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SAYONARA TO MINIMUM CONTACTS: *ASAHI METAL INDUSTRY CO. V. SUPERIOR COURT*

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I. INTRODUCTION

In *Asahi Metal Industry Co. v. Superior Court*[1] the Supreme Court returned to the ever more elusive and complex topic of state court personal jurisdiction.[2] The *Asahi* decision

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1. ___ U.S. ___, 107 S. Ct. 1026 (1987).

2. The terms "personal" or "in personam" jurisdiction will be used in this Article to describe the jurisdictional concept discussed because the Supreme Court generally uses these terms. *E.g.*, Burger King Corp. v. Rudzewicz, 471 U.S. 462, 464 (1985) ("The United States District Court for the Southern District of Florida, sitting in diversity, relied on . . . [the Florida long-arm statute] in exercising *personal jurisdiction* over a Michigan resident. . . .") (emphasis added); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 287 (1980) ("The issue before us is whether, consistently with the Due Process Clause of the fourteenth Amendment, an Oklahoma court may exercise *in personam* jurisdiction over a nonresident automobile retailer and its wholesale distributor in a products-liability action. . . .") (emphasis in original); Kulko v. Superior Court, 436 U.S. 84, 91 (1978) ("The existence of *personal jurisdiction*, in turn, depends upon the presence of reasonable notice to the defendant that an action has been brought, and a sufficient connection between the defendant and the forum State to make it fair to require defense of the action in the forum.") (emphasis added) (citations omitted).

Other terms for this jurisdictional concept include "judicial jurisdiction," which is used in RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 24-91 (1969), "territorial juris-

was the eleventh time[3] in ten years that the Court gave extensive consideration to this gradually evolving doctrine. The quantity of jurisdictional decisions in the most recent decade stands in marked contrast to the prior almost twenty-year period in which the Supreme Court failed to decide a single significant personal jurisdiction case.[4] The recent opinions have, however, failed to harmonize divergent doctrinal trends, and the result of this failure is evident in *Asahi*, in which the Court, although unanimous in its judgment,[5] was otherwise deeply divided.[6]

The *Asahi* Court held that California could not assert jurisdiction over a Japanese component part manufacturer on an indemnity claim by a Taiwanese manufacturer of a product incorporating the component part after settlement of the original plaintiffs' claims, even though the Japanese manufacturer was aware that its product would reach California in the stream of commerce, and even though the accident giving rise to the litigation occurred in California. All that can be stated confidently about the *Asahi* holding is that California was precluded from exercising jurisdiction because to do so would be "unreasonable and unfair."[7] This uncertainty resulted from the Court's division into two four-justice pluralities[8] over whether the Japanese component part manufacturer established minimum contacts with California. Although unable to agree on minimum contacts, eight justices concurred in the "fairness" conclusion.[9] Even though "fairness" has been part of jurisdictional analysis since *International Shoe Co. v. Washington*[10] first articulated the minimum

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diction," which is used in RESTATEMENT (SECOND) OF JUDGMENTS §§ 4-10 (1980), and "adjudicatory jurisdiction."

3. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985); *Burger King*, 471 U.S. 462; Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984); Calder v. Jones, 465 U.S. 783 (1984); Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984); Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982); Rush v. Savchuk, 444 U.S. 320 (1980); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); *Kulko*, 436 U.S. 84; Shaffer v. Heitner, 433 U.S. 186 (1977).

4. The Supreme Court decided no personal jurisdiction cases between Hanson v. Denckla, 357 U.S. 235 (1958), and Shaffer v. Heitner, 433 U.S. 186 (1977).

5. *See infra* notes 306-312 and accompanying text.

6. *See infra* notes 310-318 and accompanying text.

7. 107 S. Ct. at 1035.

8. *See infra* notes 313-317 and accompanying text.

9. *See infra* note 311 and accompanying text.

10. 326 U.S. 310 (1945).

contacts test,[11] and even though it has taken on added importance recently,[12] fairness alone has never been outcome determinative in any Supreme Court jurisdictional decision until *Asahi*. *Asahi* is significant, then, because it is the first case in which fairness considerations were not merely dicta in an opinion otherwise grounded on conventional views of minimum contacts.[13]

To understand the significance of *Asahi*'s departure from prior case law, and to make reasonable predictions about future developments, a review of the development of minimum contacts in Supreme Court jurisprudence is appropriate. Accordingly, Part II of this Article traces the evolution of the Court's current due process test for state court personal jurisdiction. Part III of the Article describes and analyzes the various opinions of the distressingly fragmented *Asahi* Court. The thesis of this Article is in Part IV. While recognizing its theoretical merit, the Article criticizes the Court's current two-branch approach to jurisdiction, and urges a return to the simpler due process analysis previously employed,[14] coupled with increased emphasis on discretionary motions to dismiss under the common-law doctrine of forum non conveniens.

II. 1945-1985: THE MODERN EVOLUTION OF JURISDICTIONAL DUE PROCESS

A. 1945-1958: Doctrinal Origins

A logical point of departure is to review the development of the Supreme Court's current approach to state court personal jurisdiction.[15] Although this section is not intended to rehash what has been said by many eminent scholars before, some overlap and repetition is unavoidable. The object, however, is to identify the divergent doctrinal trends that have influenced the Court's jurisdictional decision making.

The seminal case of the modern era is, of course, *Interna-*

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11. *Id.* at 316.

12. *See infra* text accompanying notes 138-50, 219-24, 242-60.

13. *See, e.g., Burger King*, 471 U.S. 462, 478-84; *World-Wide*, 444 U.S. 286, 295-99.

14. The pre-*World Wide* approach was not consistent. *See infra* text accompanying notes 83-90.

15. For more detailed discussions of this historical development, see *infra* notes 16, 17, and 22.

tional Shoe Co. v. Washington,[16] in which the Court attempted a clean break with the rigid jurisdictional principles of *Pennoyer v. Neff*.[17] Under *Pennoyer* a state could not exercise in personam jurisdiction over a nonresident defendant unless the defendant either voluntarily consented to jurisdiction or was found and served with process within the borders of the state.[18] Thus, a state's adjudicatory authority was limited to persons or property found within its geographic borders. This strict territorial view, largely adopted from international law,[19] soon proved too limiting.[20] The restrictive approach of *Pennoyer* was particularly troublesome for corporations engaged in business activity outside their state of incorporation.[21] In an effort to maintain at

16. 326 U.S. 310 (1945). For a general discussion of the various bases of asserting personal jurisdiction, see 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE §§ 1064-1073 (2d ed. 1987); *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909, 916-48 (1960).

17. 95 U.S. 714 (1878). Some question surrounds the date when *Pennoyer* was decided. It was no doubt decided during the 1877 Term. The official *United States Reports*, however, does not provide a specific date. *The Supreme Court Reporter* and the *United States Supreme Court Reports* give the date as "Jan. 21, 1878." Recent Supreme Court opinions tend to cite *Pennoyer* as having been decided in 1878. *E.g.*, Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984); *World-Wide*, 444 U.S. 286, 291; Shaffer v. Heitner, 433 U.S. 186, 196 (1977).

The case and its doctrinal principle have been the subject of extensive critical commentary. *See, e.g.*, Hazard, *A General Theory of State Court Jurisdiction*, 1965 SUP. CT. REV. 241; Nordenberg, *State Courts, Personal Jurisdiction and the Evolutionary Process*, 54 NOTRE DAME LAW. 587, 588-93 (1973); Ross, *The Shifting Bases of Jurisdiction*, 17 MINN. L. REV. 146 (1933). For a recent reexamination of, and delightful account of the personalities involved in, this venerable case, see Perdue, *Sin Scandal and Substantive Due Process: Personal Jurisdiction and Pennoyer Reconsidered*, 62 WASH. L. REV. 479 (1987).

18. 95 U.S. at 733.

19. *See* Hazard, *supra* note 17, at 252-62.

20. In dicta *Pennoyer* recognized that a state may determine the civil status of a citizen with respect to a nonresident. 95 U.S. at 734-35. As *Pennoyer* was decided at a time when business activity was starting to cross state lines, the court suggested that a state may require a nonresident entering a business transaction within the forum to appoint an agent for service of process. *Id.* at 735. Of course, from a technical perspective, service on an agent was intended to occur within the territory of the state, and, therefore, was consistent with *Pennoyer*'s view of territorial power. Consequently, even as *Pennoyer* was announcing its jurisdictional principles, the seeds of change were sown.

21. Another problem area concerned torts committed by nonresident motorists who departed the state after an accident. This jurisdictional concern was substantially resolved in 1927 when the Court upheld a Massachusetts statute providing for implied consent to jurisdiction by any motorist who used the state's highways provided that the cause of action arose out of that use. Hess v. Pawloski, 274 U.S. 352 (1927). Since service of process was effected under the typical nonresident motorist statute upon a public

least technical compliance with *Pennoyer*, the Court developed principles subjecting nonresident corporations to jurisdiction based on fictional concepts of "implied" consent, corporate "presence," or "doing business" within the forum state.[22]

In an attempt to free the states from the pitfalls and fictions inherent in the earlier doctrines, the Court in *International Shoe* announced that when in personam jurisdiction is asserted over a nonresident defendant "due process requires only that . . . [the defendant] have certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "[23] Although perhaps containing the most celebrated language in all of jurisdictional jurisprudence, the minimum contacts test proved easier to state than to apply because it was deliberately cast in extremely general language.[24]

In one sense the emphasis on defendant's contacts was a substitute for the discarded "presence" or "doing business" fictions,[25] but, unlike those theories, the minimum contacts analysis was vitally concerned with fairness and reasonableness. The articulation of the test itself required defendant contacts with the forum "such that" assertion of jurisdiction comported with

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official within the forum state, *Pennoyer*'s limitations were again at least technically observed.

22. For historical accounts of pre-*International Shoe* jurisdiction over corporations, see 4 C. WRIGHT & A. MILLER, *supra* note 16, § 1066; Kalo, *Jurisdiction as an Evolutionary Process: The Development of Quasi In Rem and In Personam Principles*, 1978 DUKE L.J. 1147, 1176-82; Kurland, *The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569, 577-86 (1958); *Developments*, *supra* note 16, at 919-23.

23. 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

24. Chief Justice Stone, in an opinion joined in by all participating justices except Justice Black, candidly acknowledged that the dividing line between activities that reach the jurisdictional threshold and those that do not "cannot be simply mechanical or quantitative." 326 U.S. at 319. Recently, the Court reiterated this view in observing:

> Like any standard that requires a determination of "reasonableness," the "minimum contacts" test of *International Shoe* is not susceptible of mechanical application; rather, the facts of each case must be weighed to determine whether the requisite "affiliating circumstances" are present. We recognize that this determination is one in which few answers will be written "in black and white. The greys are dominant and even among them the shades are innumerable."

Kulko v. Superior Court, 436 U.S. 84, 92 (1978) (citations omitted) (quoting Estin v. Estin, 334 U.S. 541, 545 (1948)).

25. *See* Lilly, *Jurisdiction Over Domestic and Alien Defendants*, 69 VA. L. REV. 85, 89 (1983).

"fair play."[26] Later in the opinion Chief Justice Stone emphasized that the demands of due process require "contacts of the corporation with the state of the forum as make it *reasonable* . . . to require the corporation to defend the particular suit which is brought there."[27] Although fairness or reasonableness may have been an underlying theme, the Court appeared to assume fairness and reasonableness if the contact element of the test was satisfied.[28] In any event, the Court failed to identify any criteria by which to evaluate fairness or reasonableness apart from contacts, or how those considerations otherwise independently impacted on the basic test.[29] This was understandable. Well-settled doctrine, even if fictional, is difficult to change all at once. *International Shoe* represented a definitive step away from "consent" and "doing business," but it certainly was not a total departure from prior doctrine.

In addition, as Professor Kurland aptly noted thirty years ago, "the Court was not overruling the earlier precedents, but was substituting an appropriate rationale to demonstrate their consistency."[30] The Court divided its prior jurisdictional decisions into four general categories.[31] Although these categories, and their underlying principles, did not define minimum contacts per se, they attempted to describe permissible and prohibited assertions of in personam jurisdiction by reference to the relationship among the forum, the defendant, and the litigation.[32] The categories are divided first into "specific" and "gen-

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26. 326 U.S. at 316.

27. *Id.* at 317 (emphasis added).

28. The juxtaposition of "due process" and "minimum contacts" with "traditional notions of fair play and substantial justice" seemed to imply that if a defendant established minimum contacts with a forum, the assertion of jurisdiction complied with due process. *See* 326 U.S. at 316.

29. One sentence in the opinion, however, suggested that the contact element is evaluated "in relation to" fairness. 326 U.S. at 319.

30. Kurland, *supra* note 22, at 589.

31. 326 U.S. at 317-18.

32. Discussing the impact of *International Shoe* in Shaffer v. Heitner, 433 U.S. 186 (1977), the Court concluded "the relationship among the defendant, the forum, and the litigation . . . became the central concern of the inquiry into personal jurisdiction." *Id.* at 204. The *International Shoe* categories are four permutations of these three elements. They may be summarized as follows:
(i) When the activities of the nonresident defendant in the forum state are continuous and systematic, and the cause of action arises out of those activities, assertion of in personam jurisdiction is almost always permissible, 326 U.S. at 317-18; (ii) When the activi-

eral" jurisdiction, and then subdivided by the quantum of forum

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ties of the nonresident defendant in the forum state are casual and occasional, and the cause of action does not arise out of those activities, assertion of in personam jurisdiction is almost always inappropriate, *id.*; (iii) When the activities of the nonresident defendant in the forum state are so continuously and systematically substantial, it may be appropriate to assert in personam jurisdiction over such a defendant even for a cause of action that does not arise out of those activities, *id.* at 318; (iv) When the activities of the nonresident defendant in the forum state are casual and occasional, including single acts, but the cause of action arises out of those activities, it may be appropriate to assert in personam jurisdiction over such a defendant, depending on the nature, quality, and circumstances of the activities. *Id.*

A four-box chart in which the vertical line describes the nature and scope of the nonresident defendant's activity in the forum state, and the horizontal line describes the relationship between the litigation and those activities is useful in visualizing the relationships among the categories. Other commentators have used similar devices. *See, e.g.*, McDermott, *Personal Jurisdiction: The Hidden Agendas in the Supreme Court Decisions*, 10 VT. L. REV. 1, 39-40 (1985); Comment, *Jurisdiction Over Foreign Corporations in Tennessee*, 42 TENN. L. REV. 325, 332-33 (1975).

RELATIONSHIP OF LITIGATION

FORUM STATE ACTIVITY	(Arises Out Of)	(Does Not Arise Out Of)
(Continuous and Systematic)	(i)	(iii)
(Casual and Occasional)	(iv)	(ii)

Boxes (i) and (iv) represent instances of "specific" or "transactional" jurisdiction because a specific forum state activity or transaction of the nonresident defendant gives rise to the litigation in which personal jurisdiction is asserted over the defendant. Boxes (ii) and (iii) represent instances in which a state is exercising "general" jurisdiction over the nonresident defendant because the cause of action does not arise out of any of the defendant's forum state activities. Professors von Mehren and Trautman are generally credited with articulating the distinction between general and specific jurisdiction. *See* von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L.

state activity in which the nonresident defendant engaged.[33] The two categories of activity were described as "continuous and systematic" and "casual and occasional." It was sometimes difficult to classify a case as falling squarely in one or the other category.[34] Moreover, the basic categories alone did not test reasonableness or fairness. Perhaps recognizing this weakness, the Court observed:

> But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.[35]

This language attempts to link a defendant's contact with the forum state to the concepts of fairness and reasonableness. If the defendant's activity permits the defendant to enjoy benefits and protections of the forum state, then imposing a concomitant obligation to be held accountable within the forum is not unreasonable, at least in connection with causes of action that arise out of the forum state activities.

Having articulated a new test and having classified its prior case law into loose categories, the Court had little trouble deciding the jurisdictional issue presented in *International Shoe* itself.[36] It characterized defendant's activity as being systematic

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REV. 1121, 1136 (1966).

33. *See supra* note 32.

34. Professor Perschbacher recently observed that "the categories were left as a legacy to bedevil a generation of courts, commentators, and lawyers." Perschbacher, *Minimum Contacts Reapplied: Mr. Justice Brennan Has It His Way in* Burger King Corp. v. Rudzewicz, 1986 ARIZ. ST. L.J. 585, 592.

35. 326 U.S. at 319.

36. The entire analysis is contained in one paragraph, in which the Court concluded as follows:

> Applying these standards, the activities carried on in behalf of appellant in the State of Washington were neither irregular nor casual. They were systematic and continuous throughout the years in question. They resulted in a large volume of interstate business, in the course of which appellant received the benefits and protection of the laws of the state, including the right to resort to the courts for the enforcement of its rights. The obligation which is here sued upon arose out of those very activities. It is evident that these operations establish sufficient contacts or ties with the state of the forum to make it rea-

and continuous, and noted that the cause of action arose out of those activities. Accordingly, the case came within the category in which jurisdiction was almost never in doubt.

International Shoe thus set in motion a new theoretical framework by which to analyze due process limitations on personal jurisdiction. Its emphasis on contacts, however, retained elements of the discarded "presence" and "doing business" tests because International Shoe's contacts through its agents were physical. Moreover, although reasonableness was an underlying theme, the Court failed to explain how it was to be factored specifically into jurisdictional analysis.

While *International Shoe* was primarily concerned with defendant's contact with the forum, the next significant case[37] in the developmental line, *McGee v. International Life Insurance Co.*,[38] had a decidedly plaintiff orientation. In holding that Texas had to give full faith and credit to a California judgment in which service of process on the Texas defendant was effected by registered mail across state lines, a unanimous Court identified several new elements of the jurisdictional equation.

Having assumed the obligations of a predecessor company, including one life insurance policy with a resident of California, the defendant offered to renew the California policy.[39] The written renewal offer was mailed to the insured in California.[40] The offer was accepted[41] by the insured, who paid premiums for two years by mail from California to the Texas office of the defendant.[42]

After noting the general trend to expand the reach of state

> sonable and just, according to our traditional conception of fair play and substantial justice, to permit the state to enforce the obligations which appellant has incurred there. Hence we cannot say that the maintenance of the present suit in the State of Washington involves an unreasonable or undue procedure.

Id. at 320.

37. Between *International Shoe* and *McGee* the Court decided two other jurisdictional cases: Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952); and Travelers Health Ass'n v. Virginia, 339 U.S. 643 (1950). *Travelers Health* did not break any new ground, and *Perkins*, although some disagree, *see* McDermott, *supra* note 32, at 11 & n.47, traditionally is considered a general jurisdiction case, which raises issues beyond the scope of this Article. *See infra* notes 210-13 and accompanying text.

38. 355 U.S. 220 (1957).

39. *Id.* at 221.

40. *Id.*

41. *Id.*

42. *Id.* at 222.

court jurisdiction,[43] the Court concluded that California properly exercised personal jurisdiction over the Texas defendant because "the suit was based on a contract which had substantial connection with [California]."[44] In reaching its conclusion the Court focused on the interest of the forum state,[45] the plaintiff's interest,[46] and general litigation considerations.[47] It also considered defendant's interest in avoiding an inconvenient forum.[48] Collectively, these elements strongly favored the exercise of jurisdiction by California. Unfortunately, the Court failed to provide any guidance regarding how these various elements are to be factored into the jurisdictional calculus.[49] In addition, while emphasizing the substantial connection that the insurance contract

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43. The Court observed as follows:

> Looking back over this long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.

Id. at 222-23.

44. *Id.* at 223 (citations and footnote omitted).

45. The Court observed: "The contract was delivered in California, the premiums were mailed from there and the insured was a resident of that State when he died." *Id.* at 223. It, therefore, concluded: "It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims." *Id.*

46. The plaintiff's interest was expressed as follows:

> These residents would be at a severe disadvantage if they were forced to follow the insurance company to a distant state in order to hold it legally accountable. When claims were small or moderate individual claimants frequently could not afford the cost of bringing an action in a foreign forum—thus in effect making the company judgment proof.

Id.

47. The litigational interest was stated as follows: "Often the crucial witnesses—as here on the company's defense of suicide--will be found in the insured's locality." *Id.* at 223.

48. The only reference to defendant's interest was that "there may be inconvenience to the insurer if it is held amenable to suit in California where it had this contract but certainly nothing which amounts to a denial of due process." *Id.* at 224 (citation omitted).

49. *Cf.* Perschbacher, *supra* note 34, at 594 ("Plaintiff's convenience, defendant's convenience, and the forum state's interest in providing a forum all receive roughly equal weight.").

had with California, thus implicating "minimum contacts," the Court otherwise avoided the analytical framework of *International Shoe*. In particular it avoided classifying *McGee* under the four *International Shoe* categories, or assessing whether the Texas insurance company had invoked the benefits and protections of California law. Both of these factors figured prominently in Chief Justice Stone's *International Shoe* opinion.[50] Accordingly, many commentators view *McGee* as originating the interest-balancing approach to jurisdictional due process.[51] Nevertheless, *McGee* could have easily been decided by stricter adherence to *International Shoe*. Defendant voluntarily entered into an insurance contract with a forum state resident. The cause of action arose out of that contract and defendant, a foreign insurance company, surely invoked the benefits and protections of the forum state law.

Viewed from the temporal perspective of *McGee*, the evolution of personal jurisdiction was clouded at best. *International Shoe* stressed defendant's activity in connection with the forum,

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50. *See supra* note 36.

51. *See, e.g.*, Clermont, *Restating Territorial Jurisdiction and Venue For State and Federal Courts*, 66 CORNELL L. REV. 411, 418 (1981) ("The opinion indicated that courts should decide . . . jurisdictional issues by balancing the interests of the public, the plaintiff, and the defendant.") (footnotes omitted); Perschbacher, *supra* note 34, at 593-94. Professor Perschbacher uses the phrase "multi-interest balancing approach" to describe *McGee*'s contribution to jurisdictional analysis. *Id.*; *cf.* Lilly, *supra* note 25, at 90 (Professor Lilly reads *McGee* as foreshadowing the two-branch balancing approach of *Burger King*). Unlike Professors Clermont and Perschbacher, who view *McGee* as a pure balancing case, Professor Lilly views *McGee* as continuing to emphasize, consistent with *International Shoe*, the contacts of a defendant with the forum state. His trenchant summary of *McGee* states as follows:

> The *McGee* opinion can be read as a clear indication of the Court's willingness to apply a flexible constitutional standard to issues of in personam jurisdiction. *Assessing the defendant's contacts with the forum state remained a significant part of McGee's jurisdictional inquiry*, but other factors appeared to play an equally important role. Consistent with *McGee*, a court determining jurisdiction could take account of the actual burden of conducting a defense, the situs of the evidence, and the interests of the plaintiff and the forum state. Presumably, a court influenced by *McGee* would be receptive to an argument that *International Shoe*'s requirements of fair play and substantial justice are met by slight or infrequent contacts if other factors--suggesting reasonableness—are present. Thus, *McGee* represented not only the further weakening of territoriality, but it also realigned the fairness calculus of *International Shoe*. *McGee* suggested that courts should assess the defendant's interests in the broader context of the interests of the plaintiff and the forum state.

Id. at 90-91 (footnote omitted) (emphasis added).

and the relationship of that activity to the litigation. *McGee* emphasized the multifold interests of the forum, the plaintiff, the litigation, and the defendant. The Court's next attempt to refine jurisdictional analysis tilted decidedly toward *International Shoe* and away from *McGee*.

Only six months after it decided *McGee*, the Court confronted the problem of personal jurisdiction in the distressingly complex case of *Hanson v. Denckla*.[52] Ignoring *McGee*'s multiple-interest, fairness analysis, the Court focused sharply on the nonresident defendant's relationship with the forum state. As *Hanson* was the first case decided by the Supreme Court after *International Shoe* in which an assertion of jurisdiction by a state court was overturned, many contemporaneous commentators viewed it as abberational,[53] and attributed its result to an unorthodox concern with the merits by Chief Justice Warren.[54]

In *Hanson*, the settlor of a trust created in Delaware later moved to Florida.[55] While a resident of Florida during the eight years preceding her death, the settlor continued to have contact with the trustee, a Delaware bank, concerning administration of the trust.[56] She also executed a will and exercised a power of appointment determining the distribution of the trust assets after her death.[57] The only other contact between the Delaware bank and Florida was the distribution of trust income there to the settlor.[58] After the settlor's death, a dispute arose regarding the disposition of trust assets by the inter vivos power of appointment. Almost all of the potential beneficiaries were domiciliaries of Florida.[59] One group of beneficiaries claimed that the appointment was invalid and that the trust assets in question,

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52. 357 U.S. 235 (1958). For an extensive description and analysis of *Hanson*, see Kurland, *supra* note 22, at 610-23; Scott, *Hanson v. Denckla*, 72 HARV. L. REV. 695 (1959).

53. *See, e.g.*, Hazard, *supra* note 17, at 243-44; von Mehren & Trautman, *supra* note 32, at 1174-79; *cf.* Carrington & Martin, *Substantive Interests and the Jurisdiction of State Courts*, 66 MICH. L. REV. 227, 234-35 (1967).

54. *See, e.g.*, J. COUND, J. FRIEDENTHAL, A. MILLER & J. SEXTON, CIVIL PROCEDURE 104-105, note 1 (4th ed. 1985); J. LANDERS & J. MARTIN, CIVIL PROCEDURE 78, note 1 (1981); McDermott, *supra* note 32, at 13-20.

