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NOTES

Specific Personal Jurisdiction over Foreign Corporate Defendants

I. INTRODUCTION

Modern commercial transactions often involve parties from a broad geographical area. Commonly, a manufactured product will be composed of smaller parts—components—and each component may be manufactured in a different country. The actual assembly of these components may occur in a foreign country as well. Finally, the finished product may be distributed in the United States as well as other foreign countries.

Should a foreign-made component part fail and cause injury, what are the injured party's chances of suing the foreign manufacturer in the United States? After all, while the final assembler of the product dealt directly with the U.S. in selling its product here, the component manufacturer probably had only an indirect link to the domestic forum.

In asserting jurisdiction over the component manufacturer, a trial court must heed constitutional due process guarantees¹ afforded to the component manufacturer.² Since the manufacturer's link to the domestic forum may be characterized as tenuous, the court may only assert limited jurisdiction³ over the defendant.

1. *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945). The United States Supreme Court stated that constitutional due process in jurisdiction cases:

depend[s] . . . upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations.

Id. Cf. Pennoyer v. Neff, 95 U.S. 714 (1877); *Minnesota Commercial Ass'n v. Benn*, 261 U.S. 140 (1922).

2. A foreign component manufacturer for the purposes of this Comment is a foreign corporation who manufactures component parts for sale to various non-United States based companies.

3. A forum state may only assert personal jurisdiction over a non-resident defendant if the assertion comports with the due process clause of the fourteenth amendment. *International Shoe*, 326 U.S. 310. The due process clause states: "nor shall any state deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. To guarantee compliance with the clause, a non-resident defendant must have certain contacts

The court has two approaches⁴ in determining whether the manufacturer is amenable to jurisdiction in the forum. However, the crucial requirement remains that the defendant have certain minimum contacts⁵ with that forum in order to constitutionally assert jurisdiction. Traditionally, a court's inquiry into the defendant's ties has been labeled as the "minimum contacts" analysis.⁶

The United States Supreme Court recently addressed the minimum contacts analysis in the context of multi-national product manufacturers in *Asahi Metal Industry Co. v. Superior Court*.⁷ The Court's various opinions illustrate the contrasting philosophies as to whether the constitutional due process requirement should apply to a non-resident defendant: (1) who possesses insufficient contacts with the forum; or (2) who possesses insufficient contacts but will not be unreasonably burdened by defending in that forum. In light of the *Asahi* opinions, the Supreme Court apparently has enough Justices

with the forum seeking to assert jurisdiction. *International Shoe*, 326 U.S. at 316. The court may assert either general or specific jurisdiction over the defendant, depending on how extensive the defendant's contacts are. *Id.* at 317-18.

This Comment centers on limited or specific personal jurisdiction rather than general jurisdiction. The court asserts general jurisdiction over a non-resident defendant when the defendant's contacts with the forum state are extensive enough to hold the defendant accountable for any cause of action which occurs in the forum. *Id.* at 318.

However, in the specific personal jurisdiction cases, the defendant does not possess such pervasive contacts with the forum state. *Id.* Therefore, for a court to constitutionally assert jurisdiction over the non-resident defendant, the defendant must have "minimum contacts" with that forum state. *Id.* at 316.

4. One view is that constitutional due process requires a defendant to possess contacts with the forum state in order to be subject to that state's jurisdiction. *E.g.*, *Asahi Metal Indus. Co. v. Superior Court*, 107 S. Ct. 1026 (1987) (O'Connor, J., plurality opinion); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 287 (1980) (White, J. majority opinion); *see also* Ottonello, *California's Convenience-Oriented Approach to Personal Jurisdiction: A Critical Review*, 13 LINCOLN L. REV. 21 (1982); Sonenshein, *The Error of a Balancing Approach to the Due Process Determination of Jurisdiction over the Person*, 59 TEMP. L.Q. 47 (1986).

The other position applies the due process concerns to the inconveniences the defendant will face by defending in the forum. *E.g.*, *World-Wide Volkswagen*, 444 U.S. at 299 (Brennan, J. dissenting); *Asahi Metal Indus.*, 107 S. Ct. at 1038 (Stevens, J. concurring); *see also* Weintraub, *Due Process Limitations on the Personal Jurisdiction of State Courts: Time for Change*, 63 ORE. L. REV. 485 (1984); Jay, "Minimum Contacts" as a Unified Theory of Personal Jurisdiction: A Reappraisal, 59 N.C.L. REV. 429 (1981).

5. *International Shoe* established a requirement that the defendant possess minimum contacts with the forum state since the defendant, who enjoys the privilege of conducting business in that state, also carries the reciprocal obligation of defending in that forum. *International Shoe*, 326 U.S. at 319.

6. *Id.* The courts are concerned with ties possessed by the defendant in relation to the forum state. *See infra* text accompanying notes 206-12. *Cf.* Terez, *The Misguided Helicopters Case: Confusion in the Courts over Contacts*, 37 BAYLOR L. REV. 842 (1985).

7. 107 S. Ct. 1026 (1987).

who would vote⁸ to hale a foreign component manufacturer into a forum state where it does not intentionally direct its activities as long as the burden of defending in the forum state is reasonable to the defendant.⁹

An emphasis on the reasonableness to the defendant in defending in the forum is echoed by some trial courts in the minimum contacts analysis. These lower court decisions do not presently focus on the "quality and nature"¹⁰ of the defendant's conduct in the forum state. Instead, some courts have fashioned an analysis where the crucial inquiry is whether it is foreseeable that the defendant's product will end up in the forum state.¹¹ Other commentators, however, advocate the assertion of jurisdiction on the grounds that it is reasonable to all the parties to do so.¹²

In addition to a foreign defendant's due process concerns, pragmatic considerations exist in light of today's economy.¹³ Whether the court will exercise jurisdiction over a foreign component manufacturer may implicate foreign trade policy as well.¹⁴ The component manufacturer will have to structure its future business relationships to avoid being haled into distant forums when dealing with those forum states which broadly assert jurisdiction.¹⁵

8. Though all the Justices found that the assertion of jurisdiction over Asahi would be unreasonable, Justices Brennan, White, Marshall, and Blackmun found jurisdiction to be unreasonable irrespective of whether Asahi had purposefully availed itself of the forum. See *infra* text accompanying notes 130-35. Furthermore, Justice Stevens adds the fifth vote to compose a majority of the Court who would be willing to base jurisdiction on a reasonableness standard alone. See *infra* text accompanying notes 136-39. Justice Stevens stated that "an examination of minimum contacts is not always necessary to determine whether a state court's assertion of personal jurisdiction is constitutional." *Asahi*, 107 S. Ct. at 1038. (Stevens, J., concurring).

9. See also *Charles Gendler & Co. v. Telecom Equip. Corp.*, 102 N.J. 460, 508 A.2d 1127 (1986) (international corporation could constitutionally be subject to forum state's jurisdiction in a breach of warranty action if corporation knew or reasonably should have known its product would be distributed for sale in forum state). But see *Chung v. Nana Dev. Corp.*, 783 F.2d 1124 (4th Cir.), cert. denied, 107 S. Ct. 431 (1986) (foreign defendant's knowledge that its product's ultimate destination in forum state was immaterial when defendant did not affirmatively establish ties with forum state).

10. *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).

11. See, e.g., *Hedrick v. Daiko Shoji*, 715 F.2d 1355 (9th Cir. 1983).

12. See *infra* text accompanying notes 216-20.

13. In 1986, the United States trade deficit hit a record 140.57 billion dollars. L.A. Times, Mar. 18, 1987, § IV, at 3, col. 4. The amount of foreign merchandise entering into the United States may signal an increase in lawsuits against the foreign manufacturers in products liability actions.

