-18 (2003); BMW of N.A. v. Gore, 517 U.S. 559, 572-73 (1996).

[155] *BMW*, 517 U.S. at 572-73.

[156] *Id.* at 568.

[157] *Id.* (quoting TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 456 (1993).

"Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose."[158]

The Court tied the due process "excessiveness inquiry" to the territorial limitations on state sovereignty.[159] The Court explained that an award's "excessiveness" depends upon the "state interests" served by the punitive award.[160] Analogizing the scope of a state's authority to award punitive damages to a state's power to tax, the Court explained that "no single State . . . [can] impose its own policy choice[s] on neighboring States."[161] The Court held that "principles of state sovereignty and comity" suggest that a "State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States."[162]

In 2003, the *State Farm Mutual Automobile Insurance Co. v. Campbell*[163] Court considered whether a Utah jury's $145 million punitive damages award offended the due process rights of a defendant insurance company accused of fraud.[164] At trial, the plaintiff presented evidence of the defendant's deceptive practices in Utah and across the United States.[165] The Court held that the Utah jury should have been instructed that it could not punish the defendant for its out-of-state conduct because Utah "does not have the power" to punish the defendant for its actions that had no impact on Utah or its residents.[166] The Court reasoned that in considering out-of-state conduct to support its punitive damages award, the jury offended "a basic principle of federalism . . . that each State may make its own reasoned judgment about what

[158] *Id.* at 574.

[159] *Id.* The Court, in assessing the severity of the penalty a state may impose, relied on three guideposts: (1) the degree of reprehensibility of the defendant's conduct, (2) the disparity between the harm or potential harm suffered by the plaintiff, and (3) the difference between this remedy and the civil penalties authorized or imposed in comparable cases. *Id.* at 574-75. The Court's three-part inquiry ensured that the defendant had "adequate notice" of the penalty it would face. *Id.* In so finding, the Court analogized the constitutional safeguards afforded to defendants facing civil penalties to the "judgments without notice" due process protections in the personal jurisdiction analysis. *Id.* at 575 n.22 (citing Shaffer v. Heitner, 433 U.S. 186, 217 (1977) (Stevens, J., concurring)).

[160] *BMW*, 517 U.S. at 568.

[161] *Id.* at 571.

[162] *Id.* at 572.

[163] 538 U.S. 408 (2003).

[164] *Id.* at 412.

[165] *Id.* at 420.

[166] *Id.* at 422.

conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction."[167]

The Court's sovereignty theory in its punitive damages decisions mirrors the rationale animating the territorial contact inquiry of the minimum contacts doctrine.[168] Just as *Campbell* recognized that a state may punish a defendant's conduct within its territorial borders, personal jurisdiction law upholds a state's judicial authority over a nonresident's in-forum activity.[169] According to Professor Michael P. Allen, the Court's "strong territorialist" and interstate federalism approach in *Campbell* suggests that the Court's future personal jurisdiction decisions will emphasize state sovereignty as its underlying rationale.[170]

The minimum contacts doctrine recognizes a state's judicial authority over nonresidents who established their constructive presence in that state, an approach resembling each state's authority to award punitive damages based on a defendant's activity within its borders. The next section addresses how the Due Process Clause limits a state's exercise of its judicial jurisdiction to nonresidents who purposefully connect with a state and thus impliedly agree to face litigation there. The Supreme Court relies on a nonresident's implied intent in order to assess the reasonableness of a state's exercise of its authority over that resident.

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[167] *Id.*

[168] Michael P. Allen, *The Supreme Court, Punitive Damages, and State Sovereignty*, 13 GEO. MASON L. REV. 1, 60-63 (2005) (analogizing sovereignty-based rationale of punitive damages decisions of *BMW* and *Campbell* to territorial model underlying personal jurisdiction doctrine); James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169, 238 n.266 (2004) ("Like personal jurisdiction doctrine, the emerging doctrine limiting punitive damage awards has a distinct interstate federalism flavor to it.").

[169] In comparing the Supreme Court's personal jurisdiction doctrine to its punitive damages decisions, this Article acknowledges that issues concerning punitive damages reflect tort reform concerns, among other issues, that the personal jurisdiction doctrine does not. This Article simply points to the Court's punitive damages decisions as an illustration of other areas that reflect the territorial limits of state authority in a due process analysis.

[170] Allen, *supra* note 168, at 63. In his discussion, Professor Allen recognizes that personal jurisdiction jurisprudence has "at its roots a strong notion of state sovereignty." *Id.* at 61. He notes that the Court greatly limited interstate federalism and sovereignty as "driving jurisdictional forces." *Id.* at 62. Although this Article disagrees with Professor Allen on this point, *see* text accompanying notes 137-53, it agrees that *Campbell* makes it more likely that the Court will craft its future personal jurisdiction decisions "with an eye more directly focused on state sovereignty." *Id.* at 63.

2. Due Process Limits: The Implied Contract Theory in Modern Personal Jurisdiction Law

The Due Process Clause, "acting as an instrument of interstate federalism, may sometimes divest the State of its power"[171] to exercise personal jurisdiction over nonresidents despite their territorial conduct in the state because the nonresidents never purposefully[172] connected with that state.[173] Purposefulness is satisfied where nonresidents deliberately directed "some act" [174] to the forum such that they could have "reasonably anticipate[d] being haled into court" there.[175] The purposefulness inquiry protects nonresidents from facing lawsuits in jurisdictions based on a third party's acts[176] or the nonresidents' "accidental" or "attenuated" contacts with the state.[177]

The Court designed the purposefulness requirement to ensure that the state's exercise of its judicial authority would be reasonable "in the

[171] World-Wide Volkswagen v.Woodson, 444 U.S. 286, 294 (1980).

[172] Hanson v. Denckla, 357 U.S. 235, 253 (1958) ("[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State . . . .").

[173] *Id.*

[174] Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 n.18 (1985). A defendant's single act related to the forum may not be sufficient to establish jurisdiction if it is not reasonably foreseeable that the defendant would be haled into the forum's courts based on that act. *Id.*

[175] *Id.* (explaining that Due Process Clause may not be used as shield to "avoid interstate obligations that have been voluntarily assumed"); *World-Wide Volkswagen*, 444 U.S. at 297. Purposefulness can also be demonstrated by placing products in the stream of commerce or by committing an intentional tort like defamation or libel, where the defendant targeted the plaintiff who the defendant knows lives and works in the forum. Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 104 (1987); *see* Calder v. Jones, 465 U.S. 783, 789-90 (1984) (upholding California court's personal jurisdiction over writer and editor, who worked for *National Enquirer* in Florida, in lawsuit alleging defendants libeled actress plaintiff in magazine article because defendants "expressly aimed [their article] at California," defendants knew that plaintiff lived and worked in California, and *National Enquirer* had its largest circulation in California such that defendants could "reasonably anticipate" being haled into court in there). Under the *Calder* "effects" test, defendants illustrate a purposeful connection with a forum state by their intentional conduct in the forum state that is "calculated to cause injury" there. *Id.* at 791. The *Calder* Court described the purposefulness test as satisfied by a defendant who expressly aimed his tortious actions at a particular forum to harm the plaintiff there. *Id.* at 789. The Court has variously referred to purposefulness as voluntary or deliberate behavior aimed at the forum.

[176] *Burger King*, 471 U.S. at 475 (holding that unilateral activity of third person cannot be imputed to defendant in purposefulness analysis).

[177] This "ensures that a defendant's amenability to jurisdiction is not based on fortuitous contacts," but on the defendant's "real relationship with the state with respect to the transaction at issue." Purdue Research Found. v. Sanofi-Synthelabo, S.A., 338 F.3d 773, 780 (7th Cir. 2003).

context of our federal system of government."[178] This means that the nonresident must have had "fair warning" about where her conduct would render her liable to a lawsuit[179] and the opportunity to "structure [her] primary conduct" to "alleviate the risk of burdensome litigation" by "procuring insurance" or by "severing [her] connection" to the state.[180] The purposefulness inquiry, in turn, promotes the "orderly administration of the laws" by "giv[ing] 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."[181] Thus, a state may reasonably exercise personal jurisdiction over nonresidents who purposefully connect with the forum because those nonresidents chose to enjoy the benefits of conducting activities in the state, including the right to resort to the forum's courts, and thus assumed the concomitant "obligation" to respond to lawsuits "aris[ing] out of" or "connected with" their conduct there.[182]

The Court's articulation of the purposefulness inquiry suggests that a forum court's sovereign authority over nonresidents stems from an implicit agreement between the nonresidents and the forum.[183] For

[178] *World-Wide Volkswagen*, 444 U.S. at 292-93 (finding that Due Process Clause serves two different functions in personal jurisdiction arena: (1) securing "fairness" embodied in "fair play and substantial justice" factors, and (2) ensuring "reasonableness of asserting jurisdiction over the defendant . . . 'in the context of our federal system of government'" by requiring that claims in lawsuit arise from or relate to nonresident's purposeful, litigation-raising activity in state (quoting Int'l Shoe v. Washington, 326 U.S. 310, 317 (1945)); Brilmayer, *supra* note 126, at 85 (arguing that "the sovereignty concept inherent in the Due Process Clause is not the reasonableness of the burden [borne by the defendant] but the reasonableness of the particular State's imposing it."). Professor Brilmayer notes that the Supreme Court measures the reasonableness of the state's exercise of its regulatory authority by asking whether the defendant was "responsible for those [in-forum] occurrences." *Id*. at 89. So interpreted, the "Due Process Clause seems to require that the person who would suffer the deprivation have some contact with the State by which he has subjected himself to its power." *Id.*; *see also* Stein, *supra* note 86, at 711 ("Due process protects the sovereign interests of other states, but only incidentally, through its protection of the individual from illegitimate assertions of state authority. Legitimacy, though, is defined by reference to the state's allocated authority within the federal system."). For Professor Stein, an individual's due process rights "inescapably are linked to the allocation of sovereign authority." *Id.* at 706.

