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A DISSENTING VIEW OF ASAHI METAL INDUSTRY CO., LTD. V. SUPERIOR COURT

GREGORY GELFAND*

There is a strong emotional appeal in the words “fair play,” “justice,” and “reasonableness.” But they were not chosen by those who wrote the original Constitution or the Fourteenth Amendment as a measuring rod for this Court to use in invalidating State or Federal laws passed by elected legislative representatives. *International Shoe Co. v. Washington*, 326 U.S. 310, 325 (1945) (Black, J., concurring in result only).

I. INTRODUCTION

Mr. Justice Black, concurring in result only in *International Shoe Co. v. Washington*,¹ criticized the majority’s creation from thin air of a due process-based test for personal jurisdiction and predicted that the “minimum contacts” analysis would produce an entirely ad hoc jurisprudence.² In his view, every imaginable fact pattern would have to be decided, as a matter of constitutional magnitude, by the Supreme Court because the Court’s notions of “fair play and substantial justice”³ would necessarily vary with the nuances of each case. With the possible exception of his concurrence in *Epperson v. Arkansas*,⁴

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1. 326 U.S. 310, 322-26 (1945) (Black, J., concurring).

2. See *id.* at 326; (“[A]pplication of this natural law concept, whether under the terms ‘reasonableness,’ ‘justice,’ or ‘fair play,’ makes judges the supreme arbiters of the country’s laws and practices.”); see also *id.* at 323, 325.

3. *Id.* at 324 (Black, J., citing the majority in *International Shoe*, *id.* at 316; quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

4. 393 U.S. 97, 109-14 (1968) (Black, J., concurring). For my argument that Black’s

Black's opinion in *Shoe* has proven to be his most profound and prophetic.

No case demonstrates the validity of Black's concerns more than the Court's recent decision in *Ashahi Metal Industry Co., Ltd. v. Superior Court*.⁵ While *Asahi* is superficially a unanimous decision,⁶ careful examination reveals a profoundly divided Court applying analyses that contradict even the Court's recent decisions and that do not appear to be based on sound policy considerations. Because of these difficulties, the *Asahi* decision appears to have achieved little more than the resolution of the actual and highly unusual⁷ fact pattern before the Court, raising more troubling questions for future cases than it resolved. The most encouraging aspect of the *Ashahi* decision may be the knowledge that, since it reflects an entirely ad hoc jurisprudence, future decisions in the area of personal jurisdiction will likely be inconsistent with it.

II. BACKGROUND

Asahi reached the Supreme Court as the remnant of a products liability suit filed in a California state court⁸ against a number of defendants. The plaintiff claimed that a motorcycle accident in which he was injured and his wife was killed was caused by a sudden loss of air pressure in the rear tire of his motorcycle.⁹ The plaintiff alleged that the tire, tube, and sealant were defective. Cheng Shin Rubber Industrial Company (Cheng Shin), the Taiwanese manufacturer of the tube, filed a cross-

concurrence in *Epperson* presents the ideal solution to and predicts the ongoing evolution-creation controversy in the public schools, see Gelfand, *Of Monkeys and Men—An Atheist's Heretical View of the Constitutionality of Teaching the Disproof of a Religion in the Public Schools*, 16 J. L. & Educ. 271 (1987).

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

6. Only Part I of the opinion, merely stating the facts and the result, received all nine votes. Compare *infra* notes 24-36 and accompanying text.

7. See *infra* note 80 and accompanying text, with regard to the settlement of all of the principal claims in the action, leaving only an ancillary claim pending before the Court.

8. Since the action arose in state court, the Supreme Court, lacking general supervisory powers over the matter, would only have had power to rule on constitutional grounds. This made a forum non conveniens finding more difficult to justify than if the claim had been filed in federal court.

9. 107 S. Ct. at 1029.

claim against various codefendants,¹⁰ including Asahi Metal Industry Company, (Asahi), the Japanese manufacturer of the tube's valve assembly. Eventually, as the litigation proceeded, plaintiff's claims and various other claims were settled and dismissed. As the result of these settlements, Cheng Shin's indemnification cross-claim against Asahi was the only remaining claim.

Asahi objected to personal jurisdiction. The California Supreme Court, however, concluded that the trial court's exercise of jurisdiction was proper.¹¹ The United States Supreme Court granted certiorari.¹²

Asahi had continuous and very substantial¹³ contacts with both the United States¹⁴ and California in terms of both general

10. See *Asahi Metal Industry Co. v. Superior Court*, 194 Cal. Rptr. 741, 742 (Cal. Ct. App. 1983).

11. *Asahi Metal Industry Co. v. Superior Court*, 39 Cal.3d 35, 702 P.2d 543, 216 Cal. Rptr. 385 (1985). The trial court denied Asahi's motion. California's Court of Appeal issued the peremptory writ of mandate commanding the Superior Court of Solano County to quash service of the summons on jurisdictional grounds. The Supreme Court of California reversed the court of appeals and reinstated the trial court's ruling that jurisdiction was proper.

12. — U.S. —, 106 S. Ct. 1258 (1986).

13. One factor completely missing from the Court's discussion is an analysis of whether the contacts are specific or general. Specific contacts do not need to be continuous. *International Shoe* actually suggested that they do. 326 U.S. 310, 320 (1945). Later cases, however, have made it clear that a single specific contact of the right nature and quality is sufficient. See, e.g., *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); *Burt v. University of Nebraska*, 757 F.2d 242 (10th Cir.), cert. granted, 474 U.S. 1004 (1985), vacated, 475 U.S. 1063 (1986); *Laxalt v. McClatchy*, 622 F. Supp. 737, 743 (D. Nev. 1985); *Zerr v. Norwood*, 250 F. Supp. 1021 (D. Colo. 1966). The Court apparently assumed that the specific contact between Asahi and California was insufficient because the valve assembly at issue arrived in California indirectly. Such analysis embodies a test only partially consistent with *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 285 (1980), in which the arrival of the car in the southwest United States was not only indirect, but entirely fortuitous and completely in the plaintiff's control.

In addition, the Court has never discussed the possibility of a hybrid case in which the specific contact is not quite sufficient, but when joined with existing general contacts that are insufficiently continuous and systematic, form a combination of specific and general contacts that may be sufficient. See, e.g., *Buckeye Boiler Co. v. Superior Court*, 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969). *Asahi* would certainly seem to be such a case.