55. 357 U.S. at 238-39.

56. *Id.* at 252 n.24.

57. *Id.* at 239.

58. *Id.* at 252.

59. *Id.* at 254.

therefore, passed pursuant to the residuary clause of the settlor's will.[60] The Florida courts upheld this position.[61] After the Florida litigation commenced, but before judgment was entered, a competing group of claimants brought suit in Delaware, situs of the trust assets, seeking a declaration that the trust assets were validly appointed by the settlor pursuant to the inter vivos appointment.[62] Delaware refused to accord full faith and credit to the Florida decree[63] and ruled that the trust assets passed pursuant to the power of appointment. Hearing both cases under its certiorari jurisdiction,[64] the Court squarely faced the one issue on which the entire controversy turned: Did the Florida courts properly exercise jurisdiction in the dispute concerning the disposition of the trust assets physically located in Delaware?[65]

Swiftly rejecting any form of in rem jurisdiction,[66] the Court focused on whether the Florida courts had properly exercised personal jurisdiction over the Delaware trustee.[67] The analogy to *McGee*, decided earlier in the same Term, seemed obvious and strongly pointed toward jurisdiction. A nonresident corporate trustee had contact, albeit intermittently, with a Florida citizen over several years. In *McGee* the nonresident insurance company had what appeared to be a similar relationship with a California citizen. While recognizing the trend since *International Shoe* to expand state court jurisdiction, the Court was quick to note the continued existence of territorial limitations on the ex-

60. *Id.* at 240.

61. *Id.* at 238.

62. *Id.* at 242.

63. *Id.* at 243.

64. *Id.* at 238, 244.

65. *See id.* at 243-44.

66. *Id.* at 246-50.

67. There were actually two Delaware corporate fiduciary defendants: The Wilmington Trust Company, the trustee of the trust established by the settlor in Delaware, *id.* at 238, and the Delaware Trust Co., the trustee for two trusts that were appointed to receive $200,000 each under the intervivos appointments and which were actually paid a total of $400,000 upon the settlor's death. *Id.* at 239. Both were named defendants in the Florida litigation. *Id.* at 241.

Substantial controversy existed over whether the Wilmington Trust Comapny was even an indispensable party to the Florida litigation. The Court repeated its understanding that a trustee is an indispensable party to litigation concerning the validity of the trust. *Id.* at 245, 254-55. The Court seemed to go out of its way to decide this issue of Florida law. *Id.* at 255-56; *see also* Kurland, *supra* note 22, at 613-17.

ercise of jurisdictional power over nonresident defendants.[68]

The Court seemed to recognize implicitly that *McGee* may have misplaced emphasis on convenience, and it appeared determined to return jurisdictional analysis to a defendant orientation.[69] Finding no physical ties between the Delaware trustee and Florida,[70] Chief Justice Warren, writing for a bare majority, attempted to distinguish *McGee*. First, he found that no agreement had had a substantial connection to Florida.[71] Unlike the insurance contract in *McGee*, which was solicited in California, the trust agreement in *Hanson* was executed many years earlier in Delaware.[72] Florida had a relationship with this agreement because the settlor moved there. Second, while California's manifest regulatory interest over nonresident insurance companies was obvious, Florida had no similar regulatory concern.[73] Third, Chief Justice Warren recognized that, although Florida might choose its own law for determining the validity of the trust agreement,[74] the question of personal jurisdiction over a nonresident defendant was different.[75] Concluding this part of the opin-

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68. The Court's language seems to have taken direct aim at *McGee*, and focused squarely on power and territorial restriction. The Court observed:

> But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. *They are a consequence of territorial limitations on the power of the respective States.* However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the "minimal contacts" with that State that are a prerequisite to its exercise of *power over him.*

357 U.S. at 251 (citations omitted) (emphasis added).

69. *Id.* at 252 ("But the record discloses no instance in which the *trustee* performed any acts in Florida . . . .") (emphasis in original); *id.* at 254 ("The issue is personal jurisdiction, not choice of law. It is resolved in this case by considering the *acts of the trustee.*") (emphasis added).

70. *Id.* at 251.

71. *Id.* at 251-52.

72. *See supra* note 55.

73. 357 U.S. at 252.

74. *Id.* at 253-54 & n.27; *see also id.* at 258 (Black, J., dissenting).

75. *Id.* The Court has never really explained why personal jurisdiction and choice of law, which involve similar factors, should necessarily be decided separately. Over the years there has been much scholarly criticism of the Court's compartmentalization of these related problems. *See generally* L. BRILMAYER, AN INTRODUCTION TO JURISDICTION IN THE AMERICAN FEDERAL SYSTEM 37 (1986); Hill, *Choice of Law and Jurisdiction in the Supreme Court*, 81 COLUM. L. REV. 960 (1981); Silberman, Shaffer v. Heitner: *The End of an Era*, 53 N.Y.U.L. REV. 33, 79-90 (1978); Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 739-48 (1987); von

ion, the Chief Justice stated:

> The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state. The application of that rule will vary with the quality and nature of defendant's activity, *but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.*[76]

Although originally thought to be aberrational,[77] *Hanson*'s "purposeful availment" requirement is now commonly viewed as the critically significant element in jurisdictional due process.[78] The Delaware trustee in *Hanson* did not reach out to Florida in the same way the Texas insurance company voluntarily affiliated itself with California in *McGee*. It was the "unilateral activity" of the settlor in moving to and exercising the power of appointment in Florida that caused the nonresident defendant to have a relationship with Florida. Notwithstanding its turn away from *McGee*'s interest-balancing approach, *Hanson* did not represent a fundamental recasting of personal jurisdiction. Rather, it was a

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Mehren, *Adjudicatory Jurisdiction: General Theories Compared and Evaluated*, 63 B.U.L. REV. 279, 312-13, 323-31 (1983); von Mehren & Trautman, *supra* note 32, at 1128-1133; Weintraub, *Due Process Limitations on the Personal Jurisdiction of State Courts: Time for Change*, 63 ORE. L. REV. 485, 493, 496 (1984); Note, *Considerations of Choice of Law in the Doctrine of Forum Non Conveniens*, 74 CALIF. L. REV. 565, 590-601 (1986).

The Court has reiterated its separation of choice of law and jurisdiction in several recent cases. *See* Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 778 (1984); Kulko v. Superior Court, 436 U.S. 84, 98 (1978); Shaffer v. Heitner, 433 U.S. 186, 215 (1977). In Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985), the Court again restated this position, but found a contractual choice-of-law provision relevant to deciding whether a defendant purposefully invoked the benefits and protections of the forum state's law. *Id.* at 481-82. Last, in *Asahi* the Court seems to have shifted directions and found that a state's interest in applying its own law to a controversy is a relevant consideration under the fairness or reasonableness branch of the current test of jurisdictional due process. ___ U.S. ___, 107 S. Ct. 1026, 1034 (1987). *See generally* Cox, *The Interrelationship of Personal Jurisdiction and Choice of Law: Forging New Theory Through* Asahi Metal Industry Co. v. Superior Court, 49 U. PITT. L. REV. 189 (1987) (arguing that the minimum contacts test is identical to the test for determining whether a forum can choose its own law). *See infra* notes 366, 372-74 and accompanying text.

76. 357 U.S. at 253 (emphasis added).

77. *See supra* note 53.

78. *See, e.g.*, Louis, *The Grasp of Long Arm Jurisdiction Finally Exceeds Its Reach: A Comment on* World Wide Volkswagen Corp. v. Woodson *and* Rush v. Savchuk, 58 N.C.L. REV. 407, 408-09, 412-13, 421-23 (1980); Perschbacher, *supra* note 34, at 597-99.

refinement of the basic minimum contacts standard enunciated in *International Shoe*.[79] The analysis focused on the nature of a nonresident defendant's activity in the forum state, and whether the nature and quality of that activity[80] demonstrated that the defendant voluntarily affiliated itself with the forum state and received the benefits and protections of the laws of the forum

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79. Although Professor Perschbacher agrees that the *Hanson* Court "embellish[ed] the minimum contacts standard with the added element of 'purposeful availment,'" Perschbacher, *supra* note 34, at 598, he believes that *Hanson* incorrectly cited *International Shoe* to support the proposition that the defendant's activities must invoke the benefits and protections of the forum state's law for jurisdiction to be proper. *Id.* He apparently views invoking benefits and protections "as an illustration, not an absolute requirement for jurisdiction." *Id.* It is correct that *International Shoe* merely observed that "to the extent that a corporation exercises the privileges of conducting activities within a state, it enjoys the benefits and protection of the laws of that state." *International Shoe*, 326 U.S. at 319. But in applying the principles enunciated to the facts, Chief Justice Stone seemed to attach significance to the concept. *Id.* at 320. After noting that *International Shoe*'s activity in Washington was "systematic and continuous," he was careful to note as follows: "They resulted in a large volume of interstate business, in the course of which appellant received the benefits and protections of the laws of the state, including the right to resort to the courts for the enforcement of its rights." *Id.* For further discussion of the significance of invoking the benefits and protections of the forum state law to jurisdictional analysis, see *infra* notes 227-33 and accompanying text.

80. The *Hanson* Court failed to make use of the *International Shoe* categories distilled from pre-*International Shoe* case law. *See supra* note 32 and accompanying text. The *Hanson* fact pattern illustrates how difficult it is to limit the description of a nonresident's forum state activities to two broad classifications: casual and occasional or systematic and continuous. While a defendant's forum state activity may be systematic and continuous in the sense that it occurs at regular intervals, it may only represent a very limited part of the nonresident's national or international trade or business. Moreover, if certain single acts are sufficient to confer jurisdiction, there is no significance to classifying a nonresident defendant's activity as casual and occasional.

Of course, it would seem that the added "purposeful availment" requirement is a condition precedent to jurisdiction in any event. Unless the nonresident defendant's forum state activities are purposefully undertaken, their nature and scope and relationship to the litigation are irrelevant. In *Hanson* the Delaware trustee had intermittent contact with the settlor in Florida. But because the Court viewed these contacts as resulting from the unilateral activity of the settlor, they did not count in the Court's view.

Only rarely has the Court returned to *International Shoe*'s categories. In Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984) the court cited *International Shoe*'s categories without directly discussing them. *Id.* at 774. The Court has engaged in a full scale discussion of the *International Shoe* categories only twice. Both were in the only general jurisdiction cases that the Court has decided. *See* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414-17 (1984); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 445-47 (1952). It would, therefore, seem reasonable to conclude that the only significance to describing abstractly a nonresident defendant's forum state activities by the *International Shoe* classifications is that if the activity is sufficiently and substantially systematic and continuous, general jurisdiction may be appropriate. For a discussion of these two post-*International Shoe* general jurisdiction cases, see *infra* note 213.

state. Unfortunately, the Court failed to explain what it meant by an activity that was sufficient to invoke the benefits and protections of the laws of the forum state.[81] For example, did the benefits and protections invoked have to be related to the forum state activity that gave rise to the litigation or would unrelated activity giving rise to benefits and protections suffice?[82] The Court has never satisfactorily answered this question, nor has it ever sufficiently clarified what it meant by the phrase "benefits and protections" of the forum state law.

Even though the Court gave mixed signals in the 1957-1958 Term, when it decided both *McGee* and *Hanson*, the Court made no attempt to clarify what appeared to be two radically different approaches to jurisdictional analysis for a period of almost twenty years.[83] Although most commentators viewed *Hanson*, with its return to concerns of sovereignty and territorial power, as abberational, viewed from hindsight *McGee*'s amorphous balancing of multiple interests may well have represented the deviation from developing doctrine. At least that reading of *McGee* appeared to be correct prior to *Burger King*[84] and *Asahi*.

Most commentators view the interregnum between *Hanson* and *Shaffer v. Heitner*[85] as an era of jurisdictional expansion in which state legislatures passed long-arm statutes to reach to the limits of due process,[86] in which state courts actually found those limits,[87] and in which *Hanson* was largely ignored.[88]

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81. Lilly, *supra* note 25, at 92 n.29 ("*Hanson* does not make clear what sorts of benefits and protections (in terms of nature or substantiality) are necessary to unlock the door to adjudicatory authority.").

82. *Cf.* Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77 (arguing that unrelated contacts should not support specific jurisdiction).

83. *See generally* Louis, *supra* note 78, at 407-10; Perschbacher, *supra* note 34, at 599.

84. Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985).

85. 433 U.S. 186 (1977). *See infra* notes 96-122 and accompanying text.

86. *See generally* Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. ILL. L.F. 533, 536-37; Gorfinkel & Lavine, *Long-Arm Jurisdiction in California Under New Section 410.10 of the Code of Civil Procedure*, 21 HASTINGS L.J. 1163 (1970); Louis, *supra* note 78, at 408; Perschbacher, *supra* note 34, at 587, 594-95; Comment, *Long-Arm and Quasi in Rem Jurisdiction and the Fundamental Test of Fairness*, 69 MICH. L. REV. 300 (1970).

87. *See, e.g.*, Cornelison v. Chaney, 16 Cal. 3d 143, 545 P.2d 264, 127 Cal. Rptr. 352 (1976); Buckeye Boiler Co. v. Superior Court, 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969); Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

88. *See supra* note 83.

B. 1977-1985: Doctrinal Joinder

Regardless of how one views the interim period, the recent decade from *Shaffer* to *Asahi* provided many reformulations of the due process jurisdictional equation.[89] While frequently recognizing the relevance of *McGee*'s multiple-interest balancing approach, the Supreme Court seemed always to rest its decisions on the firmer foundation of *International Shoe*'s minimum contacts test as refined by *Hanson*.[90] Dissenting in every case in which the Court rejected a state court's assertion of jurisdiction,[91] Justice Brennan was carefully constructing a new foundation on which fundamentally to recast personal jurisdiction.[92] As

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89. *See infra* text accompanying notes 115-21, 132-38, and 160-65.

90. *See, e.g.*, Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Kulko v. Superior Court, 436 U.S. 84 (1978).

91. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 419-28 (1984) (Brennan, J., dissenting); *World-Wide*, 444 U.S. 299-313 (Brennan, J., dissenting) (dissent also applies to Rush v. Savchuk, 444 U.S. 320 (1980)); Kulko v. Superior Court, 436 U.S. 84, 101-02 (1978) (Brennan, J., dissenting); Shaffer v. Heitner, 433 U.S. 186, 219-28 (1977) (Brennan, J., dissenting).

92. First, dissenting in *World-Wide* and *Rush*, Justice Brennan openly expressed dissatisfaction with minimum contacts as the touchstone of jurisdictional due process when he stated: "Because I believe that the Court reads *International Shoe* and its progeny too narrowly, and because *I believe that the standards enunciated by those cases may already be obsolete as constitutional boundaries*, I dissent." *Rush*, 444 U.S. at 299 (emphasis added). Later in his opinion, Justice Brennan observed: "It may be that affirmance of the judgments in these cases would approach the outer limits of *International Shoe*'s jurisdictional principle. But that principle, with its almost exclusive focus on the rights of defendants, may be outdated." *Id.* at 307-08.

Second, Justice Brennan started to articulate a new approach to jurisdictional due process, in which the purposeful availment contacts doctrine of *International Shoe* and *Hanson* was joined with the multiple-interest balancing doctrine of *McGee*. Justice Brennan's approach started to take meaningful form in his *World-Wide* dissent when he observed:

> The existence of contacts, so long as there were some, was merely one way of giving content to the determination of fairness and reasonableness.
>
> *Surely International Shoe contemplated that the significance of the contacts necessary to support jurisdiction would diminish if some other consideration helped establish that jurisdiction would be fair and reasonable.* The interests of the State and other parties in proceeding with the case in a particular forum are such considerations. *McGee v. International Life Ins. Co.*, for instance, accorded great importance to a State's "manifest interest in providing effective means of redress" for its citizens.
>
> Another consideration is the actual burden a defendant must bear in defending the suit in the forum. Because lesser burdens reduce the unfairness to

several recent commentators have suggested,[93] he may have finally succeeded in *Burger King Corp. v. Rudzewicz*.[94] Justice Brennan attempted to unify the divergent earlier approaches into a single test and in doing so may have caused the fragmentation so evident in *Asahi*.

As with the emergence of the two doctrinally distinct approaches in the thirteen-year period after *International Shoe*, it is beyond the scope of this Article to analyze in detail all the twists and turns of Supreme Court jurisdictional jurisprudence in the current era.[95] It is necessary, however, to trace the evolution of the Court's two-branch approach to jurisdictional analysis, which materialized in its present form in *Burger King*, to understand why the *Asahi* Court was so deeply divided.

Although *Shaffer v. Heitner*[96] is unquestionably the most significant Supreme Court decision concerning state court jurisdiction since *International Shoe*, it's primary importance is its toppling of *Pennoyer*'s in rem branch. Nevertheless, in accom-

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> the defendant, jurisdiction may be justified despite less significant contacts. The burden, of course, must be of constitutional dimension. Due process limits on jurisdiction do not protect a defendant from all inconvenience of travel, and it would not be sensible to make the constitutional rule turn solely on the number of miles the defendant must travel to the courtroom. Instead, the constitutionally significant "burden" to be analyzed relates to the mobility of the defendant's defense. For instance, if having to travel to a foreign forum would hamper the defense because witnesses or evidence or the defendant himself were immobile, or if there were a disproportionately large number of witnesses or amount of evidence that would have to be transported at the defendant's expense, or if being away from home for the duration of the trial would work some special hardship on the defendant, then the Constitution would require special consideration for the defendant's interests.

Id. at 300-01 (emphasis added) (citations omitted).

93. Perschbacher, *supra* note 34, at 612-24; *see also* Knudsen, Keeton, Calder, Helicopteros *and* Burger King—International Shoe's *Most Recent Progeny*, 39 U. MIAMI L. REV. 809, 837-40 (1985); Sonenshein, *The Error of a Balancing Approach to the Due Process Determination of Jurisdiction Over the Person*, 59 TEMP. L.Q. 47, 56-58 (1986); Comment, *Giving the Boot to the Long-Arm: Analysis of Post-*International Shoe *Supreme Court Personal Jurisdiction Decisions, Emphasizing Unrealized Implications of the "Minimum Contacts" Test*, 75 KY. L.J. 885, 898-901, 905-09 (1987).

94. 471 U.S. 462, 471-78 (1985).

95. For more extensive analysis of the most recent Supreme Court personal jurisdiction decisions and their underlying theories, see Greenstein, *The Nature of Legal Argument: The Personal Jurisdiction Paradigm*, 38 HASTINGS L.J. 855 (1987); Knudsen, *supra* note 93; Perdue, *supra* note 17, at 508-19; Perschbacher, *supra* note 34; Stein, *supra* note 75; Weintraub, *supra* note 75; Comment, *supra* note 93.

96. 433 U.S. 186 (1977).

plishing that very worthy and long overdue goal,[97] the majority, speaking through Justice Marshall, gave strong support to the defendant approach of *Hanson*.

The jurisdictional issue in *Shaffer* was complicated because the forum state asserted quasi-in-rem[98] rather than personal jurisdiction. A stockholder of a Delaware corporation with its principal place of business in Phoenix, Arizona commenced a shareholder's derivative action in the Delaware Court of Chancery against the corporation, its wholly-owned subsidiary,[99] and twenty-eight officers or directors of one or both corporate defendants.[100] The complaint alleged that the individual defendants breached their duties to the corporations by causing the corporations to engage in activities in Oregon resulting in "substantial damages in a private antitrust suit and a large fine in a criminal contempt action."[101] None of the individual defendants was a resident of Delaware.[102] No act relevant to the cause of action occurred in Delaware,[103] and apparently none of the individual defendants had any contact with Delaware other than through their positions as officers and directors of the Delaware chartered defendant or its wholly-owned subsidiary.[104]

Nonpersonal jurisdiction was asserted over the individual

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97. The application of *International Shoe*'s standards to assertions of quasi-in-rem jurisdiction had been proposed by many courts and commentators prior to *Shaffer*. The principal cases and commentaries are collected in Silberman, *supra* note 75, at 34-35 n.34.

98. In *Hanson* the Supreme Court provided definitions for the traditional jurisdictional categories as follows:

> A judgment *in personam* imposes a personal liability or obligation on one person in favor of another. A judgment *in rem* affects the interests of all persons in designated property. A judgment *quasi in rem* affects the interests of particular persons in designated property. The latter is of two types. In one the plaintiff is seeking to secure a pre-existing claim in the subject property and to extinguish or establish the nonexistence of similar interests of particular persons. In the other the plaintiff seeks to apply what he concedes to be the property of the defendant to the satisfaction of a claim against him.

Hanson v. Denckla, 357 U.S. 235, 246 n.12 (1958). It used these same definitions in *Shaffer*. 433 U.S. at 199 n.17 (quoting Hanson v. Denckla, 357 U.S. 235, 246 n.12 (1958)).

99. The subsidiary was a California corporation with a principal place of business in Phoenix, Arizona. 433 U.S. at 189 n.1.

100. *Id.* at 189-90.

101. *Id.* at 190 (footnotes omitted).

102. *Id.* at 191.

103. *Id.* at 213.

104. *See id.*

defendants. Delaware law deemed Delaware the situs of ownership of all stock in Delaware corporations.[105] Pursuant to this statute, common stock and options of twenty-one of the twenty-eight individual defendants[106] were seized under Delaware's sequestration procedure.[107] These defendants made special appearances to challenge on due process grounds the assertion of jurisdiction.[108] After losing in the state courts, they prevailed in the United States Supreme Court.

Rejecting the fiction that an action against property is not, in essence, an action against the owner of the property,[109] the Court, "conclude[d] that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."[110] Applying those standards to the nonresident, individual defendants in the case before it, the Court emphasized the relationship among the forum state, the litigation, and the defendants. Its approach was substantially closer to *International Shoe* and *Hanson* than it was to *McGee*. Although it referred to the "reasonableness" and "fair play" standard of *International Shoe* at several places in its opinion,[111] the Court appeared to rely, as it had in *International Shoe*, on contacts as an indication of fairness and reasonable-

105. *Id.* at 192 & n.9.

106. *Id.* at 192 & nn.7 & 8.

107. *Id.* at 190-91 & nn.4-6.

108. *Id.* at 192-93.

109. *Id.* at 205-06.

110. *Id.* at 212. Despite the passage of more than ten years since the Court concluded that all assertions of state court jurisdiction must be analyzed under *International Shoe*'s standards, *Shaffer*'s reach remains in dispute. *See e.g.*, R. LEFLAR, L. MCDOUGAL, & R. FELIX, AMERICAN CONFLICTS LAW § 41 (4th ed. 1986); Note, *The Physical Presence Basis of Personal Jurisdiction Ten Years After* Shaffer v. Heitner: *A Rule in Search of a Rationale*, 62 NOTRE DAME L. REV. 713 (1987). For earlier commentary speculating on the reach of *Shaffer*, see Lilly, *supra* note 25, at 97 n.55.

111. Concluding its historical review of personal jurisdiction developments, the Court stated: "We think that the time is ripe to consider whether the standard of fairness and substantial justice set forth in *International Shoe* should be held to govern actions *in rem* as well as *in personam*." 433 U.S. at 206. In addition, in urging that *International Shoe* serve as a universal standard for all forms of jurisdiction, the Court noted as follows: "The case for applying to jurisdiction *in rem* the same test of 'fair play and substantial justice' as governs assertions of jurisdiction *in personam* is simple and straightforward." *Id.* at 207. In responding to the argument that "*in rem* jurisdiction avoids the uncertainty inherent in the *International Shoe* standard," *id.* at 211, the Court predicted that "the fairness standard of *International Shoe* can be easily applied in the vast majority of cases." *Id.*

ness.[112] It found the contacts created by the ownership of stock to be inadequate to confer jurisdiction.[113]

As the chartering state, Delaware obviously had a substantial, if not manifest, regulatory interest in the conduct of officers and directors of Delaware corporations.[114] The Court, however, rejected the argument that this strong state interest alone should permit jurisdiction, because Delaware failed to enact a statute specifically making corporate fiduciaries of Delaware corporations subject to jurisdiction.[115] If the Court had been inclined to adopt the *McGee* approach, the substantial state interest would have weighed heavily in favor of jurisdiction. Moreover, the Court, in most conclusory langauge, suggested that, even if Delaware's interest is acknowledged, the "argument fails to demonstrate that Delaware is a fair forum for this litigation."[116] Instead of elaborating the fairness point, the Court immediately returned to the argument, which was so prominent in *Hanson*,[117] that, even if the strong state interest supported the application of Delaware law, it did not necessarily follow that jurisdiction could be asserted over the defendants.[118] Responding to the argument that defendant officers and directors invoked the benefits and protections of Delaware law, a critically significant element of *Hanson*'s jurisdictional analysis, the Court stated that this argument only suggested once more that Delaware law should apply to the controversy, but that it did not "demonstrate that appellants have 'purposefully avail[ed themselves] of the privilege of conducting activities within the forum State,' in a way that would justify bringing them before a Delaware tribunal."[119] Finally, in language foreshadowing *World-Wide*'s foreseeability analysis,[120] the Court observed that the defendants "had no reason to expect to be haled before a Delaware

112. *See id.* at 216; *accord* Brilmayer, *supra* note 82, at 81 & n.28.

113. *Id.* at 213.

114. *Id.* at 222-23 (Brennan, J., dissenting).