[179] *Burger King*, 471 U.S. at 472-74.

[180] *Id.*

[181] *World-Wide Volkswagen*, 444 U.S. at 297.

[182] *Burger King*, 471 U.S. at 475-76.

[183] *See* Brilmayer, *supra* note 91, at 1 (asserting that minimum contacts doctrine embodies theory of contract law by incorporating exchange of promise analysis).

example, in *World-Wide Volkswagen*,[184] the plaintiffs, while living in New York, bought an Audi automobile from the defendant Seaway, an Audi dealership located in New York.[185] As the plaintiffs drove through Oklahoma, their car caught fire after another automobile hit them.[186] The plaintiffs brought a products liability suit against the defendants Seaway and World-Wide Volkswagen, the Northeast regional car dealership, in Oklahoma state court.[187] The Court found that Oklahoma lacked jurisdiction over the defendants because they did not deliberately seek out the privileges and benefits of Oklahoma law: they did not sell cars there, solicit business there, or attempt to serve the Oklahoma market in any way.[188]

In *World-Wide Volkswagen*, the Court defined the judicial jurisdictional reach of a state in contractual terms[189] by focusing on whether the nonresidents actually or impliedly agreed to enjoy Oklahoma's laws in exchange for their obligation to defend a lawsuit that arose from their activities there.[190] The *World-Wide Volkswagen* finding that the defendants

[184] *World-Wide Volkswagen*, 444 U.S. at 286.

[185] *Id.* at 288.

[186] *Id.*

[187] *Id.*

[188] *Id.* at 295.

[189] *Id*. Although contracts can be established either expressly or impliedly by parties, express and implied contracts do not differ in their legal effect, as the only difference lies in the respective obligor's method of manifesting assent. RESTATEMENT (SECOND) OF CONTRACTS § 4, cmt. a (1981). The purposefulness inquiry evolves from the tenets of implied contract, as the assent given by both the forum and an out-of-state resident is a legal fiction. *See* Brilmayer, *supra* note 91, at 19-20. An implied contract exists when the courts infer the obligor's assent based on the obligor's conduct or other nonverbal evidence of consent. *See* RESTATEMENT (SECOND) OF CONTRACTS, *supra*, § 4, cmt. a (describing elements required to satisfy implied contract). As the *Restatement (Second) of Contracts* explains, the assent or "consideration" necessary to create a valid contract revolves around an exchange of promises or performances. *Id.* § 71(1). In an implied contract, the contracting parties are presumed to "bargain" for this exchange and to return promises or performances predicated on that bargain. *Id*. § 71(2); 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS §§ 1.1, 2.4 (3d ed. 2004) (noting that contract is only valid if parties bargained for exchange). What matters is "not *what* is bargained for" but "that each person's promise or performance is induced by the other's." Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 287 (1986) (emphasis added). The bargained-for exchange rationale allows for "private planning and to prevent the weight of legal coercion from falling upon those informal or 'social' arrangements where the parties have not contemplated legal sanctions for breach." *Id.* at 289; *cf.* MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 106-07 (2d ed. 1998) (explaining different theories of justice in contractual terms by asking whether contract was agreed to and if it was fair).

[190] *See* Stein, *supra* note 86, at 690 (noting that contractual justification has predominated Court's decisions for past 40 years with *World-Wide Volkswagen* as primary example of view that state's regulatory sphere for jurisdictional purposes rests on consensual, contractual arrangement between defendant and forum state). Several court decisions reflect the

had not deliberately sought out the benefits of Oklahoma law to justify extraterritorial jurisdiction over them suggests that purposefulness requires a "meeting of the minds" [191] between the defendants and the forum. With its contract justification, the minimum contacts doctrine aims to ensure that a nonresident defendant impliedly agreed to the forum state's judicial jurisdiction.[192]

A state court's assertion of specific jurisdiction over a nonresident depends on a nonresident's constructive presence in the state and that nonresident's implied agreement that, in exchange for the opportunity to

notions of implied contract in the minimum contacts doctrine. *See* Heritage House Rests., Inc. v. Cont'l Funding Group, Inc., 906 F.2d 276, 282-83 (7th Cir. 1990) (finding that defendant purposefully availed himself of protections and benefits of Illinois law when he made misrepresentations at heart of lawsuit during phone calls and in letter that he directed to plaintiff in Illinois); Bullion v. Gillespie, 895 F.2d 213, 217 (5th Cir. 1990) (finding jurisdiction over nonresident defendant physician in Texas in medical malpractice lawsuit because defendant purposefully conducted activities in Texas by shipping drugs to plaintiff from California to Texas on three occasions and by calling plaintiff's physician in Texas to monitor plaintiff's condition, thereby invoking benefits of Texas law and accepting burden of facing suit there); Atlanta Auto Auction, Inc. v. G & G Auto Sales, Inc., 512 So.2d 1334, 1336 (Ala. 1987) (upholding jurisdiction over nonresident car seller in Alabama where defendant purposefully directed its marketing efforts to residents of Alabama and thus availed itself of privilege of making sales to, and profits from, Alabama residents, thus, requiring defendant to "bear the burden commensurate with the benefits [it] received from its sales in Alabama"); Michiana Easy Livin' Country, Inc. v. Holten, 168 S.W.3d 777, 785 (Tex. 2005) ("Jurisdiction is premised on notions of implied consent — that by invoking the benefits and protections of a forum's laws, a nonresident consents to suit there.").

[191] Stein, *supra* note 86, at 721. Professor Stein has argued that with *Shaffer v. Heitner*, 433 U.S. 186 (1977), the Court made clear that the contract justification of the purposefulness inquiry was not merely based on notions of a fair exchange of benefits for burdens, a quasi-contractual notion, but required a "truly consensual meeting of the minds" to support extraterritorial jurisdiction. Stein, *supra* note 86, at 721. In *Shaffer*, a Delaware court asserted jurisdiction over the directors of a Delaware corporation in a shareholder derivative action based on the plaintiff's attachment of the defendant directors' shares that, under Delaware law, were deemed to be located in Delaware. 433 U.S. at 214. The plaintiff claimed that, in attaching the defendants' property in the state, Delaware obtained quasi in rem jurisdiction over the defendants who, aside from serving as directors in a company incorporated in Delaware, had no connection with the forum. *Id.* The Court held that Delaware lacked jurisdiction over the defendants because their contacts with the state did not put them on notice that Delaware would require them to answer for their behavior there since all of the alleged malfeasance at the heart of the shareholder litigation occurred outside of Delaware. *Id.* at 216 ("It strains reason . . . to suggest that anyone buying securities in a corporation formed in Delaware impliedly consents to subject himself" to Delaware's jurisdiction. (internal quotation marks omitted)). This language suggests that the purposefulness inquiry involves notions of implied contract where the parties knowingly exchange benefits and burdens.

[192] *See* Stein, *supra* note 86, at 721 (arguing that Court, in focusing jurisdictional inquiry on "how the defendant and [the] forum state have consensually ordered their relationship," has effectively privatized due process concerns underlying law of personal jurisdiction).

enjoy a state's laws, she will submit to its courts' authority. The constructive presence and purposefulness inquiries aim to ensure that the state court's exercise of its authority over the nonresident will be reasonable and hence comport with due process. The following section describes the additional due process protections of "fair play and justice" in the minimum contacts inquiry. These protections examine the fairness of the state's exercise of jurisdiction based on the prospective impact the lawsuit would have on the parties, the court system, and the several states.[193]

3. Additional Due Process Limits: "Fair Play and Substantial Justice" Concerns

Under the minimum contacts doctrine, due process also requires that a state's exercise of judicial jurisdiction over a nonresident comports with "fair play and substantial justice."[194] To that end, the Court assesses the burden shouldered by the nonresidents in defending themselves in the forum state,[195] the forum state's interest in adjudicating the dispute,[196] the

[193] *See* Kevin C. McMunigal, *Desert, Utility, and Minimum Contacts: Toward a Mixed Theory of Personal Jurisdiction*, 108 YALE L.J. 189, 193-94, 207 (1998) (describing considerations of defendant's conduct and mental state in minimum contacts doctrine as "reflect[ing] a retrospective, i.e., ex post, viewpoint that looks back from the initiation of the lawsuit" and that "fair play and substantial justice" concerns of judicial efficiency, parties' convenience, and states' shared interests "reflect a prospective, i.e., ex ante, viewpoint that looks forward from initiation of the lawsuit").

[194] Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985); *World-Wide Volkswagen*, 444 U.S. at 292.

[195] *See, e.g.*, Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 114 (1987) (plurality opinion) (O'Connor, J.) ("The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders."). In *Asahi*, eight Justices agreed that the California court's exercise of jurisdiction over the Japanese defendant would be unreasonable given the distance the defendant would have to travel to litigate the case and the difficulty defendant would face in submitting its dispute with the Taiwanese company to a "foreign nation's judicial system." *Id.* Of all of the "reasonableness" factors, the defendant's inconvenience is "always a primary concern." *World-Wide Volkswagen*, 444 U.S. at 292; Ticketmaster-N.Y., Inc. v. Alioto, 26 F.3d 201, 210 (1st Cir. 1994) (explaining that California defendant's burden of having to litigate case in Massachusetts is "entitled to substantial weight in calibrating the jurisdictional scales"). The inconvenience factor weighs heavily in the jurisdictional balance of the reasonableness factors because it provides a mechanism through which "courts may guard against harassment." *Ticketmaster*, 26 F.3d at 211.