14. See *infra* Part IV of text.

15. For example, if a foreign corporate manufacturer knows that the forum state will liberally find that the defendant has sufficient minimum contacts, the defendant will either

This Comment addresses both the constitutional and economic concerns. The first portion examines the United States Supreme Court's limited personal jurisdiction standard by reviewing *World-Wide Volkswagen v. Woodson*¹⁶ and its subsequent refinement in *Burger King Corp. v. Rudzewicz*.¹⁷ The next section of this Comment analyzes the *Asahi Metal Industry*¹⁸ case in both the California Supreme Court and the United States Supreme Court. In particular, this Comment examines the Supreme Court's retraction of California's broad application (of limited personal jurisdiction), while neglecting to implement a clearly defined analysis.¹⁹ The third section examines the economic trade implications which result from the application of this unclear standard to foreign corporations. Finally, this Comment suggests an analysis which returns to the primary constitutional concern of the minimum contacts inquiry: "[to protect] the defendant against the burdens of litigating in a distant or inconvenient forum" when the defendant lacks sufficient ties with the forum state.²⁰

tailor its dealings to avoid this forum or it will increase its costs to the consumers of that forum to cover added insurance costs. Weinberg, *The Helicopter Case and the Jurisprudence of Jurisdiction*, 58 S. CAL. L. REV. 913, 929 (1985).

16. 444 U.S. 286 (1980).

17. 471 U.S. 462 (1985). Though *Burger King* deals with a contract dispute as opposed to a products liability claim, as in *World-Wide Volkswagen*, the Supreme Court illustrated pertinent principles of the due process analysis which should override this distinction. See generally Sonenshein, *supra* note 4. Professor Sonenshein's position is based on the defendant's constitutional due process concerns. *Id.* at 48. Therefore, whether the plaintiff's cause of action arises in tort or contract has nothing to do with creating a defendant's minimum contacts with the forum state. *But see* Terez, *supra* note 6, at 935-41.

18. *Asahi Metal Indus. Co. v. Superior Court*, 39 Cal. 3d 35, 702 P.2d 543, 216 Cal. Rptr. 385 (1985), *cert. granted*, 475 U.S. 1044 (1986) (No. 85-693, 1986 Term), *argued*, Oct. 5, *rev'd*, 107 S. Ct. 1026 (1987).

19. *Asahi Metal Indus. Co. v. Superior Court*, 107 S. Ct. 1026 (1987). The Supreme Court unanimously held *Asahi* could not be subject to California's jurisdiction. *Id.* However, the decision was marked by three opinions. Justice O'Connor, for the plurality, required a defendant to have purposefully availed itself of the forum. See *infra* text accompanying notes 117-24. Justice Brennan's separate opinion focused on the reasonableness of asserting jurisdiction over *Asahi* and reaffirmed a "foreseeability" approach to jurisdiction. See *infra* text accompanying notes 130-34. Justice Stevens' opinion centered on the actual valve itself in determining jurisdiction. See *infra* text accompanying notes 136-39.

20. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292-94 (1980). Justice White was also concerned "that the [s]tates, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *Id.* However, one commentator has suggested that this federalism concern is no longer an appropriate interest in the analysis. Hay, *Refining Personal Jurisdiction in the United States*, 35 INT'L & COMP. L.Q. 32, 34 (1986). Another scholar finds federalism concerns immaterial in relation to the due process concerns in cases involving domestic defendants, but distinguishes cases involving international defendants. Weinberg, *supra* note 15, at 924-25.

Additionally, in *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*,

II. RECENT HISTORY OF SPECIFIC PERSONAL JURISDICTION²¹

A. Specific Jurisdiction

Chief Justice Stone's majority opinion in *International Shoe Co. v. Washington*²² specified four situations where the court has to assess the defendant's contacts in order to assert personal jurisdiction:²³ (1) when the defendant's continuous and systematic activity created plaintiff's cause of action;²⁴ (2) when the defendant's isolated activities in the forum are insufficient to render him accountable when the cause of action is unrelated to that activity;²⁵ (3) when the defendant's activity may be so pervasive within the forum as to make the defendant amenable to suit even though the cause of action does not arise out of that activity;²⁶ and (4) when the defendant's activities are sporadic or isolated, yet the plaintiff's cause of action arises out of such activity so that the defendant may nevertheless be amenable to suit.²⁷

The United States Supreme Court further refined the four situations in *Helicopteros Nacionales de Colombia, S.A. v. Hall*.²⁸ Essentially, the Court described *International Shoe's* third category as

456 U.S. 694 (1982), Justice White stated in the majority opinion that the due process clause "is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns." *Id.* at 703 n.10. See generally Lewis, *The Three Deaths of "State Sovereignty" and the Curse of Abstraction in the Jurisprudence of Personal Jurisdiction*, 58 NOTRE DAME L. REV. 699 (1982); Comment, *Federalism, Due Process, and Minimum Contacts: World-Wide Volkswagen v. Woodson*, 80 COLUM. L. REV. 1341 (1980).

21. This Comment focuses on the minimum contacts analysis applied by the courts from 1980 to the present. The test presently being applied uses the standards rooted in the 1980 Supreme Court *World-Wide Volkswagen* decision. See generally Annotation, *Products Liability: In Personam Jurisdiction over Nonresident Manufacturers or Sellers under "Long-Arm" Statutes*, 19 A.L.R.3d 13 (1968).

22. 326 U.S. 310 (1945).

23. *Id.* at 317-18.

24. *Id.* at 317; see, e.g., *International Shoe*, 326 U.S. 310 (where non-resident defendant's extensive business gave rise to litigation because of defendant's failure to comply with state unemployment fund).

25. *Id.*; see, e.g., *Hanson v. Denckla*, 357 U.S. 235 (1958) (where Florida forum had no jurisdiction over trustee Delaware corporation when settlor created a Delaware trust and settlor's will was probated under Florida law).

26. *Id.* at 318; see, e.g., *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952) (where forum state was allowed to assert jurisdiction over foreign corporation even though the cause of action was not related to defendant's contacts because corporation's contacts in state were so extensive).

27. *Id.* at 318; see, e.g., *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957) (where forum state allowed jurisdiction over corporation whose sole contact was insurance policy issued to forum resident who sued on policy).

28. 466 U.S. 408 (1984).

"general" jurisdiction²⁹ and the fourth situation as "specific" jurisdiction.³⁰ One commentator has illustrated the significance of this distinction.³¹ He believes that specific jurisdiction assesses the defendant's *minimum contacts*,³² while general jurisdiction analyzes the defendant's *systematic and continuous* contacts.³³

Later United States Supreme Court decisions modified the specific jurisdiction, minimal contacts analysis. The Court has grappled with finding just how minimum the defendant's contacts may be to warrant the assertion of jurisdiction. Specifically, the United States Supreme Court has examined whether a defendant's foreseeability of its product's presence in the forum would make the defendant amenable to suit in that forum.³⁴ The Court later re-emphasized that the jurisdictional analysis must assess the defendant's intentional, forum-directed activity.³⁵

B. World-Wide Volkswagen: *The Role of Foreseeability in the Minimum Contacts Analysis*

In a products liability action where the plaintiffs were injured while driving through Oklahoma, the Oklahoma Supreme Court asserted specific personal jurisdiction over the non-resident regional automobile distributor.³⁶

In reversing the Oklahoma Supreme Court, the United States Supreme Court majority and dissenting opinions illustrate the differing views regarding where the minimum contacts focus should be in relation to the defendant's interests.³⁷ On one hand, Justice White's majority opinion stated that the *International Shoe Co. v. Washington*³⁸ concepts of "fair play"³⁹ and "substantial justice"⁴⁰ of haling the

29. *Id.* at 414 n.9; see also von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136 (1966).