115. *Id.* at 214. Shortly after the decision in *Shaffer*, the Delaware legislature enacted a service of process statute to reach nonresident directors of Delaware corporations. DEL. CODE ANN. tit. 10, § 3114 (Cum. Supp. 1986); *see* J. COUND, J. FRIEDENTHAL, A. MILLER & J. SEXTON, *supra* note 54, at 149, note 1.

116. 433 U.S. at 215.

117. *See supra* notes 74 & 75 and accompanying text.

118. 433 U.S. at 215.

119. *Id.* at 216 (citation omitted).

120. *See infra* notes 174-78 and accompanying text.

court."[121] Once more the Court offered no explanation for this observation. To the contrary, logic suggests that an officer and director of a Delaware corporation should well anticipate litigation in the courts of Delaware, especially in connection with a shareholder's derivative suit.

Although commentators have debated *Shaffer*'s contribution to the current two-branch approach to jurisdictional due process,[122] *Shaffer* resurrected little, if any, of *McGee*'s multiple-interest balancing approach, while it placed heavy reliance on the affiliational minimum contacts test of *International Shoe* and *Hanson*.

The next Term in *Kulko v. Superior Court*[123] the Court continued to emphasize the relationship between the defendant and the forum state. A couple, domiciliaries of New York, separated and later divorced.[124] The wife took up residence in California, but returned to New York to sign a separation agreement, which provided for the couple's children to live with their father in New York and spend holidays with their mother in California.[125] Thereafter, the mother obtained a Haitian divorce.[126] Less than two years later one child asked to live with her mother. Her father acquiesced and bought the child a one-way plane ticket to California.[127] Two years later the other child moved to California with a plane ticket provided by his mother.[128] Shortly thereafter the mother commenced an action against the father in California seeking to (1) domesticate her previously obtained Haitian divorce, (2) obtain full custody of the couple's children, and (3) increase her husband's child support obligations.[129] The defendant made a special appearance to

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121. 433 U.S. at 216.

122. *Compare* Perschbacher, *supra* note 34, at 600 ("[T]he Court relied on *Hanson*'s territorial view of minimum contacts, not *McGee*'s interest-balancing approach.") *with* Clermont, *supra* note 51, at 421 ("The surprising result, then, is that the formluations of both *McGee* and *Hanson* survive: an assertion of jurisdiction apparently must pass both the reasonableness and the power tests.") (footnote omitted).

123. 436 U.S. 84 (1978).

124. *Id.* at 86-87.

125. *Id.* at 87.

126. *Id.*

127. *Id.* at 87-88.

128. *Id.* at 88.

129. *Id.* Defendant only contested jurisdiction to increase his child support obligation.

challenge jurisdiction "on the ground that he was not a resident of California and lacked sufficient 'minimum contacts' with the State . . . to warrant the . . . assertion of personal jurisdiction over him."[130] The California Supreme Court, with two judges dissenting, affirmed the lower courts' rejection of the defendant's jurisdictional challenge because the defendant had caused effects in California by allowing his children to live there, and because he invoked the benefits and protections of California law when he sent his daughter to live with her mother in California.[131]

The Supreme Court reversed. In its discussion of legal principles, the Court once again strongly emphasized the affiliational minimum contacts test derived from *International Shoe*, *Hanson* and *Shaffer*, as opposed to the multiple-interest balancing approach of *McGee*. Speaking for the Court, Justice Marshall stated: "The existence of personal jurisdiction . . . depends upon . . . *a sufficient connection between the defendant and the forum state* to make it fair to require defense of the action in the forum."[132] Although the Court gave substantial attention to the interests of the plaintiff and the forum state,[133] the Court rested its holding on the lack of any relevant contact between the defendant and the forum state.[134] As in *International Shoe*, fairness and reasonableness were not independently factored into the jurisdictional equation, but were assumed if contacts were established. The Court expressed this view as follows:

> While the interests of the forum State and of the plaintiff in proceeding with the cause in the plaintiff's forum of choice are, of course, to be considered, an essential criterion in all cases is whether the "quality and nature" of the defendant's activity is such that it is "reasonable" and "fair" to require him to conduct his defense in that State.[135]

Undoubtedly the decision of the Court striking down Cali-

130. *Id.* (citation omitted).

131. Kulko v. Superior Court, 19 Cal. Sup. Ct. 3d 514, 524-25, 564 P.2d 353, 358-59, 138 Cal. Rptr. 586, 591 (1977), *aff'g* 63 Cal. App. 3d 417, 133 Cal. Rptr. 627 (Ct. App. 1976), *rev'd*, 436 U.S. 84 (1978).

132. 436 U.S. at 91 (emphasis added) (citations omitted).

133. *Id.* at 92, 98, 100. More attention was given to plaintiff and forum state interests than in any case since *McGee*.

134. *Id.* at 100-01.

135. *Id.* at 92 (citation omitted).

fornia's assertion of jurisdiction was substantially influenced by the domestic relations context in which the jurisdictional issue was presented.[136] The Court had difficulty applying principles derived from jurisdictional disputes arising in tort and commercial contexts to litigation over custody and child support.[137] Although *Kulko* undoubtedly was consistent with the affiliational minimum contacts approach, its substantial consideration of plaintiff and forum state interests also appeared to validate *McGee*'s multiple-interest balancing approach for modern jurisdictional analysis. But as in *McGee*, the Court failed to clarify how these considerations are factored into the jurisdictional framework established in *International Shoe* or how they independently impact upon the analysis.[138] Nevertheless, *Kulko* may well have laid the groundwork for the doctrinal joinder of *International Shoe* and *Hanson* with *McGee*. The Court's next personal jurisdiction decision expressly attempted to divide jurisdictional due process into a two-branch inquiry.

In deciding whether Oklahoma could assert personal jurisdiction over two New York defendants in a products liability action arising out of an accident in Oklahoma, the Supreme Court in *World-Wide Volkswagen v. Woodson*[139] explicitly divided minimum contacts analysis into two distinct branches. Writing for a divided Court,[140] Justice White articulated this conceptual division as follows:

> The concept of minimum contacts . . . can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.[141]

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136. *See id.* at 93, 94, 97-98. *See generally* Bodenheimer & Neeley-Kvarme, *Jurisdiction Over Child Custody and Adoption After* Shaffer *and* Kulko, 12 U.C. DAVIS L. REV. 229 (1979).

137. 436 U.S. at 97.

138. *See supra* text accompanying note 49.

139. 444 U.S. 286 (1980).

140. The Court divided 6-3, with Chief Justice Burger and Justices Stewart, Powell, Rehnquist, and Stevens joining Justice White's majority opinion. Justices Brennan, Marshall, and Blackmun each filed dissenting opinions.

141. 444 U.S. at 291-92. Commentators soon dubbed the two "related, but distinguishable, functions," *id.*, the "sovereignty branch" and the "convenience branch" of a

The Court then attempted to explain its two "related, but distinguishable, functions."[142] Finding a source for protection against inconvenient litigation in the general language of *International Shoe*,[143] the Court characterized this function or branch of minimum contacts as testing reasonableness or fairness.[144] The Court identified five separate elements distilled from prior case law to give content to this branch. They were: (1) "burden on the defendant;"[145] (2) "the forum State's interest in adjudicating the dispute;"[146] (3) "the plaintiff's interest in obtaining convenient and effective relief,[147] at least when that interest is not adequately protected by the plaintiff's power to choose the forum;"[148] (4) "the interstate judicial system's interest in obtaining the most efficient resolution of controversies;"[149] and (5) "the shared interest of the several states in furthering fundamental substantive social policies."[150] Other than its recognition, in view of modern advances in transportation and communication,[151] of the diminished role of due process to protect against inconvenient litigation, the articulation of the five elements, without further explanation or elaboration, was the Court's only discussion of the fairness branch.

Although the Court alluded to state sovereignty and federalism in *International Shoe*[152] and *Hanson*,[153] these concepts had

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new two-part test. *See, e.g.*, J. COUND, J. FRIENDENTHAL, A. MILLER & J. SEXTON, *supra* note 54, at 115, note 2.

142. 444 U.S. at 291-92.

143. *Id.* at 292.

144. *Id.*

145. *Id.*

146. *Id.* (citing McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957)).

147. *Id.* (citing Kulko v. Superior Court, 436 U.S. 84, 92 (1978)).

148. *Id.* (citing Shaffer v. Heitner, 433 U.S. 186, 211 n.37 (1977)).

149. *Id.* (citing *Kulko*, 436 U.S. at 93, 98).

150. *Id.*

151. *Id.* at 292-93.

152. Paraphrasing Judge Learned Hand's famous criticism of the "presence" fiction, Chief Justice Stone, in *International Shoe*, acknowledged that presence is "used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy *the demands of due process.*" 326 U.S. at 317 (emphasis added) (citing Hutchinson v. Chase & Gilbert, Inc., 45 F.2d 139, 141 (2d Cir. 1930)). The Court then recognized that sovereignty and federalism are implicated in jurisdictional due process when it stated: "Those demands may be met by such contacts of the corporation with the state of the forum as make it reasonable, *in the context of our federal system of government*, to require the corporation to defend the particular suit which is brought there." *Id.* (emphasis added).

never been given the significance they had in *World-Wide*. Perhaps the Court was using "sovereignty" as a substitute for the purposeful affiliation requirement derived from those earlier cases.[154] Hindsight and the final part of the *World-Wide* opinion strongly suggest that this substitution is probably what the Court intended by its use of sovereignty.[155] Nevertheless, the concept of sovereignty as presented by the Court was susceptible to a much broader and quite different interpretation. Justice White appeared to find a structural limitation in both the original text and the fourteenth amendment of the Constitution to the assertion of state court personal jurisdiction.[156] He described

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153. Discussing in rem jurisdiction, Chief Justice Warren observed: "Founded on physical power, the *in rem* jurisdiction of a state court is limited by the extent of its power and *by the coordinate authority of sister States*. The basis of the jurisdiction is the presence of the subject property within the *territorial jurisdiction* of the forum State." Hanson v. Denkla, 357 U.S. 235, 246 (1958) (emphasis added) (citations and footnote omitted); *see supra* note 68 and accompanying text.

154. *See* Lilly, *supra* note 25, at 104. Professor Lilly explained the "sovereignty" concept in terms that parallel traditional views of minimum contacts when he wrote:

> [W]hen one state manifests its sovereign power through the purported exercise of its judicial jurisdiction, parallel prerogatives of sister states may circumscribe this authority. *The quality, number or pattern of defendant's contacts will determine which states can sustain their competing jurisdictional claims.* Because contacts are measured against the requirements of the due process clause, this constitutional provision limits and distributes the judicial power among the various states.

Id. (emphasis added) (footnote omitted).

155. *See* 444 U.S. at 295-99. Justice White may have adopted the sovereignty concept to free conventional minimum contacts analysis from the vestiges of *Pennoyer*'s narrow view of adjudicatory power. Of course, calling something by another name does not really change it. Part III of the *World-Wide* opinion is consistent with *International Shoe* and *Hanson*. *See infra* text accompanying notes 164-65.

156. Justice White articulated this structural limitation on the assertion of state court jurisdiction as follows:

> Nevertheless, 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. The economic interdependence of the States was foreseen and desired by the Framers. In the Commerce Clause, they provided that the Nation was to be a common market, a "free trade unit" in which the States are debarred from acting as separable economic entities. But the Framers also intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister States—*a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment.*

444 U.S. at 293 (emphasis added) (citation omitted). No further explanation was offered for this significant constitutional pronouncement.

these limitations as being contained in "principles of interstate federalism embodied in the Constitution."[157] But he did not state where in the text, or fourteenth amendment, of the Constitution these principles are found.[158] Moreover, Justice White failed to explain how the assertion of jurisdiction by one state might impinge upon the sovereignty of a sister state.[159]

Immediately before applying the articulated principles to the facts of *World-Wide*, Justice White seemed to elevate the sovereignty branch to a far more prominent role than the fairness branch. This portion of the opinion appeared inconsistent with the earlier articulation of the dual role played by minimum contacts, in which each function or branch appeared equally important.[160] After quoting *International Shoe* for the innocuous proposition that due process prohibits a state from asserting jurisdiction over a defendant with which it "has no contacts, ties, or relations,"[161] Justice White emphatically stated:

> Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum state is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.[162]

This powerful language appeared to sound the death knell for *McGee*'s multi-interest balancing approach to jurisdictional due process. Contemporaneous commentators certainly viewed *World-Wide* that way.[163]

Remarkably, in applying its new two-branch minimum con-

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157. *Id.*

158. *See supra* note 156.

159. *See id.*

160. *See supra* note 141 and accompanying text.

161. 444 U.S. at 294.

162. *Id.* (citation omitted).

163. *See, e.g.*, Clermont, *supra* note 51, at 422-23; Kamp, *Beyond Minimum Contacts: The Supreme Court's New Jurisdictional Theory*, 15 GA. L. REV. 19, 20, 24, 29 (1980). *See generally* Lewis, *The Three Deaths of "State Sovereignty" and the Curse of Abstraction in the Jurisprudence of Personal Jurisdiction*, 58 NOTRE DAME L. REV. 699, 711-18 (1983); Comment, *Federalism, Due Process, and Minimum Contacts*: World-Wide Volkswagen Corp. v. Woodson, 80 COLUM. L. REV. 1341, 1352-61 (1980).

tacts test to the case before it, the Court not only forgot about the fairness branch, but it also seemed to ignore the sovereignty branch, at least insofar as sovereignty had any significance "as an instrument of interstate federalism."[164] The Court's analysis, however, was perfectly consistent with *International Shoe* and *Hanson*. The analysis focused on whether the nonresident defendants had purposefully availed themselves of the benefits and protections of Oklahoma law. The Court found that they had not, and reversed the decision of the Oklahoma Supreme Court, which had upheld jurisdiction over the two New York defendants.[165]

The *World-Wide* defendants were all participants in the distribution of Audi automobiles. An Audi automobile manufactured by one defendant,[166] imported by another,[167] and regionally distributed by a third,[168] was sold by a retail dealer, the fourth defendant,[169] to plaintiffs in New York. Plaintiffs later decided to move to Arizona.[170] While traveling in their Audi from New York to their new home in Arizona, plaintiffs were involved in an accident in Oklahoma, causing personal injury and property damage.[171] Claiming that their injuries resulted from design defects in the Audi's gas tank and fuel system, they brought a products liability action in an Oklahoma state court against each party in the Audi's chain of distribution.[172] The New York regional distributor and retail dealer challenged jurisdiction. Despite the apparent absence of any connection between the New York defendants and the forum state, the Oklahoma Supreme Court upheld jurisdiction because an automobile sold and distributed by these defendants was involved in an accident in Oklahoma, and on the alternative, but speculative, ground that these defendants derive substantial economic benefit from automobiles that may periodically be used in Oklahoma.[173]

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164. 444 U.S. at 294.
165. *Id.* at 295, 298-99.
166. Audi NSU Auto Union Aktiengesellschaft. *Id.* at 288.
167. Volkswagen of America, Inc. *Id.*
168. World-Wide Volkswagen Corp. *Id.*
169. Seaway Volkswagen, Inc. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. *See id.* at 290-91.

Finding "a total absence of those affiliating circumstances that are a necessary predicate to any exercise of state-court jurisdiction,"[174] the Supreme Court reversed. The remainder of the majority opinion is devoted largely to refuting the argument that jurisdiction was proper because it generally was foreseeable that an automobile purchased in New York might cause injury in Oklahoma.[175] The Court acknowledged, however, that "foreseeability" is not "wholly irrelevant."[176] In expressing this view, drawn from its then most recent jurisdiction decisions,[177] the Court appeared to articulate another critically significant element of jurisdictional analysis when it stated: "[T]he foreseeability that is critical to the due process analysis is . . . that the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there."[178] While some commentators view the "foreseeability of being haled into court" requirement favorably,[179] and others find

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174. *Id.* at 295. The Court also noted:

> Petitioners carry on no activity whatsoever in Oklahoma. They close no sales and perform no services there. They avail themselves of none of the privileges and benefits of Oklahoma law. They solicit no business there either through salespersons or through advertising reasonably calculated to reach the State. Nor does the record show that they regularly sell cars at wholesale or retail to Oklahoma customers or residents or that they indirectly, through others, serve or seek to serve the Oklahoma market.

Id.

175. *Id.* at 295-96.

176. *Id.* at 297.

177. Both *Kulko* and *Shaffer* mentioned, but did not attach substantial significance to, the concept of reasonably anticipating forum state litigation. Kulko v. Superior Court, 436 U.S. 84, 97-98 (1978); *see supra* text accompanying notes 120-21 (*Shaffer*).

178. 444 U.S. at 297. Professor Perschbacher, notwithstanding his criticism of the concept, *see infra* note 180, views foreseeability in the *World-Wide* sense as a critically significant element of jurisdictional due process. Perschbacher, *supra* note 34, at 604 ("In *World-Wide Volkswagen* and to a greater extent in *Burger King*, foreseeability has become a critical step in the analysis.").

179. *See, e.g.*, Hay, *Judicial Jurisdiction Over Foreign- Country Corporate Defendants—Comments on Recent Case Law*, 63 OR. L. REV. 431, 432-33 (1984) (foreseeability "is a proper counterbalance to the local forum's inclination to favor the local plaintiff"); *cf.* Lewis, *A Brave New World for Personal Jurisdiction: Flexible Tests Under Uniform Standards*, 37 VAND. L. REV. 1, 18-24 (1984), in which Professor Lewis urges that factors extrinsic to the lawsuit are a more reliable indicators of the concept of "foreseeability of forum state litigation" than are intrinsic factors. He expressed this view as follows:

> How readily a court concludes that a reasonable person in the defendant's position should have expected suit in a particular forum state on a particular claim will vary with the source and probative value of the evidence about expectations. In the usual case the only evidence relevant to these expectations

it useless,[180] it generally is duplicative of *Hanson*'s purposeful

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that will be adducible at a hearing on jurisdiction will be intrinsic to the lawsuit—it will consist of the facts about the defendant's allegedly actionable conduct and the place where that conduct occurred or had reasonably foreseeable effects. In such cases a court should proceed cautiously before concluding that a reasonable person in the defendant's position should have expected to defend the particular claim in the particular forum picked by the plaintiff. Nevertheless, the situs of the defendant's conduct at issue in the lawsuit may often be enough, standing alone, to fairly support an inference of the required expectations. For example, if the plaintiff proves that the defendant's assertedly actionable conduct took place in or foreseeably affected State X, and State X is the forum, may it not be fairly concluded that a reasonable potential defendant (assuming he contemplated suit somewhere) should have included State X among the states in which he might be called to account? Indeed, on close examination, nonresident motorist statues and other widely accepted means of securing personal jurisdiction that are rationalized in terms of contacts in fact may be constitutionally valid today only on this broader rationale of expectations generated by the situs of the defendant's challenged activity.

A court should be far less hesitant to find that a reasonable person in the defendant's position ought to have expected to defend a particular claim in a particular state when extrinsic evidence of such an expectation is present—that is, evidence about circumstances, other than the defendant's conduct at issue in the lawsuit, that should put the potential defendant on notice of where an action might be brought. Examples of such circumstances include forum selection clauses in contracts, other affirmative indications of consent to jurisdiction, and state long-arm statutes that are keyed to specific transactions. These circumstances usually will enable courts to conclude fairly and confidentially that the hypothetical reasonable defendant who contemplates suit should have expected to be sued in the state designated by the long-arm statute, contractual agreement, or other medium of consent. Fundamental fairness does suggest, however, two caveats on this rationale. First, the evidence must show that the statute, forum selection clause, or other extrinsic source of the defendant's expectations about place of suit likely will put the defendant on notice that his conduct might subject him to the jurisdiction of a particular state. Second, if the extrinsic source of the defendant's expectations about place of suit is his own agreement, that agreement must be voluntary in the sense that the defendant could have withheld it without sacrificing a preexisting constitutional right.

Id. at 20-22 (emphasis added) (footnotes omitted).

180. *See, e.g.*, Maltz, *Reflections on a Landmark*: Shaffer v. Heitner *Viewed From a Distance*, 1986 B.Y.U.L. REV. 1043, 1056-57; Perschbacher, *supra* note 34, at 604, in which the author criticizes *World-Wide*'s foreseeability analysis as follows:

> Requiring a reasonable anticipation of forum litigation has its problems. On one level, this analysis is hopelessly circular--or at least dependent on the last Supreme Court jurisdiction opinion. ("Reasonably anticipate" is a subjective element objectively defined.) Potential defendants probably do not actually consider the possibility of litigation in an out-of-state forum, or any particular place for that matter. Assuming they do (which this test must require), and that this element must be shown objectively, the distinction between the foreseeability of litigation because one sells products in a distant forum through intermediaries or whether the products arrive in the forum through

availment requirement. Justice White even acknowledged as much when he observed that if " 'a corporation purposefully avails itself of the privileges of conducting activities within the forum State,' it has clear notice that it is subject to suit there."[181] In some situations, however, a nonresident defendant may not invoke the benefits and protections of forum state law, but forum state litigation nevertheless may be foreseeable. This situation is most likely to be found in tort and other noncommercial cases with individual defendants. Purposeful availment of the benefits and protections of forum state law most often is encountered in commercial contexts by business defendants.[182] A nonresident individual, on the other hand, may engage in conduct either within[183] or without[184] the state, which will have

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the predictable movement of consumers is a difficult one. However, the Court makes this distinction, over vigorous dissents in *World-Wide Volkswagen.*

Id. (footnote omitted); Weinberg, *The Helicopter Case and the Jurisprudence of Jurisdiction*, 58 S. CAL. L. REV. 913, 919 (1985) ("foreseeability of the place of trial is a value that does not seem to need heavy handed constitutional protection"); Weintraub, *supra* note 75, at 502 (suggesting that *World-Wide*'s view of foreseeability "would protect from suit even a large, multi-state seller of high-priced goods and, perhaps more to the point, would protect that seller's liability insurer").

181. 444 U.S. at 297.

182. *See, e.g.*, Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472-76, 480-82 (1985); Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 773-75, 779, 781 (1984); Travelers Health Ass'n v. Virginia, 339 U.S. 643, 648 (1950).

183. For example, when a nonresident motorist uses the highways of the forum state, he does not invoke the benefits and protections of the forum state law that are related to the litigation in any meaningful sense. Of course, the police power of the state protects the motorist while he is in the forum state, and, of course, the nonresident may sue a tortfeasor in the courts of the forum state. But these types of forum state benefits and protections are not directly related to the occurrence of an automobile accident giving rise to the lawsuit. Professor Stein expressed the view that benefits in these circumstances are far outweighed by the burdens imposed on the nonresident defendant. Stein, *supra* note 75, at 736 (criticizing purposeful availment as a "consensual" or "fair exchange" doctrine, but approving jurisdiction over a nonresident motorist in an action arising from a forum state accident because such a defendant acts within the forum's "sphere of regulatory authority").

184. *E.g.*, Calder v. Jones, 465 U.S. 783, 787 & n.6, 789 (1984) (approved jurisdiction over two Florida journalists in California based on the effects caused by their allegedly libelous article in the forum state). In the tort context presented in *Calder* it is difficult to see how the nonresident defendants invoked the benefits and protections of forum state law while writing and publishing their article. It is easy, however, to discern how these defendants reasonably should have anticipated litigation in California where the target of their article lived and worked. *But see* Kulko v. Superior Court, 436 U.S. 84 (1978) (suggesting that the forum "effects" in a domestic relations dispute were too attenuated to confer jurisdiction). For further discussion and analysis of *Calder*, see *infra* note 207.

foreseeable consequences from which the individual reasonably should anticipate forum state litigation. Consequently, in many situations *World-Wide*'s foreseeability concept apparently has independent significance apart from *Hanson*'s purposeful availment requirement.

Finally, the Court contrasted the unilateral conduct of the *World-Wide* plaintiffs in driving their New York-purchased automobile to Oklahoma with an attempt by a manufacturer to serve, directly or indirectly, a foreign market. In dicta which would deeply divide the *Asahi* Court, Justice White observed:

> The forum state does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.[185]

World-Wide and its companion case *Rush v. Savchuk*[186] seemed

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185. 444 U.S. at 297-98.

186. 444 U.S. 320 (1980). In *Rush* the Court struck down Minnesota's assertion of quasi-in-rem jurisdiction arising from the garnishment of an insurance obligation. Under this type of attachment jurisdiction, which developed in New York, *see* Simpson v. Loehmann, 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1967); Seider v. Roth, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966), a forum state plaintiff could attach the obligation of an insurance company doing business in the forum to defend and indemnify a nonresident-insured defendant.

The facts were simple. Savchuk was a passenger in an automobile driven by Rush which was involved in a single car accident in Indiana. The car was owned by Rush's father and was insured by State Farm Mutual Automobile Insurance Company. 444 U.S. at 322. Any claim by Savchuk against Rush would have been barred by Indiana's guest statute. *Id.* After moving to Minnesota, Savchuk commenced an action against Rush. As there was no basis to assert personal jurisdiction over Rush in Minnesota, "Savchuk attempted to obtain jurisdiction by garnishing State Farm's obligation under the insurance policy to defend and indemnify Rush in connection with such a suit." *Id.* (footnote omitted).