[196] The "forum's adjudicatory interest" inquiry assesses the forum's interest in the litigation without comparing the forum's interest in the matter to other jurisdictions' interest in the case. *See, e.g.*, Chaiken v. VV Publ'g Corp., 119 F.3d 1018, 1029 (2d Cir. 1997) (finding that Massachusetts had no interest in hearing lawsuit about injured reputation of plaintiff who lived in Israel); Sawtelle v. Ferrell, 70 F.3d 1381, 1395 (1st Cir. 1995); Mesalic v.

plaintiff's interest in obtaining convenient and effective relief,[197] the interstate judicial system's interest in obtaining the most efficient resolution of controversies,[198] and the common interest of all of the sovereign states in furthering substantive social policies.[199] Courts should decline to exercise personal jurisdiction over nonresidents if these "fair play and substantial justice" factors overwhelmingly suggest that the exercise of jurisdiction would be unfair.[200]

Fiberfloat Corp., 897 F.2d 696, 701 (3d Cir. 1990) (explaining that New Jersey had strong interest in protecting its residents from out-of-state manufacturers who commited torts or breached contracts with its residents).

[197] *Asahi*, 480 U.S. at 113 ("When minimum contacts have been established, often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the alien defendant."). The Second and Ninth Circuits have suggested that they accord plaintiff's inconvenience little weight. *See*, *e.g.*, Metro. Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 574 (2d Cir. 1996) (finding plaintiff's choice of forum irrelevant to jurisdiction inquiry); Core-Vent Corp. v. Nobel Indus. AB, 11 F.3d 1482, 1490 (9th Cir. 1993) ("Neither the Supreme Court nor our court has given much weight to inconvenience to the plaintiff.").

[198] *See*, *e.g.*, Guidry v. U.S. Tobacco Co., Inc., 188 F.3d 619, 631 (5th Cir. 1999) (assessing efficiency concerns, courts look at judicial system's interest in adjudicating individual claims against multiple defendants in single litigation); OMI Holdings, Inc. v. Royal Ins. Co., 149 F.3d 1086, 1097 (10th Cir. 1998) (finding jurisdiction inappropriate and forum inefficient because insurance litigation would be governed by Canadian law); *Robertson-Ceco*, 84 F.3d at 574 (finding Vermont inefficient forum for litigation because plaintiff did not live in Vermont and witnesses and evidence were located outside of Vermont).

[199] Courts have identified the following issues as advancing the collective interests of the sister states: a state's ability to provide a convenient forum for its residents to redress injuries by nonresidents from far-flung places who connect with forum residents in "our age of advanced telecommunications," *Sawtelle*, 70 F.3d at 1395; the foreign policy interests that arise when pursuing a case against a foreign national defendant, *Asahi*, 480 U.S. at 115, *Wortham v. Karstadtquelle AG* (*In re Nazi Era Cases*), 320 F. Supp. 2d 204, 231 (D.N.J. 2004); the enforcement of securities regulations, see, for example, *Pinker v. Roche Holdings Ltd*., 292 F.3d 361, 372 (3d Cir. 2002); and the "widely shared interest in preserving citizens' willingness to talk openly with the press," see, for example, *Ticketmaster*, 26 F.3d at 211.

[200] *Asahi*, 480 U.S. at 116 (finding that California state court improperly exercised jurisdiction over Taiwanese valve manufacturer, even if defendant purposefully availed itself of California market, given California's lack of interest in Japanese company's impleader action against Taiwanese defendant, high burden California litigation would impose on Taiwanese defendant, Japanese plaintiff's slight interest in trying case in California, and international diplomacy concerns implicated in case that counseled against exercise of jurisdiction); *id.* (Brennan, J., concurring) ("I do agree, however, with the Court's conclusion in Part II-B that the exercise of personal jurisdiction over Asahi in this case would not comport with 'fair play and substantial justice" . . . . This is one of those rare cases in which "minimum requirements inherent in the concept of 'fair play and substantial justice' . . . defeat the reasonableness of jurisdiction even [though] the defendant has purposefully engaged in forum activities."). The Court, in *Burger King Corp. v. Rudzewicz*, noted that a weaker showing of a defendant's purposeful contact with the forum could support forum-court jurisdiction where "fair play and substantial justice" strongly supported jurisdiction. 471 U.S. 462, 477-78 (1985). Professor Stein argues that the Supreme Court's *Asahi* decision marked a retreat from this view. Stein, *supra* note 124, at

The "fair play and substantial justice" concerns maintain an ex post view of due process[201] by examining the prospective impact the litigation will have on the parties, the court system, and the states.[202] The purposefulness requirement and its due process protections, in contrast, measure the reasonableness of the state's exercise of its adjudicative authority based on the nonresident's territorial conduct. To that end, the purposefulness inquiry assumes an ex ante perspective, focusing on the nonresident's past acts — her in-state conduct that gave rise to the litigation — that implicate the forum state's sovereignty.

The next subpart addresses how, in determining the reasonableness of the state's exercise of its judicial authority, the principles of constructive presence and purposefulness seemingly operate in harmony in cases arising from traditional telephone contacts. Those principles, however, tear apart when applied to borderless cellular phone communications.

B. The Purposefulness Inquiry Presumes that Telephones Direct Communications to Single, Identifiable Locations

The Court designed the current minimum contacts doctrine at a time when individuals directed circuit-switched telephone communications to known geographic locations. As a result, the notions of territorial contact and a defendant's purposeful connection with a particular place almost always ran together. That remains true in today's traditional telephone system used by 180 million U.S. residents.[203] Communications

426. He explains that *Asahi* suggested that while the "reasonableness" concerns could divest a forum of jurisdiction, those factors could not compensate for a low level of purposefulness. *Id.*

[201] McMunigal, *supra* note 193, at 194; Stein, *supra* note 124, at 427. Professor James Weinstein observes that the "fair play and substantial justice" considerations protect interests beyond the individual liberty of nonresident defendants. Weinstein, *supra* note 168, at 227-31. He explains that the forum state's interest in the litigation, the interstate judicial system's interest in efficient resolution of controversies, and the shared policy interests of the several states protect interstate federalism concerns. *Id.* at 228 n.233. The consideration of the "plaintiff's interest in convenient and effective relief," Weinstein observes, stems from "a common law rule of interstate venue by which the Supreme Court has attempted to allocate judicial power among the states efficiently and fairly." *Id.* at 229. So, too, does the "efficient resolution of controversies" interest implicate interstate venue considerations.

[202] Kogan, *supra*, note 92, at 358-59 (explaining Supreme Court's current minimum contacts doctrine as wavering between two different approaches — interstate sovereignty and fairness to litigants and court system).

[203] *See supra* notes 17-20; *see also* Condlin, *supra* note 90, at 132-33 (explaining that technology used in pre-Internet world to "extend one's reach into other states — the telephone, automobile, railroad, airplane, and the like — could be pointed in single directions, so to speak").

over the PSTN cross state lines in predictable directions made clear by a telephone or fax number's area code.[204] The Supreme Court's decisions, and those of the lower federal and state courts, reflect the presumption that home and office telephones connect individuals in specific geographic locations.[205]

In *Burger King*,[206] the defendant, a resident of Michigan, entered into a franchise agreement with Burger King, a Florida corporation, through its Michigan representatives for the operation of a Burger King restaurant in Michigan.[207] The franchise agreement obligated the defendant and his partner to pay Burger King over $1 million dollars during a twenty-year period.[208] Although the defendant dealt with Burger King's district office in Michigan, he also negotiated directly with the company's headquarters in Miami, Florida.[209] The defendant contacted Burger King's headquarters by mail and by telephone to resolve disputes over building design, site-development fees, rent computation, and defaulted payments.[210] When the negotiations failed, Burger King sued the defendant and his partner in federal district court in Florida for their alleged breach of the franchise agreement and trademark infringement.[211]

Justice Brennan, writing for the Court, held that given the "inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines," the defendant's physical presence in Florida was not necessary for jurisdiction[212] so long as he "purposely directed" his efforts toward residents of that state.[213] Guided by these principles, the Court found that the defendant purposely connected with Florida by mailing letters and placing phone calls to Burger King's Miami office to negotiate the terms of the franchise agreement out of which the lawsuit arose.[214] The Court also based its finding that the defendant deliberately affiliated himself with Florida on the length and substantiality of the commercial

[204] *See supra* notes 21-24 and accompanying text.

[205] *See infra* notes 206-38 and accompanying text.

[206] 471 U.S. 462 (1985).

[207] *Id.* at 466.

[208] *Id.* at 467.

[209] *Id.* at 467 n.7.

[210] *Id.* at 467 n.7, 468 n.9, 481.

[211] *Id.* at 468.

[212] *Id*. at 476. The Court noted that although "territorial presence frequently will enhance a potential defendant's affiliation with a State and reinforce the reasonable foreseeability of suit there," physical presence in the state is not required. *Id.*

[213] *Id.*

[214] *Id.* at 481.

relationship between the parties, the amount of money that regularly flowed between Michigan and Florida related to the agreement, and the choice-of-law clause in the franchise agreement.[215] The Court upheld the exercise of jurisdiction over the defendant in Florida based on the defendant's purposeful affiliation with the state and the fair play and substantial justice concerns.[216]

In *Burger King*, the Court viewed the defendant's telephone calls and letters as functional equivalents, reflecting the traditional assumption that telephone calls, like mail, are routed to single, identifiable locations. The Court's presumption made sense because given the circuit-switched telephone technology of the time, phone calls to businesses "across state lines"[217] reliably began and ended in known fora. The *Burger King* Court thus appropriately framed the minimum contacts inquiry around an individual's purposeful connection with a forum, since area codes of the circuit-switched telephone system clearly indicated the location of phone calls made and satisfied the fair warning objective of the purposefulness inquiry.