14. The Court has never clarified in the international cases whether the relevant contacts are with the particular state or with the entire American market. Because a distant foreign defendant can defend in one state as easily as in another, it may be argued that the relevant criteria are the contacts with the United States as a whole. See, e.g., *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1238-39 (6th Cir. 1981); *Engineered Sports Products v. Brunswick Corp.*, 362 F. Supp. 722, 728 (D. Utah 1973) ("Due Process

and specific jurisdiction.¹⁵ With regard to general contacts, Asahi sold its tire valve assemblies to several tire manufacturers, including Cheng Shin.¹⁶ A number of these companies sold their tires, with Asahi valves, in the United States, resulting in a very large volume of sales. Between 1978 and 1982 Asahi sold from 100,000 to 500,000 valve assemblies per year to Cheng Shin alone.¹⁷ No exact figures were before the Court regarding the number of these valves (or the number of valves sold to other manufacturers) that were ultimately sold in the United States or California. An inspection of the tires in one motorcycle shop in the California county where the suit was filed, however, showed that Asahi's valves were present in substantial numbers.¹⁸ Of approximately 115 tire tubes in the store, 97 were manufactured in Japan or Taiwan; twenty-one of these (18.26%) had valve stems made by Asahi. Twelve of the twenty-one Asahi valve assemblies (57%) were on Cheng Shin tubes with the remainder incorporated into other manufacturers' tires. Further, Cheng Shin produced an affidavit of one of its purchasing managers stating that he had told Asahi that Cheng Shin sold tubes throughout the world and "specifically the United States."¹⁹ The record also reveals that 20% of Cheng Shin's sales to the United States were in California.²⁰ Asahi did not contest this fact, but rather countered with an affidavit of its president (who would have to have been an expert in American law to be competent to testify on this matter)²¹ stating that Asahi "has never contemplated that

or traditional notions of fair play and substantial justice should not immunize an alien defendant from suit in the United States simply because each [individual] state makes up only a fraction of the substantial nationwide market for the offending product.")

15. See *supra* note 13.

16. Sales to Cheng Shin accounted for 1.24% and 0.44% of Asahi's income in 1981 and 1982, respectively. — U.S. —, 107 S. Ct. 1026, 1030 (1987). Therefore, it is quite clear that Asahi was doing most of its business with other companies.

17. The number of Asahi valve assemblies sold, per year, to Cheng Shin were as follows: 150,000 in 1978; 500,000 in 1979; 500,000 in 1980; 100,000 in 1981; and 100,000 in 1982. 107 S. Ct. at 1030.

18. An attorney for Cheng Shin made an informal examination of one cyclery in Solano County and uncovered these findings in 1983. Because Asahi marks its valves with an "A" in a circle, counsel was able to make an immediate identification. Since we have no assurances that this was a truly random survey, we may assume that the Court discounted these figures.

19. 107 S. Ct. at 1030.

20. *Id.*

21. Regarding admissibility, the opinion of someone unfamiliar with American juris-

its limited sales of tire valves to Cheng Shin in Taiwan *would subject it to lawsuits* in California.”²² Thus, Asahi sold a large volume of valve assemblies annually to a number of companies whose tires were sold with Asahi’s knowledge throughout the world and, particularly, in the United States. Even discounting the figures produced by opposing counsel, tire tubes with Asahi valves constituted a very significant portion of the stock continuously sold in California motorcycle shops.²³

With regard to Asahi’s specific contacts, Asahi sold the valve assembly in the tire that was involved in the California accident. This valve assembly was sold to Cheng Shin who, as Asahi had forewarning that it would, incorporated the valve into a tube and shipped it for resale to a consumer in California.

III. THE *Asahi* OPINIONS

In evaluating the *Asahi* opinions, the first question concerns which of the three opinions — and possibly which part or parts of a given opinion — speak for a majority of the Court. Accordingly, a brief overview of the opinions will precede detailed analysis of the specific points of contention. All nine justices felt that jurisdiction was lacking. Yet Justice O’Connor’s opinion for the Court is probably less the product of majority support than Justice Brennan’s concurrence. O’Connor’s opinion, in turn, is broken down into Parts I, II-A, II-B, and III. Because only Parts I and II-B have the support of a majority of the Court, each part

dictional concepts regarding whether American courts would apply jurisdiction appears to be irrelevant. The Court has never applied a “man in the street” test for jurisdiction, and it is unlikely that the man in the street would have views on such a subject.

22. 107 S. Ct. at 1030 (emphasis added). The crucial test of jurisdictional assertion is at times said to be the foreseeability of being “haled into court.” *World-Wide Volkswagen v. Woodson*, 444 U.S. 285, 297 (1980). This foreseeability analysis is absolutely circular. Whether or not it is foreseeable that the defendant will be haled into court depends entirely on what the Supreme Court decides. If the Court decides tomorrow that certain circumstances justify jurisdiction, it suddenly becomes 100% foreseeable that such a defendant will be haled into court in such cases. It is clear that the president’s affidavit was drafted by counsel who had *World-Wide* in mind. The fallacy of the affidavit, however, shows the inadequacy of the explanation given in *World-Wide*.

23. If we assume that the percentage of the cyclery’s Japanese or Taiwanese tire tubes containing Asahi valve stems (18.26%; see *supra* text accompanying note 18) is exaggerated, a more probable figure still might be 10%, which is a very significant portion of the market. Asahi would have needed to argue that it had insufficient contacts with a market in which its sales accounted for 10%, which seems astounding.

of the O'Connor opinion must be treated separately.

Part I of O'Connor's opinion is simply a summary of the facts of the case and its procedural development. It was joined unanimously and it is difficult to imagine anyone (even counsel for Cheng Shin) disagreeing with all but the last two words — "we reverse." Following Part I, the fragmentation begins.

Part II-A concluded that Asahi lacked the necessary contacts with California. O'Connor argued that, even if Asahi was aware that its valve assemblies would ultimately be sold in California, California could not assert personal jurisdiction under the "stream of commerce" doctrine.²⁴ O'Connor interpreted even the stream of commerce doctrine as requiring that a defendant purposefully direct its actions toward the forum state.²⁵ O'Connor found that Asahi did not purposefully avail itself of the privilege of exploiting the California market because it did no business there directly and, more importantly, did not direct or control the distribution system that brought its valves to California. To the extent that this portion of O'Connor's opinion represents a major departure from accepted stream of commerce analysis, it should be noted that this portion of her opinion garnered only four votes; she was joined only by Rehnquist, Powell (who is no longer on the Court), and Scalia. The five remaining justices, speaking through either the concurrence opinion of Brennan or Stevens, specifically rejected this portion of O'Connor's analysis.

Part II-B of O'Connor's opinion held that even if the threshold minimum contacts existed, the Due Process Clause²⁶

did not allow California to assert personal jurisdiction because of an added fairness factor.²⁷ O'Connor reached this conclusion because the burden on the foreign defendant was found to be severe, as opposed to the minimal interests of Cheng

24. 107 S. Ct. at 1033.

25. For example, O'Connor stated: "[A] defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State." 107 S. Ct. at 1033.

26. See U. S. CONST. amend. XIV. An identical restriction is probably binding on the federal courts under the Due Process Clause of the Fifth Amendment. See U. S. CONST. amend. V.