The Minnesota Supreme Court upheld the exercise of quasi-in-rem jurisdiction. Savchuk v. Rush, 311 Minn. 480, 245 N.W.2d 624 (1976). On appeal the Supreme Court vacated the judgment and remanded for reconsideration in light of *Shaffer*. 433 U.S. 902 (1977). Distinguishing its garnishment statute from Delaware's sequestration procedure, which was struck down in *Shaffer*, because the insurance policy was intimately related to the litigation, the Minnesota Supreme Court again upheld jurisdiction. Savchuk v. Rush, 272 N.W.2d 888 (Minn. 1978). The Supreme Court reversed. It reiterated that the jurisdictional "inquiry must focus on 'the relationship among the defendant, the forum, and the litigation.'" 444 U.S. at 327 (quoting Shaffer v. Heitner, 433 U.S. 186, 204 (1977)). Finding the relationship to Minnesota created by the "adventitious" decision of his insurer to do business there plainly inadequate, the Court found that Rush did not engage in any purposeful conduct related to the forum. *Id.* at 328-29. It also found no significant

plainly intended to restrict extensions of state court jurisdiction. At the end of the 1979 Term it was becoming abundantly clear that *McGee*'s multiple-interest balancing was the exception and *Hanson*'s purposeful availment was the rule. Most commentators deplored this development[187] and found comfort only in

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contact between the underlying litigation and Minnesota. The Court noted that the insurer's obligation had nothing to do with the substance of the litigation. If no substantive connection was required, a defendant insured by a national insurance company would be subject to jurisdiction in all fifty states. *Id.* at 330.

The Court also rejected the analogy to a direct-action statute, which Judge Friendly adopted in O'Conner v. Lee-Hy Paving Corp., 579 F.2d 19 (2d Cir.), *cert. denied*, 439 U.S. 1034 (1978), to uphold *Seider* jurisdiction after *Shaffer*, because without a direct action statute there is no basis to reach the garnishee insurer without proper jurisdiction over the "nominal" nonresident insured defendant. 444 U.S. at 330-31. In essence the Court recognized that *Seider* attachment jurisdiction allowed jurisdiction over a nonresident defendant based on the forum state activities of his insurer. *Id.* at 332. Finding "[s]uch a result plainly unconstitutional," the Court observed that "[t]he requirements of *International Shoe* . . . must be met as to each defendant over whom a state court exercises jurisdiction." *Id.*

The Court seemed particularly concerned with the shift in focus under *Seider* jurisdiction from the relationship among the defendant, the forum, and the litigation *"to that among the plaintiff, the forum,* the insurer and the litigation." *Id.* According to the Court, the inquiry was shifted from defendant's purposeful affiliation to plaintiff's connection with the forum. *Id.* The Court once more expressed its preference for the jurisdictional approach of *International Shoe* and *Hanson*. The Court plainly found the *Seider* approach "forbidden by *International Shoe* and its progeny." *Id.* But, as in *Kulko* and *World-Wide*, it recognized that the multi-interest balancing approach of *McGee* had a role in the jurisdictional equation. Unlike its ambiguous reference to the fairness or reasonableness branch in *World-Wide*, the court in *Rush* attempted to explain how the fairness elements enter the calculus. The Court stated: "If a defendant has certain judicially cognizable ties with a State, a variety of factors relating to the particular cause of action may be relevant to the determination whether the exercise of jurisdiction would comport with 'traditional notions of fair play and substantial justice.'" *Id.* Plainly, the Court was asserting that only after minimum contacts are first found under the *International Shoe-Hanson* purposeful availment approach, do any other factors enter the analysis to test reasonableness or fairness. The Court did not indicate, however, whether jurisdiction properly found under a traditional minimum contacts analysis, could be dislodged by *McGee*-type factors, such as the forum state interest, or whether those other factors might only serve to reinforce contacts-based jurisdiction, or how the other elements are generally factored into the jurisdictional equation. For the Court's current view of this subject, see *infra* text accompanying notes 245-55. *But see infra* text accompanying notes 336-41.

187. *See, e.g.*, Braveman, *Interstate Federalism and Personal Jurisdiction*, 33 SYRACUSE L. REV. 533 (1982); Gottlieb, *In Search of the Link Between Due Process and Jurisdiction*, 60 WASH. U.L.Q. 1291, 1297-1300 (1983); Jay, *"Minimum Contacts" as a Unified Theory of Personal Jurisdiction: A Reappraisal*, 59 N.C.L. REV. 429 (1981); Lewis, *supra* note 179, at 7-9; Lilly, *supra* note 25, at 102-07; Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U.L. REV. 1112 (1981); Weintraub, *supra* note 75, at 499-503. *Contra* Brilmayer, *supra* note 82, at 84-88,

Justice Brennan's sharp dissent, which both questioned the continuing vitality of *International Shoe*,[188] and vigorously advocated adoption of a multiple-interest balancing approach to jurisdictional due process.[189]

The adoption of the sovereignty function or branch of the minimum contacts test in *World-Wide* set off a firestorm of academic protest,[190] and the Supreme Court attempted to clarify its view of sovereignty two years later in *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*.[191] Recognizing that the right of a defendant to waive objections to personal jurisdiction undermines the sovereignty and federalism concerns expressed in *World-Wide*, Justice White recanted much of his prior analysis both in the text of the opinion[192] and in a lengthy

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91-96; Louis, *supra* note 78, at 423-32.

188. *E.g.*, McDougal, *Judicial Jurisdiction: From a Contact to an Interest Analysis*, 35 VAND. L. REV. 1, 13-15 (1982) (finding a foundation for a "systematic interest analysis theory" in Justice Brennan's dissent, but proposing substantial modifications); *see supra* note 92 and accompanying text.

189. *See* 444 U.S. at 300-01; *supra* note 92 and accompanying text.

190. *See, e.g.*, Braveman, *supra* note 187; Clermont, *supra* note 51; Drobak, *The Federalism Theme in Personal Jurisdiction*, 68 IOWA L. REV. 1015 (1983); Gottlieb, *supra* note 187; Jay, *supra* note 187; Kamp, *supra* note 163; Lewis, *supra* note 179; Redish, *supra* note 187.

191. 456 U.S. 694 (1982). It is likely that the repudiation of the sovereignty branch of the due process analysis is indirectly attributable to the negative academic response to its articulation in *World-Wide*. The Court in *Insurance Corp.* deliberately addressed the issue even though it was unnecessary to decide the case before it. Justice Powell certainly believed the issue did not need to be addressed when he stated: "Fair resolution of this case does not require the Court's broad holding." *Id.* at 710 (Powell, J., concurring in the judgment, but not joining the opinion of the Court). The issue in *Insurance Corp.* was whether "a district court, as a sanction for failure to comply with a discovery order directed at establishing jurisdictional facts, [may] proceed on the basis that personal jurisdiction over the recalcitrant party has been established?" *Id.* at 695. FED. R. CIV. P. 37(b)(2)(A) allows a federal district court to order that "designated facts shall be taken to be established" as a sanction for failure to comply with a discovery order. The Court upheld personal jurisdiction over several foreign insurance companies because by failing to comply with a discovery order, the defendants waived their right to object to jurisdiction. *Id.* at 707-09. The Court analogized the discovery sanction to a waiver resulting from failure to enter a timely objection to personal jurisdiction. FED. R. CIV. P. 12(b)(2) & (h). *Id.* at 705.

192. 456 U.S. at 702-04. Contrasting federal subject matter jurisdiction with state court personal jurisdiction, Justice White recognized that, while the former is constitutionally circumscribed by Article III and may not be waived by litigants, no similar structural limitation applies to personal jurisdiction, which may be waived by a defendant. *Id.* He then stated: "The requirement that a court have personal jurisdiction flows not from Art. III, but from the Due Process Clause. The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on

footnote.[193] In addition, he repudiated the notion that the Constitution imposed a structural limitation on state court personal jurisdiction.[194] If the Constitution contained any structural limitation on state court personal jurisdiction, it would be impossible for a defendant to waive objections to the assertion of personal jurisdiction. Justice White came to this conclusion by contrasting personal jurisdiction with federal subject matter jurisdiction. Recognizing that article III, section 2 of the Constitution circumscribes the scope of federal subject matter jurisdiction[195] and that litigants cannot confer subject matter

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judicial power not as a matter of sovereignty, but as a matter of individual liberty." *Id.* at 702 (footnote omitted). Justice White concluded his textual recantation of *World-Wide*'s sovereignty branch as follows: "In sum, the requirement of personal jurisdiction may be intentionally waived, or for various reasons a defendant may be estopped from raising the issue. These characteristics portray it for what it is—a legal right protecting the individual." *Id.* at 704.

193. 456 U.S. at 702-03 n.10, which states:

> It is true that we have stated that the requirement of personal jurisdiction, as applied to state courts, reflects an element of federalism and the character of state sovereignty vis-a-vis other States. For example, in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-292 (1980), we stated:
>
> [A] state court may exercise personal jurisdiction over a nonresident defendant only so long as there exist 'minimum contacts' between the defendant and the forum State. The concept of minimum contacts, in turn, can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system. (Citation omitted).
>
> Contrary to the suggestion of JUSTICE POWELL, *post*, at 713-714, our holding today does not alter the requirement that there be "minimum contacts" between the nonresident defendant and the forum State. Rather, our holding deals with how the facts needed to show those "minimum contacts" can be established when a defendant fails to comply with court-ordered discovery. The restriction on state sovereign power described in *World-Wide Volkswagen Corp.*, however, must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns. Furthermore, if the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement: Individual actions cannot change the powers of sovereignty, although the individual can subject himself to powers from which he may otherwise be protected.

Id. (emphasis added).

194. *See supra* notes 192-93.

195. Federal subject matter jurisdiction is even more narrowly limited by statute. *See, e.g.*, Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 373-74 (1978) (narrowly construing 28 U.S.C. § 1332 (1968 & Supp. 1986)); Aldinger v. Howard, 427 U.S. 1, 17

jurisdiction on federal courts by consent or waiver, Justice White tersely observed that "[n]one of this is true with respect to personal jurisdiction."[196] Although rejecting any structural limit on state court personal jurisdiction, the Court acknowledged that the jurisdictional reach of state courts is limited by the individual liberty interest protected by the due process clause.[197]

Focusing on *Insurance Corp.*'s sovereignty retreat, certain commentators concluded that the Court had opened the door to full application of the multi-interest balancing approach to jurisdictional due process espoused in *McGee* and to a lesser extent in *World-Wide*'s fairness or reasonableness branch.[198] The next three *International Shoe* progeny, all decided during the 1983 Term, proved that prediction wrong, and generally unsettled the law of personal jurisdiction.

Two of the cases—*Keeton v. Hustler Magazine, Inc.*[199] and *Calder v. Jones*[200]—were decided on the same day and were written by then Justice Rehnquist writing for unanimous Courts.

(1976) (narrowly construing 28 U.S.C. § 1343 (Supp. 1987), which is the jurisdictional statute implementing 42 U.S.C. § 1983 (1982)). Fundamentally, Congress may not expand the allocation of judicial power—constitutional subject matter jurisdiction—conferred by Article III of the Constitution. *Cf.* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (rejecting the power of Congress to confer by statute original jurisdiction on the Supreme Court not provided for in the Constitution). But as a result of the Madisonian Compromise at the Constitutional Convention, the Constitution itself did not mandate creation of inferior—or lower—federal courts. It left the creation of such courts to Congress. *See* Redish & Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 52-55 (1975). In the years following the adoption of the Judiciary Act of 1789, which first established inferior federal courts, it was a much debated question whether the lower courts created by Congress must necessarily exercise all of the judicial power not allocated by the Constitution to the original jurisdiction of the Supreme Court, or whether Congress could, in statutorilly creating such courts, confer less than the Constitutional maximum. The later view prevailed. Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850). Thus, Congress not only is authorized to create lower federal courts, but also is granted the power to prescribe their jurisdiction within the outer limits established in Article III, § 2 of the Constitution. As a result of this development, for a federal court to have jurisdiction over a controversy it must have proper statutory, as well as constitutional, subject matter jurisdiction. *Kroger*, 437 U.S. at 371-72.

196. 456 U.S. at 702.

197. *Id.* at 702-03 & n.10.

198. *See, e.g.*, Weintraub, *supra* note 75, at 504-05. *But see* Lewis, *supra* note 162, at 739-42 (suggesting that state-interest factors should also be displaced by *Insurance Corp.'s* individual liberty functional analysis of due process).

199. 465 U.S. 770 (1984).

200. 465 U.S. 783 (1984).

Both arose out of libel suits against notorious national publications, one known for sexually explicit photographs[201] and the other for malicious gossip.[202] It is difficult to distill any coherent theme from either case. Both seem to mix *International Shoe - Hanson* purposeful availment theory with *McGee* multi-interest balancing analysis, but not in any meaningful or organized manner. Moreover, neither opinion used the fairness branch factors as collectively articulated in *World-Wide.*

In *Keeton* the Court upheld New Hampshire's jurisdiction over a nonresident publisher based on the distribution in the forum state of the defendant-publisher's magazine which contained allegedly defamatory material.[203] The action was brought

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201. *Hustler Magazine.*

202. *The National Enquirer.*

203. In *Keeton*, plaintiff-petitioner brought a diversity action in the United States District Court for the District of New Hampshire against defendant-respondent, claiming that she had been libeled in five separate issues of respondent's magazine. 465 U.S. at 772. Petitioner, a resident of New York, had no connection with New Hampshire other than the circulation there of another magazine, *Penthouse*, which she assisted in producing. *Id.* She admittedly brought suit in New Hampshire because it was the only state in which the statute of limitations over her defamation claim had not run. *See id.* at 772-73 n.1. Respondent was an Ohio corporation with its principal place of business in California. *Id.* at 772. Its only connection with New Hampshire was the monthly circulation there of 10,000 to 15,000 copies of the magazine. *Id.*

The district court dismissed Keeton's complaint on the ground that the due process clause proscribed application of New Hampshire's long-arm statute to assert personal jurisdiction over respondent based only on the distribution there of less than one percent of its national circulation. *Id.* The First Circuit affirmed. *Id.* at 773. In doing so, the court relied on three rationales: (i) plaintiff's lack of contacts with New Hampshire; (ii) the applicability of the "single publication rule," which required damages to be awarded for plaintiff's injuries suffered nationwide if she prevailed at trial, even though only a small, if not insignificant, portion of her injuries were suffered in New Hampshire; and (iii) the unfairness of applying New Hampshire's unusually long six-year statute of limitations for libel actions. *Id.* Collectively, these factors pointed to New Hampshire's lack of a sufficient interest in adjudicating a controversy between two nonresident parties.

In reversing, the United States Supreme Court emphasized the elements outlined in the jurisdictional model presented by *International Shoe* and *Hanson.* The critical focus of any in personam jurisdictional inquiry, according to Justice Rehnquist, is "on 'the relationship among the defendant, the forum, and the litigation.' " *Id.* at 775 (quoting, Shaffer v. Heitner, 433 U.S. 186, 204 (1977)). In *Keeton* Hustler's systematic and continuous circulation of its magazine in New Hampshire was found sufficient to allow the state to assert personal jurisdiction over a libel action arising from the contents of the magazine. *Id.* at 780-81. In addition, the Court found that in entering the New Hampshire market, Hustler purposely availed itself of the privilege of conducting business there, and "no doubt would have claimed the benefit of [New Hampshire law] if it had a complaint against a subscriber, distributor, or other commercial partner." *Id.* at 779. Moreover, the Court found that the requisite foreseeability was present because "Hustler

in New Hampshire by a nonresident plaintiff after the statute of

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. . . has continuously and deliberately exploited the New Hampshire market, [and therefore,] must reasonably anticipate being haled into court there in a libel action based on the contents of its magazine." *Id.* at 781 (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297-98 (1980)).

In affirming the district court dismissal, the First Circuit raised troubling concerns that the Supreme Court felt compelled to address. First, the Court agreed that the fairness of subjecting Hustler to jurisdiction in New Hampshire "depends to some extent on whether respondent's activities relating to New Hampshire are such as to give that State a legitimate interest in holding respondent answerable on a claim related to those activities." *Id.* at 776. The Court, however, was very unclear about whether the interest of the forum state is a separate element of the jurisdictional equation, or whether it is subsumed within the basic test which focuses on the relationship among the defendant, the forum, and the litigation. The Court stated: "But insofar as the State's 'interest' in adjudicating the dispute is a part of the Fourteenth Amendment due process equation, as a surrogate for some of the factors already mentioned, . . . we think the interest is sufficient." *Id.*

In finding a sufficient forum state interest in *Keeton*, the Court focused on (i) New Hampshire's clearly expressed interest in protecting both residents and nonresidents from damages resulting from libel circulated there; (ii) its interest in protecting New Hampshire citizens from falsehoods published there; and (iii) its interest in cooperating with its sister states, through the "single publication rule," in providing a forum to litigate efficiently in a single proceeding all issues and damages flowing from the nationwide circulation of the same libel. *Id.* at 776-78. The Court tangentially noted, however, that the actual applicability of the "single publication rule" to award multistate damages was a matter of substantive law that did not enter the litigation at the jurisdictional stage. *Id.* at 778 n.9.

Similarly, the Court disposed of the concern expressed by the court of appeals regarding the unfairness of applying New Hampshire's uniquely long statute of limitations. Mr. Justice Rehnquist's language in this regard is instructive:

> Strictly speaking, however, any potential unfairness in applying New Hampshire's statute of limitations to all aspects of this nationwide suit has nothing to do with the jurisdiction of the Court to adjudicate the claims. . . . The question of the applicability of New Hampshire's statute of limitations to claims for out-of-state damages presents itself in the course of litigation only after jurisdiction over respondent is established, and we do not think that such choice of law concerns should complicate or distort the jurisdictional inquiry.

Id. at 778.

Moreover, the Court unequivocally rejected the notion that a plaintiff's contact with the forum state was a separate element that must be thrown into the jurisdictional puzzle. *Id.* at 779. Citing its decision in Calder v. Jones, 465 U.S. 783, 788-89 (1984), issued the same day, however, the Court acknowledged that a plaintiff's residence in the forum state may well enhance a defendant's contact with the forum because of defendant's relationship to plaintiff. *Id.* at 780.

The Supreme Court was either not being candid or it ignored reality in *Keeton* when it endorsed a suit in New Hampshire under the "single publication" rule, but stated in a footnote that the actual award of multistate damages is an open question to be resolved by substantive law after the jurisdictional inquiry. If multistate damages cannot be awarded, and ultimately that issue will raise due process concerns which the court failed to recognize, a plaintiff in Keeton's position will have no incentive to sue, and the right to do so will be meaningless. This aspect of *Keeton* was also troubling because the "sin-

limitations of every other jurisdiction had expired.[204] The Court's relatively brief opinion emphasized the relationship among the defendant, the forum, and the litigation, consistent with *International Shoe* and *Shaffer*. It also gave serious consideration to the interest of the forum state[205] and rejected the notion that jurisdictional due process required that plaintiffs have minimum contacts with the forum state.[206]

The *Calder* Court upheld jurisdiction by California over two nonresident, individual defendants who had not purposefully availed themselves of the benefits and protections of California law.[207] In doing so the Court explicitly approved the forum "ef-

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gle publication rule," which provided incentive for the action in *Keeton*, might allow New Hampshire to award damages for libel committed outside New Hampshire causing injury to plaintiff outside of New Hampshire. Plainly, New Hampshire would have no interest in, and a "minimum contacts" analysis would preclude if from, adjucating out-of-state torts, apart from defamation, causing injury outside of New Hampshire. In essence, the single-publication rule plus the systematic and continuous, albeit limited, circulation of its magazine there, gave New Hampshire a form of general jurisdiction over Hustler.

204. 465 U.S. at 772-73 & n.1.

205. *Id.* at 775-78. Justice Brennan's brief concurring opinion suggested that the emphasis on New Hampshire's interest in adjudicating the dispute between Keeton and Hustler was inconsistent with *Insurance Corp. Id.* at 782 (Brennan, J., concurring). If the due process clause, which is the only relevant part of the Constitution for this purpose, restricts, as *Insurance Corp.* suggested, the assertion of state court jurisdiction to protect the individual liberty interest of a nonresident defendant, then consideration of "state interest" as part of jurisdictional analysis is inappropriate. *See id. See generally* Knudsen, *supra* note 93, at 811-16; Lewis, *supra* note 179, at 7-9; Lewis, *supra* note 163, at 718-27, 739 ("the Court's reasons for holding that satisfaction of sovereignty interests is not a *sine qua non* of personal jurisdiction also undermine the foundations of other government interest doctrines . . . ."); Lewis, *The "Forum State Interest" Factor in Personal Jurisdiction Adjudication: Home-Court Horses Hauling Constitutional Carts*, 33 MERCER L. REV. 769 (1982).

206. 465 U.S. at 779 ("But plaintiff's residence in the forum state is not a separate requirement, and lack of residence will not defeat jurisdiction established on the basis of defendant's contacts."); *accord* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 806-08 (1985).

207. *Calder* was a libel action filed in a California state court by the actress Shirley Jones, a resident and domiciliary of California, against National Enquirer, Inc., a Florida corporation having its principal place of business in Florida. The Enquirer publishes a national weekly newspaper. Shirley Jones also sued the Enquirer's local distributor, and petitioners, Calder and South, both Florida residents, who edited, and reported for, the Enquirer respectively. 465 U.S. at 784-86. California's jurisdiction over the Enquirer, which circulated approximately 600,000 of its weekly copies in California, was not in question. *Id.* at 785 & n.2 (the Enquirer and its local distributor did not challenge jurisdiction). The Enquirer's California circulation represented more than ten percent of its nationwide circulation and was more than twice as large as its circulation in the next highest state. *Id.*

The cause of action arose from an allegedly libelous article published in the Enquirer accusing Jones of such heavy drinking that it prevented her from fulfilling her professional obligations. *Id.* at 788 & n.9. The article was written and edited by the individual defendant-petitioners in Florida, based on sources located in California. Neither Calder nor South, however, had any relevant or material personal contacts with California. *Id.* at 785-86.

In quashing service of process on the individual defendants, the California trial court concluded that first amendment considerations should be weighed when jurisdiction is sought over reporters and editors from distant jurisdictions, and concluded that assertion of jurisdiction would have a chilling effect on the media under the circumstances presented. The court also found significant the presence of two corporate defendants against whom plaintiff could fully satisfy her claim. *Id.* at 786.

The California intermediate appellate court reversed. Jones v. Calder, 138 Cal. App. 3d 128, 187 Cal. Rptr. 825 (Ct. App. 1982), *aff'd*, 465 U.S. 783 (1984). It found the lower court's first amendment rationale unpersuasive and concluded that jurisdiction could be asserted over the individual defendants because they intentionally had caused tortious injury to plaintiff in California. The court thought it irrelevant that the intentional activity causing injury in California was performed in Florida, because the cause of action arose out of activity intended to have an effect in California. *Id.* at 133-34, 187 Cal. Rptr. at 829.

Again writing for a unanimous Court, Justice Rehnquist returned to the basic principles presented by the jurisdictional scheme of *International Shoe* and *Hanson*. Relying on the tripartite division of minimum contacts language in *Shaffer*, he observed: "In judging minimum contacts, a court properly focuses on 'the relationship among the defendant, the forum, and the litigation.' " 465 U.S. at 788 (citations omitted). He then cited *Keeton* for the proposition that a plaintiff's lack of contact with the forum will not defeat proper jurisdiction, but further observed that a plaintiff's contacts with the forum may be so substantial that jurisdiction not otherwise proper may be found as a result of such contact. *See id.* Since the plaintiff in *Calder* lived and worked in California, and since she was the focus of the individual defendants' activities in Florida (the writing and editing of the article in question), the Court concluded that her cause of action arose out of defendants' Florida activities. Consequently, since California was the focal point of both the article and the harm suffered by plaintiff, *id.* at 788-89, the Court held that in personam jurisdiction over the individual defendants was "proper in California based on the 'effects' of their Florida conduct in California." *Id.* at 789.

The Court then addressed the defendants' argument that they were no more responsible for the impact of the allegedly libelous article in California than a Florida welder would be for a boiler that the welder worked on in Florida which subsequently exploded causing injury in California. Rejecting this analogy as inapt, the Court stated that the defendants in *Calder* were not charged with "untargeted negligence" but with intentional acts that they knew would have a "potentially devastating impact" on plaintiff in California. *Id.* The Court concluded they "must 'reasonably anticipate being haled into court there.' " *Id.* at 790 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)).

The Court acknowledged that the defendants' contacts with California are not to be equated with their employer's contacts, and that "[e]ach defendant's contacts with the forum State must be assessed individually." *Id.* But in language that may have implicitly rejected the "fiduciary shield" doctrine, the Court also observed that defendants' status as employees did not insulate them from jurisdiction, particularly when they were the "primary participants in an alleged wrongdoing directed at" the forum state. *Id.* Under the "fiduciary shield" doctrine, a creature of New York law, the acts of a corporate offi-

fects" test of the *Restatement (Second) Conflicts of Law*.[208] The individual defendants were the author and editor of an allegedly libelous article that they knew would have its most substantial impact in California where the plaintiff lived and worked.

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cial undertaken in a corporate capacity within the forum state generally cannot be used to predicate jurisdiction over the officer in an individual capacity. *See* Bulova Watch Co. v. K. Hattori & Co., 508 F. Supp. 1322, 1347 (E.D.N.Y. 1981) (Weinstein, C.J.).

