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SOVEREIGNTY AND PERSONAL JURISDICTION DOCTRINE: UP THE STREAM OF COMMERCE WITHOUT A PADDLE

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I. INTRODUCTION

THE last decade has been a very active one for Supreme Court pronouncements on personal jurisdiction.[1] Nonetheless, however numerous, the collection of decisions has failed to clarify personal jurisdiction doctrine. If anything, doctrine in the personal jurisdiction area is less clear, less tied to the stated theoretical underpinnings than when the decade began. From the relatively flexible standard of *International Shoe Co. v. Washington*,[2] which replaced the strict territoriality-based rule of *Pennoyer v. Neff*[3] with a standard oriented, instead, toward the fairness and reasonableness concerns of the due process clause,[4] the Court has moved to a rigid two-step formulation of the personal jurisdiction test, which once again emphasizes sovereignty and territoriality.[5]

Since its decision in *World-Wide Volkswagen Corp. v. Woodson*,[6] wherein the Court insisted that a defendant's purposeful contacts with the forum state are a condition precedent to a consideration of

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1. *See, e.g.*, Burnham v. Superior Court, 110 S. Ct. 2105 (1990); Ashai Metal Indus. v. Superior Court, 480 U.S. 102 (1987); Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985); Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984); Calder v. Jones, 465 U.S. 783 (1984); Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984); Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Rush v. Savchuk, 444 U.S. 320 (1980).

2. 326 U.S. 310 (1945).

3. 95 U.S. 714 (1877).

4. [D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'

326 U.S. at 316 (emphasis added).

5. *World-Wide Volkswagen*, 444 U.S. at 294.

6. 444 U.S. 286.

whether personal jurisdiction is fair,[7] it has become increasingly clear that the two-step personal jurisdiction standard is unworkable. The consequence of having established such a rigid, unworkable standard is a series of decisions that open by stating the *World-Wide Volkswagen* test, cite the language of *World-Wide* establishing sovereignty as key to personal jurisdiction doctrine, and finally go on to decide the case before the Court without application of the test nor adherence to the theory.[8]

The degeneration of personal jurisdiction doctrine, the division on the Court, and the resulting unprincipled decision making is nowhere more clearly illustrated than in the Supreme Court's decision in *Asahi Metal Industry Co. v. Superior Court*.[9] *Asahi* was a personal jurisdiction case in which the Court was unable to form a majority view of the rationale for the decision. A majority of the justices clearly rejected the *World-Wide Volkswagen* dictate, yet the court cited that opinion approvingly throughout.[10] *Asahi* was followed by still another fragmented opinion last year.[11]

It is obvious, in reading the recent Supreme Court decisions, that the current formulation of doctrine is neither adequate to explain those decisions nor to predict future results. This Article suggests a new formulation of personal jurisdiction theory. Unlike suggestions by other commentators which focus solely upon the reasonableness or fairness of taking jurisdiction over an absent defendant,[12] this Article concludes that the Court is wedded to the concept of sovereignty and its continuing role in personal jurisdiction doctrine.[13] Therefore, I pro-

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7. The Court in *World-Wide Volkswagen* concluded that the petitioners failed to demonstrate sufficient minimum contacts and, therefore, did not reach the question of whether an assertion of jurisdiction by the Oklahoma courts was fair. *Id.* at 299.

8. *See, e.g.*, Asahi Metal Indus. v. Superior Court, 480 U.S. 102 (1987); Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); *See also*, Stephens, *The Single Contract as Minimum Contacts: Justice Brennan "Has It His Way"*, 28 WM. & MARY L. REV. 89 (1986); Stewart, *A New Litany of Personal Jurisdiction*, 60 U. COLO. L. REV. 5 (1989).

9. 480 U.S. 102 (1987).

10. Eight members of the Court concluded that the assertion of personal jurisdiction over petitioner Asahi did not comport with "fair play and substantial justice," *id.* at 113-16; however, four members of that majority also concluded that minimum contacts were absent. *Id.* at 112-13. Consistent with the *World-Wide Volkswagen* scheme, the question of fairness should never have been reached. Only Justice Scalia, finding no sufficient contacts, did not reach the fairness step.

11. Burnham v. Superior Court, 110 S. Ct. 2105 (1990).

12. *See, e.g.*, Lewis, *A Brave New World for Personal Jurisdiction: Flexible Tests Under Uniform Standards*, 37 VAND. L. REV. 1 (1984); Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U.L. REV. 1112 (1981).

13. For a well-reasoned and persuasive account of why sovereignty continues to emerge as a theme in Supreme Court decisions in spite of efforts to downplay its importance, see Stein, *Styles of Argument on Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689 (1987).

pose to join, in part, those who have suggested a reconciliation between choice of law and personal jurisdiction doctrines.[14] By making the consideration of whether a forum may apply its own law to a particular case an explicit part of a personal jurisdiction determination, territorial concerns embodied in the constitutional limitations on choice of law will be incorporated into the personal jurisdiction standard. However, this Article additionally suggests that the most recent Supreme Court decisions can only be explained by a theoretical framework that depends on acceptance of sovereign power and territoriality as essential to assertions of personal jurisdiction. Combined with a traditional due process analysis, which scrutinizes the fairness of an assertion of jurisdiction, such a reformulation should accommodate the two prongs which historically dominate personal jurisdiction theory.

This Article will examine briefly the evolution of the current personal jurisdiction standard. It then will use the stream of commerce cases to illustrate the degeneration of that standard, a degeneration which culminated in the confusion of the *Asahi* opinion. Finally, the Article will suggest a reformulation of jurisdictional doctrine that emphasizes a reconciliation with choice of law theory, while at the same time acknowledging that other fundamental notions of sovereign power continue to dominate personal jurisdiction doctrine. This reformulation will have both explanatory and predictive value.

II. Evolution of Personal Jurisdiction Doctrine

The Supreme Court's decision in *International Shoe* represented a repudiation of the established personal jurisdiction rule and, seemingly, the theory underlying that rule. It appeared, however briefly, that assertions of personal jurisdiction were to be allowed whenever reasonable and fair.[15] The Court's view of the new personal jurisdiction probably reached its zenith in *McGee v. International Life Insurance Co.*[16] But by 1980, *World-Wide Volkswagen*[17] was only the latest

14. *See, e.g.*, Martin, *Personal Jurisdiction and Choice of Laws*, 78 Mich. L. Rev. 872 (1980); Peterson, *Proposals of Marriage Between Jurisdiction and Choice of Law*, 14 U.C. Davis L. Rev. 869 (1981); Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U. L. Rev. 33 (1978); Stein, *supra* note 13; von Mehren, *Adjudicatory Jurisdiction: General Theories Compared and Evaluated*, 63 B.U.L. Rev. 279 (1983).

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

16. 355 U.S. 220 (1957). The Court upheld personal jurisdiction in California over a foreign insurance company which assumed an insurance policy issued to a California resident. The insurance company did no other business in the forum state. The Supreme Court held that "[it] is sufficient for purposes of due process that the suit was based on a contract which had substantial connection" with the forum state. *Id.* at 223.

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

in a line of cases in which the Court moved the jurisdictional standard away from an emphasis on fairness and reasonableness and toward an emphasis on the territoriality and sovereignty concerns embodied in the minimum contacts test.[18]

In *World-Wide*, the Court acknowledged that 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.[19]

The latter function is served by the requirement that a defendant have purposeful minimum contacts with the forum and it is this requirement the Court chose to emphasize in *World-Wide*, citing *Hanson v. Denckla*[20] for the proposition that:

> 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.[21]

The source of such a federalism function was nowhere explained by the Court. From the language in *Hanson*, then, comes the inevitable conclusion that the defendant's contacts and ties with the forum are a threshold requirement for personal jurisdiction.[22] Absent such contacts, the Court did not need to consider the interests of the plaintiff or the forum state, nor the presence or absence of inconvenience to

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18. *Id.* at 294.

19. *Id.* at 291-92.

20. 357 U.S. 235 (1958), *reh'g denied*, 358 U.S. 858.

21. *World-Wide Volkswagen*, 444 U.S. at 294. The Court also cites *Hanson* language:

> '[T]he requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of *Pennoyer v. Neff* to the flexible standard of *International Shoe Co. v. Washington*. 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.'

Id. (citations omitted). *But see* Insurance Corp. of Ireland v. Compagnie Des Bauxites De Guinee, 456 U.S. 694, 702 n.10. (1982).

22. *See supra* note 7 and accompanying text.

the defendant. If, and only if, the defendant had such contacts with the forum, might the court have gone on to consider the reasonableness of asserting personal jurisdiction in light of those other factors.

The Court went on to explain that the defendant's contacts must be purposeful, not fortuitous,[23] and that the "mere 'unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State.'"[24] For those reasons the Court disallowed the Oklahoma state court's assertion of jurisdiction over the New York retailer of an automobile and over the regional distributor located in New York, who did business in New York, New Jersey and Connecticut. Although a car the retailer and regional distributor sold was driven to Oklahoma, where it exploded during an accident because of an allegedly defective gas tank, such a contact was deemed insufficient to satisfy the test set out by the Court.[25]

The Court was careful, in its discussion of "mere unilateral activity," to distinguish the situation in which a manufacturer or distributor's sale of a product "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."[26] In oft-quoted language the Court stated that "[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."[27] The Court then cited *Gray v. American Radiator & Standard Sanitary Corp.*[28] as an example of a stream of commerce case and left the lower courts and commentators to grapple with the distinction thus apparently made between goods which are brought into a state by consumers and cause injury and

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23. *World-Wide Volkswagen*, 444 U.S. at 297.

24. *Id.* at 298 (quoting Hanson v. Denckla, 357 U.S. at 253).

25. *Id.* at 299. For an argument that "strict" personal jurisdiction as well as strict substantive tort liability was a choice open to the Court, see Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and Pennoyer Reconsidered*, 62 WASH. U.L.Q. 479 (1987).

26. *World-Wide Volkswagen*, 444 U.S. at 297.

27. *Id.* at 297-298.

> Hence if 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, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others.

Id. at 297.

28. 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

goods which are sent into the state by a manufacturer or distributor, purchased there by a "consumer," and then cause injury.[29]

III. STREAM OF COMMERCE THEORY IN THE LOWER COURTS

The Supreme Court offered little in the way of rationale for the distinction outlined above. Soon after that decision the lower courts were confronted with the issue, and although the contexts of the cases varied, a broad consensus emerged as to the meaning of the Supreme Court's distinction.[30]

Most of the courts that considered the issue held that personal jurisdiction could be premised upon a party's placement into the stream of commerce of a product which landed in the forum state.[31] Those courts found that the Supreme Court intended a broad exception in *World-Wide* for defendants who made use of the stream of commerce to distribute their products, which eventually caused injury.[32] The majority of courts considered the extent of a defendant's control in the

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29. *See infra* notes 30-51 and accompanying text.

30. For a thorough discussion of the caselaw, see Dayton, *Personal Jurisdiction and the Stream of Commerce*, 7 REV. OF LITIGATION 239 (1988). "By the time the Court rendered its *Asahi* decision early in 1987, courts in at least sixteen states, and most federal appellate courts had ruled that the stream of commerce theory comported with the principles articulated in *International Shoe* and its progeny." *Id.* at 267-68. *See also* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 117 (Brennan, J., dissenting). "[M]ost courts and commentators have found that jurisdictions premised on the placement of a product into the stream of commerce is consistent with the Due Process Clause, and have not required a showing of additional conduct." Also, "[t]he Court of Appeals for the Eighth Circuit appears to be the only Court of Appeals to have expressly adopted a narrow construction of the stream-of-commerce theory . . . although the Court of Appeals for the Eleventh Circuit has implicitly adopted it." *Id.* at 118, n.2.