Lower federal and state courts[218] presume that nonresident telephone callers purposefully direct communications to particular fora based on the area codes of the telephone numbers they call.[219] For example, in *Launer v. Buena Vista Winery, Inc.*,[220] the defendants, a California winery and its parent company, hired the plaintiff, a New Jersey resident, to work as its sales agent in the New York area.[221] During the plaintiff's

[215] *Id.* at 481, 487.

[216] *Id.* at 487.

[217] *Id.* at 476.

[218] Opinions decided before *Burger King*, in assessing the purposefulness of a defendant's actions, presumed that a defendant making telephone calls avails himself of a forum based on the telephone numbers he dialed. *See, e.g.*, Brown v. Flowers Indus., Inc., 688 F.2d 328, 334 (5th Cir. 1982) (upholding Mississippi court's exercise of personal jurisdiction over Indiana resident based on defendant's defamatory long-distance telephone call to Office of United States Attorney in Oxford, Mississippi, because defendant initiated phone call and committed intentional tort during his conversation with Mississippi attorney); Parke-Bernet Galleries, Inc. v. Franklyn, 256 N.E.2d 506, 508 (N.Y. 1970) (finding that California defendant's telephone call to New York auction house to bid on paintings during live art auction effectively "projected" defendant into plaintiff's New York auction room, thereby signaling defendant's purposeful engagement of activity in New York and justifying jurisdiction over him there).

[219] *See* Digital Equip. Corp. v. Altavista Tech. Inc., 960 F. Supp. 456, 466-67 (D. Mass. 1997) (distinguishing website from telephone and fax calls because telephone, mail, and telex are "singularly" directed to state based on letter's address or "telephone or fax number with a [particular] area code").

[220] 916 F. Supp. 204 (E.D.N.Y. 1996).

[221] *Id.* at 206.

employment, the defendants faxed a memorandum with allegedly discriminatory remarks to the plaintiff at his office.[222] Following his dismissal, the plaintiff sued the defendants for religious discrimination under Title VII in federal district court in New York.[223]

The defendants moved to dismiss the case on the grounds that New York lacked jurisdiction over them, arguing that they never knew that plaintiff had an office there and, thus, they never purposefully connected with New York with regard to the alleged discrimination.[224] In response, the plaintiff produced evidence that the defendants faxed the discriminatory memorandum to his office telephone, which had a 718 area code — the area code covering the Brooklyn and Queens region of New York.[225] The plaintiff also presented proof that the defendants frequently called him at his 718 office telephone number.[226]

Launer held that New York had jurisdiction over the defendants.[227] The district court, applying New York's long-arm statute, held that, by faxing and by calling the plaintiff at his 718 office telephone number, the defendants purposefully "transacted business" there that gave rise to the lawsuit.[228] The court ruled that those calls and faxes illustrated that the defendants deliberately availed themselves of New York law and that the exercise of jurisdiction over them comported with fair play and substantial justice.[229]

Similarly, in *Wien Air Alaska, Inc. v. Brandt*,[230] the plaintiff, an aircraft leasing company, sued the defendant, an attorney living in Germany, for fraud, breach of contract, and misrepresentation in federal district court in Texas.[231] The plaintiff alleged that the defendant called the plaintiff's employee at her home and office phones in Texas to discuss his representation of the plaintiff.[232] During those phone calls, the defendant allegedly made fraudulent promises that gave rise to the lawsuit.[233]

The defendant argued that his communications with the plaintiff's employee in Texas were insufficient to support a finding of minimum

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[222] *Id.* at 209.
[223] *Id.* at 206.
[224] *Id.* at 206-07.
[225] *Id.* at 207.
[226] *Id.*
[227] *Id.* at 209-11.
[228] *Id.* at 209.
[229] *Id.* at 210.
[230] 195 F.3d 208 (5th Cir. 1999).
[231] *Id.* at 211.
[232] *Id.* at 212.
[233] *Id.*

contacts since it was fortuitous that the plaintiff's employee lived in Texas.[234] The district court firmly rejected the defendant's argument.[235] The court found that the defendant purposefully availed himself of Texas by calling Texas telephone numbers because those calls gave rise to the alleged fraud at the heart of the lawsuit.[236] The court found the defendant's argument about the fortuitous nature of the employee's Texas location specious since it suggested that the defendant "could mail a bomb to a person in Texas but claim Texas had no jurisdiction because it was fortuitous that the victim's zip code was in Texas."[237] The court upheld jurisdiction over the defendant in Texas, relying on the defendant's deliberate telephone calls to Texas phone numbers as proof of his "purposeful availment" of Texas and its laws and on the "fair play and substantial justice" factors that supported the exercise of jurisdiction.[238]

Launer and *Wien* assumed that the area codes of the telephone numbers called by the defendants signaled the recipients' geographic locations and thus the states with which the defendants affiliated themselves.[239] Similarly, *Burger King* relied on the plaintiff's telephone

[234] *Id.* at 212-13.

[235] *Id.*

[236] *Id.* at 215.

[237] *Id.* at 213.

[238] Neal v. Janssen, 270 F.3d 328, 332 (6th Cir. 2001) (finding personal jurisdiction over foreign nonresident defendant in Tennessee appropriate based on phone calls and faxes that defendant directed to plaintiffs in Tennessee because phone calls and faxes formed basis of fraud action and illustrated defendant's purposeful direction of his communications to Tennessee); *Wien Air Ala.*, 195 F.3d at 213, 215; Hafen v. Strebeck, 338 F. Supp. 2d 1257, 1262 (D. Utah 2004) (exercising personal jurisdiction over nonresident defendant because defendant "knew when he made the alleged misrepresentations [over the telephone] to Hafen in Utah that he was directing his conduct to a specific person in the state" and because defendant's misrepresentations during telephone calls formed basis of plaintiff's complaint); Long v. Grafton Executive Search, 263 F. Supp. 2d 1085, 1089 (N.D. Tex. 2003) (finding specific jurisdiction over defendant in Texas based on defendant's "purposeful" telephone calls and e-mails to Texas employment agency in which defendant allegedly defamed plaintiff and tortiously interfered with her prospective business relations); Brian Jackson & Co. v. Eximias Pharm. Corp., 248 F. Supp. 2d 31, 36, 37 n.6 (D.R.I. 2003) (exercising specific jurisdiction over nonresident defendant, start-up pharmaceutical company in Pennsylvania, based on defendant's telephone calls and faxes over "ordinary telephone lines" to plaintiff's Rhode Island phone number because those telephone calls gave rise to contract litigation); Roland v. Margi Sys. Inc., 1:00-CV-00341, 2001 WL 241792, at *1-3 (W.D.N.Y. Feb. 28, 2001) (exercising personal jurisdiction over California defendant in New York federal district court in employment discrimination suit because defendant regularly contacted plaintiff at her Buffalo, New York area telephone number in course of her work and, thus, defendant should have anticipated being haled into court in New York for claims arising out of such conduct).

[239] *Wien Air Ala.*, 195 F.3d at 213-15; Launer v. Buena Vista Winery, Inc., 916 F. Supp.

number as the geographic marker of the defendant's actions in Florida.[240] *Burger King* and its progeny reveal that the purposefulness standard is built on the assumption that nonresident defendants deliberately direct telephone communications to identifiable locations. Thus, as presumed by *Burger King* and explicitly articulated in *Launer*, a telephone number's area code provides nonresidents with fair warning about the location of their actions, thereby allowing courts to find that those nonresidents deliberately availed themselves of particular fora.[241] As the next subpart demonstrates, this presumption fails in a world where communication technologies do not accurately identify the locations of telephone calls, resulting in a clash between the territorial contact and implied contract principles at the heart of the minimum contacts doctrine.

C. Cellular Phone Cases: Struggling to Apply the Minimum Contacts Doctrine to Borderless Communications

Cases addressing the jurisdictional significance of cellular phone communications demonstrate a fundamental dissonance between the territorial contact and implied contract requirements of the minimum contacts doctrine. Because cellular phones are mobile and can be answered in unpredictable locations, nonresidents lack warning about the states they actually contact when calling cellular phones.[242] Thus, a nonresident's calls to a cellular phone user can inflict harm within a state's borders, implicating traditional state jurisdictional sovereignty, without a nonresident knowing she contacted that state.

Courts that have dealt with litigation arising out of cellular phone contacts have weighed the implied contract theory prong more heavily, denying states jurisdiction over nonresidents because purposeful availment was absent.[243] Consider as an illustration *Denver Truck and Trailer Sales, Inc. v. Design and Building Services, Inc.*[244] There, the plaintiff, a South Dakota company, hired the defendant, a remodeling company in Colorado, to replace the floor in the plaintiff's Colorado showroom.[245] After the plaintiff refused to pay for the work, the defendant's attorney called the plaintiff's president on his cellular phone, which had a South

204, 209-10 (E.D.N.Y. 1996).

[240] Burger King Corp. v. Rudzewicz, 471 U.S. 462, 480-81 (1985).

[241] *Id.*; *Launer*, 916 F. Supp. at 207, 209.

[242] *See supra* note 24 and accompanying text.

[243] *See, e.g.*, Michiana Easy Livin' Country, Inc. v. Holten, 168 S.W.3d 777, 791 (Tex. 2005).

[244] 653 N.W.2d 88, 92 (S.D. 2002).

[245] *Id.* at 90.