Finally, the Court plainly rejected the notion accepted by the California trial court that first amendment considerations should enter the jurisdictional inquiry. 465 U.S. at 790. Jurisdictional analysis was already imprecise according to the Court and should not be further complicated. *Id.* Besides, the Court thought the first amendment was given sufficient consideration in defamation actions through applicable substantive law. *Id.* at 790-91. More than seventeen years after the late Judge Henry J. Friendly of the United States Court of Appeals for the Second Circuit first advanced the proposition that substantive law adequately protects those accused of defamation, and, therefore, necessarily vague first amendment standards should not be superimposed on jurisdictional analysis, Buckley v. New York Post Corp., 373 F.2d 175, 182-84 (2d Cir. 1967), it appeared that the Supreme Court had finally endorsed this position.

Another issue raised by *Calder* is whether the specifically targeted intentional tort theory, which allowed California to assert jurisdiction over the individual defendants, logically can be limited to a plaintiff's domicile. If the California statute of limitations had run, under *Keeton*, Jones could have sued anywhere the National Enquirer was systematically and continuously distributed. In *Keeton* the Court recognized that the "reputation of [a] libel victim may suffer harm even in a state in which he has hitherto been anonymous." 465 U.S. at 777 (footnote omitted). If this was true for Keeton in New Hampshire, it was even more true for Jones, a well known entertainment figure. Logically, the individual defendants in *Calder* can be said to have specifically targeted their article to all readers of the National Enquirer wherever located. The basis on which California exercised jurisdiction over the individual defendants was the effect in California of their editing and reporting activities in Florida. Their Florida activity had a similar harmful effect in every state in which the libel was read. The difference is only in the scope of the injury suffered. Consequently, *Keeton*'s "anonymous harm" theory may have broadened the scope of *Calder*, and thus, the individual defendants there may be subject to suit anywhere their employer can be sued. The individual defendants would have this broad exposure in *Calder* not because the employer's contacts with the forum state are attributable to them, but because their Florida activity caused harm in every jurisdiction in which Jones' reputation, even if she were anonymous, suffered injury.

In *Calder*, the Court also apparently gave tacit approval to two, far reaching state court decisions upholding specific jurisdiction—Buckeye Boiler Co. v. Superior Court, 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969), and Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961). 465 U.S. at 789. These cases have been viewed as pushing state court personal jurisdiction to the outer limits of due process. *See supra* note 87 and accompanying text. The implicit approval of *Buckeye Boiler* and *Gray* in *Calder* stands in marked contrast to the *Asahi* plurality's failure to cite, let alone discuss these significant state court decisions. Justice Brennan, in his separate *Asahi* plurality opinion, stated that the Court substantially relied on *Gray* in *World-Wide* when it first articulated the stream of commerce theory. 107 S. Ct. 1026, 1037 (1987). *See infra* notes 329-32 and accompanying text.

208. 465 U.S. at 787 & n.6, 789.

The Court appeared to reach hard to justify jurisdiction in *Keeton* and *Calder*.[209] One is left with the uncomfortable impression that the Court might have reached a different result if instead of *Hustler* and the *National Enquirer*, the publisher-defendants in these cases had been the *New York Times* and the *Washington Post*.

The third jurisdictional case of the 1983 Term was *Helicopteros Nacionales de Colombia, S.A. v. Hall*,[210] in which the Supreme Court addressed the issue of general jurisdiction for the first time in over thirty years.[211] The Court struck down Texas' assertion of jurisdiction over a foreign corporate defendant because the defendant's contact with the forum state did not rise to the level of "substantially systematic and continuous" contact necessary to support jurisdiction over a cause of action not arising out of defendant's forum state activity.[212] General jurisdiction raises fundamentally different concerns than does specific jurisdiction. The threshold inquiry is not focused narrowly on the triparte relationship among the defendant, the forum, and the litigation. Rather, general jurisdiction looks at a defendant's entire affiliational relationship with the forum, whether related to the litigation or not. Accordingly, *Helicopteros* raised many significant jurisdictional issues that are beyond the scope of this Article.[213]

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209. *See* Perschbacher, *supra* note 34, at 606-08 (suggesting that these cases "fell outside the rigid standards established in *World-Wide Volkswagen* and *Rush*").

210. 466 U.S. 408 (1984). Commentary on *Helicopteros* was uniformly critical. *See, e.g.*, Knudsen, *supra* note 93, at 824-35; McDermott, *supra* note 32, at 41-45; Weinberg, *supra* note 180; Weintraub, *supra* note 75, at 528-32.

211. The Court's only other general jurisdiction case decided in the post-*International Shoe* era was Perkins v. Benquet Consol. Mining Co., 342 U.S. 437 (1952).

212. 466 U.S. at 415-16, 418-19.

213. In *Helicopteros* the Court reversed a decision of the Texas Supreme Court upholding in personam jurisdiction by the courts of Texas over Helicopteros, a Colombian corporation with its principal place of business in Bogota. The suit concerned a wrongful death action brought by the survivors of four United States citizens, all non-domiciliaries of Texas, who were killed in the crash in Peru of a helicopter owned by Helicopteros. Helicopteros was in the business of providing helicopter transportation for the oil and construction industry in South America. 466 U.S. at 409. It had entered into a contract to supply such services to the employer of the survivors' decedents, a Peruvian consortium that was the alter-ego of a joint venture headquartered in Houston, Texas. *Id.* at 410. At the request of the joint venture, the chief executive officer of Helicopteros came to Houston to negotiate the contract, which was later executed in Lima, Peru. *Id.* The contract provided that the joint venture would make payments to an account maintained by Helicopteros at the Bank of America in New York City. *Id.* at 411. Speaking for an

The next Term, however, finally brought about the conflu-

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eight Justice majority, Justice Blackmun summarized Helicopteros' general lack of contact with Texas as follows:

> Helico[pteros] never has been authorized to do business in Texas and never has had an agent for the service of process within the State. It never has performed helicopter operations in Texas or sold any product that reached Texas, never solicited business in Texas, never signed any contract in Texas, never had any employee based there, and never recruited an employee in Texas. In addition Helico[pteros] never has owned real or personal property in Texas and never has maintained an office or establishment there. Helico[pteros] has maintained no records in Texas and has no shareholders in that State.

466 U.S. at 411 (footnote omitted).

Helicopteros' only general contacts with Texas were its purchase of approximately 80% of its helicopter fleet over an eight year period from a Texas manufacturer, the training of its pilots and maintenance personnel in Texas, and occasional visits by its management personnel to Texas for technical consultation over the same eight-year period. *Id.*

The Texas Supreme Court upheld jurisdiction under the Texas long-arm statute, which it interpreted to reach to the limits permissible under the fourteenth amendment's due process clause. *Id.* at 412-13 & n.7. The court also held that prior Supreme Court decisions interpreting the due process clause permit the assertion of personal jurisdictions over Helicopteros under the facts presented. Hall v. Helicopteros Nacionales de Colombia, S.A., 638 S.W.2d 870, 873 (Tex. 1982), *withdrawn*, 677 S.W.2d 19 (Tex. 1984); *see also* Carlson, *General Jurisdiction and the Exercise of In Personam Jurisdiction Under the Texas Long-Arm Statute*, 28 S. TEX. L. REV. 307 (1986). When the Supreme Court reviews a state court decision in such circumstances, its only basis for review is to evaluate whether the state court correctly interpreted the ambit of the due process clause. The Court's task in *Helicopteros* was considerably lightened by the plaintiff-respondents' concession that their "claims against Helico[pteros] did not 'arise out of,' and [were] not related to, Helico[pteros'] activities within Texas." 466 U.S. at 415 (footnote omitted).

In view of this concession, which eliminated a finding of specific or transactional jurisdiction, the only possible basis for in personam jurisdiction would have been if Helicopteros were found to be subject to general jurisdiction in Texas. The Court began its analysis by recognizing the distinction between specific and general jurisdiction, describing the latter as follows:

> Even when the cause of action does not arise out of or relate to the foreign corporation's activities in the forum State, due process is not offended by a State's subjecting the corporation to its *in personam* jurisdiction when there are sufficient contacts between the State and the foreign corporation.

466 U.S. at 414 & n.9 (citing, Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952)). It then reviewed the facts of *Perkins*. In essence, the defendant mining company, a Philippine corporation, had carried out almost all of its corporate activities in Ohio during the Japanese occupation of the Philippines during the Second World War. Those activities were limited in scope during the War, but the Court nevertheless was able to characterize them as systematic and continuous. In such circumstances the Court held that nothing in the due process clause precluded Ohio from asserting personal jurisdiction over the mining company in connection with a cause of action that did not arise out of its activities there. 466 U.S. at 415.

Contrasting the Texas activities of Helicopteros with the Ohio activities of the mining company in *Perkins*, the Court predictably found that they did not constitute the

ence of the two divergent doctrinal trends that had influenced

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same kind of continuous and systematic general business contacts that give rise to general jurisdiction. While Ohio was, as a practical matter, the principal place of business and corporate headquarters of the mining company during the war, the only connections Helicopteros had with Texas, apart from the one negotiating trip by its CEO, were its purchases of equipment and the training of its personnel there.

As the Texas Supreme Court found sufficient contacts to support jurisdiction based on Helicopteros' purchases and related training and consulting trips to Texas, the Supreme Court was compelled to discuss the scope of state court personal jurisdiction predicated on such contacts. The Court resurrected Rosenberg Bros. & Co. v. Curtis Brown Co., 260 U.S. 516 (1923), a pre-*International Shoe* decision, to support its conclusion that "mere purchases, even if occurring at regular intervals, are not enough to warrant a State's assertion of *in personam* jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions." 466 U.S. at 418 (footnote omitted). In *Rosenberg*, a unanimous Court, speaking through Justice Brandeis, held that a Tulsa-based retail concern was not subject to personal jurisdiction in New York under the "presence" theory, based on purchases of merchandise in, and related trips to, New York by its officers. 260 U.S. at 517-18.

By reaffirming *Perkins* and *Rosenberg* more than thirty and sixty years respectively after it decided those cases, it is fair to conclude that the Court settled some open questions, but its reliance on these cases raised several new issues as well. It now seems apparent that a state may not assert in personam jurisdiction over a nonresident defendant on a cause of action that neither arises from, nor is related to, the forum state activity of the defendant, unless the defendant engages in the type of continuous and systematic general business contacts within the forum found sufficient in *Perkins*. Moreover, purchases within the forum state standing alone, even if occurring at regular intervals over a substantial number of years, are insufficient to establish the necessary continuous and systematic activity. To the extent that the passage of time may have eroded confidence in *Rosenberg* and *Perkins*, *Helicopteros* appeared to revitalize those cases for modern jurisdictional analysis.

On the other hand, several questions were raised by *Helicopteros*. First, despite its clear reaffirmation of *Perkins*, the Court failed to provide either a satisfactory definition of, or concrete elements to test, the type of forum state activity of a nonresident defendant that is sufficiently systematic and continuous to trigger the imposition of general jurisdiction. Perhaps the Court was unwilling to formulate specific guidelines because it wanted to maintain a flexible case-by-case approach and not be limited unduly by a rigid test. In addition, systematic and continuous is inherently ambiguous. *See supra* note 80 and accompanying text. A nonresident defendant may systematically and continuously sell widgets or distribute publications in a particular state, but those widgets or publications may only represent a small fraction of the defendants national or international sales or distributions. Consequently, the Court presented a classic legal continuum, one end of which is represented by *Perkins* and the other by *Helicopteros*. After *Helicopteros* a corporation may well be subject to general jurisdiction only in its state of incorporation or in the state of its principal place of business.

Another question left open by *Helicopteros* is whether a meaningful distinction exists between a cause of action that "arises out of" a nonresident defendant's activity within the forum state and one that is merely "related to" a defendant's forum state activities. Also uncertain is whether any such distinction should have jurisdictional significance in the context of specific or transactional jurisdiction. This question was sharply raised by Justice Brennan's dissent, which vigorously objected to the failure of the majority to consider the applicability of specific or transactional jurisdiction in

jurisdictional jurisprudence for almost forty years. Although the result in *Burger King Corp. v. Rudzewicz*[214] was understandable, the manner in which the Court reached its decision was decidedly unexpected. Justice Brennan, the great jurisdictional dissenter of the modern era,[215] wrote the majority opinion and in doing so attempted fundamentally to restructure the law of per-

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Helicopteros. 466 U.S. at 419-20 (Brennan, J., dissenting). In Brennan's view, Helicopteros' acknowledged purchase contacts with Texas were "sufficiently important, and sufficiently related to the underlying cause of action, to make it fair and reasonable for the State to assert personal jurisdiction over [it] for the wrongful death actions filed by the respondents." *Id.* at 420. The majority acknowledged the possibility of a jurisdictionally meaningful distinction between "arising out of" and "related to," but declined to express any view on the matter because the parties did not argue the point. *Id.* at 415 & n.10.

Still another question raised by *Helicopteros* is whether *Rosenberg* will be further resurrected to preclude the assertion of even specific jurisdiction based on regular purchase contacts. In a footnote, the majority observed that the *International Shoe* Court

> cited *Rosenberg* for the proposition that "the commission of some single or occasional acts of the corporate agent in a state sufficient to impose an obligation or liability on the corporation has not been thought to confer upon the state authority to enforce it." . . . Arguably, therefore, *Rosenberg* also stands for the proposition that mere purchases are not a sufficient basis for either general or specific jurisdiction.

466 U.S. at 418 n.12 (citation omitted). Although the Court declined to express a view regarding the continuing validity of *Rosenberg* with respect to an assertion of specific jurisdiction, *id.*, it appears that the entire gamut of jurisdictional case law since *Rosenberg*, would undermine the applicability of *Rosenberg* to specific or transactional jurisdiction.

Finally, despite argument by the respondents that Texas had "jurisdiction by necessity" over Helicopteros, the Court declined "in the absence of a more complete record" to consider the applicability, or even the existence, of such a doctrine, which it characterized as "a potentially far-reaching modification of existing law." 466 U.S. at 419 & n.13. Jurisdiction by necessity generally is thought to allow a court to assert jurisdiction when no other forum is available to a plaintiff. In *Helicopteros* there were three defendants. The Court concluded that respondents failed to carry their burden of proving that all three could not be sued in one forum because the record was unclear whether such a suit could have been brought in Colombia or Peru. *See infra* note 363. This was at least the second time in less than seven years that the Court declined an opportunity to consider the doctrine of "jurisdiction by necessity." *See* Shaffer v. Heitner, 433 U.S. 186, 211 n.37 (1977).

For recent scholarly consideration of general jurisdiction, see Brilmayer, Haverkamp, Logan, Lynch, Neuwirth & O'Brien, A General Look at General Jurisdiction, 66 TEX. L. REV. 723 (1988); Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 HARV. L. REV. 1444 (1988); Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610 (1988); Twitchell, *A Rejoinder to Professor Brilmayer*, 101 HARV. L. REV. 1465 (1988).

214. 471 U.S. 462 (1985).

215. *See supra* note 91 and accompanying text.

sonal jurisdiction. In general, the principles that emerge are those that Justice Brennan long espoused in dissent.[216] Nevertheless, his opinion had to accommodate the well-settled purposeful availment doctrine. Consequently, Justice Brennan created not a synthesis or merger of prior doctrine into a unified conceptual scheme, but rather a forced linkage of two very separate doctrines that are not easily harmonized.

As several commentators have noted, *Burger King*'s significance is not the Court's decision in the case before it, or even its statement that a single contract may be a minimally sufficient contact, but rather its importance is what the Court said about personal jurisdiction generally.[217] Accordingly, the focus of this section of the Article is on the Court's attempt to distill a new jurisdictional framework from its hodgepodge of prior case law.[218]

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216. Noting this recent turnaround, commentators could not resist the play on words from Burger King's well-known advertising campaign in titling their articles. *E.g.*, Perschbacher, *supra* note 34; Stephens, *The Single Contract as Minimum Contacts: Justice Brennan "Has It His Way"*, 28 WM. & MARY L. REV. 89 (1986).

217. *E.g.*, Perschbacher, *supra* note 34, at 612-13 ("Justice Brennan literally reconstructs the outlines of modern personal jurisdiction by reworking the old patchwork of cases into a new design"), 619 ("Brennan's sweeping language and rewrite of the minimum contacts test, incorporating his ideas from the past thirty years, is more than a mere application of *International Shoe* and its progeny to contract cases."); Stephens, *supra* note 216, at 113 ("*Burger King* is a more interesting case for what it implies about personal jurisdiction generally than for what it implies about contract cases").

218. The underlying litigation arose from a dispute between Burger King corporation, a Florida corporation with its principal place of business in Miami, and one of its franchisees. 471 U.S. at 464. Appellee, Rudzewicz, a domiciliary of Michigan, was a principal of a corporate-franchisee of Burger King, and personally guaranteed all the franchisee's obligations. *Id.* at 466-67. Although headquartered in Miami, Burger King had ten regional offices which monitored the operation of franchisees on a day-to-day basis. *Id.* at 466. Rudzewicz and his partner, MacShara, "jointly applied for a franchise to Burger King's Birmingham, Michigan district office in the autumn of 1978." *Id.* Although Rudzewicz and MacShara essentially dealt with the Birmingham district office, they also had communication with Burger King's headquarters in Miami. *Id.* at 467 & n.7. After settling several disputes that arose during negotiations, Rudzewicz and MacShara signed a franchise agreement with Burger King, and commenced operation of a Burger King restaurant in Drayton Plains, Michigan. *Id.* at 467-68. Although successful at first, the franchise soon experienced financial difficulty and defaulted on monthly payments due under the agreement to Burger King. *Id.* at 468. When negotiations failed to resolve the dispute, Burger King terminated the franchise and demanded that Rudzewicz and MacShara give up possession of the Drayton Plains facility. *Id.* When they refused and continued to operate the restaurant, Burger King commenced an action in the United States District Court for the Southern District of Florida for breach of contract and for tortious infringement of Burger King's trademarks and service marks as a result of the continued

The fall of *World-Wide*'s sovereignty branch,[219] combined with the failure of the Court explicitly to apply the fairness branch factors during the 1983 Term trilogy of *Keeton*, *Calder*, and *Helicopteros*,[220] left the significance of *World-Wide*'s fair-

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operation of the facility as a Burger King franchise by Rudzewicz and MacShara. *Id.* at 468-69.

Rudzewicz and MacShara asserted that the district court lacked personal jurisdiction "because they were Michigan residents and because Burger King's claim did not 'arise' within the Southern District of Florida." *Id.* at 469. After the district court rejected their jurisdictional challenge, Rudzewicz and MacShara answered and counterclaimed under Michigan's Franchise Investment Law. *Id.* After a three-day bench trial, the court found that defendants breached their contract and infringed Burger King's trademarks and service marks. The court entered judgment against them in the sum of $228,875 for contract damages and ordered defendants immediately to turn over possession of the Drayton Plains facility to Burger King. *Id.* Last, the court found that since defendants failed to prove any essential element of their counterclaim, Burger King was entitled to costs and attorneys fees. *Id.*

Only Rudzewicz appealed. *Id.* The Eleventh Circuit Court of Appeals reversed on the ground that jurisdiction in the Southern District of Florida was fundamentally unfair because the circumstances surrounding, and negotiations concerning, the Drayton Plains franchise did not provide Rudzewicz with reasonable notice of the possibility of litigation in Florida. *Id.* at 470.

The Supreme Court reversed. Pointing to the combination of the choice-of-law provision in the franchise agreement, which made the agreement subject to Florida law, and the twenty-year term of the agreement, the Court concluded that Rudzewicz deliberately and knowingly formed a long-term affiliational relationship with an entity headquartered in the forum state and that as a result he should have reasonably anticipated forum state litigation. *Id.* at 481-82. This analysis and conclusion satisfied the power or traditional minimum contacts part of the new two-branch test of personal jurisdiction. *Id.*

Turning to the fairness or reasonableness branch, the Court concluded that Rudzewicz failed to establish that jurisdiction in Florida would be unreasonable. *Id.* 482-85. Of the five-part fairness branch, the Court only discussed two parts. First, the Court found that the interest of the forum state weighed in favor of jurisdiction. But the Court's language in this respect was lukewarm at best: "[W]e cannot conclude that Florida had no 'legitimate interest in holding [Rudzewicz] answerable on a claim related to' the contacts he had established in that State." *Id.* at 482-83 (citations omitted). The other factor discussed was the burden on the defendant. In that connection, Justice Brennan indicated that, although Rudzewicz alleged litigational prejudice in Florida because of his inability to call certain Michigan witnesses, he failed to prove it. *Id.* at 483-84 & n.27. The Court reiterated the point it made during its discussion of general legal principles that most defendant convenience objections can be accommodated by a change of venue. *Id.* at 484; *see infra* text accompanying notes 259-61.

In dicta the Court noted that it was rejecting "any talismanic jurisdictional formulas." *Id.* at 485. It made this point to ensure that the upholding of personal jurisdiction over Rudzewicz, whom the Court noted was an experienced and sophisticated businessman, *id.* at 484, did not herald the approval of jurisdiction over small consumer purchasers in the seller's jurisdiction, especially in connection with mail-order purchases. *Id.* at 485-87.

219. *See supra* notes 190-97 and accompanying text.

220. Although the fairness branch per se was not discussed by any of the 1983 Term

ness branch in some doubt. Any doubt, however, was dispelled by *Burger King*.

Justice Brennan's opinion in *Burger King* undertook a fundamental transformation of jurisdictional due process by articulating a new two-branch approach to state court personal jurisdiction. The first branch, devoid of any notions of sovereignty or federalism, focused on the purposeful affiliation of a nonresident defendant with the forum state and the relationship of the nonresident's forum state activity to the litigation. This branch might be characterized as the "power" or "traditional minimum contacts" branch.[221] The other branch was resurrected intact from *World-Wide* and might still be labeled the "fairness" or "reasonableness" branch.[222] But, unlike in *World-Wide*, in which it was articulated and then ignored, in *Burger King* the fairness branch was given a vital jurisdictional role. Justice Brennan not only attempted to explain how the fairness branch related to the power branch, but also partially applied it to the facts of the case before the Court.[223]

The Court's discussion of general legal principles devoted substantially more space to the power branch than it did to the fairness branch.[224] Justice Brennan started his presentation by tying *Insurance Corp.*'s repudiation of sovereignty to *International Shoe*'s minimum contact analysis.[225] Without any transition, Justice Brennan immediately shifted to a discussion of the type of foreseeability that *World-Wide* found critical to due process.[226] As in *World-Wide*, fair warning or reasonable anticipation of forum state litigation was thought to provide " 'a degree of predictability to the legal system that allows potential de-

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trilogy, individual fairness branch factors figured prominently in two of the three cases. For example, the forum state interest was a significant element of the Court's analysis in *Keeton*. *See supra* note 203. The interests of the plaintiff and the forum state were important to the decision in *Calder*. *See supra* note 207.

221. The term "power" to describe this function of due process is attributable to Professor Clermont. Clermont, *supra* note 51, at 423-24; *see also* R. FIELD, B. KAPLAN & K. CLERMONT, MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE 25 (5th ed. 1987 Supp.).

222. 471 U.S. at 477.

223. *Id.* at 476-78, 482-85.

224. Part IIA of the opinion is Justice Brennan's articulation of the current two-branch test of jurisdictional due process. 471 U.S. at 471-78. Less than two pages of this part of the opinion addresses the fairness branch. *Id.* at 476-78.

225. *Id.* at 471-72.

226. *Id.* at 472; *see supra* notes 176-78 and accompanying text.

fendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.' "[227] The fair warning requirement was satisfied, stated Justice Brennan, "if the defendant has '*purposefully directed*' his activities at residents of the forum,"[228] and the litigation " 'arise[s] out of *or relate[s] to*' " those activities.[229]

Although scholars have speculated over Justice Brennan's use of the phrase "purposefully directed,"[230] he apparently used "directed" rather than "availed" because "directed" is more inclusive. It includes out-of-state actors causing in-state effects. Although such a nonresident defendant would generally not invoke the benefits and protections of the forum state's law, such a defendant should reasonably anticipate, or have fair warning of, forum state litigation.[231] This slight alteration of language did not represent a groundbreaking shift in doctrine. Rather it was an artful way of including within the critical *Hanson* purposeful availment doctrine cases such as *Calder v. Jones*,[232] in which the Court upheld jurisdiction over nonresident defendants

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227. *Id.* (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)).

228. *Id.* (emphasis added) (citing Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774 (1984)).

229. *Id.* (footnote omitted) (emphasis added) (quoting Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984)). Although accurately quoting the *Helicopteros* majority, the reference in the opinion to litigation that "relates to" defendant's forum state activity is misleading. It is not clear that the Court intended any distinction between the two concepts. Although Justice Brennan, in *Helicopteros*, strongly urged that specific jurisdiction could be predicated on conduct that merely "relates to," but does not "arise out of" defendant's forum state activity, 466 U.S. at 420, 424-28 (Brennan, J., dissenting), the majority refused to consider whether there was any jurisdictional significance to the distinction because it was not raised by the parties. *Id.* at 415 & n.10. Including "related to" claims within specific jurisdiction would have represented a substantial departure from existing doctrine, and acceptance of Justice Brennan's own view expressed in dissent. *See supra* note 213.

230. Professor Perschbacher, for example, believes that Justice Brennan carefully chose "purposefully directed" to avoid any notion that physical acts within the forum state, which Perschbacher apparently believes are required for purposeful availment, are determinative of personal jurisdiction. Perschbacher, *supra* note 34, at 620. Perschbacher plainly states that Justice Brennan "absorbed the purposeful availment requirement within his purposefully directed language." *Id.* at 621. On the other hand, Professor Stein states that the *Burger King* Court "confirmed that purposeful availment was the *sine qua non* of the due process test." Stein, *supra* note 75, at 732. By not even mentioning the purposeful direction langauge, it would appear that Professor Stein failed to find any meaningful distinction between the two terms.