31. *See, e.g.*, McBead Drilling Co. v. Kremco, Ltd., 509 So. 2d 429, 432 (La. 1987); Hewitt v. Eichelman's Subaru, Inc., 492 A.2d 23, 25-26 (Pa. Super. Ct. 1985); Tonka Corp. v. TMS Entertainment, Inc., 638 F. Supp. 386, 389 (D. Minn. 1985); Copiers Typewriters Calculators, Inc. v. Toshiba Corp., 576 F. Supp. 312, 317 (D. Md. 1983); Noel v. S. S. Kresge Co., 669 F.2d 1150, 1153-55 (6th Cir. 1982); Oswalt v. Scripto, Inc., 616 F.2d 191 (5th Cir. 1980). In addition to the caselaw accepting a broad stream of commerce theory, several states revised their long arm statutes to reflect the Court's decision in *World-Wide Volkswagen*. *See, e.g.*, ALASKA STAT. § 09.05.015(4)(B) (1983); FLA. STAT. § 48.193(1)(f)(2) (1989); LA. REV. STAT. ANN. § 13:3201(8) (West Supp. 1987); NEV. REV. STAT. § 14.080 (1985); N.C. GEN. STAT. § 1-75.4(4)(b) (1983); 42 PA. CONS. STAT. ANN. § 5322(a)(1)(iii) (Purdon 1981).

32. *E.g.*, Bean Dredging Corp. v. Dredge Technology Corp., 744 F.2d 1081 (5th Cir. 1984) (holding that defendant manufacturer of steel castings, which introduced thousands of its products into the stream of commerce, including two ultimately used in construction of an allegedly defective dredge in Louisiana, and which sought the broadest market possible without making any attempt to limit the states in which its castings would be sold, was subject to jurisdiction in Louisiana).

distribution process unimportant in the jurisdictional analysis.[33] Instead, a court following the majority approach looked to whether the defendant was aware of the distribution scheme.[34] If the defendant was aware, the court found that defendant to be indirectly serving the market, and receiving economic benefit from that distribution and marketing scheme.[35] Given this awareness and the economic benefit derived, most courts had no trouble finding that such a defendant "should reasonably anticipate being subject to suit in any forum within that market where the defendant's product caused injury."[36]

The lower federal courts also held that a foreign manufacturer could not protect itself by using an elaborate distribution scheme and then disclaiming awareness. For example, in *Poyner v. Erma Werke GmbH*,[37] the defendant German manufacturer of firearms argued that because it had sold its product to an independent New York distributor, it should not have been subject to personal jurisdiction in Kentucky in a products liability action brought by a Kentucky resident. The Sixth Circuit Court of Appeals overturned the district court's denial of personal jurisdiction, holding, "the use of an independent distributor so that the manufacturer is only indirectly responsible for the product reaching an injured consumer, in and of itself, will not insulate a non-resident foreign corporation from suit."[38]

Similarly, the District Court for the Eastern District of Pennsylvania upheld personal jurisdiction in a products liability suit by a helicopter purchaser against the manufacturer of the helicopter and the French manufacturer of the helicopter parts. In *Rockwell Interna-*

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33. *E.g.*, Nelson v. Park Industries, Inc., 717 F.2d 1120, 1126 (7th Cir. 1983), *cert. denied sub nom.*, Burnam Tony & Co. v. F.W. Woolworth Co., 465 U.S. 1024 (1984).

> Further, [defendant-manufacturer] submits that it had no control over the flannel shirts once they were sold to [distributor] and that it made no efforts to distribute the shirts anywhere. However, even though [defendant-manufacturer] did not originate the distribution system and do[es] not control it, they did place the flannel shirts in and move them along a stream of commerce destined for retail sale throughout the United States in Woolworth's retail stores. . . . [A] critical fact is whether those defendants were aware of that distribution system. If they were aware . . . they should reasonably anticipate being subject to suit in any forum within that market where their product caused injury.

Id.

34. *Id.*; Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distributors Pty., Ltd. 647 F.2d 200, 204 (D.C. Cir. 1981).

35. *Stabilisierungsfonds Fur Wein*, 647 F.2d at 204; Rockwell Int'l Corp. v. Construzioni Aeronautiche Giovanni Agusta, S.P.A., 553 F. Supp. 328, 334 (E.D. Pa. 1982); Poyner v. Erma Werke GmbH, 618 F.2d 1186, 1190 (6th Cir. 1980), *cert. denied sub nom.*, Insurance Co. of North America v. Poyner, 449 U.S. 841 (1980).

36. *Nelson*, 717 F.2d at 1126.

37. 618 F.2d 1186 (6th Cir. 1980).

38. *Id.* at 1190 (citing Eyerly Aircraft Co. v. Killian, 414 F.2d 591 (5th Cir. 1969)).

tional Corp. v. Construczione Aeronautiche Giovanni Agusta,[39] the court applied stream of commerce theory to find that even though the foreign defendant's "involvement in the sale and distribution of the ball bearing may be once or twice removed from Augusta's final sale to Rockwell, SNFA's purposeful availment . . . actually took place at an earlier point. That occurred when SNFA decided to enter and exploit the international 'executive corporate transport market'. . . ."[40] A complex distribution scheme should not, the court held, prevent an injured plaintiff from seeking redress against a foreign manufacturer.

> Moreover, a manufacturer or major distributor should not be allowed to profit from the sale of its product in a state, while simultaneously insulating itself from liability by establishing an indirect and multi-faceted chain of distribution. Simply because a business operation is structured in such a way as to avoid direct activity in the Commonwealth of Pennsylvania would not prevent the state courts from imposing personal jurisdiction upon the non-resident defendant.[41]

The Tenth Circuit also has endorsed a broad stream of commerce theory. In *Fidelity and Casualty Co. v. Philadelphia Resins Corp.*,[42] the court stated:

> If a defendant's product comes into the forum state as a result of a deliberate, although perhaps indirect, effort of the defendant to serve the forum state's market, then that defendant is subject to jurisdiction there. Placing one's product into the 'stream of commerce' with the expectation of distribution into particular areas is the classic example of such an indirect effort.[43]

Only one circuit that considered this issue expressly formulated a narrow construction of stream of commerce theory. In *Humble v. Toyota Motor Co.*,[44] the Eighth Circuit found that personal jurisdiction could not be properly asserted over a foreign manufacturer of car seats, reasoning that even though the manufacturer could have perceived that its product would find its way into Iowa, where the seat manufacturer never advertised, solicited any business, or otherwise sought to serve any market in the United States, but merely sold its

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39. 553 F. Supp. 328 (E.D. Pa. 1982).
40. *Id.* at 331.
41. *Id.* at 334 (citations omitted).
42. 766 F.2d 440 (10th Cir. 1985).
43. *Id.* at 446.
44. 727 F.2d 709 (8th Cir. 1984).

products to foreign car manufacturer in Japan, the manufacturer was not subject to personal jurisdiction in Iowa.[45]

Unclear from the court's opinion is the weight given to the fact that the defendant was a manufacturer of component parts. That factor aside, the court formulated a standard which apparently requires a defendant manufacturer to do more than place a product, which eventually ends up in the forum state, into the stream of commerce. Advertising, soliciting business, and attempting to directly serve the forum market all are activities that evidence a defendant's "purposeful availment" and that the defendant should reasonably foresee being haled into court in the forum.[46]

Jurisdictional holdings in the First, Third, and Fourth Circuits remained unclear.[47] Those courts refused to apply stream of commerce theory to support an assertion of personal jurisdiction in particular factual situations. They did not posit a narrow view of stream of commerce theory but recognized limiting factors in its application. The First and Fourth Circuits found stream of commerce theory inapplicable where only a single sale occurred in the forum state.[48] The courts' position appears to be that single sales in the forum state simply do not constitute a stream of commerce, according to "the minimal regularity due process demands."[49]

The Third Circuit also rejected application of stream of commerce theory in certain situations.[50] The court focused on the relationship between the distributor and the defendant manufacturer and on whether evidence "indicat[es] that [defendant] could anticipate either use of its product or litigation in the [forum state]."[51]

IV. THE *ASAHI* CASE

In 1987 the Supreme Court addressed the question of whether by releasing one's product into the stream of commerce with the expectation that it would end up in the hands of consumers in the forum

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45. *Id.* at 710.

46. *Id.*

47. *See*, Chung v. NANA Dev. Corp., 783 F.2d 1124 (4th Cir. 1986), *cert. denied*, 479 U.S. 948 (1986); Dalman Rodriguez v. Hughes Aircraft Co., 781 F.2d 9 (1st Cir. 1986); Max Daetwyler Corp. v. R. Meyer, 762 F.2d 290 (3d Cir.), *cert. denied*, 474 U.S. 980 (1985).

48. *See, e.g.*, *Chung*, 783 F.2d 1124; *Dalman Rodriguez*, 781 F.2d 9. These opinions appear to anticipate Justice Stevens' approach in *Asahi* rather than that of Justice O'Connor. *See infra* notes 98-104 and accompanying text.

49. *Chung*, 783 F.2d at 1129. This result is also consistent with the language of the Supreme Court in *World-Wide Volkswagen*. *See infra* note 68 and accompanying text.

50. *See, e.g.*, *Max Daetwyler*; DeJames v. Magnificence Carriers Inc., 654 F.2d 280 (3d Cir. 1981).

51. *Max Daetwyler*, 762 F.2d at 300 n.13.

state, one was thereby subject to personal jurisdiction in the forum.[52] Given the less than clear resolution of this question in *Asahi*, one wonders why the Court sought to deal with the issue at that time. There was no great clamoring in the lower courts for it to do so. As has been previously suggested, most circuits simply accepted the dichotomy set up in *World-Wide Volkswagen* and adopted a broad view of assertions of personal jurisdiction against manufacturers who participated in an interstate chain of distribution.[53]

Asahi was originally a products liability action. Gary Zurcher was severely injured and his wife was killed in a motorcycle accident that occurred in September 1978 in Solano County, California. Zurcher alleged that the accident occurred because his rear tire exploded and suddenly lost air. His lawsuit was filed in California state court against Cheng Shin Rubber Industrial Co., Ltd. (Cheng Shin), the Taiwanese manufacturer of the tube, and others. Cheng Shin filed a cross complaint seeking indemnification from its codefendants and from Asahi Metal Industry Co., Ltd. (Asahi), the manufacturer of the tube valve assembly. The plaintiff's claims against Cheng Shin and the other defendants were settled and dismissed, leaving only Cheng Shin's action against Asahi before the California courts.[54]

Asahi moved to quash the service of summons on the ground that the California courts could not constitutionally assert personal jurisdiction over it.[55] The superior court denied the motion to quash based upon evidence submitted by both Asahi and Cheng Shin.[56] That evidence established Asahi to be a Japanese corporation that manufactured tire valve assemblies in Japan and sold those assemblies to Cheng Shin and several other tire manufacturers for use as components in tire tubes. Asahi's sales to Cheng Shin took place in Taiwan, and valve assemblies were shipped from Japan to Taiwan.[57]

In 1978, Cheng Shin bought and used 150,000 Asahi valve assemblies; in 1979, 500,000; in 1980, 500,000; in 1981, 100,000; and in 1982, 100,000. Sales to Cheng Shin made up 1.24% of Asahi's income in 1981 and 0.44% in 1982. Cheng Shin alleged that 20% of its sales

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52. Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987).

53. *See supra* notes 30-52 and accompanying text.

54. *Asahi*, 480 U.S. at 105-06.

55. California's long arm statute authorized the assertion of personal jurisdiction "on any basis not inconsistent with the Constitution of this state or of the United States." CAL. CIV. PROC. CODE § 410.10 (West 1973). Hence, every statutory interpretation is merged into a constitutional determination.