30. *Id.* at 414 n.8; see also von Mehren & Trautman, *supra* note 29, at 1136.

31. Note, *Specific and General Jurisdiction—the Reshuffling of the Minimum Contacts Analysis*, 59 TUL. L. REV. 826, 833 (1985).

32. *Id.* at 833; Furthermore, the *Helicopteros* opinion also required that the plaintiff's cause of action *arose* out of, rather than *related* to the defendant's minimum contacts. *Helicopteros*, 466 U.S. at 414.

33. Note, *supra* note 31, at 833.

34. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); see *infra* text accompanying notes 45-53.

35. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); see *infra* text accompanying notes 69-77.

36. *World-Wide Volkswagen*, 444 U.S. at 286.

37. See *supra* note 4.

38. 326 U.S. at 317.

defendant into the forum state should apply to the non-resident defendant's contacts with the forum state⁴¹ in asserting specific personal jurisdiction.⁴² On the other hand, Justice Brennan's dissent⁴³ illustrated a second approach. He stated that *International Shoe's* fairness notions apply to the fairness a defendant experiences in defending a suit in the forum state.⁴⁴

1. The Majority Opinion

In Justice White's minimum contacts analysis, it was insignificant that a defendant could foresee its product arriving in the forum.⁴⁵ The defendant can reasonably—and fairly—expect to be haled into that forum, under Justice White's approach, only when the defendant's intentionally directed activities caused injury there.⁴⁶ Foreseeability, then, is relevant to the minimum contacts analysis only to the extent that the defendant directed its activities at the forum. Justice White's analysis did not center on a defendant's knowledge that it may be haled into the forum simply because it was aware its product had been introduced into the forum by a third party's unilateral acts.⁴⁷ Rather, Justice White stressed that once the defendant expected sales in the forum due to its product's entrance into the business world's stream of commerce,⁴⁸ then the defendant may logically conclude that it may be haled into that forum state should the product fail.

Additionally, Justice White discussed whether the defendant's privileges and benefits from the forum state were sufficient contacts.⁴⁹ Where these benefits are merely economic, such benefits in themselves do not confer jurisdiction as long as the defendant possesses no other

39. *Id.* at 316. Ottonello has attributed Justice Stone's *International Shoe* requirements to Judge Learned Hand in *Hutchinson v. Chase & Gilbert*, 45 F.2d 139 (2d Cir. 1930). Ottonello believes Judge Hand took the position that once a defendant had minimum contacts with the forum, that defendant's due process rights were not implicated by defending in that forum. Ottonello, *supra* note 4, at 21, 30.

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

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

42. *See supra* note 3.

43. *World-Wide Volkswagen*, 444 U.S. at 299.

44. *Id.* at 300-01.

45. *Id.* at 295-97.

46. *Id.* at 297.

47. *Id.* at 298.

48. *Id.* at 297-98.

49. *Id.* at 299.

"constitutionally cognizable contact with that [s]tate."⁵⁰ Clearly, a defendant would need to have some intentional contact with the forum state other than "marginal revenues"⁵¹ resulting from the product's entrance into the stream of commerce.⁵² Because the defendant in *World-Wide Volkswagen* lacked the expectation that its product would be purchased in Oklahoma and, at best, received only marginal

50. *Id.*

51. *Id.*

52. The minimum contacts analysis as applied to component manufacturers is frequently termed the "stream of commerce" approach. The theory was introduced in *Gray v. American Radiator & Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961) which held that a defendant who "delivers its products into the stream of commerce with the expectation that they will be purchased in the forum [s]tate" may constitutionally be subject to the forum state's jurisdiction. *World-Wide Volkswagen*, 444 U.S. at 298.

The stream of commerce theory has been justified as follows:

a manufacturer may be held amenable to process in a forum in which its products are sold, even if the products were sold indirectly through importers or distributors with independent sales and marketing schemes. Courts have found the assumption of jurisdiction in these cases to be consistent with the due process requirements . . . [since] by increasing the distribution of its products through indirect sales within the forum, a manufacturer benefits legally from the protection provided by the laws of the forum state for its products, as well as economically from indirect sales to forum residents [A] manufacturer [may not] . . . insulate itself from the reach of the forum state's long-arm rule by using an intermediary or by professing ignorance of the ultimate destination of its products.

DeJames v. Magnificence Carriers, 654 F.2d 280, 285 (3d Cir. 1981).

This Comment argues against any type of mechanical test. Rather, the heart of the jurisdictional question should look to the intentional, forum-directed activity of the defendant. In fact, the stream of commerce test essentially is equated, by the decisions discussed herein, with the defendant's mere knowledge that its product eventually would reach the forum. See *Dalmau Rodriguez v. Hughes Aircraft Co.*, 781 F.2d 9 (1st Cir. 1986). The court rejected the stream of commerce test when defendant sold a helicopter to another bidder and the product reached the forum. The court held that knowledge of the product's ultimate destination was not the test; rather, the test was the purposeful act of the defendant. *Id.* at 15. *But see* *Oswalt v. Scripto, Inc.*, 616 F.2d 191 (5th Cir. 1980) (where Japanese manufacturer was subject to jurisdiction when it delivered millions of lighters to an exclusive distributor for sale in the United States). *Id.* at 199-200; *Rockwell Int'l Corp. v. Construzioni Aeronautiche Giovanni Agusta, S.P.A. and S.N.F.A.*, 553 F. Supp. 328 (E.D. Pa. 1982) (where foreign corporation was subject to jurisdiction when it designed component part specifically for sale in the United States).

The stream of commerce theory is troublesome because as one scholar has recognized, "[u]nfortunately, the courts have not defined the outer limits of jurisdiction over component part manufacturers in a multiple component part scenario." Note, *Asahi Metal Industry Co. v. Superior Court: Minimum Contacts in California Become Minimal*, 22 WILLAMETTE L. REV. 589, 600 (1986).

Conceptually, the situation in *Asahi* can be distinguished from a "typical" stream of commerce case. In *World-Wide Volkswagen*, the car manufacturer's product was the "waterfall" that started the stream. In that case, jurisdiction over the defendant was proper. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298 (1980). However, in *Asahi*, the foreign manufacturer's valve was a "rock tossed into the stream" by a third party, who was another foreign manufacturer.

revenues from the forum state, the Court declined to assert jurisdiction.⁵³ Under Justice White's view, *International Shoe's* fairness notions could only be satisfied when the defendant intentionally acted toward the forum state.

2. The Dissenters

a. Justice Brennan's balancing analysis

Justice Brennan's dissent balanced the interests of the parties to determine whether jurisdiction over the defendant was proper.⁵⁴ His discussion of the fairness factors to the defendant⁵⁵ did not apply to the forum's assertion of jurisdiction over a defendant who lacked contacts. Rather, fairness to a defendant revolved around the extent the defendant was inconvenienced by defending in the forum state.⁵⁶ Justice Brennan takes a different approach from the majority opinion, since Justice Brennan did not focus on the defendant's intentional, forum-directed activity.⁵⁷

Essentially, Justice Brennan advocated a sliding scale approach. For example, when the defendant possessed minimal contacts with the forum, but would not be unreasonably inconvenienced by defending in the forum state, jurisdiction over that defendant was justified.⁵⁸ However, Justice Brennan included an undefined caveat which required that the burdens on the defendant "must be of constitutional dimension."⁵⁹

In *World-Wide Volkswagen*, Justice Brennan classified the defendant's purposeful activity in the Oklahoma forum as the sale of an automobile in New York.⁶⁰ He felt the automobile's transitory nature

53. The defendants in *World-Wide Volkswagen* contesting the forum state's jurisdiction were the regional distributor and retailer. Plaintiffs also named the manufacturer and importer, however, these defendants did not contest jurisdiction based on the "stream of commerce" theory. *Id.* at 298. See generally Hay, *Judicial Jurisdiction over Foreign-Country Corporate Defendants—Comments on Recent Case Law*, 63 ORE. L. REV. 431, 435-44 (1984). See also *infra* notes 157-60 and accompanying text.