231. *See supra* notes 182-84 and accompanying text.

232. 465 U.S. 783 (1984); *see supra* note 207.

based solely on the forum effects of their out-of-state conduct.[233]

The opinion then attempted to explain "why a forum legitimately may exercise personal jurisdiction over a nonresident who 'purposefully directs' his activities toward forum state residents."[234] Unfortunately, the Court only offered two very general rationales for why jurisdiction is proper in these circumstances. First, "[a] State generally has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors."[235] Second, it is unfair to allow nonresident defendants to escape voluntarily assumed obligations arising from interstate activities.[236] Significantly, both justifications are oriented toward the plaintiff and forum. The first is obviously concerned with the forum state interest. The second is concerned with fairness, but not from the defendant's perspective. The Court suggested that it is unfair to potential forum-state plaintiffs to permit a nonresident defendant to direct his interstate activities in a manner in which he derives benefits without a concomitant obligation to "account . . . for consequences that arise proximately from such activities."[237] Although these justifications are sensible, they are in some respects inconsistent with the concept that due process protects the individual liberty interest of defendants from being unfairly subjected to state judicial power, which Justice Brennan emphasized in opening this part of the *Burger King* opinion.[238] Nevertheless, the recognition by *Burger King* that purposeful direction implicates state and plaintiff interests is a key analytical point of this Article's thesis.[239]

The next portion of the opinion repeated *World-Wide*'s discussion of foreseeability and *Hanson*'s famous "unilateral activity," "purposeful availment," and "invoking benefits and protec-

233. 465 U.S. at 787 & n.6.

234. 471 U.S. at 473. Explanations of this sort are unusual in Supreme Court jurisprudence. *See* Stein, *supra* note 75, at 761 ("the Court has not explained what justifies jurisdiction").

235. 471 U.S. at 473 (citing McGee v. International Life Ins. Co., 355 U.S. 220, 222-23 (1957)).

236. *Id.* at 473-74. The Court quoted *McGee* for the proposition that advances in transportation and communication have made it substantially less burdensome for a nonresident to defend an action in a forum state. *Id.* at 474.

237. *Id.* at 474.

238. *See supra* notes 191-93, 197 and accompanying text.

239. *See infra* text accompanying notes 419-22.

tions" language.[240] Unfortunately, the Court failed to explain how these concepts relate to, and harmonize with, the earlier "fair warning" and "purposeful direction" language.[241] The use of different terminology to describe the same or similar concept causes confusion and promotes litigation aimed at finding the differences in usage meaningful. The conclusion of this section of the opinion, which represents a significant departure from prior case law, states:

> Thus where the defendant "deliberately" has engaged in significant activities within a State, or has created "continuing obligations" between himself and residents of the forum, he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by "the benefits and protections" of the forum's laws *it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well.*[242]

Here Justice Brennan states for the first time that minimum contacts, if established, only raise a presumption of proper adjudicatory authority. The Court provided no direct authority for this view[243] and offered no citation of any type in support of this novel and far reaching doctrinal shift.

After carefully dispelling any notion that physical presence in the forum is required,[244] Justice Brennan dramatically shifted the discussion to the fairness branch: "*Once it has been decided* that a defendant purposefully established minimum contacts within the forum State, these contacts *may* be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.' "[245] Justice Brennan's list of other factors, which ap-

240. 471 U.S. at 474-76.

241. *See supra* note 230.

242. 471 U.S. at 475-76 (citations omitted) (emphasis added).

243. The seeds of the two-branch approach were sown originally in *Kulko, World-Wide* and *Rush. See supra* text between notes 138-52, note 186. Nevertheless, the idea that a positive finding of minimum contacts only raises a presumption of proper jurisdiction is entirely new and represents the emergence of a new analytical framework under the due process clause.

244. 471 U.S. at 476.

245. *Id.* (quoting International Shoe Co. v. Washington, 326 U.S. 310, 320 (1945)) (emphasis added).

pears to be nonexclusive,[246] was lifted verbatim from *World-Wide*. The fairness branch factors are: (1) the burden on defendant, (2) the interest of the forum state, (3) the plaintiff's interest in obtaining relief, (4) the systemic interest in obtaining the most efficient resolution of the litigation, and (5) the systemic interest in furthering substantive social policies.[247] Justice Brennan's introduction of the fairness branch with the "once it has been decided"[248] language is most significant. It unequivocally implies that purposefully established minimum contacts must be found before the due process analysis proceeds to the fairness branch.[249] The decision in *Asahi*, however, tends to undermine this point.[250]

Significantly, and unlike the first collective articulation of the fairness branch in *World-Wide*,[251] *Burger King* attempted to explain the relationship between the fairness branch and the power branch.[252] Justice Brennan made three slightly overlapping observations. First, he strongly suggested that the interplay between the two branches may result in a finding of jurisdiction if the power or minimum contacts branch is weak, so long as the reasonableness or fairness branch is strong.[253] Second, if the power branch is plainly satisfied by a defendant's purposeful direction of activities to the forum state, the burden shifts to the defendant to show that other factors render jurisdiction unreasonable.[254] Finally, and perhaps most significantly for under-

246. Introducing the fairness branch factors in *World-Wide*, the Court's language suggests that its list of "other relevant factors" is not exclusive. *See* 444 U.S. 286, 292 (1980).

247. 471 U.S. at 477 (quoting *World-Wide*, 444 U.S. at 292).

248. *Id.* at 476.

249. No specific threshold level of minimum contacts, however, is contemplated. In view of Justice Brennan's statement that weak minimum contacts may be offset by a strong affirmative showing under the fairness branch, *see infra* text accompanying note 253. Any level of contact apparently would be sufficient for a court to proceed to the fairness side of the equation. If this interpretation is correct, the entire significance of the power branch is called into question.

250. *See infra* subpart III C.

251. *See supra* text accompanying notes 145-51.

252. 471 U.S. at 477-78.

253. *Id.* at 477. In support of this proposition, Justice Brennan cited *Keeton*, *Calder* and *McGee*, which are the three Supreme Court personal jurisdiction cases approaching the limits of due process. They are also cases in which fairness branch factors, although not labelled as such, were given prominence. In each of these cases strong plaintiff and forum interests seemed to overcome weak minimum contacts.

254. *Id.* No authority was offered for this significant proposition.

standing the result in *Asahi*, *Burger King* suggested that jurisdiction, although proper under the power branch, may be defeated by a strong showing under the fairness branch.[255]

Notwithstanding the grudging acknowledgement that jurisdiction may be divested by the fairness branch, the opinion seems deliberately crafted to expand rather than to restrict the ambit of state court personal jurisdiction. Certainly, Justice Brennan's first observation concerning the relationship between the two branches suggested that he envisaged the fairness branch as increasing opportunities for jurisdiction by a *McGee*-like, multiple-interest balance process: "These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required."[256] This conclusion is not surprising considering that the author of the *Burger King* opinion has consistently been the Court's leading advocate of jurisdictional expansion.[257] Furthermore, the opinion contemplates a substantial burden on defendant to show unfairness —"he must present a compelling case."[258] Moreover, the Court stated that most defendant objections can be "accommodated through means short of finding jurisdiction unconstitutional."[259] The Court suggested that application of a forum's choice-of-law rules and motions for a change of venue can often alleviate jurisdictional unfairness to defendants.[260] The concept that defendant objections to jurisdiction generally can be accommodated without striking down a state's assertion of jurisdiction is another significant element of this Article's thesis.[261]

Undoubtedly, *Burger King* was intended to expand jurisdiction. It is therefore ironic that in *Asahi*, the Court's first post-*Burger King* jurisdictional case, Brennan's two-branch due process analysis was invoked to overturn the assertion of jurisdiction by California. Even more ironic, perhaps, was the Court's reliance on the fairness branch to reach its decision.

By the time it heard *Asahi* the Supreme Court definitively

255. *Id.* at 477-78.
256. *Id.* at 477.
257. *See supra* notes 91-94 and accompanying text.
258. 471 U.S. at 477.
259. *Id.*
260. *Id.* & nn.19-20.
261. *See infra* notes 430-39 and accompanying text.

had joined the two divergent doctrinal approaches to jurisdictional due process. As stated earlier, however, *Burger King*'s joinder of *McGee*'s multi-interest balancing approach with *Hanson*'s purposeful availment analysis did not merge the two doctrines into a uniform test providing reasonably consistent and predictable results. This conclusion is buttressed by the seriously divided Court in *Asahi*, which produced two four-justice plurality opinions and a third opinion of three justices.

III. THE *Asahi* LITIGATION

A. *California Courts: A Mixed Result*

Asahi arose from a 1978 accident between a motorcycle and a tractor-trailer on a California highway, in which one citizen of California was killed and another severely injured.[262] Approximately one year later the survivor and his children filed a products liability action in a California state court alleging that the "accident was caused by a sudden loss of air and an explosion in the rear tire of the motorcycle, and . . . that the motorcycle tire, tube, and sealant were defective."[263] The complaint named several defendants,[264] including Cheng Shin Rubber Industrial Co., Ltd. (Cheng Shin), the Taiwanese manufacturer of the tire tube.[265] More than two years later Cheng Shin cross-claimed against its codefendants, and filed third-party claims against

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262. Asahi Metal Indus. Co. v. Superior Court, ___ U.S. ___, 107 S. Ct. at 1029.

263. *Id.*

264. The complaint named Dunlop Tire & Rubber Co. as the first defendant. Order Denying Motion to Quash Summons, Zurcher v. Dunlop Tire & Rubber Co., No. 76180 (Super. Ct., Solano County, Cal., April 22, 1983), Appendix A to Joint Appendix, Asahi Metal Indus. Co. v. Superior Court, ___ U.S. ___, 107 S. Ct. 1026 (1987) (No. 85-693). The opinion of the Supreme Court of California indicates that Sterling May Company, Inc., the California retailer of the motorcycle tire tube, was another original defendant. Asahi Metal Indus. Co. v. Superior Court, 39 Cal. 3d 35, 41, 702 P.2d 543, 544, 216 Cal. Rptr. 385, 387 (1985), *rev'd*, ___ U.S. ___, 107 S. Ct. 1026 (1987). Cheng Shin's United States subsidiary, Cheng Shin Tire USA, Inc., a California corporation which markets its parent's products in the United States, was also an original defendant. Brief for Respondent at 1-2, Asahi Metal Indus. Co. v. Superior Court, ___ U.S. ___, 107 S. Ct. 1026 (No. 85-693) [hereinafter cited as "Brief for Respondent"]. *But see* Asahi Metal Indus. Co. v. Superior Court, 147 Cal. App. 3d 30, 194 Cal. Rptr. 741, 743 (1983) ("Cheng Shin Tire USA, Inc. . . . apparently is not involved in this lawsuit"), *vacated*, 39 Cal. 3d 35, 702 P.2d 543, 216 Cal. Rptr. 385 (1985), *rev'd*, ___ U.S. ___, 107 S. Ct. 1026 (1987).

265. 107 S. Ct. at 1029.

several new parties, including Asahi Metal Industry Co., Ltd. (Asahi), the Japanese manufacturer of the tube's valve assembly.[266] Cheng Shin's affirmative claims sought indemnification.[267]

Asahi manufactured valve assemblies in Japan[268] and sold them to several major tire and tube manufacturers, including Cheng Shin.[269] Cheng Shin manufactured tire tubes in Taiwan, incorporating as component parts valve assemblies purchased from Asahi and other suppliers,[270] and sold completed tire tubes throughout the world.[271] Asahi apparently had no contact with California other than the sale there of finished products by others containing its valve assemblies.[272]

Asahi moved to quash service of process for lack of jurisdiction.[273] In support of its motion Asahi submitted an affidavit from its president,[274] indicating that it sold valve assemblies to Cheng Shin for ten years, and that between 1978 and 1982 it sold 1.35 million valve assemblies to Cheng Shin, which Cheng Shin incorporated into motorcycle tubes.[275] All of the sales from Asahi to Cheng Shin occurred in Taiwan, and the valve assem-

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266. *Id.* at 1029-30. The timing of Cheng Shin's cross-complaint is stated in the opinion of the California intermediate appellate court. Asahi Metal Indus. Co. v. Superior Court, 194 Cal. Rptr. at 742.

Under California procedure the term "cross-complaint" is used to describe any claim that would be designated a counterclaim, FED. R. CIV. P. 13(a) & (b), cross-claim, FED. R. CIV. P. 13(g), or third-party claim, FED. R. CIV. P. 14(a) & (b), under federal practice. *See* CAL. CIV. PROC. CODE § 428.10(a) & (b) (West Cum. Supp. 1988); American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 584, 578 P.2d 899, 902, 146 Cal. Rptr. 182, 185 (1978); *cf.* CAL. CIV. PROC. CODE § 422.10 (West 1973) ("The pleading allowed in civil actions are complaints, demurrers, answers, and cross-complaints").

267. 107 S. Ct. at 1029.

268. *Id.* at 1030. The California Supreme Court characterized Asahi as "a major Japanese producer of valve assemblies." 39 Cal. 3d at 41, 702 P.2d at 544, 216 Cal. Rptr. at 387.

269. 107 S. Ct. at 1030. Cheng Shin's Supreme Court brief stated that Asahi "sold its product to such Worldwide marketers as Honda, Yokohama, Bridgestone and Kenda, who sell extensively in the United States and California marketplaces." Brief for Respondent at 13.

270. 107 S. Ct. at 1030.

271. *Id.*

272. *See id.*

273. *Id.*

274. *See* 194 Cal. Rptr. at 742; *see also* Asahi Metal Indus. Co. v. Superior Court, 39 Cal. 3d 35, 41, 702 P.2d 543, 544-45, 216 Cal. Rptr. 385, 387 (1985).

275. 39 Cal. 3d at 41, 702 P.2d at 545, 216 Cal. Rptr. at 387; *see also* 107 S. Ct. at 1030; 197 Cal. Rptr. at 742.

blies were shipped from Japan to Taiwan.[276] Apparently there was no written contract between Asahi and Cheng Shin.[277]

Cheng Shin submitted information indicating that approximately twenty percent of its United States sales were made in California.[278] Moreover, one of Cheng Shin's lawyers conducted a survey of a retail outlet operated by a codefendant,[279] in which he found the following: (1) eighty-four percent of the tire tubes offered for sale were of Japanese or Taiwanese origin;[280] (2) fifty-five percent of such tubes were manufactured by Cheng Shin;[281] (3) twenty-three percent of the tubes manufactured in Japan or Taiwan had Asahi valve assemblies;[282] and (4) twenty-three percent of the Cheng Shin tubes had Asahi valve assemblies.[283] Although unscientific, this survey demonstrated that Asahi produced a substantial volume of valve assemblies, which it sold to several major tube and tire manufacturers, and that a significant number of these valve assemblies were component parts of products directly marketed in California. In addition, a Cheng Shin manager submitted a declaration expressing the belief that Asahi fully understood that its valve stem assemblies would be indirectly marketed throughout the United States, including California.[284] Asahi responded with an affidavit of its president asserting that it never contemplated that limited sales to Cheng Shin of valve stem assemblies in Taiwan would render it amenable to jurisdiction in California.[285]

Basing its decision largely on the information summarized above, the California trial court denied the motion to quash the summons.[286] The brief opinion emphasized the global scope of Asahi's business[287] and, accordingly, concluded that " '[i]t is not

276. 107 S. Ct. at 1030.

277. *Id.*

278. *Id.* Significantly, the record does not reveal what percentage of Cheng Shin's worldwide sales are made in the United States. 39 Cal. 3d at 54-55, 702 P.2d at 554, 216 Cal. Rptr. at 396 (Lucas, J., dissenting).

279. 39 Cal. 3d at 41 n.1, 702 P.2d at 545 n.1, 216 Cal. Rptr. at 387 n.1.

280. *See id.*; *see also* 107 S. Ct. at 1030.

281. *See* 107 S. Ct. at 1030.

282. *See id.*

283. *See id.*

284. *See id.*

285. *See id.*

286. *Id.*

287. *Id.*

unreasonable that [Asahi] defend claims of defect in [its] product[s] on an international scale.' "[288] Asahi sought review by California's intermediate appellate court,[289] which directed the trial court to grant Asahi's motion to quash.[290] After the filing of a petition for a hearing in the California Supreme Court, the plaintiffs settled with all original defendants,[291] and their complaint was dismissed with prejudice.[292] Nevertheless, the California Supreme Court stated that "the dismissal ha[d] no bearing on the propriety of California's exercise of jurisdiction over Asahi,"[293] and upheld "the trial court's order denying Asahi's motion to quash service of [the] summons."[294]

Although recognizing that Asahi had no independent contacts with the forum state,[295] the California Supreme Court found that "Asahi's indirect business [in California], through Cheng Shin and others, [was] substantial."[296] More significantly, the court found that Asahi was aware that a portion of the valve assemblies it sold to Cheng Shin would be incorporated in finished products sold in California.[297] From this finding the court concluded that Asahi (1) should have reasonably anticipated being haled into court in California;[298] (2) purposefully availed itself of the benefits and protections of California's laws;[299] and (3) knew that it would benefit economically from the sale in California of tubes incorporating its valves as component parts.[300] Moreover, the California court found its conclusion consistent with the dicta of the Supreme Court in *World-Wide*[301] that jurisdictional due process is satisfied with respect to a defendant that " 'delivers its products into the stream of commerce with

288. *Id.* (quoting Order Denying Motion to Quash Summons, *supra* note 264).

289. Asahi petitioned for a writ of mandate. 194 Cal. Rptr. at 742.

290. 194 Cal. Rptr. at 744; *see also* 107 S. Ct. at 1030.

291. 39 Cal. 3d at 55, 702 P.2d at 555, 216 Cal. Rptr. at 397 (Lucas, J., dissenting). The settlement was for $300,000. Stewart, *Shortening California's Long Arm*, A.B.A. J., April 1, 1987, at 45.

292. 39 Cal.3d at 52 n.9, 702 P.2d at 552 n.9, 216 Cal. Rptr. at 395 n.9.

293. *Id.*

294. *Id.* at 54, 702 P.2d at 553, 216 Cal. Rptr. at 396.

295. *Id.* at 48, 702 P.2d at 549, 216 Cal. Rptr. at 392.

296. *Id.*

297. *Id.*

298. *Id.*, 702 P.2d at 550, 216 Cal. Rptr. at 392.

299. *Id.*

300. *Id.* at 49, 702 P.2d at 550, 216 Cal. Rptr. at 392.

301. *See id.*, 702 P.2d 549, 216 Cal. Rptr. at 393.

the expectation that they will be purchased by consumers in the forum State.' "[302] Last, the California Supreme Court concluded that jurisdiction over Asahi in connection with Cheng Shin's indemnification claim was both fair and reasonable.[303]

Hearing the case under its certiorari jurisdiction,[304] the Supreme Court reversed.[305]

B. United States Supreme Court: A Confusing But Unanimous Result

Although all nine justices concurred in the judgment reversing the California Supreme Court, the Court was deeply divided regarding the proper rationale for its result.

Justice O'Connor's opinion, which announced the judgment of the Court,[306] was divided into three parts, which were designated by roman numerals.[307] Part II of the opinion was further divided into two subparts, labelled "A" and "B".[308] The only part of the opinion in which all the other justices joined was Part I, which simply presented the background of the case and the decisions below.[309] Part II-A, which was joined by Chief Justice Rehnquist and Justices Powell and Scalia, presented

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302. *Id.* at 48 n.3, 702 P.2d at 549 n.3, 216 Cal. Rptr. at 391-92 n.3 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 298 (1980)) (emphasis omitted). *World-Wide* cited (with a "*cf.*" signal) Gray v. American Radiator & Stand. Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961), in support of the stream-of-commerce proposition.

303. 39 Cal. 3d at 54, 702 P.2d at 553, 216 Cal. Rptr. at 396. Even though its decision was handed down after the United States Supreme Court decided *Burger King*, the California Supreme Court did not cite *Burger King* in its *Asahi* opinion. As *Burger King* was decided on May 20, 1985, and the California Supreme Court decided *Asahi* on July 25, 1985, it is likely that the California decision was substantially completed prior to the release of *Burger King*. Even though it did not consider *Burger King*, the California Supreme Court analyzed whether California's assertion of jurisdiction over Asahi was fair and reasonable. 39 Cal. 3d at 52, 702 P.2d at 552, 216 Cal. Rptr. at 394. The court undertook a separate fairness analysis even though it expressed doubt regarding the "continuing relevance of the fairness determination." *Id.* at 52 n.8, 702 P.2d at 552 n.8, 216 Cal. Rptr. at 394 n.8. *See supra* notes 219-20 and accompanying text.

304. 475 U.S. 1044 (1986).

305. 107 S. Ct. at 1031, 1035.

306. *Id.* at 1029.

307. The Court's statement of the issue preceded Part I of O'Connor's opinion. 107 S. Ct. at 1029.

308. *Id.* at 1031, 1033.

309. *Id.* at 1029-31.

O'Connor's view of traditional minimum contacts.[310] Part II-B, in which all justices except Scalia joined, contains O'Connor's fairness or reasonableness analysis.[311] Curiously, even though she mustered an eight-justice majority for her fairness analysis, O'Connor's holding, presented in Part III, appeared more firmly grounded on minimum contacts, a part of her opinion for which she drew only plurality support.[312] Consequently, the holding was joined only by the same three justices who joined her minimum contacts analysis.

Under the "power" or "traditional minimum contacts" branch, the Court issued three separate opinions. Two of the opinions divided the Court into directly conflicting four-justice pluralities.[313] While professing to rest on fairness considerations alone,[314] the third opinion offered yet another view of the power or minimum contacts branch.[315] The O'Connor plurality concluded that minimum contacts had not been established because Asahi did not purposefully direct its business activity to California.[316] Justice Brennan, joined by Justices White, Marshall, and Blackmun, maintained that minimum contacts were established based on Asahi's awareness that its products would be marketed in California.[317]

The division between the O'Connor and Brennan pluralities was attributable to the different interpretations each opinion gave to *World-Wide*'s stream-of-commerce dicta.[318] After *World-Wide*, the lower federal courts were divided on whether mere awareness that a product left the stream of commerce in the forum state was sufficient to establish minimum contacts, or whether a defendant was required to exhibit more deliberate or purposeful conduct with respect to the forum state to establish

310. *Id.* at 1031-33.

311. *Id.* at 1033-35.

312. *See id.* at 1029, 1035.

313. *See id.*

314. *Id.* at 1038 ("Part II-B establishes, after considering the factors set forth in *World-Wide* . . . that California's exercise of jurisdiction over Asahi in this case would be 'unreasonable and unfair.' *This finding alone requires reversal.* . . .") (emphasis added) (citations omitted) (Stevens, J., concurring in part and concurring in the judgment).

315. *Id.* at 1038 (Stevens, J., concurring in part and concurring in the judgment).

316. *Id.* at 1033.

317. *Id.* at 1035-36.

318. *Compare id.* at 1031-33, *with id.* at 1035-37 & nn.1-2.

minimum contacts.[319] Although acknowledging the split in authority,[320] Justice O'Connor, without close analysis, concluded that due process requires more than mere "awareness." She expressed this view as follows:

> The "substantial connection" . . . between the defendant and the forum State necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully directed toward the forum State.* . . . The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State."[321]

The opinion then described conduct, in addition to insertion of the product into the stream of commerce, that may indicate "purposeful direction."[322]

The additional conduct described were all acts that might indicate more clearly an intent or purpose to serve the market in the forum State. The examples given by the Court were: (1) "designing the product for the market in the forum State";[323] (2)

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319. *Id.* at 1032-33; *The Supreme Court, 1986 Term—Leading Cases*, 101 HARV. L. REV. 119, 261 & n.6 (1987). *See generally* 4 C. WRIGHT & A. MILLER, *supra* note 16, § 1067 n.55; Hay, *supra* note 179, at 433-44; Jordan & Leiner, *American Jurisdiction over Foreign Corporations in Product Liability Lawsuits: The* Asahi *Decision and Beyond*, 21 J. WORLD TRADE L. 31, 38-43 (1987); Weintraub, Asahi *Sends Personal Jurisdiction Down the Tubes*, 23 TEX. INT'L L.J. 55, 66 & nn.64-65 (1988); Casenote, Asahi Metal Indus. Co. v. Superior Court: *Minimum Contacts in California Become Minimal*, 22 WILLAMETTE L. REV. 589, 595-602 (1986) (criticizing California Supreme Court's *Asahi* opinion).

320. Justice O'Connor recognized that the lower courts were divided on the stream-of-commerce theory when she stated:

> Some courts have understood the Due Process Clause, as interpreted in *World-Wide Volkswagen*, to allow an exercise of personal jurisdiction to be based on no more than the defendant's act of placing the product in the stream of commerce. Other courts have understood the Due Process Clause and the above-quoted language in *World-Wide Volkswagen* to require the action of the defendant to be more purposefully directed at the forum State than the mere act of placing a product in the stream of commerce.

107 S. Ct. at 1032.

321. *Id.* at 1033 (emphasis in original) (citations ommitted).