56. *Asahi*, 480 U.S. at 107 (*citing* Zurcher v. Dunlop Tire & Rubber Co., No. 76180 (Cal. App. Dep't Super. Ct., Apr. 20, 1983) (order denying motion to quash summons).

57. *Asahi*, 480 U.S. at 106.

in the U.S. were in California and also acknowledged that it sold its finished product throughout the world.[58]

The manager of Cheng Shin stated in an affidavit:

> In discussions with Asahi regarding the purchase of valve stem assemblies the fact that my Company sells tubes throughout the world and specifically the United States has been discussed. I am informed and believe that Asahi was fully aware that valve stem assemblies sold to my company and to others would end up throughout the United States and in California.[59]

Asahi countered with its own affidavit, wherein Asahi's president maintained that "Asahi has never contemplated that its limited sales of tire valves to Cheng Shin in Taiwan would subject it to lawsuits in California."[60]

Based on the information above, the superior court concluded that "Asahi obviously does business on an international scale. It is not unreasonable that they defend claims of defect in their product on an international scale."[61] The California Court of Appeals disagreed and issued a peremptory writ of mandate commanding the superior court to quash service. The appellate court was of the view that "'it would be unreasonable to require Asahi to respond in California solely on the basis of ultimately realized foreseeability that the product into which its component was embodied would be sold all over the world including California.'"[62] The Supreme Court of California reversed, discharging the writ of mandate.[63] The California Supreme Court concluded that the exercise of jurisdiction over Asahi was consistent with due process because Asahi knew that some of the valve assemblies sold to Cheng Shin would be incorporated into tire tubes sold in Cali-

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58. *Id.* A somewhat unusual, informal examination of the valve stems of tire tubes in one cycle store in Solano County was conducted by an attorney for Cheng Shin. That examination revealed that "of the approximately 115 tire tubes in the store, 97 were purported manufactured in Japan or Taiwan, and of those 97, 21 valve stems were marked with the circled letter "A", apparently Asahi's trademark. Of the 21 Asahi valve stems, 12 were incorporated into Cheng Shin tire tubes." *Id.* at 107. The weight to be given such a declaration is unclear.

59. *Id.* at 107 (citing 39 Cal. 3rd 35, 48 n.4, 702 P.2d 543, 549 n.4 (1985).

60. 39 Cal. 3rd 35, 48 n.4, 702 P.2d 543, 549 n.4 (1985). One suspects from this language that the lawyer for Asahi was aware of *World-Wide*'s requirement that the foreseeability that is relevant to a personal jurisdiction determination is foreseeability of being haled into court.

61. *Id.* at 107 (*citing* Zurcher v. Dunlop Tire & Rubber Co., No. 76180 (Cal. App. Dep't Super. Ct., Apr. 20, 1983) (order denying motion to quash summons).

62. *Asahi*, 480 U.S. at 107-8 (quoting Appendix to Petition for Cert. at B5-B6).

63. 39 Cal. 3d 35, 702 P.2d 543 (1985).

fornia, and because Asahi benefited from the sale of those products in California.[64]

The U.S. Supreme Court granted certiorari and reversed the California court.[65] The Court's opinion consisted of several parts, only two of which commanded majority support. A discussion of each part in some detail follows, in order to reveal the full magnitude of the Court's disarray.

A. Part II A

Part II A of the opinion, joined in by Justices O'Connor, Powell, Scalia and Chief Justice Rehnquist, addressed the first stage of the two-stage analysis which the Court formulated in *World-Wide Volkswagen*. Specifically, the Justices considered whether the nonresident, Asahi, had purposeful contacts with the forum state, received the benefits and protections of the forum state, and therefore had reason to expect that it might be haled into court in that forum.[66] Justice O'Connor's opinion focused on the purposefulness of Asahi's contacts, the concern being, apparently, that the defendant not be brought into the state through the unilateral activities of another.[67] O'Connor attempted to align more closely the concept of purposeful availment, found in cases like *World-Wide Volkswagen*, with acts of a manufacturer who, like Asahi, places a product into the stream of commerce. To that end, Part II A quoted language from *World-Wide*:

> 'Hence if 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, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owners or to others.'[68]

In O'Connor's view, the passage quoted above limits other language, also found in *World-Wide*, which lower courts had interpreted to indi-

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64. *Id.* at 49, 702 P.2d at 549-50. The California Supreme Court relied upon the decision in *World-Wide Volkswagen* to support its holding that jurisdiction over Asahi was constitutional on these facts.

65. *Asahi*, 480 U.S. at 108.

66. *Id.* at 109.

67. *Id.* at 109-10.

68. *Id.* at 110 (quoting *World-Wide Volkswagen*, 444 U.S. at 297).

cate a broader formulation of the standard for stream of commerce cases.[69]

Part II A of *Asahi* referred to the lower courts' treatment of cases since *World-Wide Volkswagen*, in which "the defendant acted by placing a product in the stream of commerce, and the stream eventually swept defendant's product into the forum State, but the defendant did nothing else to purposefully avail itself of the market in the forum state."[70] Some of those lower courts, the opinion noted, found good jurisdiction premised on nothing but the defendant's act of placing the product in the stream of commerce. The opinion then went on to adopt the position taken by the minority of courts, that "the Due Process Clause, and the above-quoted language in *World-Wide Volkswagen* require the actions 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."[71]

Part II A then rejects the assertion of the Supreme Court of California that "because the stream of commerce eventually brought some valves Asahi sold Cheng Shin into California, Asahi's awareness that its valves would be sold in California was sufficient . . ." basis for California to validly exercise personal jurisdiction.[72] Prior cases, O'Connor stated, required purposeful action of a defendant directed toward the forum state, and "[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State."[73] What was required, according to the minority, was "additional conduct of the defendant," such as "designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as a sales agent in the forum State."[74] However, this opinion said, "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

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69. *See supra* notes 30-51 and accompanying text. As discussed earlier in this Article, the majority of circuits which had occasion to consider the language from *World-Wide* had concluded that the Court had in fact formulated a broad stream of commerce theory. In *World-Wide*, the Court stated that the "forum 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." *Id.* (quoting *World-Wide Volkswagen*, 444 U.S. at 297-98).

70. *Asahi*, 480 U.S. at 110.

71. *Id.* at 111.

72. *Id.* at 110-111.

73. *Id.* at 112.

74. *Id.*

product into the stream into an act purposefully directed toward the forum State."[75]

Therefore, the O'Connor opinion concluded, respondents failed to demonstrate that Asahi had taken any action to "purposefully avail itself of the California market."[76] Asahi had no office, no agents, no employees, and no property in California. The company did not advertise or otherwise market its product there. Nor did it "create, control, or employ the distribution system that brought its valves to California."[77] According to the O'Connor opinion, failure to prove such purposeful activity was fatal to respondent's assertion of personal jurisdiction.[78]

B. Part II B

All members of the Court, except Justice Scalia, joined in Part II B of the opinion, which considered whether assertion of jurisdiction over Asahi would offend "'traditional notions of fair play and substantial justice.'"[79] In making its determination, the Court considered the "burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief."[80] Also relevant was "'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.'"[81]

The Court concluded that to assert jurisdiction over Asahi under the circumstances of the case would violate the fairness and justice principles underlying the due process clause and the minimum contacts test.[82] The Court based its conclusion on several lines of reasoning. First, not only had the burden on the defendant been severe in terms of time and expense in traveling to California for trial, but, more importantly, the defendant had been forced to submit its dispute with Cheng Shin to a foreign nation's judicial system. "The unique burdens placed upon one who must defend oneself in a foreign legal

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75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 113 ("On the basis of these facts, the exertion of personal jurisdiction over Asahi by the Superior Court of California exceeds the limits of due process.").

79. *Id.* (quoting International Shoe v. Washington, 326 U.S. 310, 316 (1945), quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

80. *Id.*

81. *Id.* (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980)).

82. *Id.* at 114 ("A consideration of these factors in the present case clearly reveals the unreasonableness of the assertion of jurisdiction over Asahi, even apart from the question of the placement of goods in the stream of commerce.").

system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders."[83]

Second, neither the plaintiff nor the forum had significant interests at stake. All that remained of the case before the Court was an indemnification claim by a Taiwanese corporation, Cheng Shin, against Asahi. "The transaction on which the indemnification claim is based took place in Taiwan; Asahi's components were shipped from Japan to Taiwan. 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."[84] Moreover, the Court indicated that because the plaintiff, Cheng Shin, was not a California resident, "California's legitimate interests in the dispute have considerably diminished."[85] The Court rejected the position taken by the California Supreme Court, that the State had a strong interest in protecting its consumers from unsafe products. In response, the Court said the issue before the California courts was not safety standards but rather indemnification, and the Court noted: "[I]t is not at all clear at this point that 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."[86]

The admonition of *World-Wide Volkswagen*, that courts must take into consideration the interests of the several states in "the efficient judicial resolution of the dispute and the advancement of substantive policies," requires that the California courts in this case consider the "procedural and substantive policies of other *nations* whose interests are affected by the assertion of jurisdiction by the California Court."[87] Such interests, the Court said, will vary from case to case.

> In every case, however, those interests, as well as the Federal government's 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."[88]

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83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.* at 115. The Court did not hesitate to refer to choice of law concerns in a personal jurisdiction case to bolster its conclusion that jurisdiction ought *not* apply. *See infra* notes 147-153 and accompanying text.
87. *Id.* (emphasis in original).
88. *Id.*

C. *Part III*

Only Justices O'Connor, Rehnquist, Powell and Scalia concurred in Part III of the opinion, which concluded that because the facts of the 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 . . ."[89]

D. *Brennan's Concurrence*

Justice Brennan's opinion, joined by Justices White, Marshall, and Blackmun, concurred in part and in the judgment. He agreed with Part II B of the opinion that the exercise of jurisdiction over Asahi would not have comported with fair play and justice. However, he rejected the analysis and conclusions in Part II A and the interpretation of stream of commerce theory contained therein. Brennan characterized *Asahi* as "one of those rare cases in which 'minimum requirements inherent in the concept of fairplay and substantial justice . . . defeat the reasonableness of jurisdiction even [though] the defendant has purposefully engaged in forum activities.'"[90]

Justice Brennan first rejected the portion of Part II A that would require a plaintiff to show "additional conduct" directed toward the forum before finding jurisdiction appropriate under the stream of commerce theory. "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."[91] A company that participated in this flow of products and was aware that its products were being marketed in the forum state would not, Justice Brennan asserted, be surprised at the possibility of a lawsuit there, "[n]or will the litigation present a burden for which there is no corresponding benefit."[92] Such a defendant receives economic benefit from the sale of the product in the forum state and "indirectly benefits from the State's laws that regulate and facilitate commercial activity. These benefits accrue regardless of whether that participant directly conducts business in the forum State, or engages in additional conduct

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89. *Id.* at 116. A majority of the Court could not join in this conclusory statement which seems merely to restate the *International Shoe* test as a conclusion. This is evidence of how polarized the Court has become as a result of the tensions inherent in the current personal jurisdiction doctrine and the weaknesses in the doctrine's theoretical underpinnings.

90. Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 116 (Brennan, J., concurring) (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477-78 (1985)).

91. *Id.* at 117.