27. See 107 S. Ct. at 1033-35 (Part II-B).

Shin²⁸ and the forum state in adjudicating what had become, by virtue of the settlement of the principal case, a contractual dispute between two Asian trading partners. In addition, the international context of this matter was thought to warrant special caution by the Court which stated at one point, "Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field."²⁹ Part II-B is particularly significant because all of the justices except Scalia joined in it.³⁰

Part III of O'Connor's opinion is a one sentence conclusion that surprisingly rested the ultimate outcome of the opinion on the minimum contacts analysis asserted in Part II-A, which garnered only four votes, rather than the more broadly supported reasoning of Part II-B.³¹ Accordingly, Part III, like Part II-A, was joined only by Justices Rehnquist, Powell, and Scalia. Further, O'Connor gave no reason for not including the fairness analysis of Part II-B as a co-equal or alternate basis of the decision in this—one would have thought—improbable closing sentence.

Justice Brennan's concurrence was joined by Justices White, Marshall, and Blackmun, and differs only in degree from Justice Stevens' concurrence (also joined by White and Blackmun, but not Marshall). Both concurrences agreed with Part II-B of O'Connor's opinion that jurisdiction in California would have been unfair, but both concurring opinions argued that the un-

28. 107 S. Ct. at 1034. The Court seems to have dismissed Cheng Shin's interest in this litigation by cavalierly assuming that, since plaintiff and defendant were both Asian companies, the matter would be better adjudicated in an unspecified court in the Far East.

29. 107 S. Ct. at 1035 (quoting *United States v. First Nat'l City Bank*, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting)).

30. 107 S. Ct. at 1029. Since Justice Scalia joined Part II-A, and did not write to explain his failure to join II-B, we are left with the unlikely assumption that he agreed that Asahi lacked the basic contacts, but nonetheless did not feel that the assertion of jurisdiction would have been unfair.

31. 107 S. Ct. at 1035. The entirety of Part III of O'Connor's opinion reads as follows:

Because the facts of this case do not establish minimum contacts such that the exercise of personal jurisdiction is consistent with fair play and substantial justice, the judgment of [the] Supreme Court of California is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Part III presumably was separated into a distinct section from Part II-B solely because those who joined Part II-B would not have been willing to support it.

fairness argument should be the only reason for declining jurisdiction. The principal point of disagreement, then, was over Part II-A of the O'Connor opinion, which concluded that Asahi lacked the necessary contacts with California. At the core of this disagreement are questions of the meaning and acceptance of the stream of commerce argument. Brennan's concurrence rejected the O'Connor suggestion that the defendant must direct or control the flow of its goods to purposefully avail itself of the benefits of doing business in the forum. Brennan argued that one who places goods into the general stream of commerce indirectly benefits from the sales that ultimately result in the forum state and that depend upon the forum state's laws that regulate and facilitate commercial activity.³² Since Asahi made routine and extensive sales to Cheng Shin and other manufacturers and knew that they would sell the ultimate product in California, Brennan would have found sufficient contacts to justify personal jurisdiction over Asahi in that state.

Justice Stevens's concurrence rejected Part II-A for two reasons that were not used by Brennan. First, Stevens found an examination of the contacts unnecessary since it had already been determined that jurisdiction would not be permitted on the ground of unfairness or unreasonableness.³³ Second, and more importantly, Stevens superficially agreed with O'Connor's statement of the "purposeful direction" version of the stream of commerce doctrine, but argued that O'Connor misapplied it to the case.³⁴ Stevens' reasons for concluding that the test was misapplied, however, actually amount to a differing concept of purposefulness that more resembles Brennan's analysis than O'Connor's reasoning. Stevens argued that an "unwavering line" cannot be drawn between "mere awareness" that an item will find its way into the forum state and "purposeful availment" of that market through intermediaries.³⁵ Stevens, while purporting to agree with O'Connor's test, nonetheless concluded:

32. 107 S.Ct. at 1035-36 (Brennan, J., concurring). Although the logic of Justice Brennan's analysis does not require that Asahi have had knowledge of where its goods were going, Brennan nonetheless indicated that such knowledge, albeit not control, would be required. 107 S. Ct. at 1035. Compare *infra* notes 43-45 and accompanying text.

33. 107 S. Ct. at 1038 (Stevens, J., concurring).

34. *Id.*

35. *Id.*

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.³⁶

Stevens's view differs from Brennan's opinion in more than semantics. Certainly Stevens would have imposed a slightly higher standard, but his analysis was so much closer to Brennan's as to render Brennan's concurrence the closest approximation of a majority opinion with regard to the stream of commerce argument, supported, in essence, by five votes. Combining Part II-B of O'Connor's opinion with Brennan's concurrence gives the most accurate "majority" view possible of the *Asahi* decision.

From this, or any other combination of the *Asahi* opinions, however I respectfully dissent.

IV. THE STREAM OF COMMERCE DOCTRINE

Prior to *Asahi*, the stream of commerce doctrine was widely applied by courts throughout the nation.³⁷ The doctrine is well-stated (and justified) in Friedenthal, Kane, and Miller's Hornbook as follows:

If the defendant purposefully caters to a national market, distributing its product across the country through its own efforts or the efforts of middlemen, a plaintiff still can constitutionally

36. *Id.*

37. See, e.g., *Bean Dredging Corp. v. Dredge Technology Corp.*, 744 F.2d 1081 (5th Cir. 1984); *Carson v. Park Indus., Inc.*, 717 F.2d 1120, 1126 (7th Cir. 1983), *cert. denied*, 465 U.S. 1024 (1984); *Hedrick v. Daiko Shaji Co.*, 715 F.2d 1355 (9th Cir. 1983); *Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distrib. Pty. Lt.*, 647 F.2d 200, 203 (D.C. Cir. 1981); *Poyner v. Erma Werke GMBH*, 618 F.2d 1186, 1190-91 (6th Cir.), *cert. denied*, 449 U.S. 841 (1980); *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); *von Mehren & Trautman, Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1168-72 (1966); J. FRIEDENTHAL, M. KANE & A. MILLER, *CIVIL PROCEDURE*, 136 (1985); 4 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE*, 259-61 (1969); Currie, *The Growth of the Long-Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. ILL. LAW F. 533, 546-60; Note, *North Carolina Adopts the Stream of Commerce Theory of Jurisdiction: A Step in the Right Direction*, 20 WAKE FOREST L. REV. 737 (1984).

assert jurisdiction over that defendant in virtually any state where the product malfunctions. The assertion of jurisdiction is fair because the national or international manufacturer receives economic benefit from a countrywide market and reasonably should expect to be subject to suit in any state.³⁸

In effect, by finding insufficient contacts under the stream of commerce doctrine in *Asahi*, O'Connor has defined that formerly sound theory out of existence. O'Connor's view requires that the defendant control the flow of its products and actually choose where they will go. This is precisely the type of requirement that the stream of commerce doctrine exists to overcome. A defendant who personally sends his product to California, or contracts with someone else to send it to California, does not use the stream of commerce; he *sells* in California. It is fair to say that if *Asahi* did not qualify under the stream of commerce doctrine, no one ever will.³⁹ *Asahi* sold 1.35 million valve assemblies to Cheng Shin for worldwide distribution during the period relevant to this suit, while also selling assemblies to other manufacturers for similar distribution. If O'Connor's view is accepted, the doctrine is dead, awaiting only burial. That such a view could garner even one justice's support, let alone four, suggests a complete lack of common ground between the objectives governing their analysis, and those previously thought to be universally accepted.