54. *World-Wide Volkswagen*, 444 U.S. at 299-300 (Brennan, J., dissenting).

55. See *supra* notes 39-40.

56. *World-Wide Volkswagen*, 444 U.S. at 300 (Brennan, J., dissenting).

57. *Id.*

58. *Id.* at 301.

59. *Id.*; Justice Brennan does not specify what composes a "constitutional dimension." However, he does say that it relates to the "mobility of the defendant's defense" even though "it would not be sensible to make the constitutional rule turn solely on the number of miles the defendant must travel to the courtroom." *Id.*

60. *Id.* at 306.

was indicative of the defendant's intent to reach distant forums.⁶¹ Therefore, Justice Brennan concluded that the defendant possessed sufficient contacts with the Oklahoma forum, and, since defending in Oklahoma was not unduly burdensome, jurisdiction was reasonable.⁶²

b. Justices Marshall and Blackmun: focus on the chattel

Both Justices Marshall and Blackmun agreed with the majority that jurisdiction should be based on a defendant's "deliberate and purposeful" activity.⁶³ However, they departed from the majority view by analyzing the chattel itself (*i.e.*, the car).⁶⁴ They found that the automobile's very nature made it reasonable for the defendants to anticipate their products' presence in the forum state.⁶⁵ Because of the automobile's transitory nature, the Justices found that the defendants intentionally directed activity toward the Oklahoma forum.⁶⁶ The defendants had every reason to expect to be haled into Oklahoma since their car sales constituted purposeful availment of the Oklahoma forum.⁶⁷

C. Burger King: *Emphasis on the Defendant's Purposefully Directed Activities*

While the majority in *World-Wide Volkswagen* clarified that the role of foreseeability in the minimum contacts analysis is a conclusion rather than an assessment of the defendant's intentional conduct, Justice Brennan's majority opinion in *Burger King*⁶⁸ defined the purposeful availment test.⁶⁹ His opinion focused on the extent to which

61. *Id.*

62. *Id.* Justice Brennan also characterized the defendant's contacts as "sufficiently significant" because of Oklahoma's interest in the action. *Id.* at 307. Additionally, he found the assertion of jurisdiction to be "fair and reasonable." *Id.*

63. *Id.* at 314 (Marshall, J. & Blackmun, J., dissenting).

64. *Id.*; see also *id.* at 318, (Blackmun, J., dissenting) where a crucial factor in the inquiry was the instrumentality under consideration.

65. *Id.* at 314-15 (Marshall, J. & Blackmun, J., dissenting).

66. *Id.*

67. *Id.* at 315.

68. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985). The majority opinion in *World-Wide Volkswagen* consisted of Justices White, Stewart, Powell, Rehnquist, Stevens, and Chief Justice Burger. The dissenters were Justices Brennan, Marshall, and Blackmun. In *Burger King*, Justices White and Stevens filed a dissent.

The dissenters' analysis of defendant Rudzewicz' minimum contacts centered on the contract, similar to *World-Wide Volkswagen's* dissenters. Justices Marshall and Blackmun focused on the car's presence. See *supra* note 64.

69. See *supra* note 5.

the defendant intentionally directed itself toward the forum state. *Burger King* involved the fast-food chain's breach of contract⁷⁰ suit in Florida against a non-resident franchisee, Rudzewicz, a Michigan resident. The Court determined that the Florida forum could properly assert jurisdiction over Rudzewicz based on Rudzewicz' affirmative forum-directed conduct of contracting with Burger King, the Florida-based corporation.⁷¹

Justice Brennan further extended *World-Wide Volkswagen* jurisdictional principles by focusing on the defendant's intentional forum-directed activity⁷² and not the independent actions of a third party.⁷³ He did not consider Rudzewicz' forum-related contacts which were "random," "fortuitous," or "attenuated."⁷⁴ However, Justice Brennan would permit the assertion of jurisdiction over the defendant whose connection with the forum state was a result of the defendant's own intentional activities.⁷⁵ Justice Brennan's analysis required a defendant to affirmatively reach out beyond his own state and establish ties with the forum state.⁷⁶

At a minimum then, the *Burger King* opinion initially required the defendant to intentionally direct his activities toward the forum state.⁷⁷ After making this determination, the second consideration in Justice Brennan's due process analysis involved the concept of balancing each party's interests. This balancing was also introduced in Justice Brennan's *World-Wide Volkswagen* dissent.⁷⁸ Thus, by meshing *World-Wide Volkswagen*'s balancing concept with *Burger King*'s pur-

70. See *supra* note 17. Additionally, Burger King and Rudzewicz' franchise agreement stated it would be governed by Florida laws. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 466 (1985).

71. 471 U.S. at 481.

72. The majority in *World-Wide Volkswagen* did not elaborate on what would constitute purposefully availing conduct. Rather, they refined the role of foreseeability in the analysis. *Id.*

73. *Id.* at 475 (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984)).

74. *Id.* at 475 (quoting *Keeton v. Hustler Magazine*, 465 U.S. 770 (1984) (emphasis added)).

75. *Id.* at 476 (citing *McGee v. International Life Ins. Co.*, 355 U.S. 220, 222-23 (1957)).

76. This analysis can be analogized to the tort distinctions between intentional and negligent conduct. See *infra* text accompanying notes 83-87. In both *Burger King* and *World-Wide Volkswagen*, the majority opinions specified a standard where the defendant intentionally established ties with the forum state. Foreseeability, involving negligence standards, was rejected as the minimum contacts test. See also *Terez supra* note 6, at 936; *infra* text accompanying notes 213-15.

77. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985).

78. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 299 (1980).

purposeful availment requirement, jurisdiction over the defendant would be constitutional if the defendant had insignificant contacts with the forum state, but the burden of defending in that forum was slight.⁷⁹ In addition, both the forum state and plaintiff must possess compelling interests to adjudicate the matter in the forum state.⁸⁰

III. THE MINIMUM CONTACTS ANALYSIS AFTER *BURGER KING*

A. Foreseeability as a "Negligence" Standard

From *Burger King*, personal jurisdiction is determined in part by the defendant's purposeful conduct directed toward the forum state. Activities which typically constitute such purposeful activity are establishing offices⁸¹ or maintaining agents⁸² in the forum state. Such activity is illustrative of a non-resident defendant's intent to conduct and solicit business in the forum.

On the other hand, according to *World-Wide Volkswagen*, if the defendant's activities in the forum state consist only of the defendant's awareness that his product could conceivably reach the forum, this awareness would be insufficient to meet the due process requirement. In analyzing whether the defendant purposefully availed itself of the forum state or merely was aware its product may be in the forum state, one may analogize to the tort concepts of intentional and negligent conduct. Intentional acts consist of the defendant's own consciousness that his actions will probably effectuate certain consequences.⁸³ Negligent conduct, in contrast, consists only of a defendant's knowledge that his activity may cause a risk of harm to another.⁸⁴

This analogy also applies to the the minimum contacts analysis. The United States Supreme Court cases which have allowed a forum

79. *Burger King*, 471 U.S. at 476-77.