92. *Id.*

directed toward that State.'"[93] Consistent with this position, Brennan observed that the majority of courts and commentators had found jurisdiction based upon placing a product into the stream of commerce to comport with due process and had required no showing of additional conduct.[94]

Brennan further maintained that the Part II A analysis was a "marked retreat" from the position taken by the Court in *World-Wide Volkswagen*, in which the Court cited approvingly the decision of the Illinois Supreme Court in *Gray v. American Radiator and Standard Sanitary Corp.*[95] and "took great care to distinguish 'between a case involving goods which reach a distant State through a chain of distribution and a case involving goods which reach the same State because a consumer . . . took them there.'"[96]

Brennan concluded, therefore, that the California Supreme Court correctly applied stream of commerce theory and correctly determined that Asahi had minimum contacts with California. He supported his conclusion by highlighting the court's finding that "'[a]lthough Asahi did not design or control the system of distribution that carried its valve assemblies into California, Asahi was aware of the distribution system's operation, and it knew that it would benefit economically from the sale in California of products incorporating its components.'"[97]

E. Stevens' Concurrence

In a separate concurrence in part and concurrence in the judgment, Justice Stevens, joined by Justices White and Blackmun, also wrote to explain his disagreement with the Part II A analysis. First, and somewhat surprisingly, Justice Stevens argued that Part II A was not necessary to the Court's decision: "An examination of minimum contacts is not always necessary to determine whether a state court's assertion of personal jurisdiction is constitutional."[98] Because the Court in Part II B concluded that it would be unreasonable and unfair to take jurisdiction over Asahi, and because "[t]his finding alone requires reversal," Stevens felt that the Court need not have considered stream of commerce theory in this case.[99] "Accordingly, I see no reason in this case for the Court to articulate 'purposeful direction' or any other test

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93. *Id.*
94. *Id.* at 117-18, 117 n.1.
95. 22 Ill. 2d 432, 176 N.E.2d. 761 (1961).
96. *Id.* at 120 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 306-07 (1980)).
97. *Id.* at 121 (quoting Appendix to Petition for Cert. at C-11).
98. Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 121 (Stevens, J., concurring).
99. *Id.*

as the nexus between an act of a defendant and the forum State that is necessary to establish minimum contacts."[100]

"Second," Stevens' concurrence continued, "even assuming that the test ought to be formulated here, Part II-A misapplies it to the facts of this case."[101] In Stevens' view, O'Connor erroneously assumed that "an unwavering line can be drawn between 'mere awareness' that a component will find its way into the forum State and 'purposeful availment' of the forum's market. Over the course of its dealings with Cheng Shin," Stevens argued, "Asahi ha[d] engaged in a higher quantum of conduct than '[t]he placement of a product into the stream of commerce, without more . . . .'"[102] The question of whether or not conduct such as Asahi's "rises to the level of purposeful availment" required the Court to make a "constitutional determination" based upon the "volume, the value, and the hazardous character of the components."[103] The concurrence went on to suggest that a regular course of dealing over a period of several years, which resulted in 100,000 units annually reaching the forum State, would probably have been sufficient to constitute purposeful availment.[104]

V. CRITIQUE OF *ASAHI*

In the context of a "stream of commerce" case, the Court demonstrated most clearly to date the unworkability of the *World-Wide Volkswagen* analysis. As that earlier case dictated, the Court set out to establish the requisite minimum contacts necessary to subject a nonresident defendant to personal jurisdiction. In the first part of its analysis, the Court examined the facts of the case in order to assess the purposefulness of the defendant's contacts. According to *World-Wide Volkswagen*, determining that such purposeful contacts exist is a prerequisite to the second phase of the analysis, which considers the fairness and reasonableness of exercising jurisdiction over the defendant.[105]

On first reading, one might conclude that *Asahi* finally brought the Court back to a *McGee* type analysis. That is, one might argue that reasonableness and fairness concerns were foremost in the Court's collective mind and that in *Asahi* the Court concluded, in contrast to *McGee*, that personal jurisdiction would be unfair and unreasonable.

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100. *Id.* at 122.
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *See supra* note 5 and accompanying text.

Such a conclusion, however, is difficult to reconcile with those parts of the opinion dealing with stream of commerce theory which rely heavily upon discussions of defendant's contacts with California and the purposeful nature of those contacts.

Moreover, even Part II B of the opinion, which concluded that asserting jurisdiction over Asahi offended traditional notions of justice and fair play, had imbedded in it considerations of sovereignty and territorial power.[106] Particularly significant was the Court's suggestion that California's interest in hearing this case was weak in light of the unlikelihood that California law would apply.[107]

Thus the Court seemed unwilling to wholly abandon sovereignty concerns in its personal jurisdiction analysis. Yet it is also clear that the *World-Wide Volkswagen* two-step analysis is unworkable. O'Connor's opinion in *Asahi* was clearly inconsistent with the test enunciated in *World-Wide Volkswagen* in that it went on to consider fairness concerns even though the threshold test of minimum contacts had not, according to her opinion, been met.[108] The remainder of this Article will attempt to reconcile inconsistencies in the Court's position—inconsistencies which result, it will be argued, from the Court's attempt to separate out the sovereignty and fairness concerns of the *International Shoe* test. It is possible, and arguably preferable, to incorporate sovereignty notions into a test framed in fairness and reasonableness concerns.

The problem with this scheme as suggested in *World-Wide* and confirmed in subsequent opinions, is that it is impossible to consider defendant's contacts with the forum in a vacuum. Contacts are not neutral.[109] Reasonableness concerns come into play as soon as the Court begins to describe the contacts, and the notion of purposefulness, which is linked so closely to the sufficiency of defendant's contact, is itself dependent upon reasonableness and fairness. That is, the

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106. The "contacts" analysis also has fairness concerns imbedded in it, which evidences the futility of separating out these "functions."

107. Not only did the Court raise this choice of law issue in support of its holding that jurisdiction over Asahi was unfair, but it also deemed significant the fact that no California resident was a party to the suit. *But c.f.* Keeton v. Hustler Magazine, 465 U.S. 770, 779 (1984) ("[W]e have not to date required a plaintiff to have 'minimum contacts' with the forum State before permitting that State to assert personal jurisdiction over a nonresident defendant.").

108. Even if one views contacts not as a threshold test but as one of two coequal requirements that must be met, failure to find minimum contacts eliminates the need to determine fairness.

109. *See* Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 77-78; Weisburd, *Territorial Authority and Personal Jurisdiction*, 63 WASH. U.L.Q. 377, 405 (1985) ("To say that particular effects are irrelevant to liability is to say that they are not the events that the law seeks to regulate in establishing a rule of liability.").

Court will discuss certain contacts and the sufficiency of those contacts, for purposes of personal jurisdiction, in light of its conviction that asserting jurisdiction based upon certain kinds of contacts is inherently fair or unfair, reasonable or unreasonable (or as Professor Brilmayer has characterized it, in light of its determination that certain contacts count).[110]

By trying to treat sovereignty and fairness as separate and distinguishable concerns, the Court has imposed upon itself a rigid analytical framework that leads inevitably to unprincipled decision making—decision making which purports to resolve legal issues based upon a certain theoretical analysis but which cannot, in fact, do so.[111]

The stream of commerce cases illustrate quite clearly the Court's dilemma and the inadequacy of its analytical method. By distinguishing cases such as *Gray v. American Radiator* from the *World-Wide* case, the Court created a problem for itself that it was unable to resolve in *Asahi*. The Court indicated that while a defendant, whose product is carried by the plaintiff to a distant forum where it causes injury, has not demonstrated a sufficiently purposeful contact, a manufacturer, who takes advantage of the stream of commerce to deliver its product to the forum state, is subject to jurisdiction there if injury results.[112] The Court explicitly stated in the *World-Wide* that, with re-

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110. Brilmayer, *supra* note 109. *See, e.g.*, Calder v. Jones, 465 U.S. 783, 789-790 (1984). Although the Court acknowledged that mere foreseeability that a product will cause harm in a jurisdiction was insufficient to support personal jurisdiction, it allowed the assertion of jurisdiction over a National Enquirer writer and editor because their

> [I]ntentional, and allegedly tortious, actions were expressly aimed at California. Petitioner South wrote and petitioner Calder edited an article that they knew would have a potentially devastating impact upon respondent. And they knew that the brunt of that injury would be felt by respondent in the State in which she lives and works and in which the National Enquirer has its largest circulation. Under the circumstances, petitioners must 'reasonably anticipate being haled into Court there' to answer for the truth of the statements made in their article.

Id.

Leaving aside for the moment the circularity of the "reasonably anticipates" test, it is clear that underlying the Court's conclusion was the assumption that it was fairer or more reasonable to hold petitioners accountable for intentional acts aimed at the forum. One need only contrast the differing treatment of allegedly negligent acts in *World-Wide* and *Asahi*. In *Calder* these petitioners had no control over final publication or distribution, yet the Court had no difficulty finding sufficient contacts.

Another example of the Court's deciding which contacts count as a way of determining whether jurisdiction exists is Kulko v. Superior Court, 436 U.S. 84 (1978), in which the father's act of sending his daughter to California (clearly an act directed at the forum) is not sufficient to meet the "effects" test.

111. For a suggestion that differing views of "fairness" held by members of the Court may impact on decision making, see Maltz, *Unravelling the Conundrum of the Law of Personal Jurisdiction: A Comment on Asahi Metal Industry Co. v. Superior Court of California*, 1987 DUKE L.J. 669.

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

gard to such a manufacturer, "it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others."[113]

The first problem, then, in articulating an analytical framework for stream of commerce cases is deciding whether the Court's formulation of the stream of commerce theory in *World-Wide* was meant to answer both prongs of the personal jurisdiction test or just the first. That is, is demonstrating that a manufacturer has placed a product into the stream of commerce knowing it will end up in the forum state, where it injures a consumer, in and of itself sufficient to satisfy the personal jurisdiction test? Or must the Court independently consider the fairness of such a jurisdictional assertion? The language of *World-Wide* suggests the latter is subsumed by the former.[114] *Asahi*, on the other hand, seems to separate the two determinations, arguably with little success. The O'Connor opinion on contacts certainly anticipated and was influenced by her perception of the inherent unfairness of upholding jurisdiction based on the facts of that case.

The practical consequences of the *Asahi* opinion will be few. Given the division on the Court regarding stream of commerce doctrine, lower federal and state courts are likely to continue as before, awaiting a definitive Supreme Court decision in this area. Moreover, by determining that the state of California unfairly asserted jurisdiction over Asahi, the Court provided little guidance to the lower courts. The facts in Asahi were so peculiar (the foreign defendant, the indemnification nature of the claim, the foreign plaintiff) that few courts will find the case helpful.[115]

Separating out the two aspects of the personal jurisdiction test seems unworkable because the concerns which inform those aspects are interrelated. Additionally, such a separation arguably places too little emphasis on sovereignty concerns in some instances and too much in others. That sovereignty interests play an appropriate role in any given case is merely fortuitous.

VI. *BURNHAM V. SUPERIOR COURT*

While this Article particularly focuses on personal jurisdiction in the stream of commerce context, the more general and necessary focus

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113. *Id.*

114. *Id.*

115. For a discussion of immediate post-*Asahi* caselaw, see Dayton, *Personal Jurisdiction and the Stream of Commerce*, 7 REV. OF LITIGATION 239, 245-47 (1988). *See also* Maltz, *supra* note 111 (concluding that the significance of the decision lies in the fact that *Asahi* was an alien defendant).

is on personal jurisdiction doctrine itself. Certainly, one cannot formulate a credible alternative to the Court's version of personal jurisdiction analysis without considering its most recent decision on the subject.[116] In May of 1990 the Supreme Court decided *Burnham v. Superior Court*[117] and answered a question which was left unresolved after *Shaffer v. Heitner*.[118] In *Burnham*, the defendant, a New Jersey resident, was served with process regarding a divorce action while visiting in California. Defendant was in California to see his children and to conduct business. Appearing specially in the California action, he moved to quash the summons on the grounds that he lacked sufficient minimum contacts with the state of California to be subject to personal jurisdiction there. The superior court denied his motion, and his mandamus petition was also denied by the California Court of Appeal. The California courts were of the opinion that because he was personally served while physically present in the state, the due process requirements of the fourteenth amendment were satisfied.[119]

In another fragmented decision, Justice Scalia announced the judgment of the Court and delivered an opinion in which Chief Justice Rehnquist and Justice Kennedy joined, and Justice White joined in part. The Court upheld assertion of personal jurisdiction where service of process was made upon a defendant who was physically present in the forum state, even though the defendant had no other contacts with the forum and left the state immediately after he was served.[120] Justice Scalia concluded: "[A]mong the most firmly established principles of personal jurisdiction in American tradition is that the courts of a State have jurisdiction over nonresidents who are physically present in the State."[121] In a lengthy discussion of the history of this rule, he acknowledged that it may have originally been based upon a misreading of English common law which it purported to follow, but was, in any event, well established in this country by the time the fourteenth amendment was adopted.[122]

> This American jurisdictional practice is, moreover, not merely old; it is continuing. It remains the practice of, not only a substantial number of the States, but as far as we are aware *all* the States and the federal government—if one disregards (as one must for this

116. The implications in this decision for the role of sovereignty concerns in personal jurisdiction doctrine are particularly important.