Whereas O'Connor goes to some lengths to stress her literal use of the term "*purposeful direction*," Justice Stevens treats this purposefulness as a requirement which may be met by implied purposefulness rather than actual purposefulness. "Whether or not . . . conduct rises to the level of purposeful availment [depends on] the volume, the value, and the hazard-

38. J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE 136 (1985).

39. O'Connor's opinion did not accept the common understanding of the stream of commerce doctrine. O'Connor's standard for applying the doctrine is that a defendant must purposefully direct its actions *toward the particular forum state* for that state to assert jurisdiction. 107 S. Ct. at 1033. The placement of a product into the open stream of commerce, in her view, does not constitute a purposefully directed act. Nor does the defendant's awareness that his product is being sold by others in the forum state satisfy her standard. The situation that might conceivably qualify under her view would be one in which a defendant makes a product uniquely designed for use in the forum state. 107 S. Ct. at 1033. One may wonder, however, whether this would be a category of any significance.

ous character"⁴⁰ of the items sold. Stevens, then, employed a legal fiction—implied purposefulness—which serves largely to complicate and obscure the underlying analysis.⁴¹

Brennan's concurrence relied on the fact that Asahi's regular and extensive sales were made with *knowledge* of Cheng Shin's American and worldwide sales. Quoting from *World-Wide Volkswagen Corp. v. Woodson*,⁴² he argued:

[I]f the sale of a product of a manufacturer or distributor . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other states . . . [t]he forum state does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce *with the expectation* that they will be purchased by consumers in the forum state.⁴³

Even Brennan, however, did not go far enough. A manufacturer should be subject to jurisdiction under the stream of commerce doctrine even absent actual awareness of the product's final market. No matter how many middlemen exist between a manufacturer's placement of his product into the stream of commerce and the arrival of the final product in a state, the manufacturer still benefits financially from the sale of the product, and exposes the public to the product's risks. O'Connor's argument that Asahi did not purposely avail itself of the California market blithely ignores economic reality. She looked only at the narrowest facts to decide against personal jurisdiction:

[Asahi] has no office, agents, employees, or property in Califor-

40. *Id.* at 1038 (Stevens, J., concurring).

41. This Article has assumed that Stevens was in a middle-ground position between Brennan and O'Connor, but at no point does he actually clarify whether his analysis would require knowledge. Thus it is actually possible that Stevens took an approach using much of O'Connor's wording, but which would produce results more generous to a state's power to exercise jurisdiction than Brennan's view.

42. 444 U.S. 286, 299 (1980). It is worth noting that Justice Brennan dissented in *World-Wide* because he did not feel that case went far enough. Whether Brennan changed his views on *World-Wide* or whether he was simply using it as a standard beyond which restriction on jurisdiction should not go is now unclear. If the latter case is true, then Brennan may well agree with the view expressed in this Article that even knowledge need not be required under the stream of commerce analysis.

43. 107 S. Ct. at 1037 (emphasis added).

nia. 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. . . . There is no evidence that Asahi designed its product in anticipation of sales in California.⁴⁴

Asahi did none of these things, but it did do a brisk and profitable business in California and, in doing so, it injured two people. In my view, *World-Wide* carved out a narrow exception for an *isolated* case when the *consumer* moved the product to a place that was foreseeable only in the sense that portable or mobile items can be moved anywhere.⁴⁵ The general rule, however, is, or should be, that a manufacturer who makes a product and thereby exposes the populace of a state to harm from the product, should be required to defend in that state when damage occurs there. It is a basic function of a state to provide compensation for persons injured within its boundaries, and this power should be curtailed only when compelling reasons require the Court to do so. Absent unusual considerations, a manufacturer who readily accepts the benefits of the sale of his product must also shoulder the responsibility of litigation wherever he permits his product to be marketed.

There seems to be no reason to place a premium on control, as O'Connor did. Her analysis will only produce more companies doing business through "independent" middlemen. Her reasoning would routinely expose consumers to harm from faulty products with significant impairment of the right to seek damages. Protection is stripped away from injured consumers while manufacturers, shorn of responsibility for their products, participate in chains of distribution that stretch across continents and nations. It is difficult to imagine how manufacturers of any component part could be subjected to jurisdiction in places other than of their own choosing under O'Connor's reasoning since such companies rarely market their products directly.⁴⁶

44. *Id.* at 1033.

45. I should indicate my view that *World-Wide* was itself incorrectly decided. If a rational person were constructing rules of interstate venue, the obvious place to pick would be the situs of the harm. To the extent the Court's analysis has brought it to a point where it finds itself rejecting such a situs, it seems more appropriate to question the analysis than the situs.

46. If O'Connor's analysis became the rule, even manufacturers of the final product could readily escape jurisdiction by the simple expedient of employing middlemen and

Asahi benefits from every sale of a tube using its valve. Depending on whether one analyzes the question under LIFO or FIFO accounting procedures,⁴⁷ Asahi benefits because the ultimate sale by Cheng Shin is the reason Asahi had the earlier sale, or it will be the reason Asahi will have its next sale. Either way, Asahi is not a disinterested spectator. If Cheng Shin has a good year, Asahi has a good year.

For much the same reasons, whether Asahi *knew* where Cheng Shin sold its products seems immaterial. The economic and practical realities are the same regardless of whether someone from Asahi happens to ask where the product is going. The defendant's objection only becomes strong enough to overcome the presumption of jurisdiction at the place of injury or sale when either the defendant has affirmatively attempted to avoid having his product enter a state,⁴⁸ or when a product's entrance into a state was so fortuitous that no one could reasonably have thought to take steps to prevent the product from entering the state.⁴⁹

An analogy to criminal law may be useful in clarifying this dissenting view. O'Connor's view may be compared to a rule of law that would make a party guilty of a crime only if he directs his weapon at a particular person. Under this analogy, Brennan's view would find that a crime has been committed even if you shoot at no one in particular, but in a given direction, knowing

not controlling their market selection.

47. FIFO is an accounting term for "first in-first out"; LIFO is an accounting term for "last in-first out." LIFO and FIFO are accounting techniques used to assess the profitability of a particular sale. The price received for the object sold must be compared to the cost of the object sold. Where a company has ongoing sales and an inventory pool, the FIFO and LIFO accounting techniques represent the two major conceptual approaches to the evaluation of the cost of the goods sold. *See generally*, E. M. FARIS, ACCOUNTING FOR LAWYERS, 134-40 (3rd ed. 1975); S. GUNTER, ACCOUNTING FOR LAWYERS 1987, 95-98 (1987).