Dakota area code, and threatened to file a lien on the plaintiff's property.[246] The South Dakota court refused to exercise personal jurisdiction over the defendant based on the attorney's phone call to the South Dakota phone number that gave rise to the business tort claim.[247] Although the defendant knew that the plaintiff's company had a South Dakota office, the district court ruled that because "it was a cellular phone," the defendant's attorney "had no idea where [plaintiff's president] actually was at the time of the call."[248]

In a similar vein, the Supreme Court of Texas in *Michiana Easy Livin' Country, Inc. v. Holten*[249] recently refused to uphold personal jurisdiction over an Indiana business that allegedly made misrepresentations to a Texas resident over the telephone.[250] There, the plaintiff, a Texan resident, called the defendant from his Texas telephone number to discuss purchasing a custom motor home from the defendant.[251] The plaintiff bought the vehicle and had it shipped to his home in Texas.[252] The plaintiff sued the defendant in Texas, alleging that the defendant defrauded him over the telephone.[253]

The court held that recent changes in telephone technology made reliance on telephone calls "obsolete as proof of purposeful availment."[254] The court reasoned that:

> While the ubiquity of "caller ID" may allow nonresidents to know a caller's telephone number, that number no longer necessarily indicates anything about the caller's location. If jurisdiction can be based on phone conversations "directed at" a forum, how does a defendant avail itself of any jurisdiction when it can never know

[246] *Id.* at 92.

[247] *Id.*

[248] *Id.* Although cellular phone contacts have only been addressed in a limited number of cases, those decisions implicitly follow the *Denver Truck* notion that cellular phone contacts lack jurisdictional significance due to the geography-defying nature of cellular phones. *See*, *e.g.*, Burrows Paper Corp. v. R.G. Eng'g, Inc., 363 F. Supp. 2d 379, 387 (N.D.N.Y. 2005) (refusing to exercise personal jurisdiction over nonresident defendant in breach of contract action even though defendant's agent, using his cellular phone, talked to plaintiff while agent was physically in New York because it was "mere fortuity" that defendant's agent was actually in New York since his mobile phone had Virginia area code).

[249] 168 S.W.3d 777 (Tex. 2005).

[250] *Id.* at 791-92.

[251] *Id.* at 781.

[252] *Id.* at 781, 784.

[253] *Id.* at 784.

[254] *Id.* at 791.

> where the other party has forwarded calls or traveled with a mobile phone?[255]

Michiana established a bright-line rule that all telephone contacts, as a categorical matter, lack constitutional significance under the minimum contacts doctrine due to the geography-defying nature of twenty-first century telephone communications.[256] The *Michiana* court excluded all telephone communications from the minimum contacts analysis, including, but not limited to cellular phone calls.[257]

The *Michiana* and *Denver Truck* courts held the implied contract theory indispensable to the exercise of extraterritorial jurisdiction and that the absence of "fair warning" required by the purposefulness inquiry trumped state sovereignty concerns. Those courts presumably did so to protect the nonresident defendants from extraterritorial jurisdiction in unexpected fora. In so finding, the courts destroyed the jurisdictional significance of such contacts and, with it, the states' sovereign authority over nonresidents' harmful communications transmitted to their territories. Such an approach erroneously eliminates state sovereign authority over harmful borderless communications sent to a state's territory in the name of a nonresident's implied agreement with the state. As the following part will show, purposefulness is not essential to ensuring that a state's exercise of jurisdiction over a nonresident is reasonable.

III. REBUILDING PERSONAL JURISDICTION THEORY FOR A BORDERLESS WORLD

In personal jurisdiction litigation arising from borderless communications, the emphasis on either territorial contact or implied contract yields very different results. The Court inevitably has to decide which of these constitutes the primary operating principle of the minimum contacts doctrine. Subpart A argues that state sovereignty values underlying the territorial contact inquiry deserve primacy over the theory of implied contract. Giving the implied contract theory preeminence in the minimum contacts doctrine risks destroying a sovereign state's extraterritorial adjudicative authority over nonresidents' harmful communications.[258] Sovereignty principles are too

[255] *Id.*

[256] *Id.*

[257] *Id.*

[258] Although no court has yet addressed VoIP in the context of personal jurisdiction, courts undoubtedly will face this issue in the near future as VoIP becomes the primary

central to a healthy federalism to be sacrificed in the name of honoring a fictional agreement between a nonresident and a forum state where a nonresident's due process rights can otherwise be secured.

Subpart B contends that considerations of sound judicial administration support the elimination of the purposefulness requirement. By favoring territorial contact over purposefulness, courts avoid satellite litigation concerning a defendant's intent in transmitting calls to VoIP users whose area codes do not reflect their geographic location. Moreover, using the territorial contact inquiry to protect state sovereignty concerns harmonizes the Court's seemingly contradictory trends of decentralization, as exemplified by judicial federalism, and centralization, as exemplified by cases defining and protecting a concept of national citizenship. It does so by recognizing that state courts have developed such competence that nonresidents' interest in avoiding a particular state's courts is insufficient to justify the impediments to interstate commerce that would result from preserving nonresidents' ability to avoid litigating in particular fora.

Subpart C proposes a solution for protecting nonresidents from unreasonable exercises of extraterritorial jurisdiction once provided by the implied contract theory. Under this solution, the reasonableness of a state's exercise of its judicial authority would hinge on the state's regulatory interest in the nonresident's territorial conduct. To that end, only the objective impact of the nonresident's local activity would be relevant. Where a state has a strong interest in the nonresident's litigation-related territorial activity, the exercise of jurisdiction over the nonresident would be reasonable. If, on the other hand, the state has a weak interest in the nonresident's conduct, the state's exercise of jurisdiction over the nonresident would not comport with due process. Without relying on the artifice of an implied contract, such a standard will secure state adjudicative authority over harmful communications transmitted to a state's borders and protect a nonresident defendant from a state's unreasonable exercise of jurisdiction.

A. The Twin Pillars Applied to VoIP Communications: The Threat to Extraterritorial Personal Jurisdiction and a Return to Pennoyer

If the Court clings to purposefulness and its implied contract rationale in VoIP jurisdiction cases, the theories of implied contract and territorial contact will inevitably collide. To illustrate this clash of principles,

mode of our virtual communications as technology analysts predict. *See supra* note 77 and accompanying text.

consider this hypothetical: Corporation A ("A"), a VoIP subscriber, operates a consulting business in Chicago that maintains Illinois, Michigan, and New York phone numbers. Corporation B ("B"), another VoIP subscriber, operates a business in Philadelphia. B uses telephone numbers with Pennsylvania, New Jersey, and New York area codes.

B's president sees an online listing for A's consulting business in the New York *Yellow Pages*. B's president calls A's New York number and hires A to provide advice on a project. A's employees contact B at its New York number. Employees of A and B communicate over the telephone and by fax. A's employee sends a fax with critical, misleading information to B's New York number. Representatives of A also convey false information to B's president over the telephone. B relies on those misrepresentations and suffers significant damages.

B wants to sue A for fraud in Pennsylavania where it received A's fax and telephone calls. Under the implied contract theory in current personal jurisdiction law, B cannot sue A in Pennsylvania since A's employees never knew they called Pennsylvania. The number A dialed in contacting B did not have a Pennsylvania area code. Thus, A never bargained to receive protection from, and subject itself to, the laws of Pennsylvania. Because B's telephone number warned A that it could be sued in New York, not Pennsylvania, a Pennsylvania court would lack jurisdiction over the fraud claim if the minimum contacts doctrine requires purposeful availment.

On the other hand, the territoriality component of the minimum contacts doctrine will prevent B from suing A in New York as well. A can successfully oppose personal jurisdiction in New York because nothing actually happened in New York that would warrant a New York court's adjudicative authority. Thus, if both territorial contact and implied contract remain essential components of the minimum contacts doctrine, personal jurisdiction over A would be inappropriate in Pennsylvania, where primary litigation-arising activities occurred, and in New York, where A's employees believed they contacted B. B could sue in A's home state of Illinois, but may find it costly and inconvenient to litigate its case in Illinois.

Limiting B to suing A only in the state where A can be found reinstates the formalistic regime of *Pennoyer v. Neff*.[259] In borderless communication cases, requiring purposefulness effectively destroys six decades of extra-territorial personal jurisdiction.[260] Such evisceration of extraterritorial

[259] 95 U.S. 714, 722 (1877).

[260] Scholars have urged courts to jettison the purposefulness inquiry in cases involving

adjudicative jurisdiction undermines the Supreme Court's principal purpose in designing the minimum contacts doctrine: to expand the state court judicial authority over nonresidents' in-forum, litigation-raising activities.[261] It also contravenes *Burger King*'s[262] explicit recognition that telephone communications create meaningful ties with states that may warrant state adjudicative authority.

Such a return to *Pennoyer* would establish a broad and troubling immunity from extraterritorial jurisdiction for nonresident defendants who commit torts, discriminate, and breach contracts over borderless communications. Because VoIP promises even more communication and commerce across state lines than the technologies that prompted the Court to abandon *Pennoyer* in *International Shoe*,[263] a de facto return to the nineteenth century theory of personal jurisdiction is untenable. This cries out for a reformulation of the minimum contacts doctrine.[264]

A choice between the territorial contact and implied contract rationales of the minimum contacts doctrine is unavoidable. Some may argue that concerns about the jurisdictional problems posed by VoIP are overstated. They will likely assert that area codes of phone numbers will still correspond to telephone users' actual locations most of the time and, thus, the territorial contact and implied contract theories will continue to yield the same result.