117. 110 S. Ct. 2105 (1990).

118. 433 U.S. 186 (1978).

119. *Burnham*, 110 S. Ct. at 2108.

120. *Id.* at 2115.

121. *Id.* at 2110.

122. *Id.* at 2111.

> purpose) the few opinions since 1978 that have erroneously said, on grounds similar to those that petitioner presses here, that this Court's due-process decisions render the practice unconstitutional.[123]

Justice Scalia went on to reject the notion that *International Shoe* was meant to change that traditional rule. According to Scalia, *International Shoe* merely held that a defendant's "litigation-related 'minimum contacts' may take the place of physical presence as the basis for jurisdiction."[124]

> Nothing in *International Shoe* or the cases that have followed it, however, offers support for the very different proposition petitioner seeks to establish today: that a defendant's presence in the forum is not only unnecessary to validate novel, nontraditional assertions of jurisdiction, but is itself no longer sufficient to establish jurisdiction. That proposition is unfaithful to both elementary logic and the foundations of our due process jurisprudence.[125]

Relying heavily upon the longstanding acceptance of such transient personal jurisdiction, Scalia concluded:

> The short of the matter is that jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of "traditional notions of fair play and substantial justice." That standard was developed by *analogy* to "physical presence," and it would be perverse to say it could now be turned against that touchstone of jurisdiction.[126]

Lastly, Scalia turned to what he characterized as petitioner's "strongest argument," that *Shaffer v. Heitner* required the Court to consider transient personal jurisdiction in light of "the standards set forth in *International Shoe* and its progeny."[127] He rejected this argument as well, noting that "*Shaffer*, like *International Shoe*, involved jurisdiction over an *absent defendant*, and that the case stands for nothing more than the proposition that when the 'minimum contact,' that is a substitute for physical presence, is established by property ownership, it must, like other minimum contacts, be related to the litigation."[128]

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123. *Id.* at 2113 (emphasis in original).
124. *Id.* at 2114.
125. *Id.* at 2115.
126. *Id.* (emphasis in original).
127. *Id.*, *citing* Shaffer v. Heitner, 433 U.S. 186, 212 (1978).
128. *Id.* (emphasis in original).

Scalia asserted that the holding in *Burnham* in no way contradicted *Shaffer*. He acknowledged, however, that:

> Our basic approach to the due process question is different. We have conducted no independent inquiry into the desirability or fairness of the prevailing in-state service rule, leaving that judgment to the legislatures that are free to amend it; for our purposes, its validation is its pedigree, as the phrase '*traditional notions* of fair play and substantial justice' makes clear.[129]

In Scalia's view, the Court was not compelled to consider whether such service of process met contemporary standards of due process.

Justice White concurred in the judgment, writing separately to indicate his view:

> The rule allowing jurisdiction to be obtained over a non-resident by personal service in the forum state, without more, has been and is so widely accepted throughout this country that I could not possibly strike it down, either on its face or as applied in this case, on the ground that it denies due process of law guaranteed by the Fourteenth Amendment.[130]

In order to strike down such a traditionally accepted practice, Justice White would apparently have required a showing that "as a general proposition the rule is arbitrary and lacking in common sense in so many instances that it should be held violative of Due Process in every case."[131]

Justice Brennan, joined by Justices Marshall, Blackmun and O'Connor, concurred in the judgment. He wrote separately to disagree with the proposition that "a jurisdictional rule that 'has been immemorially the actual law of the land,' . . . automatically comports with due process simply by virtue of its 'pedigree.'"[132] While acknowledging the relevance of history in establishing whether a jurisdictional rule satisfies due process, Brennan would undertake an "independent inquiry into the . . . fairness" of such a rule. Such an independent inquiry is required by the Court's decision in *Shaffer*. "The critical insight of *Shaffer* is that all rules of jurisdiction, even ancient ones, must satisfy contemporary notions of due process. No longer were we content to limit our jurisdictional analysis to pronouncements that

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129. *Id.* at 2116 (emphasis in original).
130. *Burnham*, 110 S. Ct. at 2119 (White, J., concurring).
131. *Id.* at 2119-20.
132. *Burnham*, 110 S. Ct. at 2116 (Brennan, J., concurring).

'the foundation of jurisdiction is physical power.'"[133] That the Court was willing to abandon the rule regarding *quasi in rem* jurisdiction in *Shaffer* is a clear indication, Brennan suggested, that the Court "did not believe that the 'pedigree' of a jurisdictional practice was dispositive in deciding whether it was consistent with due process. . . . If we could discard an 'ancient form without substantial modern justification' in *Shaffer*, . . . we can do so again."[134]

Having said all of that, Brennan did not, in the final analysis, discard transient personal jurisdiction. Applying the minimum contacts analysis, he found sufficient evidence that the defendant purposefully availed himself of the benefits and protections of the state of California, and that the potential burdens the defendant would suffer in defending the suit would be very slight.[135] Moreover, Brennan was willing to conclude, more generally, that "as a rule the exercise of personal jurisdiction over a defendant based on his voluntary presence in the forum will satisfy the requirements of due process."[136]

The final opinion in the case is that of Justice Stevens, his concurrence concluding that "the historical evidence and consensus identified by Justice Scalia, the considerations of fairness identified by Justice Brennan, and the common sense displayed by Justice White, all combine to demonstrate that this is, indeed, a very easy case."[137]

Once again the Court confirms that its current doctrine is inadequate to the task of deciding whether personal jurisdiction exists. Once again the Court is unable to muster a majority for any one of the various theories which might support jurisdiction in this case. And once again it is necessary to look to what the Court has *done*, rather than what the Court has *said* it was doing, to make any sense of the *Burnham* opinion.

Underlying all the opinions in *Burnham* is the notion of sovereignty, of power based upon territoriality and the presence of the defendant in that territory. The Scalia opinion, as well as the opinion of Justice White, makes no pretense that fairness or reasonableness lie at the heart of the determination that defendant Burnham should be subject to the power of the state of California.[138] Scalia's opinion is not

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133. *Id.* (quoting McDonald v. Mabee, 243 U.S. 90, 91 (1917)).

134. *Id.* at 2121.

135. *Id.* at 2125.

136. *Id.*

137. *Burnham*, 110 S. Ct. at 2126 (Stevens, J., concurring).

138. "That continuing tradition [transient personal jurisdiction], which anyone entering California should have known about, renders it 'fair' for Mr. Burnham, who voluntarily entered California, to be sued there for divorce—at least 'fair' in the limited sense that he has no one but himself to blame." *Burnham*, 110 S. Ct. at 2118.

only replete with references to territoriality and sovereignty,[139] but it also evidences real hostility to the notion that personal jurisdiction determinations might depend upon a case-by-case assessment of fairness or reasonableness:

> The "contemporary notions of due process" applicable to personal jurisdiction are the enduring "*traditional* notions of fair play and substantial justice" established as the test by *International Shoe*. By its very language, that test is satisfied if a state court adheres to jurisdictional rules that are generally applied and have always been applied in the United States.[140]

Scalia's view is certainly a novel interpretation of what the Court meant in *International Shoe*, and it is one generally at odds with the analysis the Court has employed since that case. His interpretation specifically conflicts with the holding in *Shaffer*. One would have a difficult time supporting an argument that jurisdictional assertions based on property ownership are somehow less valid than jurisdictional assertions based on the defendant's physical presence in the state with the justification that property ownership has not been blessed with the "pedigree" of recognition accorded to the defendant's presence. Scalia's attempt to distinguish the two concepts is clearly unsatisfactory. Even if one accepts Scalia's view that *quasi in rem* jurisdiction was at issue in *Shaffer* because of the fiction that it was the property rather than the person being sued and that therefore explained the court's willingness to abandon the historical rule, by his own characterization of the test in *International Shoe*, the historical acceptance of that practice would render it consistent with "traditional notions of fair play and substantial justice," and therefore with due process.

Even Justice Brennan, who purports to be applying a fairness test, finds reasonableness upon very little more than traditional notions of power and sovereignty and on the absence of any compelling evidence of inconvenience to the defendant. He seems to give very little weight to the defendant's interest and to find those interests met on very little evidence. This is hardly the emphasis one would expect from a justice focusing upon fairness.

The obvious conclusion one draws, from both the result in *Burnham* and the various opinions, is a sense that the Court is reverting back to physical presence and territoriality as the bases for personal jurisdiction. The Court relies not upon fairness or reasonableness con-

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139. *Id.* at 2109-19.
140. *Id.* at 2117 (emphasis in original).

cerns of the petitioner before it but instead upon sovereign power as traditionally defined: power over one physically present. The *Burnham* decision is thus further evidence of the Court's frustration with the minimum contacts analysis. *International Shoe* was supposed to do away with reliance upon physical presence as the core of jurisdictional doctrine and to substitute an analysis, as Judge Learned Hand had suggested, which addresses the real concern underlying the due process clause: Is it fair and reasonable to subject the defendant to jurisdiction in this forum?[141]

The lower courts are left then with a theory of personal jurisdiction with which the Court itself is clearly uncomfortable, and which lacks the very predictability the Court sought to provide. The remainder of this Article will suggest that much of the dissonance experienced by the Court in its efforts to apply the personal jurisdiction test could be eliminated by a standard which looks, instead, to choice of law doctrine to satisfy the territoriality concerns of the Court, but retains the fairness component of the current analysis.

VII. THE NEW TERRITORIALITY

A. Choice of Law and Personal Jurisdiction

The Supreme Court has consistently expressed the view that personal jurisdiction and choice of law are two very different doctrines, which are informed by different concerns. The Court has thus far resisted attempts to treat the two doctrines as parallel.[142] However, given the clear relationship between the two,[143] it is not surprising that the Court has occasionally resorted to use of portions of the analysis on one to consider the other. In two of its most recent personal jurisdic-

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141. "In the end there is nothing more to be said than that all the defendant's local activities, taken together, do not make it reasonable to impose such a burden upon it." Hutchinson v. Chase & Gilbert, Inc., 45 F.2d 139, 142 (2d Cir. 1930).

142. *See, e.g.*, Hanson v. Denckla, 357 U.S. 235, 254 (1958), *reh'g denied*, 358 U.S. 858:

> As we understand [Florida's] law, the trustee is an indispensable party over whom the court must acquire jurisdiction before it is empowered to enter judgment in a proceeding affecting the validity of a trust. It does not acquire that jurisdiction by being the 'center of gravity' of the controversy, or the most convenient location for litigation. The issue is personal jurisdiction not choice of law.

Id.; Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) (in which the Court found due process allows personal jurisdiction over absent plaintiff class members but found insufficient "contact" with the controversy to support the assertion of Kansas law over the controversy). *See also* Kulko v. Superior Court, 436 U.S. 84 (1978); Shaffer v. Heitner, 433 U.S. 186 (1977).