48. *See, e.g.*, Kulko v. Superior Court, 436 U.S. 84, 97 (1978) (appellee, seeking to avoid California's high child support payments, had his ex-wife fly to New York to sign a contract to ensure that he would have no contact with California). A company is free to decline to sell to someone who is expected to resell in a particular state, or who will not promise not to resell in that state. If, in such a situation, the middleman should then sell in that state in violation of the manufacturer's rights or expectations, or if the product should otherwise find its way to the state, the manufacturer would be exempt from jurisdiction under *World-Wide*.

49. *See, e.g.*, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295-299 (1980).

people are there. This Article contends that one cannot shoot without first looking to see that people are not going to be hit. In jurisdictional terms, there is little difference between a defendant who knows his product is going to be sold in California and one who does not care to ask. Holding a party liable only if he has knowledge that his product will reach the forum state simply places a premium on ignorance.

V. THE USE OF TWO-STEP ANALYSIS

The portion of Justice O'Connor's opinion that received the genuine endorsement of the Court is Part II-B.⁵⁰ In this segment of the opinion, O'Connor asserted that, minimum contacts notwithstanding, other considerations would render adjudication in California unwise or unfair. Thus, in *Asahi* the jurisdictional analysis was clearly divided into two separate steps: step one, "are there sufficient contacts?" and step two, "would litigation in the chosen forum be fair?"

Minimum contacts analysis, which was originally a one-step process, has been gradually bifurcated into a two-step inquiry. In deciding personal jurisdiction questions, courts originally looked for contacts that were sufficient to render the assertion of jurisdiction fair.⁵¹ Thus, the question of fairness *was* the question of the sufficiency of the contacts. Gradually, a separation into the twin concerns of "sufficiency of contacts" and "fairness" crept into some lower court decisions.⁵² This two-step analysis

50. See *supra* note 30 and accompanying text.

51. See, e.g., *International Shoe Co. v. Washington*, 326 U.S. 310, 326 316-21 (1945). The same wording was used in Part III of the O'Connor opinion, which clumsily expressed the basis for the *Asahi* Court's conclusion. See *supra* note 31.

52. See, e.g., *Buckeye Boiler Co. v. Superior Court*, 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969). In *Buckeye*, among other factors considered in the jurisdictional analysis, the California Supreme Court thought it was significant that the majority of witnesses were in California. See also *Haile v. Henderson Nat'l Bank*, 657 F.2d 816, 828 (6th Cir. 1981) (Keith, J., dissenting); *Aaron Feror & Sons Co. v. Atlas Scrap Iron*, 558 F.2d 450, 453 (8th Cir. 1977); *Caesar's World, Inc. v. Spencer Foods, Inc.*, 498 F.2d 1176, 1180 (8th Cir. 1974); *Humble v. Toyota Motor Co.*, 578 F. Supp 530, 532 (N.D. Iowa), *aff'd*, 727 F.2d 709 (8th Cir. 1982); *Controlled Metals, Inc. v. Non Ferrous Int'l Corp.*, 410 F. Supp. 339, 342-43 (E.D. Pa. 1976); *Oxford First Corp. v. PNC Liquidating Corp.*, 372 F. Supp. 191, 203-05 (1974); *Oliver v. American Motors Corp.*, 70 Wash. 2d 875, 882-83, 425 P.2d 647, 652 (1967); *Tyee Constr. Co. v. Dulien Steel Prod., Inc.*, 62 Wash. 2d 106, 115, 381 P.2d 245, 251 (1963); *Nixon v. Cohn*, 62 Wash. 2d 987, 999, 385 P.2d 305, 312 (1963); *Fisher Governor Co. v. Superior Court*, 347 P.2d 1, 3-4, 1 Cal. Rptr. 1, 3-4

may have even become an unarticulated or unexplained factor in a handful of Supreme Court cases as well. It probably played a silent role in *Hanson v. Denckla*,⁵³ and was at least obliquely and unknowingly mentioned in *McGee v. International Life Insurance Co.*⁵⁴ and *Kulko v. Superior Court*.⁵⁵ The only Supreme Court decisions to discuss explicitly the two-step analysis, however, were the companion cases of *Keeton v. Hustler*⁵⁶ and *Calder v. Jones*,⁵⁷ which flatly and persuasively rejected the suggestion. In *Hustler*, a defamation suit was filed in New Hampshire, the only jurisdiction in the nation in which the statute of limitations had not run.⁵⁸ Neither plaintiff nor defendant were from New Hampshire. The Court, in reversing the decision below, held that the defendant's regular, albeit minor, circulation of its magazines in the forum state amounted to sufficient contacts to support the assertion of New Hampshire jurisdiction. Rehnquist, who delivered the opinion (and yet joined in all parts of O'Connor's opinion in *Asahi*) explicitly posed the test for jurisdiction as an integrated, one-step, contacts-based process: "The contacts between respondent and New Hampshire must be such

(1959); *Henry R. Jahn & Son v. Superior Court*, 49 Cal. 2d 855, 860, 323 P.2d 437, 442 (1958).

53. 357 U.S. 235 (1958). In *Hanson* a woman executed a trust in Delaware that was valid in that state, but not in Florida, where she later relocated. In addition, she had the trust drafted as a will that would have been valid in most jurisdictions, but Florida found it invalid because it had been witnessed by only two persons instead of three, as required by Florida law. Thus, Florida proposed to apply its law to the transaction in a way that was most likely viewed as unreasonable and offensive to the Court's notions of interstate federalism. *Hanson* is virtually impossible to distinguish from *McGee* in terms of a simple enumeration of contacts. Some feel that the only way to explain *Hanson* is to discern that the Court applied a stricter jurisdictional calculus with a view of the unfairness of the application of Florida law. See, e.g., *Phillips v. Anchor Hocking Glass Corp.*, 100 Ariz. 251, 256, 413 P.2d 732, 735 (1966); J. LANDERS & J. MARTIN, *CIVIL PROCEDURE* 78 (1981); c.f. Sobeloff, *Jurisdiction of State Courts Over Non-Residents in Our Federal System*, 43 CORNELL L. Q. 196 (1957).

54. 355 U.S. 220, 223 (1957) (stressing the forum state's interest).

55. 436 U.S. 84 (1978). *Kulko* included a number of noncontacts-based factors. For example, the Court apparently discounted some very important contacts in California, the forum state, because the parties were in that state due to circumstances related to the husband's military service on behalf of his country. *Id.* at 86-87, 90, 93. Further, *Kulko* discounted the significance of the husband's having sent the children to California voluntarily because the Court wanted to encourage such cooperative behavior among divorced parents. *Id.* at 94.

56. 465 U.S. 770 (1984).

57. 465 U.S. 783 (1984).