322. *See infra* text accompanying notes 323-26. Justice O'Connor unfortunately also emphasized the lack of any direct physical ties between Asahi and California when she stated: "Asahi does not do business in California. It has no office, agents, employees, or property in California. It does not advertise or otherwise solicit business in California. It did not create, control, or employ the distribution system that brought its valves to California." 107 S. Ct. at 1033 (citation omitted).

323. 107 S. Ct. at 1033.

"advertising in the forum State";[324] (3) "establishing channels for providing regular advice to customers in the forum State";[325] or (4) "marketing the product through a distributor who has agreed to serve as the sales agent in the forum State."[326] Although "designing," "advertising," "advising," or "marketing" with specific reference to the forum state tends to establish intent to serve that market, these are activities that almost invariably would be undertaken by manufacturers of final consumer products or of replacement parts.[327] It would be highly unusual for a nonreplacement component part manufacturer to engage in these types of consumer oriented activities. This is especially so with respect to a component part that is attached to, and not readily separable from, the final consumer product such as the valve stem of a tire tube. A literal reading of the O'Connor plurality suggests that a foreign component part manufacturer could not be sued in a jurisdiction in which its product was systematically and continuously distributed with its knowledge and acquiescence over many years so long as the manufacturer did not engage in consumer oriented activity in the forum state. In addition, O'Connor's emphasis on forum-state market activity may permit even a final product manufacturer to escape jurisdiction by insulating the manufacturing process from the distribution process.[328]

The O'Connor plurality view is also at odds with the seminal stream-of-commerce case of the post-*International Shoe* era, *Gray v. American Radiator & Standard Sanitary Corp.*[329] Although only an Illinois Supreme Court decision, *Gray*, which upheld jurisdiction over a domestic component part manufac-

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324. *Id.*

325. *Id.*

326. *Id.*

327. Replacement parts are component parts that a consumer purchases and either replaces himself or has an expert replace. Examples are automobile batteries, spark plugs, and engine filters.

328. *Cf.* Hutson v. Fehr Bros., Inc., 584 F.2d 833 (8th Cir.), *cert. denied*, 439 U.S. 983 (1978) (precluding jurisdiction over a remote distributor that maintained no control over the markets in which its products left the stream of commerce). Professor Weintraub apparently believes that *Asahi* will encourage manufacturers to use multiple layers of independent distributors to avoid product liability. Weintraub, *supra* note 319, at 69-70.

329. 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

turer,[330] has on at least two occasions been cited with approval by the Supreme Court.[331] Significantly, Justice O'Connor failed even to mention *Gray*. In discussing *World-Wide*'s stream-of-commerce language, Justice Brennan, on the other hand, acknowledged that *Gray* was cited by the Court in *World-Wide* and implied that *Gray* is a classic example of the stream-of-commerce theory. Thus, O'Connor's plurality is in direct conflict with the Supreme Court's prior, albeit implicit, approval of *Gray*. If anything, the facts in *Asahi* establish far more substantial forum state market penetration by the component part manufacturer than was evident in *Gray*.[332] The only material factual distinction, of course, is that Asahi was an alien corporation, while the component part maker in *Gray* was a domestic corporation.[333] This distinction, however, seems to have no significance for "power" branch analysis. It plays a critical role, however, under the "fairness" branch.[334]

In contrast to the O'Connor view, Justice Brennan, joined by Justices White, Marshall, and Blackmun, thought that mere awareness that a product was being distributed in the forum state was sufficient to establish minimum contacts under the power branch. Responding to the O'Connor plurality's requirement of "something more," Justice Brennan stated:

> I see no need for such a showing, however. The stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale. As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise. Nor will the litigation present a burden for which there is no corresponding benefit. A defendant who has placed goods in the stream of commerce benefits economically from the retail sale of the final product in the forum State, and indi-

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330. *Id.* at 434, 438, 176 N.E.2d at 762, 764.

331. Calder v. Jones, 465 U.S. 783, 789 (1984); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 298 (1980).

332. *Compare Asahi*, 107 S. Ct. at 1030, *rev'g* 39 Cal. 3d at 41 & n.1, 48-49 & nn.4-5, 702 P.2d at 545 & n.1, 549-50 & nn.4-5, 216 Cal. Rptr. at 387 & n.1, 392 & nn.4-5, *with Gray*, 22 Ill. 2d at 438, 442, 176 N.E.2d at 764, 766.

333. The component part manufacturer in *Gray*, Titan Valve Manufacturing Corporation, apparently had its principal place of business in Ohio. *See* 22 Ill. 2d at 434, 438, 176 N.E.2d at 762, 764.

334. *See infra* notes 385-86 and accompanying text.

> rectly benefits from the State's laws that regulate and facilitate commercial activity.[335]

Concurring in the judgment, Justice Stevens expressed the view that "*[a]n examination of minimum contacts is not always necessary* to determine whether a state court's assertion of personal jurisdiction is constitutional."[336] This statement is not only remarkable in light of forty-two years of decisional history since *International Shoe* first articulated the minimum contacts test, but is also inconsistent with the jurisdictional framework established in *Burger King*.[337] Nevertheless, this reasoning permitted Justice Stevens to concur in the judgment based on reasonableness branch factors alone without deciding whether minimum contacts were first established under the power branch. Although Justice Stevens failed to join in Justice Brennan's opinion, which found that minimum contacts were established based on Asahi's awareness that its component parts were being distributed by others in California, his position was substantially closer to Brennan's view than it was to the view of the O'Connor plurality. After suggesting that Asahi's regular course of dealing with Cheng Shin amounted to more than mere placement of a product into the stream of commerce,[338] Justice Stevens concluded his opinion as follows:

> Whether or not this conduct rises to the level of purposeful availment requires a constitutional determination that is affected by the volume, the value, and the hazardous character of the components. In most circumstances I would be inclined to conclude that a regular course of dealing that results in deliveries of over 100,000 units annually over a period of several years would constitute "purposeful availment" even though the item delivered to the forum State was a standard product marketed throughout the world.[339]

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335. 107 S. Ct. at 1035 (Brennan, J., concurring in part and concurring in the judgment).

336. *Id.* at 1038 (Stevens, J. concurring in part and concurring in the judgment) (emphasis added).

337. *See supra* notes 243-49 and accompanying text.

338. 107 S. Ct. at 1038 ("Over the course of its dealings with Cheng Shin, Asahi has arguably engaged in a higher quantum of conduct than '[t]he placement of a product into the stream of commerce, without more. . . .' ") (citation omitted) (bracket in original) (Stevens, J., concurring in part and concurring in the judgment).

339. *Id.*

Although expressly not endorsing either minimum-contacts view,[340] Justice Stevens's position is most sensible. Instead of taking a black or white view of the stream-of-commerce theory, Stevens would evaluate each component parts case by three objective criteria (*i.e.*, volume, value, and hazardous character). In *Asahi*, no reliable statistics established how many *Asahi* valves were annually marketed, albeit indirectly, in California.[341]

The two power branch pluralities are irreconcilable. Although neither engages in sufficient analysis of the unique problems posed by component part manufacturers, the Brennan plurality has the better view. A manufacturer can take steps to preclude the distribution of its product in a particular jurisdiction if it is concerned with defending lawsuits there.[342] Obviously, a manufacturer of a component part has no economic incentive to limit deliberately the market for its product. Asahi, for example, is in the business of selling valve stem assemblies. To the extent that Cheng Shin and other tube and tire manufacturers sell their own products incorporating Asahi's components throughout the world, including the United States, and specifically including California, Asahi indirectly benefits. The financial success of a component part manufacturer, particularly a manufacturer of a part that is not readily separable from the finished product, is directly tied to the success of the final product manufacturer. Consequently, to the extent that a manufacturer benefits, both economically and legally, from the distribution by others of a product incorporating its component part, it is not unreasonable to have the manufacturer stand behind that product if it causes injury.

Although Justice O'Connor's opinion failed to find minimum contacts, it went on to evaluate the fairness branch fac-

340. *Id.* ("I see no reason in this case for the Court to articulate 'purposeful direction' or any other test as the nexus between an act of a defendant and the forum State that is necessary to establish minimum contacts.").

341. *See* 39 Cal. 3d at 41 & n.1, 49 n.5, 702 P.2d at 543 & n.1, 550 n.5, 216 Cal. Rptr. at 387 & n.1, 392 n.5, *rev'd*, 107 S. Ct. 1026, 1030 (1987). Justice Steven's flexible stream-of-commerce concept may be even broader than the view of the Brennan plurality. Under Stevens's view knowledge or awareness of forum state distribution apparently is not required of a component part manufacturer if the requisite "volume, value and hazardous character" requirements are satisfied.

342. *Cf.* 39 Cal. 3d at 50, 702 P.2d at 551, 216 Cal. Rptr. at 393 ("[T]he component part manufacturer can structure its conduct to protect itself from the risk of liability in the forum state.").

tors[343] and concluded that California's assertion of jurisdiction over Asahi was, in any event, unreasonable.[344] Justice Brennan agreed, finding *Asahi* the "rare" case in which the fairness branch defeats the power branch.[345] Justice Stevens also joined O'Connor in her fairness branch analysis. Only Justice Scalia failed to join this part of the O'Connor opinion.[346]

Although it mustered the support of eight Justices, Part II-B of her opinion, containing Justice O'Connor's fairness analysis, is wooden and overly conclusory. Even assuming the relevance of the fairness branch to jurisdictional due process, which this Article vigorously disputes,[347] Justice O'Connor's analysis of the individual factors ignored several important considerations. Two themes dominated her discussion. One is that the international context of this jurisdictional dispute required special caution.[348] The other is that the plaintiff and forum state had little or no interest in jurisdiction over Asahi because the original plaintiffs settled their claims.[349] Justice O'Connor discussed each fairness branch factor in the order that they were articulated in *World-Wide*,[350] and reiterated in *Burger King*.[351]

The burden on the defendant, Justice O'Connor concluded, was "severe."[352] Her rationale for this conclusion was that the distance between Japan and California is substantial and also that jurisdiction in California would have compelled Asahi to submit its dispute with Cheng Shin to a foreign judicial system.[353] Obviously, the distance concern will be present for almost any alien defendant, except perhaps for those found in parts of Mexico and Canada, and every state or federal court represents a foreign judicial system to an alien defendant. In addition, the Court implied that the burden factor only weighs heavily against jurisdiction because of the meager interest of the

343. 107 S. Ct. at 1033.
344. *Id.* at 1034-35.
345. *See id.* at 1035.
346. *See supra* text accompanying note 311 and *infra* note 403 and accompanying text.
347. *See infra* Part IV-A.
348. 107 S. Ct. at 1034-35.
349. *Id.* at 1034.
350. *See supra* notes 143-50 and accompanying text.
351. *See supra* notes 245-47 and accompanying text.
352. 107 S. Ct. at 1034.
353. *Id.*

plaintiff and forum.[354] Moreover, and perhaps most significantly, O'Connor's defendant "burden" concerns are fundamentally at odds with the emerging global economy in general, and the substantial volume of trade between Japan and California in particular.[355] What was said by the Court thirty years ago in *McGee*,[356] and reiterated twenty-two years later in *World-Wide*,[357] concerning the nationalization of commerce, is equally true today with regard to the internationalization of commerce.[358] Last, as aptly put by Professor Weintraub, "[t]he Court's description of defendant's burden reads as though product liability insurance did not exist and insurance and legal professionals were not for hire to assist Asahi."[359]

The Court next turned to the interests of the plaintiff and the forum. For this purpose Cheng Shin was considered the plaintiff. The interests of the plaintiff and the forum state in having this litigation resolved in California were deemed "slight."[360] Cheng Shin's interest was thought to be seriously undermined by the settlement of the claims of the original plaintiffs.[361] In language that fundamentally misperceives its mission under the due process clause, the Court stated that "Cheng Shin has not demonstrated that it is more convenient for it to litigate its indemnification claim against Asahi in California rather than in Taiwan or Japan."[362] If California's exercise of jurisdiction is

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354. *See id.* Justice O'Connor stated:

> 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. In the present case, however, the interests of the plaintiff and the forum in California's assertion of jurisdiction over Asahi are slight.

Id.

355. Appendix to Brief of Amicus Curiae California Manufacturers Ass'n in Support of Respondent at A-2 to A-5, Asahi Metal Indus. Co. v. Superior Court, 107 S. Ct. 1026 (1987) (No. 85-693).

356. 355 U.S. 220, 222-23 (1957).

357. 444 U.S. 286, 293 (1980).

358. *See supra* note 355.

359. R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 4.8, at 10 (1987 Supp.).

360. 107 S. Ct. at 1034.

361. *Id.* ("All that remains is a claim for indemnification asserted by Cheng Shin, a Taiwanese corporation, against Asahi. The transaction on which the indemnification claim is based took place in Taiwan; Asahi's components were shipped from Japan to Taiwan.").

362. *Id.*

constitutional, it does not matter, at least for purposes of the due process clause, whether Taiwan or Japan are more convenient fora.[363] Moreover, to the extent that California is an inconvenient forum, Asahi could seek dismissal under the common-law doctrine of forum non conveniens.[364]

O'Connor also found that California's interest was substantially diminished by the lack of a California plaintiff,[365] and because of uncertainty over whether "California law should govern the question whether a Japanese corporation should indemnify a Taiwanese corporation on the basis of a sale made in Taiwan and a shipment of goods from Japan to Taiwan."[366]

Several problems are raised by this reasoning. First, the original plaintiff only settled when the case was in the California Supreme Court. If jurisdiction was proper when asserted,[367] it should not be dislodged because of subsequent litigational developments.[368] The Court strongly implied that the result would be different if there had been no settlement.[369] If this is a correct

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363. The Court tends to be unduly concerned with alternative fora in cases having foreign country defendants. *Cf.* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 419 n.13 (1984). Refusing to consider the doctrine of "jurisdiction by necessity" in *Helicopteros*, the Court concluded that "respondents failed to carry their burden of showing that all three defendants could not be sued together in a single forum. It is not clear from the record, for example, whether suit could have been brought against all three defendants in either Columbia or Peru." *Id.*

364. *See infra* notes 431-42 and accompanying text.

365. 107 S. Ct. at 1034 ("Because the plaintiff is not a California resident, California's legitimate interests in the dispute have considerably diminished.").

366. *Id.*

367. Defendants are generally required to raise objections to personal jurisdiction at the outset of a litigation. *See* FED. R. CIV. P. 12(b), (g) & (h). If not so raised, the defense is waived. FED. R. CIV. P. 12(h)(1).

368. *See infra* text accompanying notes 443-44, and note 445.

369. *See* 107 S. Ct. at 1034-35. The Court concluded its fairness branch analysis as follows: "Considering the international context, the heavy burden on the alien defendant, and the slight interests of the plaintiff and the forum State, the exercise of personal jurisdiction by a California court over Asahi in this instance would be unreasonable and unfair." *Id.* at 1035.

The commentators generally assume that California could have properly asserted jurisdiction over Asahi if the original plaintiffs had sued Asahi. *See, e.g.*, Jordan & Leiner, *supra* note 317, at 36 n.9 ("One must assume, however, that the unreasonableness of the exercise of jurisdiction over Asahi was largely due to the fact that the injured California plaintiff[s] had left the case."). Stewart, *supra* note 289, at 46 (quoting Professor Andreas Lowenfeld of New York University School of Law as suggesting "that the Court's outcome would have been different if the claim against Asahi Metal was 'by the guy who fell off the motorcycle.' "); Tunick, *Getting to a Foreign Company Whose Product Hurt Your Client*, THE COMPLEAT LAWYER, Winter 1988, at 61, 63 ("If this case had

reading of the opinion, then a potential defendant will not know if any particular conduct or activity in, or in connection with, the forum state will subject it to jurisdiction. Second, the emphasis on the lack of a forum-state plaintiff is plainly inconsistent with the Court's prior view that a plaintiff need not have minimum contacts with the forum state, which it expressed in *Keeton*[370] and *Calder*.[371] Third, although there is some doubt on the point,[372] applying California law to the indemnity claim, as the court suggested, but did not decide, may have been unconstitutional.[373] But this point is also inconsistent with *Keeton*, in which the Court implied that choice-of-law concerns enter the litigation only after jurisdiction is established and that "such . . . concerns should not complicate or distort the jurisdictional inquiry."[374] Moreover, a state's capacity to choose, or not choose, its own law had previously been deemed irrelevant to personal jurisdiction.[375] Consequently, it would appear that *Asahi* represents a doctrinal shift by the Court regarding the significance of choice of law for jurisdictional purposes. Whether a state may constitutionally apply its own law to a controversy is now relevant to analysis of the forum state interest factor under the fairness branch.

The Court's discussion of California's interest, moreover, ignored that Cheng Shin not only had pending claims against Asahi, but that it apparently also had unresolved crossclaims against its codefendants, at least one of which was a California citizen.[376] While California may not have been concerned about

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involved a suit against Asahi by the injured motorcyclist, the outcome of the inquiry into reasonableness and fairness may well have been completely different."). *But cf.* Weintraub, *supra* note 319, at 66-67 (based on O'Connor's minimum contacts analysis); *Recent Development*, 22 TEX. INT'L L.J. 403, 407 (1987) (same).

370. 465 U.S. at 779; *accord* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 806-11 (1985). *See supra* note 203.

371. 465 U.S. at 788. *See supra* note 207.

372. *See* Weintraub, *supra* note 319, at 68-69 & nn.78-81.

373. 107 S. Ct. at 1034.

374. 465 U.S. at 778.

375. *See supra* note 75.

376. The California Supreme Court stated that "Cheng Shin has named numerous defendants in its cross-complaint." 39 Cal. 3d at 53, 702 P.2d at 553, 216 Cal. Rptr. at 395. The Court recognized that California has an interest in resolving all cross-claims in a single proceeding to avoid inconsistent verdicts. *Id.* at 53 & n.10, 702 P.2d at 553 & n.10, 216 Cal. Rptr. at 395 & n.10. At least two original defendants were California corporations, but one was an affiliate of Cheng Shin, and, therefore, was unlikely to have

the resolution of indemnification claims between two aliens, it most certainly had an interest in resolving similar claims against its own citizens.[377]

The Court concluded its discussion of the forum state interest factor by acknowledging that jurisdiction over Asahi would deter foreign component part manufacturers from making unsafe products.[378] This admission was in response to the California Supreme Court's assertion that California "had an interest in 'protecting its consumers by ensuring that foreign manufacturers comply with the state's safety standards.' "[379] Notwithstanding its acknowledgment of California's interest, the Court concluded that the interest could be effectuated without asserting jurisdiction over Asahi "because similar pressures will be placed on Asahi by purchasers of its components as long as those who use Asahi components in their final products, and sell those products in California, are subject to the applicability of California tort law."[380] This belief was mere speculation by the Court.[381] It is inappropriate for the Court to ignore a legitimate state interest by asserting that it may be accommodated indirectly, and perhaps less effectively, in some other manner.

Last, *Asahi*'s forum-state interest analysis is also inconsistent with *Keeton*. California's interest in protecting its citizens from harmful products, even if only component parts, is at least as substantial, if not more substantial, than New Hampshire's interest in protecting its citizens from reading libel in sexually

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been a cross-defendant of Cheng Shin. *See supra* note 264. *But see* Stewart, *supra* note 291, at 45 (suggesting that after the original plaintiffs' "claims were settled for $300,000, divided between the two defendants [Cheng Shin and the California seller of tires], the only remaining part of the lawsuit was Cheng Shin's indemnification claim against Asahi Metal.").

377. *See* 39 Cal. 3d at 52-53 & nn.9-10, 702 P.2d at 552-53 & nn.9-10, 216 Cal. Rptr. at 395 & nn.9-10.

378. 107 S. Ct. at 1034 ("The possibility of being haled into a California court as a result of an accident involving Asahi's components undoubtedly creates an additional deterrent to the manufacture of unsafe components . . . .").

379. *Id.* (quoting 39 Cal. 3d at 53, 702 P.2d at 553, 216 Cal. Rptr. at 395).

380. *Id.*

381. *See* Weintraub, *supra* note 319, at 64 ("The assumption that customers will place 'similar pressures' on Asahi is unwarranted. The customers may not be able to match Asahi's bargaining power. Moreover, 'similar pressures' are a pale substitute for the incentives for safe manufacture that result from the risk of recoveries by injured Californians.").

explicit magazines.[382] In both *Keeton* and *Asahi* the parties were nondomiciliaries of the forum state. In *Keeton* that was true from the outset of the litigation. In *Asahi* the original dispute involved citizens of California on both sides of the litigation.[383]

The final two fairness branch factors are " 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.' "[384] The opinion never directly addressed these concerns, but simply suggested that in the international context these factors concern the policies of other nations.[385] Justice O'Connor, therefore, concluded that jurisdiction in the international context required special caution:

> The procedural and substantive interests of other nations in a state court's assertion of jurisdiction over an alien defendant will differ from case to case. In every case, however, those interests, as well as the Federal interest in its foreign relations policies, will be best served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum State. "Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field."[386]

The Court's concern was unwarranted. First, although some commentators have suggested that permitting extensive jurisdiction over foreign country defendants may inhibit trade,[387] others

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382. In *Keeton* the Court recognized a state's interest in asserting jurisdiction over those who commit torts within its borders, 465 U.S. at 776, and found that "[t]his interest extends to libel actions brought by nonresidents. False statements of fact harm both the subject of the falsehood *and* the readers of the statement. New Hampshire may rightly employ its libel laws to discourage the deception of its citizens." *Id.* (emphasis in original).

383. *See supra* notes 261-64 and accompanying text.

384. *Asahi*, 107 S. Ct. at 1034 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980)).

385. *Id.* at 1034 ("In the present case, this advice calls for a court to consider the procedural and substantive policies of other *nations* whose interests are affected by the assertion of jurisdiction by the California court.") (emphasis in original).

386. *Id.* at 1034-35 (quoting United States v. First Nat'l City Bank, 379 U.S. 378, 404 (Harlan, J., dissenting)).

387. *See, e.g.*, Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT'L & COMP. L. 32-33 (1987); Kennedy, *Stretching the Long-Arm in* Asahi Metal

have expressed the view that limited jurisdiction over alien defendants may well result in an unfair advantage to foreign manufacturers.[388] A domestic manufacturer subject to state court ju-

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Industry Co., Ltd. v. Superior Court: *Worldwide Jurisdiction After* World-Wide Volkswagen?, 4 B.U. INT'L L.J. 327, 336-41 (1986) (criticizing the California Supreme Court's *Asahi* decision); *Recent Development*, 27 VA. J. INT'L L. 915, 925-26 (1987).

388. Brief for Respondent at 27-28; R. WEINTRAUB, *supra* note 359, at 11; Weintraub, *supra* note 319, at 65. On November 19, 1987 Representative Dan Glickman (D-Kan.) introduced a bill to amend the Judicial Code to provide specifically for personal jurisdiction in federal district courts over foreign manufacturers whose products cause injury to a United States citizen if the foreign manufacturer "knew or reasonably should have known that its product would be imported for sale or use in the United States." 133 CONG. REC. H10,785 (daily ed. Dec. 1, 1987) (statement of Rep. Glickman). The bill also provides for simplified service of process on foreign manufacturers. *Id.* In addition, the bill allows removal of actions commenced in state courts by foreign citizens against a United States citizen "for injury that was sustained outside the United States and relates to manufacture, purchase, sale, or use of a product outside the United States." H.R. 3662, 100th Cong., 1st Sess. (1987). Last, the bill provides for choice of law as follows:

> The law of the place where any injury to person or property occurred shall govern all issues concerning liability and damages in any civil action commenced in or removed to any court of the United States which is brought by a citizen or subject of a foreign state against a United States citizen for injury that was sustained outside the United States and that relates to the manufacture, purchase, sale or use of a product outside the United States.

Id. The choice of law provision is to prevent foreign plaintiffs injured abroad from taking advantage of more favorable American tort law.

In addition to providing a remedy for injured American consumers, the bill is aimed at removing the competitive advantage of foreign manufacturers. In introducing the bill, Representative Glickman expressed these concerns:

> Currently, the judicial system of the United States unfairly places American businesses and consumers at a disadvantage in the international marketplace. Foreign nationals can sue American businesses in American courts and have the courts apply our uniquely broad standards of legal responsibility and damages to American business conducted overseas.
>
> By contrast, foreign competitors of those American businesses in the international markets are held accountable only under the less generous laws of the foreign jurisdiction in which they are marketing their products. Thus, American businesses are exposed to far more sweeping financial exposure in connection with their sales to purchasers abroad than are their foreign competitors.
>
> At the same time that we are subjecting American businesses to greater exposure than foreign counterparts operating in the same markets, our judicial system has failed to protect the interests of American consumers injured by goods produced overseas. Under present legal rules, American courts often cannot assert personal jurisdiction over foreign companies, making it impossible for injured American consumers to hold foreign manufacturers fully accountable for their negligence or intentional misconduct.
>
> As a result, American consumers are less protected from injuries caused by the growing number of foreign-produced goods sold in this country. Moreover, this creates a competitive disadvantage for American businesses in their home markets since foreign producers who sell products in this country are not sub-

risdiction must factor into its cost of doing business the possibility of incurring liability in state court litigation,[389] even if insurance can be obtained to protect against any potential liability.[390] If a foreign manufacturer of the same or similar product does not have to take account of such costs, it has an obvious competitive advantage.