143. *See* Silberman, *supra* note 14, at 88 ("If the Court *has the power to apply its own law*, it should have the power to exercise jurisdiction over the action" (emphasis in original).); Martin, *supra* note 14, at 873; Stein, *supra* note 13, at 739-48; von Mehren, *supra* note 14, at 323.

tion cases, the Court considered choice of law factors to determine the jurisdictional question.[144]

Commentators have been more willing than the Court to assert the connection between the doctrines[145] and to urge their reconciliation upon the Court. Interestingly, most of the scholarly effort in this regard appears to be from the perspective of conflicts scholars. Those scholars suggest that the Supreme Court should more closely scrutinize choice of law determinations, and the Court should employ in those cases a "minimum contacts" test like the one used in personal jurisdiction cases.[146]

Recently there have been some proposals to the contrary, that is, that the personal jurisdiction analysis should more closely resemble the choice of law test. These proposals appear, generally speaking, to take one of two forms: either the suggestion that the Supreme Court has already, in fact, adopted a personal jurisdiction standard for specific jurisdiction cases that is identical to that for choice of law determinations;[147] or, that a choice of law standard should replace the minimum contacts test of *International Shoe*.[148] This Article disputes these characterizations as neither a satisfactory statement of the law as it exists nor as it should be. Instead, this Article proposes a reconciliation of the two doctrines which recognizes that differences between them exist and might be reflected in the analysis. This reconciliation would also recognize other sovereignty concerns that should be reflected in the balance.

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144. In Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987), the Court used the possibility that California could not or would not apply its law to the indemnity question to support its conclusion of unfairness. In Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984), the Court considered whether it was "fair" to subject defendant to nationwide damages in New Hampshire, even though only a small portion of those copies were distributed in New Hampshire. In resolving this question, the Court focused in part on New Hampshire's "interest" in asserting jurisdiction. The answer, the Court said, "[D]epends 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 went on to consider New Hampshire's regulatory interest regarding torts committed in that state, even citing the Restatement (Second) of Conflict of Law at one point. However, the Court said the question of whether New Hampshire's statute of limitations should apply was left to be decided "only after jurisdiction over respondent is established, and we do not think such choice-of-law concerns should complicate or distort the jurisdictional inquiry." *Id.* at 778.

145. *See* Dayton, *supra* note 115.

146. *See, e.g.*, Martin, *supra* note 14, at 873.

147. *See, e.g.*, 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, 190 (1987) ("This article asserts that the first stage of the minimum contacts test for determining specific in personam jurisdiction is identical to the test for determining whether a forum is entitled to apply its law to a part of any controversy before it.").

148. *See* Hill, *Choice of Law and Jurisdiction in the Supreme Court*, 81 COLUM. L. REV. 960, 987-93 (1981); Silberman, *supra* note 14, at 80-90.

B. *Suggested Analysis*

As has been suggested elsewhere, most notably in a recent article by Professor Stein,[149] the history of personal jurisdiction doctrine in this country is tied to notions of sovereignty. Those courts and commentators who suggest that the Supreme Court has abandoned territoriality as a precept of such jurisdiction ignore not only that history; they ignore the doctrine as it is today framed and articulated by the Court.[150] Explicit recognition of the territoriality component would help to clarify personal jurisdiction doctrine. The "new territoriality" of authors such as Professor Stein and Professor Weisburd is not the territoriality of *Pennoyer v. Neff*. Instead, it is a territoriality which focuses upon the sovereign's interest in regulating certain activities or transactions which impact upon the forum,[151] or which focuses upon the relationship between the limits of sovereign power and the due process rights of defendants.[152] Fairness to the defendant, within the meaning of the due process clause, would remain the touchstone of jurisdictional analysis. The new analysis would simply acknowledge that fairness is not to be determined in a vacuum, but instead must be determined with reference to the legitimate sovereign authority of the forum state.[153]

While Professor Stein's proposed analysis goes a long way toward reinfusing notions of sovereignty into the personal jurisdiction determination, the concern of this Article remains that it may go too far in making regulatory authority the necessary equivalent of a fair assertion of jurisdiction,[154] and yet not far enough in acknowledging other aspects of sovereign power. Moreover, suggesting that if a state has sovereign authority to apply its own law it should fairly be able to assert personal jurisdiction simply proves too much. That suggestion fails to recognize that different functions may be served by choice of law and jurisdictional determinations, and it fails to adequately explain the case falling within the general jurisdiction of the forum even

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149. Stein, *supra* note 13; *see also* Weisburd, *supra* note 109, at 383 (contending that, just as assertions of jurisdiction are exercises of sovereignty, limits on judicial jurisdiction derive from limits on state sovereignty).

150. *See supra* notes 15-29 and accompanying text.

151. *See* Stein, *supra* note 13, at 739-48.

152. *See* Weisburd, *supra* note 109, at 383; Stein, *supra* note 13, at 706.

153. Stein, *supra* note 13, at 711. "Due Process limits on jurisdiction irrefutably are rights of individual litigants, not of states; yet individual due process rights inescapably are linked to the allocation of sovereign authority." *Id.* "Due process protects the sovereign interests of other states, but only incidentally, through its protection of the individual from illegitimate assertions of state authority." *Id.* at 706.

154. *Id.* at 703-05 (rejecting the position that the "actual burden of litigation" has real significance in the determination of whether jurisdiction is justified).

when the forum might not apply its own law. Both of these shortcomings can be addressed by an analysis that depends upon a balancing of sovereignty concerns, including the sovereign's ability to apply its own law, and fairness to the defendant. This Article proposes a personal jurisdiction doctrine that does not simply replace the current test with the test for choice of law, but which rejects the "minimum contacts" test in its most recent incarnation and substitutes a test that infuses notions of sovereignty into the reasonableness calculations. The ultimate determination of whether an assertion of personal jurisdiction would be fair and reasonable under the due process clause would be a function of both sovereign authority and the burden on the defendant. For reasons outlined below, resolving the former does not always resolve the latter.

C. *Establishing Sovereign Authority*

The analysis suggested here would look to the forum state's sovereign authority over the claim before it and inquire, does the claim assert conduct which the forum state has an interest in regulating?[155] In cases such as *Allstate Insurance Co. v. Hague*,[156] the Supreme Court announced a standard requiring that "for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."[157] Modern choice of law doctrine, operating under the slight scrutiny test stated by the Court in *Hague*, has evolved into a framework for determining whether the forum has an interest sufficient to justify the forum in applying its own law.[158] Such

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155. In discussing choice of law doctrine, one must distinguish the constitutional limitations from the various common law doctrines which seek to provide a framework within that constitutional scheme for making actual choice of law decisions. While "governmental interest" analysis seems to have dominated the latter since the 1960s, and while it is tempting to adopt both the language and perspective of the interest analysts, generally speaking, this Article uses the terms sovereign and regulatory interests to refer to the constitutional standard articulated by the Supreme Court. One must make reference to the "governmental interest analysis," but the primary concern of this Article is the merging of the constitutional standards for personal jurisdiction and choice of law.

156. 449 U.S. 302 (1981).

157. *Id.* at 312-13 (upholding application of local law to a controversy arising from a foreign accident involving residents of the foreign states); *see also* Hay, *Judicial Jurisdiction and Choice of Law: Constitutional Limitations*, 59 U. COLO. L. REV. 9 (1988); von Mehren & Trautman, *Constitutional Control of Choice of Law: Some Reflections on Hague*, 10 HOFSTRA L. REV. 35 (1981); Martin, *Constitutional Limitations on Choice of Law*, 61 CORNELL L. REV. 185 (1976).

158. For discussions of the development of modern choice of law rules and the evolution of the governmental interest analysis, see B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS

an interest should be sufficient to provide the necessary sovereign authority for taking jurisdiction in a case. However, the analysis would not end there. The sovereign interest motivating the forum to take jurisdiction would be balanced against the burden visited on the defendant as a result of being haled to the forum. In the usual case, a clear forum interest would place a heavy burden on the defendant to demonstrate unfairness or inconvenience that rises to the level of a constitutional defect.

To the extent sovereignty is recognized by the Supreme Court as having a role in the jurisdictional analysis, it is to be considered in light of the defendant's purposeful contacts with the forum, apparently as a reflection of the defendant's consent or agreement to be so bound. However, as this Article has already suggested, it is virtually impossible to consider fairness to the defendant without considering the sovereignty of the forum. Whether the relationship of the defendant to the forum is grounded in consent or in exchange,[159] the underlying justification for power based on either theory remains constant. Choice of law determinations clearly reflect sovereignty concerns,[160] and the standard used in such determinations is useful in the personal jurisdiction context. Those concerns focus upon the state's legitimate regulatory interests.[161]

(1963); Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963); Carvers, *Conflict of Laws Round Table: The Value of Principled Preferences*, 49 TEX. L. REV. 211 (1971); Kogan, *Toward a Jurisprudence of Choice of Law: The Priority of Fairness over Comity*, 62 N.Y.U. L. REV. 651 (1987); Leflar, *Choice-Influencing Considerations in Conflicts Laws* 41 N.Y.U. L. REV. 267 (1966); Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587 (1978); Sedler, *The Governmental Interest Approach to Choice of Law: An Analysis and a Reformulation* 25 UCLA L. REV. 181 (1977); Westbrook, *A Survey and Evaluation of Competing Choice-of-Law Methodologies: The Case for Eclecticism*, 40 MO. L. REV. 407 (1975).

Interest analysis, while the clear modern trend, does not command the approval of a majority of states and of late a backlash seems to have set in. *See, e.g.*, Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392 (1980); Ely, *Choice of Law and the State's Interest in Protecting its Own*, 23 WM. & MARY L. REV. 173 (1981).

159. For a full discussion of "consent" versus "exchange" and why neither suffices to explain current theory, see Stein, *supra* note 13, at 734.

160. *See, e.g.*, Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981) (The Court repeatedly refers to the state's interest in applying its own law.).

161. In an essay considering whether the full faith and credit clause or the due process clause controls choice of law decisions, Professor Currie noted:

> [I]n the discussion to follow the two clauses will not be separated for purposes of analysis, partly because the degree of overlap is large—larger than has at times been believed—but primarily because the essential principle underlying the operation of both clauses is the same: neither interferes with choice of law except when the law applied is that of a state having no legitimate interest in the application of its policy to the case at hand.

B. CURRIE, *supra* note 158, at 195.

As previously indicated, in the language of the Supreme Court, a state's legitimate interest is constitutionally sound when the forum state has "a significant aggregation of contacts with the parties and the occurrence, creating state interests, such that application of its law was neither arbitrary nor fundamentally unfair."[162] Most recently, the Court has added that "[w]hen considering fairness in this context, an important element is the expectation of the parties."[163]

The standard above has much in common, at least on its face, with the minimum contacts test; both require contact with the forum, and both contain a fairness component. In application, the two are quite different. Choice of law determinations under the direction of the Supreme Court tend to be expansive in their reach, searching for contacts between the litigation or claim and the forum's interest.[164] Personal jurisdiction determinations have been more crabbed, imposing more restrictions (such as the purposeful availment requirement), on those forums seeking jurisdiction over nonresidents. *Asahi*, with Justice O'Connor's restrictive interpretation of the minimum contacts test, is an example of this latter tendency. That it should be easier for a state to assert its laws over a nonresident than to require that a person appear before it does seem, as Professor Silberman has suggested, "counterintuitive."[165] However, this Article does not reach Professor Silberman's conclusion that "[i]f a court *has the power to apply its own law*, it should have the power to exercise jurisdiction over the action."[166]

Two principal concerns should be considered regarding the advisability of using of the choice of law test for personal jurisdiction deter-

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162. *Hague*, 449 U.S. at 320.

163. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 822 (1985).