80. *Id.* But see *infra* text accompanying notes 231-36.

81. *United States v. Toyota Motor Co.*, 561 F. Supp. 354 (C.D. Cal. 1983). A foreign corporation was subject to jurisdiction when the corporation's wholly-owned subsidiary, a California corporation, was located in the forum state.

82. *Hicks v. Kawasaki Heavy Indus.*, 452 F. Supp. 130 (M.D. Pa. 1978) (where Japanese corporation's sales of its product to their exclusive sales agent for the United States constituted purposeful availment of the forum).

83. PROSSER & KEETON ON THE LAW OF TORTS, § 8, at 35-36 (W. Keeton, 5th ed. 1984).

84. *Id.* Prosser and Keeton find the distinction between intentional and negligent conduct to be one of degree. *Id.* Essentially, the greater the defendant's certainty that specific consequences will occur, the greater responsibility the courts impose on him. *Id.* at 37. This Comment argues for the same type of analysis in the jurisdictional context.

state to assert jurisdiction over a defendant have done so based on the defendant's intentionally directed conduct toward the forum state.⁸⁵ In those cases the defendants acted with the belief that their *conduct* in the forum, such as establishing sales offices, would produce certain *results*, such as sales in the forum.⁸⁶

However, in cases where the defendant simply conducted itself with knowledge that its actions might produce risks to others, the Court has not allowed the forum to assert jurisdiction based on the defendant's foreseeability of harm alone.⁸⁷ Therefore, in light of the Supreme Court's interpretations of a defendant's activities in the forum state, a defendant must "intentionally," rather than "negligently," act in the forum state for jurisdiction to be constitutionally permissible.

*B. "Foreseeability" Remains Crucial to Minimum Contacts: The Example of Asahi Metal Industry Co. v. Superior Court*⁸⁸

In *Asahi Metal Industry*, the plaintiffs, who were injured in a motorcycle accident, brought a products liability action in a California state court against the Taiwanese tire-tube manufacturer of the motorcycle tire. Cheng Shin Rubber Industrial Co., Ltd. (Cheng Shin), the Taiwanese manufacturer, did not contest California's assertion of jurisdiction. Rather, it sought indemnification from Asahi Metal Industry Co., Ltd. (Asahi), the Japanese manufacturer of the tire-tube valve assembly.⁸⁹

Cheng Shin alleged that Asahi's California contacts arose from Asahi's business transactions in Taiwan with Cheng Shin because Cheng Shin dealt directly with California.⁹⁰ Between 1978 and 1982,

85. *E.g.*, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); *Keeton v. Hustler Magazine*, 465 U.S. 770 (1984).

86. *E.g.*, *Bean Dredging Corp. v. Dredge Technology Corp.*, 744 F.2d 1081 (5th Cir. 1984) where defendant was subject to jurisdiction when it manufactured thousands of components and injected them into the stream of commerce. The court inferred that defendant intended to reach as broad a market as possible. *Id.* at 1083. *But see Hedrick*, 715 F.2d 1355.

87. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *see, e.g.*, *DeJames v. Magnificence Carriers*, 654 F.2d 280 (3d Cir. 1981) where defendant's ability to foresee that its product might end up in forum is insufficient alone to create a reasonable expectation that it may be haled to the forum; *Humble v. Toyota Motor Co.*, 727 F.2d 709 (8th Cir. 1984) where Japanese manufacturer was not subject to jurisdiction when it manufactured components in Japan for sale in Japan to a United States corporation and all distribution and marketing was done without the Japanese manufacturer's involvement.

88. *Asahi Metal Indus. Co. v. Superior Court*, 107 S. Ct. 1026 (1987).

89. *Id.* at 1029.

90. *Id.* at 1030.

Asahi sold 1,350,000 component parts to Cheng Shin, and twenty percent of Cheng Shin's United States sales were to California.⁹¹

1. Foreseeability, Minimum Contacts, and the California Supreme Court

The appellate court granted Asahi's motion to quash service of summons based on these contacts.⁹² Cheng Shin appealed to the California Supreme Court which reversed the appellate court and affirmed the trial court's decision to assert limited personal jurisdiction over Asahi.⁹³

a. the California Supreme Court majority opinion

Chief Justice Bird extensively summarized the minimum contacts standards as developed in *World-Wide Volkswagen*. She acknowledged that the personal jurisdiction analysis "is 'not mechanical or quantitative,' but depends upon the 'quality and nature' of defendant's activities within the [s]tate."⁹⁴ In applying this test, the Chief Justice focused on the interrelationship between the defendant, plaintiff, and the forum state.⁹⁵

Moreover, Chief Justice Bird recognized that the recent trend in the minimum contacts analysis is toward liberalization.⁹⁶ However, the minimum contacts test, while more liberal in application, is still subject to certain limitations.⁹⁷ The Chief Justice characterized these limitations as: (1) to protect the defendant from unreasonable hard-

91. *Id.*

92. *Id.*

93. *Id.* at 1031.

94. *Asahi Metal Indus. Co. v. Superior Court*, 39 Cal. 3d 35, 42, 702 P.2d 543, 545, 216 Cal. Rptr. 385, 387 (1985) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)).

95. *Id.* at 42, 702 P.2d at 545, 216 Cal. Rptr. at 388 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)). *But see* *Sonenshein supra* note 4, at 48; *infra* Part V of text.

96. *Asahi Metal Indus.*, 39 Cal. 3d at 43, 702 P.2d at 546, 261 Cal. Rptr. at 388. Chief Justice Bird stated:

In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more [s]tates and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party used to defend himself in a State where he engages in economic activity.

Id. at 43, 702 P.2d at 546, 216 Cal. Rptr. at 388 (quoting *McGee v. International Life Ins. Co.*, 355 U.S. 220, 222-23 (1957)).

97. *Id.*, 702 P.2d at 546, 216 Cal. Rptr. at 388.

ships from defending in distant forums; and (2) to limit the forum state in its sovereign capacity to only assert jurisdiction over defendants who possess ties with the sovereign.⁹⁸ Finally, she recognized that the defendant must have conducted itself with the forum state so that the defendant received "benefits and protections"⁹⁹ from the forum state.¹⁰⁰

Both Cheng Shin and Asahi relied on *World-Wide Volkswagen*. Cheng Shin argued that *World-Wide Volkswagen* controlled and conferred jurisdiction over Asahi since Asahi manufactured the component valve assembly¹⁰¹ and entered it into the stream of commerce.¹⁰² Conversely, Asahi reasoned that California lacked jurisdiction based on *World-Wide Volkswagen's* definition of foreseeability in the minimum contacts analysis.¹⁰³

The majority rejected Asahi's interpretation of *World-Wide Volkswagen*. Chief Justice Bird distinguished *World-Wide Volkswagen* from Asahi's situation because the car in *World-Wide Volkswagen* reached the forum state by the consumer-plaintiff driving it there. Chief Justice Bird characterized the activity in *World-Wide Volkswagen* as "fortuitous."¹⁰⁴ In contrast, in *Asahi Metal Industry*, the manufacturer's valve assembly entered the California forum in the stream of commerce. Chief Justice Bird stated that according to *World-Wide Volkswagen*, California's assertion of jurisdiction over Asahi was justified. The court reasoned that Asahi purposefully availed itself of the California forum when it knew its valve sales to Cheng Shin would be assembled in tubes for sale in California.¹⁰⁵

Furthermore, Chief Justice Bird found Asahi conducted "substantial" business in the California forum via Asahi's sales to Cheng

98. *Id.* at 43, 702 P.2d at 546, 216 Cal. Rptr. at 388 (citing *Hanson v. Denckla*, 357 U.S. 235, 251 (1958)); see also *supra* note 20.