In addition, with the substantial amount of foreign manufactured goods annually imported into the United States,[391] a significant volume of component parts are likely to be indirectly distributed here on behalf of manufacturers that do not engage in the type of consumer or market oriented activities that the O'Connor plurality found necessary to establish minimum contacts.[392] In some circumstances an injured United States citizen may have no effective remedy unless jurisdiction can be obtained over a foreign component part manufacturer. The manufacturer of the finished product and others in the product's distribution chain may be insolvent or, even if not insolvent, may have insufficient assets to satisfy a judgment.[393] Although unlikely, in some circumstances a foreign component part manufacturer may be the only party liable.[394] Accordingly, the Court's excessive concern with "foreign relations policies"[395] was plainly unwarranted.

C. Asahi's *Impact on* Burger King's *Framework*

Curiously, Justice O'Connor only cited *Burger King* for its quoted reiteration of *International Shoe's* minimum contacts

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ject to the same financial exposure as American producers. The end result is that American products end up costing more because they must be priced to include greater liability costs.

133 CONG. REC. H10, 785 (daily ed. Dec. 1, 1987) (statement of Rep. Glickman).

389. *See id.*

390. *See generally* Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521 (1987).

391. *See supra* note 355 and accompanying text & text accompanying note 280.

392. *See supra* text accompanying notes 322-26.

393. *See* Weintraub, *supra* note 319, at 67.

394. *Id.* at 67-68 (discussing Hedrick v. Daiko Shoji Co., 715 F.2d 1355 (9th Cir. 1983), *modified sub nom.* Hedrick v. Pine Oak Shipping, S.A., 733 F.2d 1335 (9th Cir. 1984), one of the stream-of-commerce cases disapproved by the O'Connor plurality in *Asahi*).

395. 107 S. Ct. at 1035.

test,[396] and *Hanson's* "purposeful availment" rationale.[397] There were no other references to *Burger King* in her opinion. Nevertheless, Justice O'Connor followed the two-branch approach, but without recognizing the relationship and interplay between the branches as articulated by Justice Brennan in *Burger King*. A majority of the Court could not have been obtained if O'Connor rested her opinion on the power or traditional minimum contacts branch.[398] Only Chief Justice Rehnquist and Justices Powell and Scalia joined that part of her opinion.[399] Plainly *Burger King* contemplated a positive finding under the power branch before a Court proceeds to the fairness branch.[400] As the O'Connor plurality failed to find minimum contacts, *Burger King*'s teaching regarding the relationship between the two branches was ignored.

Justice Brennan's separate four-justice plurality, on the other hand, was consistent with the analytical structure established in *Burger King*. Joined by Justices White, Marshall, and Blackmun, Brennan found jurisdiction proper under the power branch, and then moved to the fairness branch.[401] Justice Brennan did not undertake a separate analysis of the fairness branch factors. He agreed with the O'Connor plurality's fairness conclusion, finding *Asahi*, as stated earlier, the "rare" case in which the fairness branch overcomes purposefully established minimum contacts under the power branch.[402] As Justice Scalia joined only O'Connor's power branch analysis,[403] it might reasonably be inferred that he agreed with the *Burger King* framework (*i.e.*, that fairness branch analysis is unnecessary in the absence of a positive finding under the power branch). If this is a

396. *Id.* at 1031.

397. *Id.*

398. *See supra* text accompanying notes 309-12.

399. *See supra* text accompanying note 308.

400. *See supra* text accompanying notes 248 & 249.

401. *See supra* text accompanying note 317 & text accompanying and preceding note 335. Justice Brennan only analyzed the power branch because he concurred in the fairness analysis of Justice O'Connor.

402. 107 S. Ct. at 1035 (Brennan, J., concurring in part and concurring in the judgment).

403. The reporter's introduction indicating the division of the Court stated that "Justice O'Connor announced the judgment of the Court and delivered . . . the opinion of the Court with respect to Part II-B, in which THE CHIEF JUSTICE, Justice BRENNAN, Justice WHITE, Justice MARSHALL, Justice BLACKMUN, Justice POWELL, and Justice STEVENS join . . . ." 107 S. Ct. at 1029.

correct statement of Justice Scalia's view, then apparently five justices, the Brennan plurality plus Scalia, endorsed the *Burger King* framework. This conclusion, however, is weakened by the joinder of Justices White and Blackmun in the separate opinion of Justice Stevens, which purported to rely exclusively on the fairness branch.[404] As Stevens failed to join either power branch plurality, he apparently viewed the fairness branch as an independent check on the assertion of jurisdiction, and believed that jurisdiction can at least be denied based on the fairness branch alone without regard to, and without first finding, minimum contacts under the power branch. Therefore, it is not possible to ascertain the views of Justices White and Blackmun concerning the continuing validity of *Burger King*'s requirement of a positive finding under the power branch before the fairness branch becomes relevant.

The confusion emanating from the splintering of the Court in *Asahi* leaves the state of personal jurisdiction seriously unsettled. First, the relationship and interplay between the two branches is more clouded after *Asahi*. The Court's resolution of the interplay between the branches will be critically significant. If the Court determines that minimum contacts must be established before the fairness branch becomes relevant, and if the O'Connor plurality's view of the stream-of-commerce doctrine prevails, an injured forum-state plaintiff may not be able to obtain jurisdiction over a component part manufacturer and may be left without a remedy.[405] In these circumstances the strong plaintiff and forum-state interest factors, found lacking in *Asahi*, but present when an injured forum state citizen is the plaintiff, could not be considered by a court because of the failure initially to find minimum contacts under the power branch. Under the *Burger King* structure these concerns are only factored into the calculus under the fairness branch.

Second, as one recent commentary suggested, it may well be that "[t]he uncertainties in deciding whether minimum contacts

404. *Id.* at 1038 (Stevens, J., concurring in part and concurring in the judgment).

405. *See* Weintraub, *supra* note 319, at 66-67 ("The manner in which Justice O'Connor cites cases favorably and with disapproval indicates that component part makers are intended to be exempt from jurisdiction, *even in suits by injured consumers in the state where the finished product caused blood to flow.*") (footnotes omitted) (emphasis added).

exist probably will lead courts to avoid the issue whenever they can rule out jurisdiction"[406] under the fairness branch.[407] Courts will understandably take this approach in cases raising the stream-of-commerce theory because the Supreme Court was unable to express a majority view on that subject in *Asahi*. Viewing the *Asahi* result narrowly, one can safely conclude that the fairness branch alone may preclude jurisdiction, but whether the fairness branch alone can create or uphold jurisdiction is uncertain.[408] If the fairness branch could uphold jurisdiction, then the entire relevance of the "power" or "traditional minimum contacts" branch will be called into serious question, and the multiple-interest balancing approach of *McGee* will have finally prevailed over the traditional minimum contacts approach of *International Shoe*, *Hanson*, and *Shaffer*.

IV. Criticism of Two-Branch Analysis and A Simplified Approach to Jurisdictional Due Process

A. Burger King's *Framework is Flawed*

The current two-branch test of state court personal jurisdiction represents an attempt to accommodate the two doctrinally divergent approaches to jurisdictional due process.[409] In making the accommodation, the current test attempts to factor into the equation every element that has ever been deemed relevant to

406. *The Supreme Court, 1986 Term—Leading Cases*, *supra* note 319, at 266 (footnote omitted).

407. *See, e.g.*, Federal Deposit Ins. Corp. v. British-Am. Ins. Co., 828 F.2d 1439, 1442 (9th Cir. 1987) ("Because we find that the exercise of personal jurisdiction . . . is unreasonable, we need not determine whether the first two prongs of the test are satisfied."). *But cf.* Mason v. F. LLI Luigi & Franco Dal Maschio Fa G.B. s.n.c., 832 F.2d 383, 385-86 (7th Cir. 1987) (distinguishing *Asahi* on fairness branch factors and finding jurisdiction proper under both power and fairness branches).

408. Some commentators view a positive power branch finding as essential to jurisdiction. *The Supreme Court, 1986 Term—Leading Cases*, *supra* note 319, at 266 n.47 ("Because the *International Shoe* standard requires both minimum contacts and reasonableness, a court still must decide whether minimum contacts exist when it finds jurisdiction reasonable."). Cases have reached the same conclusion. *E.g.*, Camelback Ski Corp. v. Behning, 307 Md. 270, 513 A.2d 874 (1986), *vacated*, ___ U.S. ___, 107 S. Ct. 1341 (1987) (remanded for reconsideration in light of *Asahi*), in which the Maryland Court of Appeals concluded that convenience and forum state interest, "while factors worthy of serious consideration, cannot alone serve as the foundation for assumption of jurisdiction." *Id.* at 286, 513 A.2d at 882.

409. *See supra* Part II A.

jurisdictional analysis.[410] No doubt, the object is to ensure that a particular assertion of state court jurisdiction is fair and reasonable.[411] This is obviously a worthy and appropriate goal. Nevertheless, as *Asahi* amply demonstrates, the current test is difficult to apply, and it is unlikely to promote consistent and predictable results.[412]

Accordingly, the *Burger King* jurisdictional framework is fundamentally flawed and should be discarded. As suggested earlier, *Burger King* contemplated a fluid balancing process between the power and fairness branches.[413] A weak power branch can be bolstered by a strong fairness branch. The fairness branch factors, which were first collectively articulated in *World-Wide*,[414] and repeated verbatim in *Burger King*[415] and *Asahi*,[416] are: (1) the burden on defendant; (2) the interest of the forum state; (3) the plaintiff's interest in obtaining relief; (4) the interstate judicial system's interest in efficiency; and (5) the societal interest in furthering fundamental substantive social policies.[417] Unfortunately, the five factors[418] do not uniformly add or subtract weight from the fairness branch side of the test. They represent three separate categories of interests, two of which directly conflict.

The first factor (burden on defendant) generally conflicts with the second and third factors (the plaintiff and forum state interests). This is particularly true when the plaintiff is a forum state citizen. The fourth and fifth factors attempt to weigh systemic and societal interests (efficiency and substantive social policy). Consequently, to balance the impact of the fairness branch on a positive finding under the power branch it appears necessary first to resolve the conflict between defendant, and plaintiff and forum considerations presented by the first three factors. Once that nebulous process is accomplished, it is further necessary to factor in the systemic efficiency and societal sub-

410. *See supra* Part II.
411. *See supra* notes 23-28 and accompanying text.
412. *See infra* notes 443-45 and accompanying text.
413. *See supra* text accompanying notes 251-57.
414. *See supra* text accompanying notes 145-50.
415. *See supra* text accompanying notes 222 & 247.
416. 107 S. Ct. at 1033-34.
417. *See Burger King*, 471 U.S. at 477.
418. *See supra* note 246 and accompanying text.

stantive policy elements of the fourth and fifth factors. The whole process seems unduly prolix and complicated. Moreover, the superficial and conclusory analyses of the fairness branch in *Burger King* and *Asahi* provide little guidance on how to undertake this process.

In addition, there are sound reasons why each of the fairness branch elements should not be factored separately into the due process jurisdictional analysis. As stated above, other than the burden on the defendant factor, the fairness branch evaluates plaintiff, forum, systemic, and societal concerns.[419] Consideration of each of these interests is fundamentally at odds with *Insurance Corp.*'s repudiation of *World-Wide*'s sovereignty branch.[420] *Insurance Corp.* concluded that nonresident defendants are protected from certain assertions of state court jurisdiction not as a matter of sovereignty or federalism, but because the due process clause protects the "individual liberty interest"[421] of defendants. Just as *World-Wide*'s sovereignty branch fell because it implicated concerns having nothing to do with a defendant's "individual liberty interest," the second through fifth fairness branch factors[422] should likewise fall. The fourth and fifth factors are especially inappropriate because they appear to raise structural concerns[423] that, if factored into the equation, are certainly paradoxical to the notion that due process protects defendants. The second and third factors, raising plaintiff and forum concerns, even if they are not structural limitations on state judicial power, are equally inconsistent with *Insurance Corp.*'s rationale. Justice Brennan even acknowledged as much in his brief concurring opinion in *Keeton*,[424] and several commentators have criticized the use of plaintiff and forum in-

419. *See supra* text following note 418.

420. *See supra* notes 190-197 and accompanying text.

421. 456 U.S. 694, 702 (1982). *See supra* notes 192-93 and accompanying text.

422. *See supra* text accompanying notes 144-50, 247 and 417.

423. Although not precisely the same as the structural limitations that Justice White in *World-Wide* thought were found in the Constitution, *see supra* notes 156-57 and accompanying text, the fourth and fifth fairness branch factors are sufficiently analogous to be treated similarly under *Insurance Corp. Cf.* Bearry v. Beech Aircraft Corp., 818 F.2d 370, 373 (5th Cir. 1987) (quoting *Ashahi*, 107 S. Ct. at 1034) (suggesting that *Asahi* represents a retreat from *Insurance Corp.* because it required "consideration of 'the shared interest of the several states in furthering fundamental substantive social policies,'" which is the fifth fairness branch factor).

424. 465 U.S. 770, 782 (1984) (Brennan, J., concurring).

terests in deciding personal jurisdiction issues.[425]

The underlying rationale for *Insurance Corp.*'s rejection of sovereignty and federalism as limitations on state jurisdictional power was expressed as follows: "[T]he requirement of *personal jurisdiction may be intentionally waived*, or for various reasons a defendant may be estopped from raising the issue. These characteristics portray it for what it is—a legal right protecting the individual."[426] Just as a defendant could not waive structural limitations on personal jurisdiction if such limitations were found in the Constitution, a defendant should not be able to waive structural concerns relating to the interstate judicial system's interest in efficiency (the fourth fairness branch factor), or the societal interest in furthering fundamental substantive social policies (the fifth fairness branch factor).[427] In addition, if the forum-state interest factor militates against assertion of jurisdiction, it is inconsistent for a defendant to be able to waive that state interest. It can reasonably be inferred that Justice O'Connor concluded in *Asahi* that efficiency and fundamental social policy would best be served if California did not assert jurisdiction over the dispute between Cheng Shin and Asahi.[428] If this inference is correct, the acknowledged right of Asahi to waive objection to jurisdiction is manifestly inconsistent with these significant systemic and societal concerns. Accordingly, the second through fifth fairness branch factors cannot withstand scrutiny under *Insurance Corp.* and should be abandoned by the Court.

The first fairness branch factor (burden on defendant) should also not be factored separately into jurisdictional analysis under the due process clause.[429] As Justice Brennan himself recognized in *Burger King*, "a defendant claiming substantial inconvenience may seek a change of venue."[430] Transfer of venue, of course, is only feasible within a unitary judicial system such

425. *See supra* note 205.

426. 456 U.S. 694, 704 (1982) (emphasis added).

427. In *Burger King* Justice Brennan suggested that "the potential clash of the forum's law with the 'fundamental substantive social policies' of another State may be accommodated through application of the forum's choice-of-law rules." 471 U.S. 462, 477 (1984) (footnote omitted).

428. *See supra* text accompanying notes 384-85.

429. *See infra* text accompanying notes 430, 439-442.

430. 471 U.S. at 477 (footnote omitted).

as the federal system. Outside of a unitary system, a defendant claiming substantial inconvenience may move for dismissal under the common-law doctrine of forum non conveniens,[431] which allows dismissal of an action otherwise jurisdictionally proper on the ground that the forum is inconvenient and a more convenient alternative forum is available. Although the academic community has engaged in much recent debate regarding the independent significance of forum non conveniens,[432] the fo-

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431. In Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947), Mr. Justice Jackson, speaking for a bare majority, described and defined the doctrine as follows:

> The principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute.
>
> . . . .
>
> The doctrine leaves much to the discretion of the court to which plaintiff resorts, and experience has not shown a judicial tendency to renounce one's own jurisdiction so strong as to result in many abuses.
>
> If the combination and weight of factors requisite to given results are difficult to forecast or state, those to be considered are not difficult to name. An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforcibility of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, "vex," "harass," or "oppress" the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.
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> Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.

Id. at 507-09 (footnotes omitted). *See generally* 15 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE § 3828 (2d ed. 1986).

432. *See, e.g.*, Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781 (1985); Stewart, *Forum Non Conveniens: A Doctrine in Search of a Role*, 74 CALIF. L. REV. 1259 (1986); Comment, *Considerations of Choice of Law in the Doctrine of Forum Non Conveniens*, 74 CALIF. L. REV. 565 (1986).

rum non conveniens doctrine seems a more appropriate vehicle than the two-branch approach of *Burger King* for taking account of defendant burden and other fairness factors.

Forum non conveniens became a firmly established part of American procedural law forty-one years ago in *Gulf Oil Corp. v. Gilbert*,[433] in which the Supreme Court articulated a multi-interest balancing test to determine whether an action should be dismissed under the doctrine.[434] The Court identified both private[435] and public[436] interests that should be evaluated. The private interest elements, which parallel the defendant burden concerns of the fairness branch, consider items related to litigational convenience.[437] The public interest elements implicate such fairness branch factors as the forum state interest, and the systemic efficiency and substantive social policy factors.[438]

As recognized by the Court in *Gilbert*, however, the factors most likely to be pressed by a defendant making a motion to dismiss on forum non conveniens grounds are the private interest factors, which include

> the relative ease of access to sources of proof; availabiity of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditions and inexpensive.[439]

An appropriate analysis of these items generally will be unique to each case.[440] Recognizing that the private interest elements are highly fact specific, the Supreme Court has maintained that "[t]he *forum non conveniens* determination is committed to the sound discretion of the trial court."[441] While it is

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433. 330 U.S. 501 (1947).

434. *Id.* at 508-09; Piper Aircraft Co. v. Reyno, 454 U.S. 235, 257 (1981) ("where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference."). *See supra* note 431.

435. 330 U.S. at 508.

436. *Id.* at 508-09.

437. *See infra* text accompanying note 439.

438. Among the public interest factors are forum state interests (first fairness branch factor) and choice of law (part of the fifth fairness branch factor).

439. 330 U.S. at 508.

440. *See* 15 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 431, at 296 & n.45.

441. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 257 (1981).

reasonable for forum non conveniens to be a doctrine of discretion, it is highly inappropriate for the jurisdictional due process inquiry similarly to be committed to trial court discretion.[442] A constitutional limitation on state judicial power ought to be based on more generally applicable neutral principles.

Undoubtedly, the two-branch approach of *Burger King* will also undermine consistency and predictabiilty in jurisdictional decision making. The Court has stated the "Due Process Clause . . . gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."[443] When a defendant has notice that its activity, conduct, or business in, or in connection with, a particular forum will subject it to suit there, it "can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State."[444]

None of these worthwhile goals can be achieved if jurisdiction depends on who the plaintiff happens to be, or whether the action is partially settled. Only if jurisdictional analysis focuses on the relationship among the defendant, the forum and the litigation, with particular emphasis on the nature, both qualitatively and quantitatively, of the defendant's forum state activity, can predictability be served.[445]

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442. *See* Stewart, *supra* note 432, at 1278-79.

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

444. *Id.*

445. These points can be illustrated by analysis of the *Asahi* facts. The Court implied that the result might have been different if the original plaintiffs had not settled. *See supra* note 369 and accompanying text. Asahi's connection and relationship to the forum remained the same without regard to whether the original plaintiffs settled. It seems particularly unreasonable to have jurisdictional authority shift with litigational developments. Suppose the plaintiffs sued Asahi as an original defendant along with Cheng Shin and the others. Then suppose plaintiffs settled during or on the eve of trial. In such circumstances it would be foolish, wasteful, and unreasonable to dismiss any cross-claims between or among defendants. Yet, in a way this is what happened in *Asahi* when the Court emphasized that the lack of a forum state interest, resulting from the lack of a forum plaintiff, precluded jurisdiction by California. *See supra* note 365. It is important to note that Asahi, as a third-party defendant, challenged jurisdiction at a time when the original plaintiffs were still in the litigation. *See supra* text accompanying notes 273, 291-92.

Moreover, had plaintiffs remained in the litigation and not asserted a direct claim against Asahi, it is unclear whether the third-party claim would have withstood a jurisdictional attack. If personal jurisdiction would have still been lacking, the conceptual

B. Suggested Approach

Forum non conveniens can deal more appropriately with the highly fact-specific determination of litigational convenience than can the fairness branch with its amorphous fluid balancing of interests. How then should jurisdictional due process be determined? Jurisdiction should rise or fall by traditional minimum contacts analysis emphasizing the triparte relationship among the defendant, the forum, and the litigation.

If properly applied, the concept of "purposeful direction" should be the linchpin of jurisdictional analysis. It is important that "purposeful direction," rather than "purposeful availment," be the critically significant element because the former includes out-of-state actors, and perhaps even some in-state actors,[446] who cause forum effects, but who do not avail themselves of the benefits and protections of forum state law in any meaningful sense.[447] The "foreseeability" analysis of *World-Wide* is unnecessary because forseeability in the *World-Wide* sense always will be present if purposeful direction is found. While "purposeful direction" will be simple enough to establish in most cases, in some situations it will not be obvious. For example, as in *Asahi*, it will not be obvious with respect to a remote component part manufacturer who engages in no consumer oriented market activities, but who, nevertheless, voluntarily enters into an agreement with a final product manufacturer knowing that the final product incorporating the component part will be marketed in the forum state. Here, as suggested earlier, the most sensible solution to the dilemma is provided by Justice Stevens's concurrence in *Asahi*.[448] The decision should be based, according to Justice Stevens, on the "volume, the value, and the hazardous

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framework of liberal party and claim joinder of most modern procedural systems would have been severely undermined. *See, e.g.*, FED. R. CIV. P. 13, 14, 18, & 20. Cheng Shin would have faced two trials instead of one and risked inconsistent results. *See* Dittman v. Code-A-Phone Corp., 666 F. Supp. 1269, 1273-1274 (N.D. Ind. 1987). See *supra* note 376. If the result would have been different had the original plaintiffs not settled, then the result is neither logical nor neutral principle based. Plaintiffs would, in that event, still have no interest in Asahi. Only the third-party plaintiff, Cheng Shin, would be interested in Asahi, which was the case even after plaintiffs settled.

446. *Cf. supra* note 183.

447. *See supra* notes 183-84 and accompanying text.

448. *See supra* notes 338-41 and accompanying text.

character of the components."[449] In addition, the length of time that the component parts have been sold to the final product manufacturer should be considered. Certainly a distinction should be made between a one time shipment of ten valve stem assemblies, and a ten-year relationship in which between 100,000 and 500,000 such valves are delivered annually.

If exclusive reliance on traditional minimum contacts is to prove workable, the Court must take a fairly liberal view of the quality and quantity of contact sufficient to invoke jurisdiction. To the extent that a defendant claims unfairness, application of the forum's choice-of-law rules, and motions to change venue or dismiss on forum non conveniens grounds should, as Justice Brennan himself recognized in *Burger King*,[450] mitigate any litigational unfairness. If the Court adopted the liberal approach to minimum contacts suggested here, the time, expense, and energy currently expended on motions to dismiss for lack of personal jurisdiction, would no doubt be transferred to motions related to choice of law and change of venue or forum non conveniens. Defendant resources would be better spent on these latter motions. Once a court has jurisdiction, it can afford to take the time to reach a more reasoned decision on choice of law, and venue or forum non conveniens issues.

It might be said that this suggested approach turns the clock back rather than forward. In a simplistic way it does. The current approach, however, is unsatisfactory. The suggested one-branch approach at least focuses on the individual liberty interest of defendants, which is what the due process clause protects. Moreover, to the extent that the fairness branch factors need be taken into account, the power branch, as aptly recognized by Justice Brennan in *Burger King*, implicitly factors into the calculus plaintiff and forum state concerns.[451] To double count these concerns as contemplated by two-branch analysis runs afoul of *Insurance Corp.*'s explanation of what and whom the due process clause protects.

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449. 107 S. Ct. at 1038 (Stevens, J., concurring in part and concurring the in the judgment).

450. *See supra* text accompanying notes 259-61.

451. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473-74 (1984). *See supra* notes 234-37 and accompanying text.

V. CONCLUSION

Perhaps one day jurisdiction, venue, forum non conveniens, and choice of law will be merged into a single doctrine.[452] That day, however, does not appear to be near. In the interim, the Supreme Court continues to struggle with the jurisdictional framework it created in *Burger King*. Despite its unanimous judgment, *Asahi* demonstrates that the Court lacks harmony in resolving jurisdictional issues under the due process clause.

It has been suggested that *Asahi* heralds the dominance of the fairness branch over the power branch.[453] Currently the fairness branch can dislodge proper jurisdiction under the power branch.[454] The Court has not determined whether the fairness branch can create or uphold jurisdiction independent of the power branch.[455] If a future decision affirms a positive role for the fairness branch, the multi-interest balancing approach of *McGee* will have prevailed, Justice Brennan will have finally had it "HIS WAY," and we will have to say "sayonara" to minimum contacts.

Nevertheless, if the more than forty-two years of decisional history since *International Shoe* is a reliable guidepost, *Asahi* is only another, albeit unfortunate, way station in the evolution of jurisdictional due process.

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452. *See* Stein, *supra* note 432, at 841-46. *Cf.* Ehrenzweig, *From State Jurisdiction to Interstate Venue*, 50 ORE. L. REV. 103, 113 (1971) (" 'Jurisdiction must become venue.' ").

453. *See supra* notes 406-07 and accompanying text.

454. 107 S. Ct. at 1035 (Brennan, J., concurring in part and in the judgment) (characterizing *Asahi* as a rare case in which fairness defeats power).

455. *See supra* note 408 and accompanying text.