58. *Hustler*, 465 U.S. at 773, 778.

that it is 'fair' to compel respondent to defend. . . ."⁵⁹ Rehnquist, speaking for a unanimous Court,⁶⁰ specifically rejected the reasoning of the lower court which, while conceding the necessary level of contacts, separately considered the element of fairness:

The Court of Appeals also thought that there was an element of due process "unfairness" arising from the fact that the statutes of limitations in every jurisdiction except New Hampshire had run on the plaintiff's claim in this case. 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. . . . [A]nd we do not think that such choice of law concerns should complicate or distort the jurisdictional inquiry.⁶¹

Further, Rehnquist criticized the court of appeals' analysis regarding the first amendment and the forum state's lack of interest in the litigation as unnecessary considerations.⁶² In view of *Asahi*, Chief Justice Rehnquist might as well have stayed home that day.

The Court's pronouncements in *Hustler* and *Calder* plainly purport to eliminate the lower courts' trend toward employing nebulous and confusing considerations about separate fairness issues in jurisdictional analysis. Rehnquist exposed the weakness of adding a second step to further complicate what is already a necessarily imprecise inquiry⁶³ in the first step.

Hustler's eradication of the step two analysis is correct at both a practical and theoretical level. Pragmatically, the contacts analysis is already extremely imprecise. It is difficult to say how many contacts constitute a sufficient nexus with the forum to satisfy the basic minimum contacts inquiry.⁶⁴ If a second step,

59. *Id.* at 775 (emphasis added).

60. Justice Brennan concurred. *Id.* at 782. Justice Rehnquist's opinion was joined by all of the remaining justices. In *Calder*, Justice Rehnquist wrote on behalf of the entire Court.

61. *Id.* at 778 (emphasis added).

62. *Id.* at 776, 779, 780 n.12; see also *Calder v. Jones*, 465 U.S. 783, 790-1 (1984) (rejecting suggestion that First Amendment concerns enter into the jurisdictional analysis).

63. See *Calder*, 465 U.S. at 790.

64. In addition, the various factors that might be susceptible to control through the

an even more amorphous fairness analysis, is to take place, there are many possible evaluative factors that would have to be considered, including public policy considerations,⁶⁵ choice of law abuse,⁶⁶ the degree to which the forum state is really interested in the litigation,⁶⁷ actual inconvenience of defending in a particular location for a particular defendant,⁶⁸ and convenience of witnesses.⁶⁹ A potential morass of elements and an equally disconcerting lack of a meaningful basis by which to weigh their effects would be involved in this second step. As a practical matter, an attorney simply would be unable to advise a client about whether his claim would meet the jurisdictional requirements in any possible forum, and trial judges would be unable to rule with any degree of confidence on jurisdictional questions. The flexibility to consider a large number of factors may be desirable, but certainty also has value to the law. Sometimes it helps

step two analysis are not likely to be controlled effectively through jurisdictional analysis in any event. Only in the most borderline cases will adjustments in the jurisdictional calculus be possible. For instance, if one views *Hanson v. Denckla*, 357 U.S. 235 (1958) (see *supra* note 53 and accompanying text) as an example of control of choice of law abuse, the effectiveness of that control through modification of the jurisdictional calculus depends entirely on the precise contacts present in that case. Consider the effect on *Hanson* if the Delaware trustee, fortuitously, happened to own a vacation home in Florida, or had a similar connection with the state that would obviously increase his contacts. The ability to curtail choice of law abuse would be lost. As an even more clear-cut example, if the defendant is a large national corporation doing business in all fifty states, control of choice of law abuse would be entirely nonexistent. The corporation could be sued in every state, regardless of the consequences. Step two shifts, but does not eradicate, the contacts-based calculus. Therefore, it must be conceded that using jurisdiction to control extraneous factors would only work sporadically, in the occasional borderline case.

65. See, e.g., *Kulko v. Superior Court*, 436 U.S. 84, 98 (1978); *New York Times v. Connor*, 365 F.2d 567, 572 (5th Cir. 1966) (overruled in *Hustler and Calder*); *Kailieha v. Hayes*, 56 Haw. 306, 311-13, 536 P.2d 568, 572 (1975).

66. See, e.g., *Hanson v. Denckla*, 357 U.S. 235, 253 (1958); *Ratliff v. Cooper Laboratories, Inc.* 444 F.2d 745, 747 (4th Cir. 1971) (overruled in *Hustler*).

67. See, e.g., *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957); *Buckeye Boiler Co. v. Superior Court*, 71 Cal. 2d 893, 458 P.2d 57, 62, 80 Cal. Rptr. 113, 118 (1969).

68. *Philips Petroleum v. Shutts*, 472 U.S. 797, 808 (1985); *Kailieha v. Hayes*, 56 Haw. 306, 311-13, 536 P.2d 568, 572 (1975).

69. *Buckeye Boiler*, 71 Cal. 2d at 903, 458 P.2d at 67, 80 Cal. Rptr. at 123. Additional concerns might include the international considerations discussed in *Asahi* and *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1983), and the discussions of commercial practicality found in *World-wide* and *Helicopteros*. The international concerns reflected in *Asahi* and *Helicopteros* should not be considered in any event. See *infra* notes 73-79 and accompanying text.

to have, if not a rule, at least a finite and manageable set of considerations. Under a two-step analysis, courts must inevitably turn to deciding jurisdictional questions for completely unknown reasons and without plausible explanations. This confusion is precisely what Justice Black predicted in *International Shoe*⁷⁰ when he warned that the amorphous minimum contacts analysis, and the natural law concept of due process on which it was based, would prove impossible to apply.

The use of a second, fairness step in jurisdictional analysis is also subject to attack at a theoretical level. If having sufficient contacts does not determine the fairness of the forum state's assertion of jurisdiction, then the relevance of contacts-based analysis, itself, is open to question. The Supreme Court is limited in reviewing jurisdictional matters to those questions falling under the ambit of due process considerations. To concede that contacts do not define fairness is to concede that the Court has, at all times since *International Shoe*, really been creating something more akin to a federal common law of interstate venue, rather than a due process-based restriction on jurisdiction.⁷¹

Yet, having picked up the sword of fairness and having placed it in the arsenal of due process, the Court seems to have forgotten that the guarantee of due process assures only a basic type of fairness that cannot be extended to create a guarantee that every case will be decided correctly. If a party wins at trial by persuading the trier of fact with dishonest testimony, the resulting verdict will be unfair. Few would claim, however, that the Supreme Court should review the testimony *de novo*. The Court's error, then, has been to extend due process protection to every unfairness regardless of whether existing doctrines of forum non conveniens should have been allowed to govern. Indeed, Justice Black persuasively argued that the minimum contacts

70. See *supra* notes 1-4 and accompanying text.

71. This explanation of the Court's minimum contacts analysis appears more plausible in any event. Among other things, it would resolve the present confusion in attempting to apply personal jurisdictional analysis to the federal courts and to appeals from the state courts to the United States Supreme Court which, obviously, sits only in Washington, D.C. In addition, if a due process-based right to object to a certain degree of defendant inconvenience or geographic movement exists, state lines are an awkward means of determining its application. Under present analysis, requiring a Delaware resident to travel a short distance to nearby Pennsylvania violates due process, while a person from east Texas may freely be required to travel to the western portion of that state because the purportedly constitutional concern is not invoked until state lines are crossed.

analysis was an extension into areas best left for the states. His view may overlook the need for some control over relations between the states in a federal system. The minimum contacts analysis chosen by the Court, however, purports to be based on due process considerations, and is poorly suited to interstate federalism concerns in any event.