That argument fails. First, preserving the implied contract theory inevitably results in the broad rule articulated in *Michiana Easy Livin'*

Internet website activities because the inquiry unnecessarily usurps state adjudicative authority. *See* Joel Reidenberg, *Technology and Internet Jurisdiction*, 153 U. PA. L. REV. 1951, 1955 (2005) (suggesting that defendants who argue that contacts via Internet are not directed at forum state challenge "very ability of sovereign states to protect their citizens within their borders from online threats"); Stein, *supra* note 124, at 412 (arguing that because unintended extraterritorial consequences of Internet conduct like website marketing and defamation in chat room fall outside adjudicative authority of affected states, purposefulness inquiry deprives states of their sovereign authority). This argument is even more compelling in VoIP-contact cases where nonresidents direct voice, fax, and data communications to individuals in a particular forum, albeit without knowing the recipient's precise location, whereas Internet websites welcome visitors but never affirmatively direct their conduct to potential plaintiffs. Thus, a stronger argument exists for protecting a sovereign state's judicial authority over calls directed to VoIP users in its territory than web marketers who post information and await visitors.

[261] *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

[262] *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 480-81 (1985).

[263] *Int'l Shoe*, 326 U.S. at 316-17.

[264] The Court, addressing concepts of due process, explained that "to hold that a characteristic is essential to due process of law [because it has been the law of the land] would be to deny every quality of the law but its age, and to render it incapable of progress or improvement." Hurtado v. California, 110 U.S. 516, 528-29 (1884).

Country, Inc. v. Holten [265] that *all* telephone contacts, traditional or otherwise, lack jurisdictional significance due to the borderless nature of twenty-first century communications. This is because callers cannot ascertain if they are dialing a traditional or VoIP number and thus do not know if they reach a particular location by dialing a specific area code. It also ignores the *Denver Truck and Trailer Sales, Inc. v. Design and Building Services, Inc.*,[266] finding that a strict reading of the implied contract theory negates the jurisdictional import of all mobile communications, including VoIP.

Second, the problem of personal jurisdiction in a borderless world will only deepen with the projected adoption of VoIP telephony for U.S. businesses and individuals in the future.[267] Because VoIP and cellular phones will ultimately transmit so much of our remote communications across state lines, interstate commerce and litigation concerning it will increasingly arise from borderless communications.[268] As a result, the clashing jurisdictional principles of territorial contact and implied contract will arise with greater frequency, forcing plaintiffs to pursue lawsuits in defendants' home states. This clash cannot long be ignored.

As the next sections illustrate, judicial efficiency and rhetoric in legal theory also support finding the state sovereignty concerns paramount. Moreover, the reasonableness of the state's exercise of its sovereign authority can be determined without sacrificing the state's judicial authority over harmful communications received in its territory, a risk that clinging to the purposefulness inquiry would cause.

B. Privileging State Sovereignty Promotes Efficient Litigation and Notions of Judicial Federalism and National Citizenship

This subpart explores the practical support for securing state judicial authority by eliminating the purposefulness requirement when applying the minimum contacts doctrine to borderless communications. Section 1 identifies the judicial inefficiency engendered by the purposefulness requirement. Section 2 identifies parallels with some of the normative theories that arise in discussions of judicial federalism and of national

[265] 168 S.W.3d 777, 791 (Tex. 2005)

[266] 653 N.W.2d 88, 92 (S.D. 2002).

[267] *See supra* note 77 (describing analysts' predictions that up to 40% of U.S. consumers and businesses will trade their landlines for VoIP by 2008).

[268] *See supra* notes 38-72 (discussing borderless nature of VoIP and SoIP). While this argument certainly has merit as to cellular phones that maintain area codes intended to reflect each subscriber's location at the time she purchased the cellular phone, this is not true for the area codes of VoIP phones.

citizenship. It finds that this is a rare situation where the Court's centrifugal impulse to elevate state courts' role and its centripal efforts to remove parochial obstructions to interstate commerce coalesce to support the primacy of the territorial contact pillar of the minimum contacts doctrine.

1. The Purposefulness Inquiry Will Generate Satellite Litigation

Elevating territorial contact over purposefulness and its implied contract rationale serves judicial economy. The purposefulness inquiry will entangle the courts in unnecessary satellite litigation to divine a defendant's actual intentions in placing a call to a VoIP subscriber. Courts routinely permit discovery and hold evidentiary hearings on personal jurisdiction contests addressing a defendant's purposeful connection with a forum.[269] Litigants, and thus the courts, will inevitably engage in extensive fact-findings and hearings about whether nonresident callers purposefully contacted particular fora when calling VoIP subscribers.

Indeed, one can envision countless factual issues that defendants will raise, including allegations of trickery where VoIP area codes differ from subscribers' actual geographic locations and disputes concerning what phone-call recipients with VoIP numbers told nonresident defendants about their locations. Litigation turning on this type of subjective inquiry is bound to congest the courts. Eliminating the purposefulness inquiry in VoIP cases, and the satellite litigation that it will entail, will result in a more expeditious and cost-efficient resolution of jurisdictional litigation.

[269] Courts generally refuse to dismiss a case on personal jurisdiction grounds without permitting the plaintiff to obtain discovery on the issue. *See, e.g.*, Androutsos v. Fairfax Hosp., 323 Md. 634, 640 (1991); Makopoulos v. Walt Disney World, Inc., 535 A.2d 26 (N.J. Super. Ct. App. Div. 1987) (remanding case for discovery in personal jurisdiction contest to uncover evidence concerning purposefulness of defendant's activities); *cf.* Purdue Research Found. v. Sanofi-Synthelabo, S.A., 338 F.3d 773, 782 (7th Cir. 2003) (explaining that plaintiff must establish personal jurisdiction over defendant by preponderance of evidence when evidentiary hearings are held by district court); LAK, Inc. v. Deer Creek Enters., 885 F.2d 1293, 1304 n.7 (6th Cir. 1989) (noting that personal jurisdiction issues are decided on their own facts and involve time and effort of courts and litigants); *In re* Baan Co. Sec. Litig., 81 F. Supp. 2d 75, 82-83 (D.D.C. 2000) (ordering discovery in personal jurisdiction contest).

2. Constructive Presence Brings Together Some Otherwise Disparate Values Animating Judicial Federalism and National Citizenship

Viewing a nonresident's constructive presence as the primary principle of personal jurisdiction law would recognize a forum state's ability to hear claims against nonresidents while honoring relationships individuals sustain with states outside their own. This approach reconciles the seemingly inapposite rhetoric deployed in support of judicial federalism, on the one hand, and national citizenship, on the other. With regard to the former, the Supreme Court has suggested that state courts be afforded greater respect as full partners in the federal system.[270] Although this typically has arisen in the context of determining whether federal or state courts should decide a dispute, a crucial underlying issue in those cases is the competence and trustworthiness of state courts.[271] To that end, the Court has paved a decentralized path, placing heavy burdens on those questioning the adequacy of state courts.[272]

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[270] The Court's insistence that state courts deserve respect underlies its abstention doctrine. *See, e.g.*, Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100, 116 (1981) (barring 42 U.S.C. § 1983 claim to remedy unconstitutional administration of state tax system because issues of state regulatory laws are more properly heard in state courts); Younger v. Harris, 401 U.S. 37, 46 (1971) (holding that federal courts must abstain from interfering with ongoing state criminal proceedings unless extraordinary circumstances show "great and immediate" threat of irreparable harm to give proper respect to state courts); R.R. Comm'n of Tex. v. Pullman, 312 U.S. 496, 501 (1941) (finding that federal courts should refrain from exercising their authority because of "scrupulous regard for the rightful independence of the state" courts). Professor Martin Redish described the federalism principles embodied in *Younger* as "[t]he desire to avoid affronting state judges by questioning their competence" and to "prevent federal interference with the orderly operation of the state judicial process." MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 298 (1980). Another illustration of this notion is the Court's refusal to find federal due process issues where recourse to state courts applying state tort law is available on the ground that state court resolution is fair and sufficient. *See, e.g.*, Daniels v. Williams, 474 U.S. 327, 332 (1986) (finding that Constitution "does not purport to supplant traditional tort law" already administered by states).

[271] *See, e.g.*, RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 322-25, 1269 (5th ed. 1996) (exploring Court's recognition that state courts are trustworthy and competent, reflecting parity of state and federal courts); Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 461 (1963) (arguing that because state courts are competent to find facts and decide law, including matters of federal law, scope of habeas review should be narrow); Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 625, 630 (1981) (arguing that state courts are as fair and as competent as federal courts, and noting that state courts should be treated as partners rather than as servants).

[272] *See, e.g.*, Robert J. Pushaw, Jr., *Bridging the Enforcement Gap in Constitutional Law: A Critique of the Supreme Court's Theory that Self-Restraint Promotes Federalism*, 46 WM. & MARY

On the other hand, the Court's jurisprudence under the Commerce Clause and the Privileges and Immunities Clause has encouraged treating citizens as members of a single national polity. Invoking a variety of contexts, the Court has refused to allow states to favor their own.[273] It has sought to create an environment in which individuals and businesses can readily travel,[274] conduct business,[275] and even retain

L. REV. 1289, 1290, 1305-09 (2004) (explaining Court's various judicial federalism doctrines that accord authority to state courts because Court views state tribunals as highly autonomous and as equal partners with federal courts in enforcing federal law). Professor Pushaw notes that the Court has crafted numerous doctrines that enable federal judges to decline jurisdiction in order to allow state judiciaries to hear such cases, including the justiciability doctrine, abstention, the well-pleaded complaint rule, the adequate and independent state grounds doctrine, and sovereign immunity. *Id*. at 1305.