99. See *supra* note 5.

100. *Asahi Metal Indus.*, 39 Cal. 3d at 43, 702 P.2d at 546, 216 Cal. Rptr. at 388 (citing *Hanson*, 357 U.S. at 253).

101. *Id.* at 47, 702 P.2d at 549, 216 Cal. Rptr. at 391.

102. See *supra* note 52.

103. *Asahi Metal Indus.*, 39 Cal. 3d at 47, 702 P.2d at 549, 216 Cal. Rptr. at 391.

104. *Id.*, 702 P.2d at 549, 216 Cal. Rptr. at 391.

105. *Id.* at 48, 702 P.2d at 550, 216 Cal. Rptr. at 392. Chief Justice Bird stated, "the distinction between the foreseeability of use in the forum and the expectation of sale in the forum is critical to the rationale in *World-Wide Volkswagen*." *Id.*, 702 P.2d at 549 n.3, 216 Cal. Rptr. at 391 n.3. However, Chief Justice Bird classified Asahi's conduct as the valve's "foreseeable use in the forum" and not as an expectation of sale. *Id.*, 702 P.2d at 550, 216 Cal. Rptr. at 392.

Shin.¹⁰⁶ The court found Asahi's economic benefits likewise to be "substantial."¹⁰⁷ Since Asahi enjoyed economic benefits from its indirect business with California, the California Supreme Court applied the *World-Wide Volkswagen* "foreseeability-of-the-product's-presence" discussion¹⁰⁸ to Asahi.

b. the dissenting opinion

Justice Lucas adhered to Asahi's interpretation of *World-Wide Volkswagen* that Asahi cannot constitutionally be haled into the California forum when Asahi's contact with that forum was mere knowledge that its component part may eventually reach that forum.¹⁰⁹ Justice Lucas was not persuaded that Cheng Shin met its burden of proof that Asahi was subject to California's jurisdiction because Cheng Shin produced "no evidence . . . that Asahi intended to serve the California market indirectly."¹¹⁰

Moreover, Justice Lucas was not convinced that Asahi even received a substantial economic benefit from its indirect sales to California through Cheng Shin. He found that Asahi's one quarter of one percent (0.25%) in revenue from Cheng Shin's California's sales did not constitute purposefully availing activity.¹¹¹ Justice Lucas concluded, "Asahi *at best* foresaw that some [of its] valves would be sold in California but it in no way purposefully availed itself of the privilege of conducting business in California, nor did it exert any effort to

106. *Id.*, 702 P.2d at 549, 216 Cal. Rptr. at 392. The Chief Justice did concede the fact Asahi possessed no offices, agents, or property in California and did not actually solicit California's business. *Id.*, 702 P.2d at 549, 216 Cal. Rptr. at 392.

107. *Id.*, 702 P.2d at 550, 216 Cal. Rptr. at 392. The majority refers this finding to the following figures: of Asahi's 1,350,000 sales to Cheng Shin in a four year period, 1.24% of Asahi's income in 1981 and .44% of its gross income in 1982 were represented by its sales to the Taiwanese manufacturer. Moreover, 22% of the "97 Japanese or Taiwanese tubes offered for sale . . . contained Asahi valve assemblies." *Id.* at 41 n.1, 702 P.2d at 545 n.1, 216 Cal. Rptr. at 387 n.1.

108. *See supra* text accompanying notes 46-50.

109. *Asahi Metal Indus.*, 39 Cal. 3d at 54-55, 702 P.2d at 554, 216 Cal. Rptr. at 396.

110. *Id.* at 54, 702 P.2d at 554, 216 Cal. Rptr. at 396.

111. *Id.* "Cheng Shin presented evidence that other tire manufacturers sell tires in California that incorporate Asahi valves but there is no indication of the number of such tires or what percentage of Asahi's total revenues are represented by such tires." *Id.* at 54-55, 702 P.2d at 554, 216 Cal. Rptr. at 396.

The lack of these actual figures seriously clouds the extent Asahi received economic benefit. Neither the majority nor dissenting opinions can persuasively say jurisdiction over Asahi should be based on this sales percentage without a better perspective on Asahi's financial picture.

serve the California market."¹¹²

2. *Asahi* in the United States Supreme Court

a. the unanimous result based on different rationales

The United States Supreme Court unanimously found that *Asahi* could not be subject to specific personal jurisdiction in the California forum.¹¹³ However, the Court was markedly split in determining why *Asahi* could not constitutionally be haled into a California court. The separate theories involved the conflict apparent from the *World-Wide Volkswagen* opinions.¹¹⁴ Presently, the Supreme Court is still split on whether to accord the jurisdictional fairness¹¹⁵ factors: (1) when the non-resident defendant possesses insufficient contacts with the forum; or (2) when the non-resident defendant possesses insufficient contacts with the forum, but will not be tremendously burdened by defending in the forum.¹¹⁶

b. Justice O'Connor's purposeful availment requirement

Writing for the plurality,¹¹⁷ Justice O'Connor found that *Asahi* could not be haled into the California forum because *Asahi* lacked forum-directed purposeful conduct.¹¹⁸ Justice O'Connor recognized that to comport with due process,¹¹⁹ the defendant must have minimum contacts with the forum state.¹²⁰ In Justice O'Connor's opinion, to assert jurisdiction over a defendant who did not intentionally direct its activities toward the forum would be unconstitutional.¹²¹

Asahi must have had intentional forum-directed activities which would constitute purposeful availment of the California forum in order for jurisdiction to be proper. Justice O'Connor emphasized that the defendant's awareness that its product would end up in the forum does not constitute the purposeful availment requirement of *International Shoe Co.*¹²² Justice O'Connor rejected the argument that

112. *Id.* at 55, 702 P.2d at 554, 216 Cal. Rptr. at 396 (emphasis added).

113. *Asahi Metal Indus. Co. v. Superior Court*, 107 S. Ct. 1031 (1987).

114. *See supra* text accompanying notes 37-44.

115. *See supra* notes 39-40.

116. *See supra* note 4.

117. Concurring with Justice O'Connor in Part IIA of her opinion were Justices Scalia, Powell, and Chief Justice Rehnquist.

118. *Asahi Metal Indus. Co. v. Superior Court*, 107 S. Ct. 1031 (1987).

119. *See supra* note 1.

120. *Asahi Metal Indus.*, 107 S. Ct. at 1031.

121. *Id.* at 1033.

122. *Id.*; *see also supra* note 85.

Asahi's entrance into the stream of commerce sufficed as purposeful availment.¹²³ Justice O'Connor stated that entrance of a component into a product assembly process is not a sufficient contact in the absence of other forum-directed activity.¹²⁴

Justice O'Connor then proceeded to apply the fairness factors to the burdens Asahi would face if forced to defend in California.¹²⁵ The purpose of the fairness factors is to justify the assertion or denial of jurisdiction.¹²⁶ The Justice concluded that the burden on Asahi would be substantial for two reasons. First, Asahi was a *Japanese* corporation that shipped its components from *Japan* to *Taiwan* based on an agreement made in *Taiwan*, and none of their mutual business activities occurred in California.¹²⁷ Second, the subject matter of the litigation (*i.e.*, indemnification) was important.¹²⁸ Justice O'Connor stated that while Cheng Shin—a Taiwan corporation—had an interest in the litigation, the original California tort plaintiff and the California forum possessed insignificant interests.¹²⁹ Therefore, the unfairness of haling Asahi into California to defend suit confirmed the denial of jurisdiction over Asahi.

c. Justice Brennan's reasonableness and fairness burdens

Justice Brennan issued a separate opinion¹³⁰ where he denied jurisdiction because it would be unreasonable to submit Asahi to jurisdiction in California.¹³¹ He also reaffirmed the stream of commerce theory to support jurisdiction¹³² and disagreed with Justice O'Connor's opinion which required some additional act by the defendant.¹³³ Rather, Justice Brennan held that bare entrance into the stream of commerce was a sufficient contact because the chain of distribution is predictable, and defendant is therefore aware that his

123. *Asahi*, 107 S. Ct. at 1033.