The newly added step two seems even less suited to either function. The true essence of the second step, as displayed in *Asahi*, appears to be a judgment of the *wisdom*, rather than the *fairness*, of entertaining the litigation in the chosen forum.⁷² One must ask whether an inquiry based on wisdom is appropriate for constitutional adjudication. Even those who might feel that the Court reached a laudable outcome in *Asahi* must consider whether it did so with regard to questions about which the California courts should be the last to speak. Constitutionalizing forum non conveniens would be a novel, far reaching, and unwarranted extension of federal power into one of the few remaining areas of state authority.

VI. INTERNATIONAL CONSIDERATIONS

Assuming, *arguendo*, that it is proper for the Court to employ a second step in the jurisdictional analysis, it does not appear that the step two analysis actually employed in *Asahi* was appropriate. The Court focused on two specific factors that it saw as rendering jurisdiction either unfair or unwise. First, the Court expressed a special concern over the effect of its jurisdictional decisions in international relations.⁷³ This concern appears to have had its origin in an obscure and, at the time, unpublished law review article.⁷⁴ Surprise at the Court's reliance on such a piece and at Rehnquist's willingness to join the opinion despite his statements in *Hustler* may be abated by observing that the author had been Rehnquist's law clerk just a few

72. Examples of the wisdom-based analysis would include concerns about the effect of personal jurisdiction decisions on the conduct of foreign affairs and the forum state's lack of interest in the litigation. On the other hand, some of the concerns reflected in step two, such as the concern about choice of law abuse, are relevant to interstate federalism.

73. 676 107 S. Ct. at 1034-35.

74. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT'L & COMP. L. 1-44 (1987).

years earlier.⁷⁵

Although the Court identified no actual foreign relations problems presented by *Asahi*, the Court seemed to suggest that a special deference to aliens weighs in the jurisdictional calculus every time the defendant is from another country: "The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders."⁷⁶ These companies, however, have chosen to do business in the United States, or even, in *Asahi's* case, throughout the world. Certainly an American company that does business in Taiwan or Saudi Arabia risks the same difficulties. For this reason, some choose not to do such business. The Court appears to have dramatically increased the probability that a foreign company can do business in the United States (indirectly, at least) and entirely escape liability for any harm caused by its products.⁷⁷

Whatever the wisdom of making such concessions to foreign nationals, it is clear that the President, Congress, or both may take international factors into account in drafting treaties, executive agreements, and legislation pursuant to their foreign affairs powers.⁷⁸ The Court, however, does not share such power. The judiciary is the only branch of government not given a foreign affairs role by the Constitution.⁷⁹ Other nations, at present,

75. See ASSOCIATION OF AM. LAW SCHOOLS, DIRECTORY OF LAW TEACHERS, 1986-87 (1986) 201. (A slight discrepancy exists between the middle initial and rank of Professor Born as identified in the Directory and that shown on the article. A telephone interview with Professor Born on October 16, 1987 confirmed the accuracy of the information related here in the text.)

76. 107 S. Ct. at 1034.

77. Oddly enough, giving this advantage to foreign companies would place them in an unfairly favorable position to compete in the American economy vis-a-vis American companies. Thus, the Court appears to be conducting its "foreign policy" in a direction completely at odds with the avowed "level playing field" objective presently advocated by the Executive and the Legislature.

78. Only the President and the Legislature have authority to negotiate. See U. S. CONST. art. II, §2, cl. 2; *id.* art. I, §8, cl. 3; *Missouri v. Holland*, 252 U.S. 414 (1920); HENKIN, PUGH, SCHACHTER & SMITH, INTERNATIONAL LAW 143-46 (1980).

79. Regarding the power to conduct foreign affairs, see U. S. CONST. art. II, §2, cl. 2 (President and Senate) (commerce with foreign nations); *id.* art. I, §8, cl. 4 (Congress) (naturalization); *id.* art. I, §8, cl. 5 (Congress) (regulation of value of foreign coin); *id.* art. I, §8, cl. 10 (Congress) (definition and punishment of piracy, crime at sea, and offenses against the law of nations); *id.* art. I, §8, cl. 12 (Congress) (raising and supporting armies); *id.* art. I, §8, cl. 13 (Congress) (providing and maintaining a navy); *id.* art. I, §8, cl. 14

do not typically give such special consideration to our citizens in their adjudicatory systems, and it is inappropriate for us to unilaterally bestow such a benefit on them. The President and Congress usually negotiate such privileges, obtaining parallel or other concessions in return. The Court in *Asahi* appears to have given away the store for free.

VII. THE EFFECT OF PARTIAL SETTLEMENTS: JURISDICTION BY HINDSIGHT

The second factor in the Court's step two analysis is even more troubling. Apparently, the most significant reason for declining jurisdiction was that the settlement of the primary case left only an indemnification claim between the foreign tire manufacturer and the foreign valve supplier.⁸⁰ One must keep in mind that the original action was a personal injury action brought by a Californian injured in California by a product purchased in California. Nonetheless, the indemnification action was said by the Court to be one in which California had no legitimate interest.⁸¹ One is therefore left to wonder if the outcome of the case would have been the same if the principal case had not settled. If the failure to settle would have changed the outcome—as I am almost certain it would—the Court has accomplished very little in deciding *Asahi*. The opinion tells us nothing more than the outcome of an especially peculiar set of facts.

More importantly, however, jurisdiction always attaches, or fails to attach, at the time of filing.⁸² At least that was the rule

(Congress) (rules for government and armed forces); *id.* art. I, §8, cl. 15 (Congress) (repelling invasions). Note that no clause refers to the judiciary. There is a well-developed practice by which the courts follow the lead of the Executive in all matters involving foreign affairs, rather than risking the inconsistency that would occur if the courts made independent judgments. *See, e.g.,* First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 760-70 (Rehnquist, J.), 773-76 (Powell, J., concurring) (1971).

80. 107 S. Ct. at 1029-30.

81. *Id.* at 1034.