[273] The Court's interpretation of the Privileges and Immunities Clause of Article IV, Section 2 of the Constitution and the Court's aggressive response to regulations and taxes that tend to burden out-of-state businesses signal an evolving theory of national citizenship that seeks to promote greater integration of citizens across state lines. Saenz v. Roe, 526 U.S. 489, 504 (1999) (invalidating California welfare statute under Privileges and Immunities Clause because it unjustly discriminated against new residents and aimed to stem tide of people moving across state borders); Quill Corp. v. North Dakota, 504 U.S. 298, 313 (1992) (finding state use tax unconstitutional under Dormant Commerce Clause analysis where defendant lacked substantial nexus to taxing state, reflecting "structural concerns about the effects of state regulation on the national economy"); Supreme Court of N.H. v. Piper, 470 U.S. 274, 283, 287-88 (1985) (finding that Privileges and Immunities Clause prevented New Hampshire from discriminating against nonresidents by denying those nonresidents the right to practice law there because New Hampshire's residency rule lacked "substantial reason" for "difference in treatment" that did not bear substantial or close relation to state's given reason for residency requirement); Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377, 431-33 (1996) (explaining that Court's focal point in its tax jurisprudence is discriminatory nature of state tax provisions that overly burden out-of-state competitors); Laurence H. Tribe, Comment, Saenz *Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future — Or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110, 141 (1999) (noting that principles underlying *Saenz* decision were animated by concerns for "interstate comity"). The Court's Dormant Commerce Clause jurisprudence reveals similar centralizing principles. *See, e.g.*, Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 584 (1997) (extending implications of Dormant Commerce Clause to nonprofit enterprises); John O. McGinnis & Ilya Somin, *Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System*, 99 NW. U. L. REV. 89, 123 (2004) (arguing that *Camps Newfound* decision suggests that Rehnquist Court was pursuing "structural federalism jurisprudence" that belied its "reputation as a pro-states' rights court"); Weinstein, *supra* note 168, at 285-86 (explaining that Court's Dormant Commerce Clause jurisprudence promotes "'common market' approach to commerce among states by invalidating laws that 'balkanize' free trade" and thus generating federal restrictions on state power to promote economic harmony among states).

[274] Dunn v. Blumenstein, 405 U.S. 330, 338 (1972) (finding that "the freedom to travel includes the 'freedom to enter and abide in any State in the Union'" (internal citations omitted)).

[275] *Piper*, 470 U.S. at 279-80 (explaining that Privileges and Immunities Clause "was intended to create a national economic union . . . . [And] therefore [it is] not surprising that

welfare benefits across state lines.[276] In so doing, the Court privileges the efficient operation of interstate commerce and the integration of the nation into a single market and polity over individuals' ties with particular states.

Notions of state sovereignty over a nonresident's in-forum activities accord with the centralizing rhetoric underlying the Court's judicial federalism jurisprudence. Upholding a state's judicial authority over VoIP communications sent across its borders supports the notion that state courts are not beset by bias against nonresidents and can fairly hear all claims before them. The constructive presence theory also honors the Court's increasing recognition that individuals enjoy jurisdictionally significant relationships with many states by acknowledging that nonresidents' communications with VoIP subscribers in a variety of fora can give rise to disputes affecting interests in those states. This approach recognizes that facilitating the resolution of these disputes in *some* forum is important to promoting seamless commerce across state lines.

By contrast, favoring the implied contract theory, as *Michiana* and *Denver Truck* do, undermines the notion of national citizenship. This misguided approach effectively establishes that states have the exclusive right to hear claims against their own citizens involving borderless communications. Forcing an injured party to bear the cost and inconvenience of traveling to the defendant's home state to obtain redress could deter some businesses from entering into interstate commerce.[277] Only a strong presumption of state courts' untrustworthiness, which is wholly inconsistent with the values underlying the Court's judicial federalism, could justify rolling back the

this Court repeatedly has found that 'one of the privileges which the Clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State'" (quoting Toomer v. Witsell, 334 U.S. 385, 396 (1948))); Kassel v. Consol. Freightways Corp., 450 U.S. 662, 671 (1981) (holding that Iowa law regulating length of trucks driving on its roads impermissibly burdened "interstate flow of goods by truck" and was therefore unconstitutional under Dormant Commerce Clause); Hicklin v. Orbeck, 437 U.S. 518, 533-34 (1978) (invalidating statute requiring that residents be hired in preference to nonresidents for positions related to development of state's oil and gas resources); *see also* JOHN HART ELY, DEMOCRACY AND DISTRUST 83 (1980) (arguing that Privileges and Immunities Clause was "intended and has been interpreted to mean" that "whatever entitlements those living in a state see fit to vote themselves will generally be extended" to out-of-state visitors).

[276] *Saenz*, 526 U.S. at 506-07 (explaining that California's welfare legislation effectively deterred welfare applicants from moving to California).

[277] At a minimum, it would deter them from obtaining VoIP numbers with out-of-state area codes, which may be a necessary prerequisite to effective competition in those markets. This would frustrate the Court's efforts to prevent state lines from insulating markets from competitive pressures.

clock to the nineteenth century rule of *Pennoyer.* Thus, a proper recognition of the state sovereignty principle in the minimum contacts doctrine would acknowledge that states maintain significant ties with nonresidents who transmit communications to VoIP users in their borders and that state courts are competent to hear those claims.

C. Alternative Means for Protecting Nonresidents from a Sovereign State's Unreasonable Exercise of Extraterritorial Jurisdiction

A nonresident's implied agreement is not essential to ensure that a state's exercise of its sovereign judicial authority over nonresidents comports with due process. The reasonableness of a state's exercise of its judicial authority can be determined by assessing the state's regulatory interest in the nonresident's territorial conduct.[278] In this analysis, courts should examine the objective impact of the nonresident's litigation-raising local activity.[279] To that end, the inquiry is claim-specific.[280] When a state has a strong regulatory interest in the nonresident's in-forum activity, the nonresident's conduct would justify the state's exercise of its judicial authority so long as "fair play and substantial justice" supported that result.[281] A state's weak interest in the

[278] Stein, *supra* note 124, at 413 (arguing that appropriate jurisdictional inquiry under minimum contacts doctrine is "not whether a defendant has surrendered his or her liberty, but whether the state's assertion of judicial authority sufficiently advances its regulatory interests to justify the attendant burden that such a proceeding would impose upon conduct outside of its territory"); Weisburd, *supra* note 91, at 405-06 (urging Court to replace purposefulness inquiry with rule that honors territorial sovereignty of states, such as examination of defendant's "liability-raising" conduct in state's territory that warrants state regulation); *see* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (sanctioning extraterritorial jurisdiction only where nonresidents establish meaningful ties to forum); Brilmayer, *supra* note 126, at 81-82, 85 (arguing that state adjudicative authority is reasonable where states have regulatory interest in nonresidents forum activities that constitute "substantively relevant events").

[279] *See* Burger King v. Rudzewicz, 471 U.S. 462, 473-75 (1985).

[280] Stein, *supra* note 124, at 413. Under Professor Stein's "regulatory precision" approach, due process "tests jurisdictional authority in relation to the nature of a defendant's activity, and the regulatory claims of all states with an interest in that activity. It is multilateral, not bilateral. It is claim-specific, not trans-substantive." *Id.*

[281] Conflict of laws jurisprudence and a state's laws can guide state courts in assessing a state's interest in a particular nonresident's in-forum, litigation-related activity. *Verizon Online Services v. Ralsky*, for example, involved nonresident defendants who sent millions of harmful spam e-mails to Virginia residents over the Virginia plaintiff's Internet service. 203 F. Supp. 2d 601, 617 (E.D. Va. 2002). The defendants claimed that the Virginia court lacked jurisdiction over them since they never knew where they sent the e-mails and thus never purposefully availed themselves of Virginia's laws. *Id.* at 619. The Virginia court found the defendants' argument unpersuasive. *Id.* at 617, 619. The court explained that the defendants could not escape Virginia's judicial jurisdiction "by simply pleading ignorance

nonresident's local conduct, on the other hand, would suggest that the state's exercise of jurisdiction would be unreasonable.[282] Some courts have moved in this direction in cases involving harmful e-mails sent to forum residents.[283] Moreover, as the Court's decisions in the punitive damages arena[284] illustrate, a nonresident's implied agreement is not

as to where [plaintiff's] servers were located." *Id.* at 620. "To do so would constitute a manifest injustice to Verizon and Virginia" that would offend Virginia's sovereign power to try causes in its courts, and the Due Process Clause does not give defendants a free pass to commit torts with "impunity." *Id.* The court, rather than asking if the defendants purposefully connected with Virginia, assessed Virginia's interest in the defendants' in-state activities to determine whether Virginia's exercise of its judicial authority would be reasonable under the Due Process Clause. *Id.* at 617. The court, relying on the *Restatement (Second) of Conflict of Laws*, explained that a "state has an especial interest in exercising judicial jurisdiction over those who commit torts within its territory." *Id.* (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 36.1 (1988)). The court held that Virginia's interest in the defendants' tortious conduct, coupled with the fact that the defendants intended to send the harmful e-mails that caused significant harm to Virginia residents, illustrated that the court's exercise of jurisdiction over the defendants satisfied the "contacts" inquiry of the minimum contacts doctrine. *Id.* at 618. The court separately addressed whether its exercise of jurisdiction would comport with "fair play and substantial justice" and found that fairness also supported the court's exercise of personal jurisdiction over the defendants. *Id.* at 621.

[282] *See* Burnham v. Superior Court of Cal., 495 U.S. 604, 637 (1990) (Brennan, J., concurring) ("[A] state has power to exercise judicial jurisdiction over an individual who is present within its territory unless the individual's relationship to the state is so attenuated as to make the exercise of such jurisdiction unreasonable."); *Ralsky*, 203 F. Supp. 2d at 617 ("A state's interest in exercising personal jurisdiction over a tortfeasor takes on a stronger role than in other contexts such as a contract dispute.").