164. *Hague* itself indicates how tenuous the connection to the forum may be and still support a constitutionally proper choice of the forum's law. In that case, plaintiff's husband died as a result of an automobile-motorcycle accident which occurred in Pierce County, Wisconsin. Operators of both vehicles were Wisconsin residents, as was decedent (a passenger on the motorcycle). The deceased had been employed for fifteen years in Red Wing, Minnesota, directly across the border from Pierce County, Wisconsin, and had commuted daily. After the accident and before initiation of the lawsuit, plaintiff moved to Minnesota, where she remarried and established residence. Plaintiff, as a representative of her deceased husband's estate, brought suit in Minnesota seeking to take advantage of a Minnesota rule which allowed "stacking" of three uninsured motorist policies. The Supreme Court upheld application of Minnesota law on the basis of the forum's "three contacts with the parties and the occurrence giving rise to the litigation:" Mr. Hague's employment in Minnesota (deemed a "very important contact" by the Court), Allstate's doing business in Minnesota, and the plaintiff's becoming a resident of Minnesota prior to instituting the litigation. Notice that only the second of these relates to defendant's "contacts" with the state and that these contacts are unrelated to the litigation before the court. 449 U.S. at 213-20.

165. Silberman, *supra* note 14, at 82.

166. *Id.* at 88 (emphasis in original).

minations. First, under modern choice of law doctrine, forums tend to choose their own laws. Given that tendency, simply substituting choice of law analysis for the minimum contacts test would create jurisdiction in cases in which jurisdiction, by current standards, is lacking.[167] While jurisdiction may be appropriate in many or most of those cases, this Article does not concede that fairness concerns of the defendant ought not prevent such assertions in certain cases. While the choice of law constitutional standard does contain a fairness component, that component seems to have been given little weight in the governmental interest analysis because, seemingly by definition, sovereign power based upon the state's legitimate interest cannot be arbitrary or unfair.

> Whatever may be the merits or drawbacks of the governmental-interest approach to choice of law, it is dangerous to make it a general test for jurisdiction as well. The danger lies in the possibility that the *jurisdictional* territorialism of *Pennoyer v. Neff*, which *Shaffer* and *Kulko* laid to rest, may now be replaced by the new territorialism of the *lex fori*.[168]

The second concern to consider in the discussion of whether to use the choice of law analysis to determine whether sovereign authority exists in the forum is the emphasis placed upon the plaintiff's residence.[169] In the personal jurisdiction analysis, one might argue that too little weight has been given to the plaintiff's residence, insofar as it represents a legitimate interest of the forum to regulate the behavior of those who come in contact with the plaintiff. Choice of law determinations might be said to err in the other direction, finding from the mere fact of plaintiff's residence a regulatory interest sufficient to support application of the forum's law.[170] While the plaintiff's residence may be a part of the sum of contacts that justifies deferring to the forum's choice of law, the focus of the courts' inquiry should be on whether that residence gives rise to a relevant regulatory interest. Both of these concerns can be mitigated, to a large extent, in the personal jurisdiction context by assigning significant weight to the defendant's interests.

In addition to considering the state's regulatory interest, and whether that interest is sufficient to justify application of the forum's

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167. *Id.* at 79.

168. Hay, *The Interrelation of Jurisdiction and Choice-of-Law in United States Conflicts Law*, 28 INT'L & COMP. L.Q. 161, 174 (1979) (emphasis in original).

169. *See* Silberman, *supra* note 14, at 85.

170. *Id.* at 86.

law, recent Supreme Court decisions, in particular *Burnham*, suggest that other remnants of territoriality may prove important to the personal jurisdiction analysis. Implicit in the *Burnham* decision is a reliance upon the view that states possess power over persons within their territorial limits. The state's power apparently exists whether or not those persons do anything within the forum that might subject them to the laws of the state. The state's power also apparently exists no matter how fleeting the persons' stay in the state. The power-based notion of territoriality in *Burnham* is as pure as any the Court has entertained since *Pennoyer*. The source of this power is explained nowhere, except as the result of tradition and historical circumstance. But it seems clear that all members of the Court, even those who would adopt the Brennan analysis, would give the notion of territorial power great weight in the analysis.

Therefore, in addition to the sovereignty concerns implicit in the choice of law analysis, concerns dependent upon the regulatory interest of the state, one must also factor in the state's traditional power over persons within the territory as a part of the personal jurisdiction determination. Physical presence, once again, becomes the "baseline" for assertions of personal jurisdiction, and it is activity analogous to presence which the Court suggests satisfies due process.

D. Establishing an Unconstitutional Burden

The principal concern about those proposals which simply equate choice of law and personal jurisdiction tests is that they represent a return to a complete emphasis on territoriality and sovereign interests of the forum. While one could agree that an explicit articulation of sovereignty factors should be included in the analysis, due process dictates that the analysis also consider the "liberty interests" of the defendant.[171] Both aspects of the analysis can be served by recognizing that fairness is a function of *both* sovereign authority and the burden on the defendant. Even if sovereign authority exists, in that the forum has a legitimate regulatory interest in applying its own law, defendant should be allowed to demonstrate that assertion of jurisdiction is unfair if the facts of a particular case so dictate. Different types of burdens may carry different weights in the court's analysis.

1. Unforeseeability/Unfair Surprise

Running through both personal jurisdiction and choice of law doctrine is the notion that unforeseeability or unfair surprise may pre-

171. For an extensive discussion of the reasons why due process concerns of the plaintiff ought not to be a consideration, see Weisburd, *supra* note 109, at 423.

clude the forum's assertion of its sovereign interest in a given case.[172] The Supreme Court in *Shutts* indicated that lack of foreseeability might represent the kind of unfairness which would defeat an assertion of forum law.[173] Speaking in terms of the "expectations" of the parties, the Court did not elaborate on the content of the unforeseeability element. Such a notion, that expectations of the defendant should influence choice of law, is certainly not a novel one.[174] Related suggestions urge that the defendant's inability to foresee the application of the forum's law should preclude such application[175] and that an assertion of forum law resulting in "unfair surprise" to the defendant is not valid.[176] How to define such unforeseeability or the situation in which unfair surprise might result remains an unanswered question.

A curious byproduct, resulting from the separate development of legislative and judicial jurisdictions, is the multiplicity of definitions regarding the foreseeability concept. The definition to be used in a case depends upon which doctrinal analysis is being employed. Professor Peterson described the distinction in the context of the *World-Wide* discussion of foreseeability:

> How does this foresight compare with that which we might require to avoid unfair surprise on the choice-of-law or legislative jurisdiction side of the equation? Just as with judicial jurisdiction there are two possibilities—one describes foresight of factual risks, the other foresight of legal consequences. *World-Wide* set foreseeability of legal consequences as the test of judicial jurisdiction, but what authorities there are suggest that the relevant inquiry for legislative jurisdiction is into factual risks.[177]

No explanations are offered in the Court's discussion of "factual" versus "legal" foreseeability, and the doctrines themselves suggest none. The obvious critique of the *World-Wide* reliance on legal consequences is that such a definition is circular. How is one to predict legal consequences? The prediction rests on what the courts have pre-

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172. *See, e.g.*, Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 822 (1985); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980). As a part of this showing, the defendant might demonstrate the fortuitous nature of his or her relationship with the forum and the generally local nature of his or her business.

173. *Shutts*, 472 U.S. at 822.

174. *See, e.g.*, Allstate Ins. Co. v. Hague, 449 U.S. 302, 317-318 (1981).

175. *Id.*

176. *Shutts*, 472 U.S. at 822.

177. *See* Peterson, *supra* note 14, at 43.

viously said (assuming they have spoken) about the legal consequences of the defendant's conduct (until, of course, they change the consequences in the case before them). Why the defendant's understanding of legal consequences should be the focus of the courts' inquiry is unclear, and such a test certainly does not ensure the predictability the Court envisioned. Thus foresight of factual risks, or unfair surprise relative to factual consequences seems the better standard. Language in *Asahi* suggests that the Court may be moving away from its "legal consequences" focus toward a focus, once again, on factual foreseeability, which should have enabled the defendant to foresee "being haled into court" in the forum.[178]

2. *Portability of Defense*

Another type of burden on the defendant, which may be a factor in determining whether an assertion of personal jurisdiction is fair, relates to the "portability" of the defendant's case. The Court should make the following inquiries: Are there witnesses or evidence that will be unavailable or difficult to produce in the forum? Will the defendant be particularly burdened by having to defend in the forum's legal system? The Supreme Court has suggested that such burdens may rise to a constitutional level and may prevent the assertion of jurisdiction, but it will be the rare case in which that occurs.[179] Furthermore, several commentators have suggested that any burden on the defendant may be cured by venue transfer provisions in the federal courts and the doctrine of *forum non conveniens*.[180]

While burdens of the nature mentioned above seem to be of lesser concern than those discussed in the preceding section, and while cases in which such burdens alone would rise to the level of constitutional unfairness are rare, such circumstances, in combination with unfair surprise or lack of foreseeability, would certainly seem to bolster a defendant's argument for unfairness. Therefore, "portability" burdens, while in the usual case insufficient to establish an unreasonable assertion of jurisdiction, should be considered in making unreasonableness determinations.[181]

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178. "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." Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 117 (1987) (Brennan, J., concurring).

179. Burger King v. Rudcewicz, 471 U.S. 462, 477-78 (1985).

180. *See, e.g.*, Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781 (1985).

181. They should be considered, particularly in the rare case like *Asahi* where defending in the forum means coping with a foreign legal system as well.

E. *Sovereignty as a Threshold Requirement*

Another problem with other proposals that suggest explicitly including a sovereignty component in the personal jurisdiction test is their retention of the *World-Wide* scheme which would continue to make that sovereignty component a threshold requirement for jurisdiction.[182] In *World-Wide*, the sovereignty component is embodied in the requirement that the defendant must have purposefully availed itself of the benefits and protections of the forum. The absence of such purposeful contacts, the Court indicated in *World-Wide,* would bar jurisdiction even where the forum was otherwise fair and the defendant was not inconvenienced.[183]

Proposals to redefine the sovereignty concerns in terms of factors other than or in addition to defendant's purposeful contacts seem to retain this scheme. That is, sovereignty remains a prerequisite to jurisdiction or perhaps is the only real consideration regarding jurisdiction.[184] The reasonableness and fairness of the forum's taking jurisdiction over the defendant never becomes an issue unless sovereignty over the defendant exists.

This Article takes the following positions: that the reasonableness of assertions of jurisdiction required by the due process clause should, instead, be a function of both sovereignty and of the burden on the defendant; that a court must consider all aspects of the litigation in order to balance the sovereignty concerns and the defendant's interests; that the over-arching concern is the reasonableness of the assertion; and that a true balancing of interests is required, with neither interest acting as a prerequisite to jurisdiction. While in rare cases jurisdiction without an established sovereignty interest may exist,[185] the position suggested here will only make a difference in cases in which the forum interest, though weak, is otherwise fair.

F. *General Jurisdiction*

After years of dormancy, scholarly attention has recently turned to general jurisdiction.[186] Two noteworthy works posit very different

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182. *See, e.g.* Weisburd, *supra* note 109, at 379.

183. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 298 (1980).

184. *See* Stein, *supra* note 13, at 690.

185. *E.g.*, cases of voluntary or involuntary waiver. *See* Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 704 (1982) (note that a doctrinal analysis premised solely upon sovereignty or on sovereignty as a threshold concern must treat waivers as outside that analysis).