82. *See, e.g.,* *Sosna v. Iowa*, 419 U.S. 393 (1975); *Cheng Fan Kwok v. Immigration & Naturalization Service*, 392 U.S. 206 (1968); *Metlakatla Indian Community, Annette Island Reserve v. Egan*, 363 U.S. 555 (1960); *Thompson, Trustee v. Magnolia Petroleum Co.*, 309 U.S. 478 (1940); *Harris v. Avery Brundage Co.*, 305 U.S. 160 (1938); *United States v. Freights, Etc. of S. S. Mount Shasta*, 274 U.S. 466 (1927); *Blamberg Bros. v. United States*, 260 U.S. 452 (1923); *North Pac. Steamship Co. v. Soley*, 257 U.S. 216, 217 (1921) ("The circumstances existing at the time of filing the bill of complaint are determinative of jurisdiction.") (citing *Way v. Clay*, 140 F. 352 (S.D. W. Va. 1904)); *Sheffield*

prior to *Asahi*. The Court did not discuss the question of overruling such a longstanding rule and, therefore, as unlikely as it seems that such a point would be overlooked, I must assume that it was.

Although this basic rule was not expressly overruled, it was clearly ignored by the *Asahi* Court's analysis of jurisdiction by hindsight. The Court's conclusion regarding the inappropriateness of jurisdiction improperly focused solely on the one remaining claim whose lone existence could only be known after the fact. The considerations O'Connor enumerated for evaluating the reasonableness of jurisdiction—e.g., the burden on the defendant and the interests of the forum state—would be properly applied, if at all, at the time of filing, when the other claims were still pending. If the vestiges that remained years afterward had been filed alone, the California courts might well have dismissed *Asahi* under the doctrine of forum non conveniens. Thus, it is irrelevant that the jurisdictional interests of the plaintiff were slight after the settlement, and it was therefore unnecessary for Cheng Shin to "demonstrate that it is more convenient for it to litigate its indemnification claim against Asahi in California rather than Taiwan or Japan."⁸³

Such a practice of shifting jurisdiction, if *Asahi* is seen as embracing a new practice of redetermining jurisdiction as events change, is inherently problematic. We must consider the policy implications of permitting the uncertainty that would result if events that might occur years after filing could divest a court of jurisdiction that was proper at the outset. Statutes of limitations present one example of the problems that might be created. These limitations might run out in the interim, and it might not be possible to re-sue in the newly appropriate forum.⁸⁴ Various

& Birmingham Coal, Iron and Ry. Co. v. Gordon, 151 U.S. 285 (1894); Horizon Creditcorp v. Oil Screw "Innovation I", 730 F.2d 1389 (11th Cir. 1984); Boble v. Marsh, 684 F.2d 12 (D.C. Cir. 1982); 1 J. MOORE, FEDERAL PRACTICE ¶ 0.91[3] (1987).

83. 107 S. Ct. at 1034.

84. In a minority of jurisdictions, the statute of limitations is not tolled by the filing of a lawsuit in another jurisdiction that later turns out to be improper. Compare *Nichols v. Canoga Indus.*, 83 Cal. App. 3d 956, 962-64, 148 Cal. Rptr. 459 463-64 (1978) (a litigant who timely files an action in the wrong forum and thereby gives notice of its pendency to his adversary may be relieved from the statute of limitations under the rule of equitable tolling) with *Baldwin v. Happy Herman's, Inc.*, 122 Ga. App. 520, 520, 177 S.E.2d 814, 815 (1970) ("A void judgment is an absolute nullity and it does not prevent the running of the statute."). Research materials available do not permit an examination of the law

other reliance-based concerns might arise. Parties would never know if the court in which they are proceeding has jurisdiction.

VIII. CONCLUSION

Asahi reflects a profoundly divided Court lacking a clear sense of which factors should govern decisions on personal jurisdiction. *Asahi* underscores the fact that the minimum contacts calculus has always been and most certainly is a completely ad hoc jurisprudence. For this reason, this Article began with the discussion of Justice Black’s prophetic concurrence in *International Shoe*, which essentially predicted that the amorphous minimum contacts analysis created in that case turned entirely on an unknown and unknowable sense of “natural justice” and would prove impossible to apply.

The most significant example of this lack of an accepted means of analyzing minimum contacts questions is found in the divergent views expressed in *Asahi* with regard to the stream of commerce analysis. The stream of commerce doctrine is an eminently sound one, and none of the *Asahi* opinions applies it as generously as this Article has suggested. The most troubling aspect of *Asahi* is the realization that four justices subscribe to the view set forth in O’Connor’s opinion, which would entirely eliminate this valuable doctrine. While this view does not account for the majority of the Court, it is surprising that such a view would find any support at all. No reason for eliminating the stream of commerce doctrine is ever spelled out in O’Connor’s opinion.

In any view, the stream of commerce doctrine grows out of the inherent power of a state to afford protection to those injured within its borders. While this power may be limited in cases in which a product arrives in the forum state through utterly fortuitous or freakish circumstances, a defendant who willingly places his product into the stream of commerce ought to be required to appear and defend that product wherever it is ultimately sold by those whose resale of the manufacturer’s product enriches him.

of Taiwan and Japan in this regard. Notably, the Court did not consider whether the courts of Taiwan or Japan would still be available for refiling a lawsuit. Under current forum non conveniens doctrine, a more preferable forum must be available before a dismissal will be entered.

Another troubling aspect of the *Asahi* decision is the true majority's apparent reliance on the two-step analysis. If *Asahi* is to be taken at its word, the Supreme Court appears to be endorsing the idea that the fairness question and the contacts inquiry are distinct and unrelated steps in deciding personal jurisdiction questions. Indeed, in *Asahi*, these two steps produce *opposite* results. In prior decisions, such as *Keeton v. Hustler*, the Court had indicated that the only question to be answered was whether sufficient contacts existed; the existence of sufficient contacts, itself, rendered the assertion jurisdiction fair. On both practical and theoretical grounds, this Article has argued that *Hustler* took the wiser course. Indeed, if either *Asahi* or *Hustler* had to be selected as the more appropriate case for applying step two's special policy considerations, clearly *Hustler*'s First Amendment ramifications would seem more important than *Asahi*'s concerns related to forum non conveniens.

Turning to the step two or fairness discussion found in *Asahi*, on which that decision stands or falls, the Court's reliance on international and forum non conveniens concerns seems misplaced. International concerns are not properly within the province of the Court, and would be better left to diplomatic negotiation. Forum non conveniens concerns are not, and ought not be, of constitutional magnitude. Further, jurisdictional decisions should not be based upon events occurring subsequent to the filing of the lawsuit.

The peculiar fact in *Asahi* that all of the principal claims had settled seems also to be the dispositive fact. Thus, once again, the Court appears to have rendered a major personal jurisdiction decision that has achieved little more than identifying the "correct" outcome of one unusual set of facts. Beyond its lack of guidance for future cases, *Asahi* is flawed because it misdecides the facts actually before the Court, and it fails to display any consensus on the Court as to the underlying analysis by which such decisions are to be made. Thus, *Asahi* signals the beginning of a dark day in the history of personal jurisdiction.