[283] Courts have refused to allow the purposefulness inquiry to divest states of their judicial authority over nonresidents who sent harmful e-mails to forum residents. *See, e.g.*, *Ralsky*, 203 F. Supp. 2d at 617-18; Internet Doorway, Inc. v. Parks, 138 F. Supp. 2d 773, 778-79 (S.D. Miss. 2001) (finding jurisdiction over defendant in federal district court in Mississippi in tort case where defendant sent e-mail all over world, including to Mississippi residents, that falsely suggested plaintiff's involvement in pornographic website because it would not be "unfair" to subject defendant to jurisdiction in Mississippi since defendant sent e-mail solicitation for pecuniary gain "at her own peril" and thus could not claim that "it was not reasonably foreseeable that she could be haled into a distant jurisdiction to answer for the ramifications of that solicitation"); Fenn v. MLeads Enters., Inc., 103 P.3d 156, 162 (Utah Ct. App. 2004) (finding that defendant "should have anticipated being haled into court wherever its email were received, even in Utah").

[284] *See supra* note 159 and accompanying text (describing Supreme Court's due process analysis of state punitive damages awards). In *State Farm Mutual Automobile Insurance Co. v. Campbell*, the Court held that due process "dictate[s] that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." 538 U.S. 408, 417-18 (2003). In assessing whether the state punitive damages award comported with the Due Process Clause, the Court did not invoke concepts of implied agreement. *Id.* Instead, the Court examined the state's territorial authority over the defendant's conduct and the excessive nature of the award in light of the reprehensibility of the defendant's conduct, the difference between the actual harm inflicted and the award, and the amount of the award compared to awards in similar

essential to ensuring that a state's exercise of its sovereign authority comports with due process.

Although this rule would expand personal jurisdiction to cases not meeting the purposefulness requirement, other means exist to protect nonresidents from being haled into distant courts unfairly. Under existing doctrine, even if a state's exercise of its judicial authority would be reasonable given its strong regulatory interest in the nonresident's in-forum conduct, its courts lack personal jurisdiction over that nonresident where the litigation would overly burden the parties, the court system, and the substantive policies of the several states. In that regard, *Asahi*[285] illustrates that the "fair play and substantial justice" concerns provide meaningful protection for nonresidents defendants.

Aside from the protections offered by current doctrine and this proposal, concerns about a nonresident's inconvenience also can be accommodated at the "subconstitutional level using the doctrine of forum non conveniens."[286] The forum non conveniens doctrine, for example, permits courts to adjust for "potential inequities between the parties" by facilitating conditional dismissals — "a device not available under the 'black-or-white' approach to jurisdiction."[287]

Some may argue that this proposal contravenes the notion that an individual's consent is essential for the legitimacy of a state's assertion of its judicial authority.[288] This argument fails for both theoretical and practical reasons. First, an individual's consent, as conceived in current personal jurisdiction law, is "hypothetical."[289] As Professor Brilmayer has observed, "theories of tacit consent assume almost exactly what they set out to prove."[290]

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cases. *Id.* at 419-20.

[285] Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 115 (1987); *see supra* notes 195, 197, and 200 and accompanying text.

[286] Perdue, *supra* note 124, at 469.

[287] Ronan E. Degnan & Mary Kay Kane, *The Exercise of Jurisdiction over and Enforcement of Judgments Against Alien Defendants*, 39 HASTINGS L.J. 799, 819 (1988).

[288] *See, e.g.*, Margaret G. Stewart, *A New Litany of Personal Jurisdiction*, 60 U. COLO. L. REV. 5, 19 (1989); Transgrud, *supra* note 92, at 884-85.

[289] Perdue, *supra* note 124, at 465.

[290] Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277, 1304 (1989). Scholars have long argued, on other grounds, that purposefulness has no place in the law of personal jurisdiction. *See, e.g.*, Stein, *supra* note 86, at 734-35 (arguing that exchange justification in minimum contacts analysis is flawed because "if purposeful availment implies contractual fairness, whether by actual or constructive contract, it does not work"); Weisburd, *supra* note 91, at 405 (arguing that because personal jurisdiction rules concerns limits on territorial sovereignty, "intent" requirement "disregards territorial sovereignty model it claims to be applying"). An argument, however, can be made that the Court's decision in *Quill Corp. v. North Dakota* undermines this Article's contention that the

Second, as a practical matter, purposefulness can no longer serve as an instrument to measure the reasonableness of a state's exercise of its judicial authority because its notions of "fair warning" and implied agreement operate under last century's assumption that individuals communicate from known locations. In the twenty-first century where area codes do not accurately signify geographic locations, the purposefulness inquiry is obsolete. Indeed, individuals today know their communications may be transmitted to VoIP or cellular phones and are thus "fairly warned" that their calls, e-mails, and faxes may be received in unexpected locations. Individuals, in that sense, can be said to have "assumed the risk" [291] of the jurisdictional consequences of their remote communications.

In the hypothetical in the prior subpart, A contacted Pennsylvania via the phone calls and faxes it made to B there. Because the allegedly misleading remarks that gave rise to B's fraud claim essentially occurred in Pennsylvania, Pennsylvania likely would have a strong interest in

purposefulness inquiry is not essential to the protection of a nonresident's due process guarantees. 504 U.S. 298, 308 (1992) (upholding North Dakota's jurisdiction to tax Delaware mail-order company under Due Process Clause because company had purposefully directed its activities to North Dakota residents). While *Quill* affirms the significance of purposefulness in the law of due process, it does not undermine the argument made here that the purposefulness inquiry jeopardizes state regulatory authority and unnecessarily protects defendants beyond the guarantees of due process in borderless communications where defendants lack knowledge of the geographic location of individuals they contact. *Quill* is distinguishable because the Court affirmed the significance of purposefulness to the due process inquiry in a case where the defendant directed its activity to a known location – catalogues and products sent through the mail to North Dakota residents. *See id.* at 302, 308. Thus, in *Quill*, the "fair warning" of the purposefulness inquiry was ably satisfied by the defendant's action of mailing catalogues and products to North Dakota. There, the defendant knew he reached out to, and made taxable sales in, North Dakota, much in the same way that the defendant in *Burger King* knew that in sending mail to the plaintiff in Florida he risked litigation there. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985). But in a world of borderless VoIP communications where parties do not, and cannot, predict the home fora of their contacts, the purposefulness requirement leads to anomalous results. For a more in-depth treatment of *Quill*, see generally John A. Swain, *Cybertaxation and the Commerce Clause: Entity Isolation or Affiliate Nexus?*, 75 S. CAL. L. REV. 419, 425 (2002) (discussing immunizing effect of *Quill* on companies seeking to avoid state taxation and suggesting alternative methods of establishing physical presence in forum), and compare David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544, 2599 (2005) (exploring how *Quill* diminishes states' authority to tax commercial activity within their borders).

[291] Verizon Online Servs., Inc. v. Ralsky, 203 F. Supp. 2d 601 (E.D. Va. 2002) (upholding personal jurisdiction over nonresident defendants who sent millions of spam e-mails through plaintiff Verizon's servers because defendants "assumed the risk" of injuring valuable property in Virgnia, even though defendants claimed to have no knowledge of destination of their e-mails).

regulating A's allegedly fraudulent remarks transmitted to its territory.[292] The "fair play and substantial justice" considerations would determine if B's inconvenience, judicial efficiency, and the state's interests would counsel divesting the Pennsylvania court of jurisdiction over B.

This standard would advance the critical concerns of the law of personal jurisdiction. It would secure a state's sovereign authority over harmful communications transmitted to its territory, protect nonresidents from unreasonable assertions of state judicial authority, and ensure that the exercise of jurisdiction would not unduly burden the parties, the courts, and the shared states' interests.

CONCLUSION

Modern personal jurisdiction law has long rested securely on the twin pillars of territorial presence and implied contract. This edifice, however, cannot stand. These concepts will come into irreconcilable conflict when applied to the borderless communications of the twenty-first century. The Supreme Court designed the modern minimum contacts doctrine to expand state adjudicative authority over nonresidents who knowingly established their presence in a state through twentieth-century transportation or communication technologies. In the traditional telephone system, where area codes let callers know the states they contacted, the concepts of in-forum presence and implied contract operate in sync. But since the Court last revisited personal jurisdiction, communication technologies have made radical advances. Twenty-first century technologies like VoIP now remove the geographic marker from *all* of our communications, including e-mail, voice, fax, file-sharing, and real-time video conferencing.

Given a defendant's inability to purposefully direct VoIP calls to particular fora, the borderless communications of the twenty-first century cannot fit in the minimum contacts paradigm. This will force the Court to decide whether constructive presence or implied contract is the primary operating principle of personal jurisdiction law. Some lower courts, addressing the jurisdictional import of cellular phone contacts, have deemed the implied contract theory paramount, finding harmful communications directed to cellular phone users jurisdictionally

[292] *See generally* Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 776 (1984) (explaining that "it is beyond dispute that [a state] has a significant interest in redressing injuries that actually occur within the [s]tate" because "[a] state has an especial interest in exercising judicial jurisdiction over those who commit torts within its territory" (internal quotation marks omitted)).

insignificant because such calls cannot be directed to particular places.

This Article has shown the mechanistic short-sightedness of this approach and its implicit disregard of state sovereignty. Although voice, fax, and data communications in the twenty-first century will increasingly lack geographic markers, we nonetheless live in a world of territorial boundaries where state regulatory powers matter. To avoid the wholesale elimination of extraterritorial state authority and a cloak of immunity over all remote communications, the implied contract theory should not be sustained. Legitimate due process concerns can and should be addressed without the artifice of an implied contract to protect defendants from abusive process. This result promotes a healthy federalism, reconciling some seemingly inconsistent centrifugal and centripetal themes in this Court's jurisprudence, and promotes judicial efficiency.