124. *Id.*

125. *Id.* at 1033-35. Part IIB of Justice O'Connor's opinion was joined by the entire Court. Justice O'Connor stated that these fairness considerations are only addressed after the Court has found the requisite minimum contacts. *Id.* at 1034.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 1035. Concurring in part and in the judgment with Justice Brennan were Justices White, Marshall, and Blackmun.

131. *Id.* Justice Brennan found Asahi's purposefully availing activity to be its entrance into the stream of commerce. *Id.*

132. *Id.* at 1035-36.

133. *Id.* at 1035.

product will reach the forum.¹³⁴ Based on this awareness, Justice Brennan found a defendant may reasonably expect to be haled to that forum.¹³⁵ However, because of the unique facts surrounding *Asahi*, Justice Brennan concurred with Justice O'Connor's fairness analysis and concluded that jurisdiction would not be proper.

d. Justice Stevens' opinion¹³⁶

Justice Stevens looked at the instrumentality (*i.e.*, the valve) involved and stated that the jurisdictional question turns on the "constitutional determination that is affected by the volume, the value, and the hazardous character of the components"¹³⁷ in the litigation. Justice Stevens focused on the instrumentality because he felt the line between mere awareness and purposeful availment was unclear.¹³⁸

More significantly, Justice Stevens stated that Justice O'Connor's purposeful availment analysis was unnecessary to the holding.¹³⁹ He reasoned that a finding of an unreasonable burden on the defendant is enough to prohibit the assertion of jurisdiction.¹⁴⁰ Justice Stevens believed that due process addresses whether it is reasonable for a defendant to be haled into the forum, not whether the forum may assert jurisdiction if the defendant lacks sufficient contacts.¹⁴¹ Moreover, he stated that the Court need not develop a "purposeful direction"¹⁴² type of test which requires the defendant to act toward the forum.¹⁴³ Justice Stevens essentially equated the reasonableness factors to minimum contacts.

3. Analysis of the Opinion

The differing opinions in *Asahi Metal Industry* clearly illustrate the problem trial courts encounter when they apply the minimum

134. *Id.*

135. *Id.*

136. *Id.* at 1038. Joined in part by Justices White and Blackmun.

137. *Id.*

138. *Id.* Justice Stevens stated that "[t]he Court seems to assume that an unwavering line can be drawn between 'mere awareness' . . . and 'purposeful availment' of the forum's market." *Id.*

139. *Id.* at 1038.

140. *Id.* Justice Stevens states "[a]n examination of minimum contacts is not always necessary to determine whether a state court's assertion of personal jurisdiction is constitutional." *Id.* (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-78 (1985)).

141. *Id.*; see also *supra* note 4.

142. *Asahi Metal Indus.*, 107 S. Ct. at 1038.

143. *Id.*

contacts analysis in attempting to assert jurisdiction over component manufacturers. While the Supreme Court intended to initiate a flexible standard in the jurisdictional analysis of *World-Wide Volkswagen*,¹⁴⁴ the test has turned into a factually specific analysis of contacts and fairness.

The United States Supreme Court has declined to establish just how minimum the defendant's contacts may be while still supporting jurisdiction.¹⁴⁵ As a result, lower courts utilize conclusionary terms (e.g., the defendant's foreseeability that it will be haled into the forum, the product's entrance into the stream of commerce, the defendant's receipt of economic benefits, and the defendant's expectations of sales in the forum) that lack substantive meaning.¹⁴⁶ Because the level of contacts required for the proper assertion of jurisdiction has not been adequately defined, courts have been encouraged to analyze only the relative burdens on each party to litigate in plaintiff's selected forum.¹⁴⁷ After balancing these burdens, courts then extract whatever facts exist to find minimum contacts.

For instance, the California Supreme Court relied on the fact that Asahi should have reasonably been aware that its product would reach California. Even though Asahi did not affirmatively conduct activities towards that forum, the California Supreme Court asserted jurisdiction.¹⁴⁸

a. *Asahi* holds the door open to three ambiguities

Both Justice Brennan's opinion¹⁴⁹ and Justice Stevens' opinion in *Asahi Metal Industry* appear to conflict with *World-Wide Volkswagen* on the issues of the defendant's minimum contacts and the fairness of haling the defendant into the forum.¹⁵⁰ The separate *Asahi Metal Industry* opinions exemplify this conflict in three ways. First, by considering a defendant's knowledge that its product may end up in the forum state as a contact sufficient to support jurisdiction, the court greatly expands *World-Wide Volkswagen's* "foreseeability" discus-

144. See *supra* note 17.

145. See Note, *supra* note 31, at 842; Terez, *supra* note 6, at 940; Weinberg, *supra* note 15, at 929.

146. E.g., Hedrick v. Daiko Shoji, 715 F.2d 1355 (9th Cir. 1983).

147. Unfortunately, this leads to a balancing of the defendant's, forum state's, and plaintiff's interests. See *supra* note 17, and *infra* text accompanying notes 231-43.

148. See *supra* note 76.

149. The focus will be on Justice Brennan's opinion because there is an apparent majority of the Court that will take this position.

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

sion.¹⁵¹ The *World-Wide Volkswagen* Court never intended this rationale of foreseeability to be the basis of the minimum contacts test.¹⁵² Second, the *World-Wide Volkswagen* economic benefits discussion is likewise greatly expanded. In *World-Wide Volkswagen*, Justice White clearly stated that economic benefits alone do not confer jurisdiction.¹⁵³ Additionally, even if receipt of economic benefits alone could support jurisdiction, Asahi's benefits arguably were *de minimis* and would therefore probably be insufficient.¹⁵⁴ Finally, Justice Stevens' *Asahi Metal Industry* opinion emphasized the product's presence in the forum, similar to the dissenters in *World-Wide Volkswagen* and *Burger King*. Focusing on the component's presence is also troublesome because it does not assess the defendant's intentional, forum-directed conduct. The entire purpose of the minimum contacts analysis is to guarantee due process for the defendant.¹⁵⁵

i. foreseeability as a derivative of stream of commerce activity

With respect to the foreseeability analysis, Justice Brennan focused on Asahi's awareness that its component would reach California because Asahi's valve entered the stream of commerce. Justice Brennan treats foreseeability of the product's presence in the forum as a significant factor in assessing a non-resident defendant's minimum contacts with the forum. However, in *World-Wide Volkswagen*, Justice White specifically stated that foreseeability that the product may be present in the forum is a *result of the defendant's purposeful availment*, not part of the actual minimum contacts test.¹⁵⁶

Logically, there is a problem with placing a heavy emphasis on a non-resident defendant's awareness of his product's presence in the forum state. California Supreme Court Justice Lucas addressed this concern:

Gauging the propriety of asserting jurisdiction by whether the party should reasonably expect to be hailed [sic] into court in the forum is noted in *World-Wide Volkswagen Corp.* but not exclusively relied upon and results in a *logical vicious circle*. If a forum

151. Ironically, this "foreseeability standard" as defined by the majority in *World-Wide Volkswagen* was feared by the dissenters as being too narrow in its approach. *Id.* at 299 (Brennan, J., dissenting) and *id.* at 313 (Marshall, J., dissenting).