186. *See, e.g.*, Brilmayer, Haverkamp, Logan, Lynch, Neuwirth & O'Brien, *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721 (1988).

views regarding the scope of general jurisdiction subdoctrine.[187] But whether one focuses upon "dispute blind" versus "dispute neutral" determinations[188] or upon Professor Brilmayer's somewhat narrower approach,[189] the Supreme Court's ambivalence towards sovereignty or territoriality concerns makes any pronouncements in this area very speculative. The Supreme Court has only recently acknowledged the general versus specific jurisdiction terminology,[190] although arguably it has upheld assertions of jurisdiction on a general jurisdiction basis for some time.[191] This Article concludes that the Supreme Court's recognition of a general jurisdiction doctrine offers justification for, and is consistent with, the balancing scheme proposed herein.[192]

The general versus specific jurisdiction distinction is helpful in articulating different types of situations in which personal jurisdiction may be asserted. Articulating those differences may aid in determining what concerns should inform decision making in this area. Ultimately, the question to be answered is the same—is it reasonable for the forum to assert jurisdiction over this defendant? Any conceptual framework that purports to provide a way of answering that question ought to encompass both general and specific jurisdiction.[193]

The general jurisdiction label is typically applied to a case in which defendant's contacts with the forum state, while continuous and systematic, are unrelated to the claim before the court. The forum is asked to assert jurisdiction over the defendant based upon these unrelated contacts. The Supreme Court has suggested that such jurisdiction may exist, but the contacts required must be of a more substantial nature than those that would support specific jurisdiction. Some variations on the general jurisdiction theme are discussed below.

1. The National Corporation Versus the Local Plaintiff Injured Outside the Forum

A resides in State X where she purchases an automobile manufactured by the BIG Corporation in X. While driving her car in State X,

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187. Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 HARV. L. REV. 1444 (1988); Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610 (1988).

188. Twitchell, *supra* note 187, at 613. Professor Twitchell uses this terminology to distinguish "an exercise of jurisdiction made without regard to the nature of the claim presented" versus "an exercise of jurisdiction based in any way on the nature of the controversy."

189. Brilmayer, *supra* note 187, at 1445.

190. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 415 n.10 (1984).

191. *See, e.g.*, Perkins v. Benquet Consol. Mining Co., 342 U.S. 437 (1952).

192. *But see* Burnham v. Superior Court, 110 S. Ct. 2105 (1990). Justice Scalia suggests that *if* general jurisdiction exists, it is in extremely limited circumstances. "It may be that whatever special rule exists permitting continuous and systematic' contacts . . . to support jurisdiction with respect to matters unrelated to activity in the forum, applies *only* to Corporations, which have never fitted comfortably in a jurisdictional regime based primarily upon de facto power over the defendant's person." *Id.* at 2110 n.1 (emphasis in original).

193. *See* Stein, *supra* note 13, at 758.

the brakes malfunction, the car crashes, and A is killed. Subsequent to the accident, B, A's widower, moves to State Y so that his children may be closer to their grandparents. B files suit against BIG Corporation in Y, alleging negligence in the design and manufacture of the car. BIG Corporation objects to personal jurisdiction because the car was manufactured and sold in X, the accident occurred in X, and A and B were residents of X at the time of both. B argues that general jurisdiction may be maintained over BIG Corporation in Y because BIG Corporation manufactures cars in State Y as well, sells 200,000 cars a year in Y, including the model manufactured in State X, and receives millions of dollars a year in revenue from State Y.

Under current Supreme Court decisions and the new territoriality justifications for jurisdiction, the assertion of personal jurisdiction should be easy to justify. Surely the defendant's contacts with the forum can be described as purposeful, and economic benefit to the defendant is clear.[194] Moreover, the "quality and nature" of defendant's contacts certainly exceed the minimum quantum necessary to support jurisdiction.[195] Similarly, sovereign authority would certainly seem to exist. The forum, State Y, has a clear interest in regulating the conduct of a company such as BIG Corporation, which is not only manufacturing cars within its boundaries, but is also selling the same kind of car, manufactured in State X, which allegedly caused the death of A. Moreover, the forum has an interest in providing relief for B, the plaintiff, and protecting its other citizens from defective products. These interests would support Y in its application of its own law, the touchstone of a theory dependant upon sovereign authority.

The balancing approach proposed by this Article would also support a decision in favor of jurisdiction on these facts. Strong forum interests weigh in favor of jurisdiction. Similarly, the defendant will be hard pressed to argue unfair surprise or that it was unable to foresee being subject to suit in the forum or that defending such a suit will be unduly burdensome in terms of the portability of its defense. Absent any strong fairness factors favoring the defendant, the forum should be able constitutionally to assert jurisdiction.

2. *The National Corporation Versus the Nonlocal Plaintiff*

Assume the same facts as above except that the plaintiff remains a resident of X. As the Supreme Court has framed the doctrine, the

194. *See supra* notes 15-29 and accompanying text.

195. *See* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 416 (1984).

plaintiff's residence should have no relevance.[196] The focus is on defendant's contacts, which remain purposeful and substantial. Therefore jurisdiction is proper. Under Professor Stein's proposal, dependent as it is on sovereign authority, the case *for* personal jurisdiction seems slightly weakened. Modern choice of law doctrine certainly makes plaintiff's residence a very important, if not determinative, factor.[197] To the extent Stein relies upon choice of law doctrine, the determination may be affected. However, the forum certainly retains a regulatory interest sufficient to support application of its own law and therefore to support personal jurisdiction.

The analysis proposed in this Article would still strongly support jurisdiction. While, as suggested earlier, the plaintiff's residence in the forum state should carry some weight, it should not be determinative, nor should its absence preclude jurisdiction. Therefore, in the hypothetical above, we are left with a strong sovereign interest, little or no unfairness or burden on defendant, and good jurisdiction.

3. The National Corporation Versus the Nonlocal Plaintiff in a Forum Where a Like Product is Neither Manufactured nor Sold

Assume the same facts as in first hypothetical except B remains in X and the BIG Corporation only manufactures air conditioning units for airplanes in State Y and sells no automobiles there. BIG Corporation still engages in extensive business in the forum and receives substantial revenues. This scenario is more problematic for theorists.

Assuming substantial, continuous, and systematic business activity in the state (which is evidence of the defendant's purposeful contacts), the results of the general jurisdiction cases suggest that general jurisdiction exists even though plaintiff's claim is totally unrelated to the forum activities.[198] Professor Stein's proposed analytical framework does not seem to result in jurisdiction nor does it explain the existing caselaw. Absent a resident plaintiff and any factors indicating that Y

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196. *See* Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984).

> Finally, implicit in the Court of Appeals' analysis of New Hampshire's interest is an emphasis on the extremely limited contacts of the *plaintiff* with New Hampshire. But we have not to date required a plaintiff to have 'minimum contacts' with the forum State before permitting that State to assert personal jurisdiction over a nonresident defendant. On the contrary, we have upheld the assertion of jurisdiction where such contacts were entirely lacking.

Id. at 779 (emphasis in original).

197. But see Ely, *supra* note 158, at 180, for the argument "that it is unconstitutional for a state to take the position that its protective policies extend only to its own citizens." (emphasis deleted).

198. *See, e.g., Helicopteros*, 466 U.S. at 408; Perkins v. Benquet, 342 U.S. 437 (1952).

has an interest in regulating BIG's car manufacturing, it seems Y would not have sufficient sovereign authority to either apply its own law or assert jurisdiction over BIG. The proposal here would look to factors supporting the sovereign's interest in the case. Those factors, including a general concern for regulating a manufacturer who does business in the state, while perhaps not sufficient to support the application of the forum's law, are still entitled to be weighed in the balance. Moreover, this hypothetical is certainly a situation in which the analogy to physical presence is not difficult to draw. A company engaged in substantial activity, receiving substantial revenues from that activity in the forum, is hardly in the position of an absent defendant. An identifiable forum interest, weighed against a lack of burden on defendant and an absence of unfair surprise, may support a determination that the forum is a fair and reasonable one. An assertion of jurisdiction under these facts is consistent with a standard that focuses upon the reasonableness or fairness of the jurisdiction considering both sovereignty concerns and the defendant's interests.

VIII. The New Territoriality and Stream of Commerce Theory

Once one accepts that sovereign authority, particularly that authority strong enough to support application of the forum's law, should be an explicit part of the personal jurisdiction test, the confusion surrounding the stream of commerce theory begins to clear up. As earlier described, the Supreme Court's most extensive discussion regarding stream of commerce theory before *Asahi* was found in *World-Wide*. But in *World-Wide*, the Court neglected to explain the relationship between the two-part analysis it was applying in that case and the stream of commerce cases. Thus, it was unclear whether meeting the stream of commerce test satisfied both prongs of the two-part analysis.

This Article has attempted to articulate an analysis which is unified in the sense that it serves one overall goal, a determination whether jurisdiction may reasonably be asserted by the forum. Two kinds of concerns are addressed in the analysis in order to reach that goal. The analysis suggested here avoids the dilemma in which the Supreme Court found itself in *Asahi*, where it strained to be true to its earlier decision in *World-Wide,* while addressing questions of unfair surprise and burdensomeness regarding the defendant.

A. The Resulting Stream of Commerce Theory

The manufacturer, including the component manufacturer, who places into the stream of commerce a product which lands in the fo-

rum and does harm there, clearly has, by its activity, subjected itself to the strong interest of the forum in regulating the conduct of manufacturers. Such an interest generally would support the forum's application of its own law, whether the manufacturer is an "active" or "passive" actor in the distribution scheme. Because the forum's interest is strong, the defendant must meet a heavy burden to establish the unfairness of the jurisdictional assertion. Usually, if facts establish that the defendant used the stream of commerce to distribute its products to the forum, jurisdiction will be almost a matter of presumption.

B. *Reconciling* Asahi

This Article concludes that the O'Connor opinion, with its overreliance upon the purposeful availment requirement of the existing analysis, fails to follow the Court's own precedent beginning with *International Shoe* and is an unworkable guide to lower courts. The Brennan opinion[199] and the Stevens opinion would both have reached the conclusion that minimum contacts sufficient to support jurisdiction existed, yet decided jurisdiction in these circumstances was unfair. While there are slight differences in terms of emphasis between the two opinions, both opinions are consistent with the stream of commerce theory outlined above, and both acknowledge that the defendant's interests may render unfair an assertion of jurisdiction otherwise supported by sovereign interests.

Consistent with the analysis suggested in this Article, a manufacturer, by using a pattern of distribution within a forum, would subject itself to the strong regulatory authority of that forum. Only in the unusual case would the defendant be able to overcome that authority. *Asahi* appears to be such an unusual case. Two factors weighed heavily against the assertion of personal jurisdiction in *Asahi*. First, Asahi was a foreign defendant who did no direct business with California. Second, the products liability action between the injured California resident and the foreign manufacturer was no longer before the Court; rather, only the indemnity action between Cheng Shin and Asahi remained. In the final analysis, *Asahi* dictates that unfairness decisions can be limited to the particular facts of the case.[200]

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199. Justice Brennan's multifactored analysis and rejection of the minimum contacts test as spelled out in his dissent in *World-Wide Volkswagen* seems consistent with the analysis suggested by this Article. The principle distinction is his emphasis on plaintiffs' interests. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 299 (1980) (Brennan, J., dissenting); Stephens, *supra* note 8, at 115.

200. It is the author's view that in light of both the suggested analysis here and the Supreme Court's difficulty with the opinion that it is *World-Wide Volkswagen* that is wrongly decided.

IX. CONCLUSION

The recent scholarly defense of a "new territoriality" which recognizes the role of sovereign authority in personal jurisdiction determinations is a welcome recognition of the concerns which underlie doctrine in this area. Saying that sovereignty is and should be relevant is not the same as saying sovereignty and the limits thereon should replace minimum contacts as the test for personal jurisdiction. Using the stream of commerce cases as the paradigm, this Article proposes a test which focuses upon the reasonableness of the assertion of jurisdiction in light of both sovereignty concerns and the fairness of the assertion to the nonresident defendant. Infusing those limits on sovereignty inherent in choice of law decisions into the personal jurisdiction determination works a long overdue reconciliation of those related doctrines.