152. See *supra* text accompanying notes 46-48.

153. See *supra* text accompanying notes 50-51.

154. See *supra* notes 107 & 111.

155. *World-Wide Volkswagen*, 444 U.S. at 296-97.

156. *Id.*

routinely asserts jurisdiction, foreign parties will expect to be hailed [sic] into court there. The more parties expect to be hailed [sic] into court, the greater the propriety of the forum's assertions.¹⁵⁷

Justice Lucas illustrates the dangers a defendant may face if foreseeability of suit was the test. However, the problems with the foreseeability test cut both ways. The plaintiffs may be hurt by the standard as well.

One commentator has faulted the *World-Wide Volkswagen* Court for containing the same circular logic that was evidenced in the California Supreme Court's *Asahi Metal Industry* opinion. Professor Jay states:

[i]f the deciding factor is whether the defendant can anticipate being hailed into court in a particular state, then a contrary result in this very case would have informed manufacturers, distributors, and retail sellers of their vulnerability Since judicial decisions supply the measure of predictability, a reviewing court following this approach should deny jurisdiction whenever the prior cases do not point precisely toward liability to suit in the forum. This might prevent the use of a perfectly fair forum on the sole ground that there was no precedent for jurisdiction.¹⁵⁸

However, Professor Jay's statement must still consider that the state has no authority to render judgment over that defendant when a state asserts jurisdiction over a non-resident defendant who does not possess minimum contacts with the forum state.¹⁵⁹

Furthermore, a defendant's affirmative solicitation of a market in the forum state is distinguishable from a defendant's passive acquiescence when a third party manufacturer injects the component (*i.e.*, in the course of the stream of commerce) into a state as part of a finished product.¹⁶⁰ Passive acquiescence is a gray area because it obviously is not a purposeful, forum-directed activity. Therefore, in cases of this nature, the minimum contacts analysis will be a highly fact-dependent inquiry into the defendant's burdens of defending in the forum.¹⁶¹

In *Asahi Metal Industry*, there were two indications that *Asahi* did *not* avail itself of the California forum. Primarily, these are prag-

157. *Asahi Metal Indus. Co. v. Superior Court*, 39 Cal. 3d 35, 55 n.2, 702 P.2d 543, 555 n.2, 216 Cal. Rptr. 385, 397 n.2 (1985) (Lucas, J., dissenting) (emphasis added).

158. Jay, *supra* note 4, at 443.

159. See *supra* note 3.

160. See *supra* note 52.

161. See *supra* notes 18 & 76 and accompanying text.

matic business concerns. Asahi's valve was a component part; therefore, it *necessarily* had to have been integrated into a part of another product. Second, Cheng Shin never met its burden of proof that Asahi purposefully availed itself of the California forum.¹⁶² Asahi's passive acquiescence in this case clearly is not the equivalent of an intention to capture the California market.¹⁶³

ii. economic benefits and the minimum contacts analysis

The California Supreme Court majority opinion's treatment of Asahi's economic benefits is superficial and cursory in light of the *World-Wide Volkswagen* language. For example, the California Supreme Court found that Asahi gained scant profits even though Justice White expressly stated in *World-Wide Volkswagen* that "marginal revenues . . . [are] far too attenuated a contact to justify that State's exercise of *in personam* jurisdiction over [defendants]."¹⁶⁴

Second, the California Supreme Court found Asahi's minute financial benefits from California stemmed from its indirect relation to the forum state. Asahi was only related to California because it sold parts to the Taiwan corporation who then sold twenty percent of its assemblies to California. The California Supreme Court again considered this a contact despite Justice White's statement in *World-Wide Volkswagen* that such benefits must originate from a "constitutionally cognizable contact with that [s]tate" in order for jurisdiction over the foreign manufacturer to be proper.¹⁶⁵

The California Supreme Court's finding that Asahi possessed sufficient contacts with the California forum was specifically approved of by Justice Brennan in his separate opinion in *Asahi Metal Industry*.¹⁶⁶ Justice Brennan stated, "I do not agree with the plurality's . . . conclusion that Asahi did not 'purposefully avail itself of the California market.'" ¹⁶⁷ However, in approving the California Supreme Court's reasoning, both Justice Brennan and the state supreme court neglected to assess the *extent* Asahi intentionally directed its activities

162. *Asahi Metal Indus. Co. v. Superior Court*, 39 Cal. 3d 35, 55, 702 P.2d 543, 554, 216 Cal. Rptr. 385, 396 (1985) (Lucas, J., dissenting).

163. See *supra* text accompanying notes 72-75.

164. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 299 (1980); see also *supra* text accompanying notes 50-52.

165. *Id.* Once more, this determination turns on the extent Asahi received benefits from California through Cheng Shin's sales. See also *supra* notes 107 & 111.

166. *Asahi Metal Indus. Co. v. Superior Court*, 107 S. Ct. 1026, 1037 (1987).

167. *Id.* at 1035.

toward California. Rather, the analysis used by the California court, and approved by Justice Brennan, has quantified the defendant's economic benefit from entrance into the stream of commerce as a sufficient contact without really addressing Asahi's forum-directed and intentional activities.¹⁶⁸

As illustrated by Justice Brennan's approval of the California Supreme Court reasoning in the Justice's *Asahi Metal Industry* opinion, the language in *International Shoe Co.* and its progeny is applied without regard to a defendant's intentional forum-directed contacts.¹⁶⁹ As a result, the minimum contacts determination has not evolved into a flexible standard as intended¹⁷⁰ but resembles a result-oriented "analysis" to constitutionally assert jurisdiction over a foreign defendant who has insufficient ties with the forum state for jurisdictional purposes.

iii. the chattel as the center of the minimum contacts inquiry

Finally, Justice Stevens' opinion¹⁷¹ is not indicative of the nature and quality of the defendant's contacts with the forum.¹⁷² Justice Stevens placed emphasis on the valve assembly itself by relying on the defendant's awareness of its product in the forum state. Under this approach, the valve assembly became Asahi's agent for service of process.¹⁷³

Similarly, Justice Marshall's and Justice Blackmun's dissent in

168. This Comment takes the position that the "apparent majority's" reasoning is not persuasive in that one conclusion depends on the other. For the defendant to have reasonably foreseen its product's presence in the forum, it must have gained substantial economic benefits. Conversely, for the defendant to have gained substantial economic benefits from the forum state, it must have been aware that its product would be present in the forum state. Therefore, the "awareness" conclusion depends upon a finding that the defendant received substantial economic benefit from the forum state which in turn depends on the defendant's awareness that its product was present in the forum to generate such a benefit in the first place. See also Jay, *supra* note 4, at 443; text accompanying notes 157-58.

169. See *supra* text accompanying notes 146-48.

170. See *supra* text accompanying note 18.

171. *Asahi Metal Indus.*, 107 S. Ct. at 1038.

172. See *supra* notes 5 & 83.

173. Justice White who concurred with Justice Stevens in *Asahi*, discussed such a concept in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 296 (1980). He stated, "if foreseeability were the criterion [in the jurisdictional analysis], a local California tire retailer could be forced to defend in Pennsylvania when a blowout occurs there Every seller of chattels would in effect appoint the chattel his agent for service of process. His amenability to suit would travel with the chattel." *Id.*

*World-Wide Volkswagen*¹⁷⁴ and Justice White's and Justice Stevens' dissenting opinion in *Burger King*¹⁷⁵ centered on the instrument involved (*i.e.*, the car and the contract) to support their positions. To focus the inquiry on the instrument involved is flawed in two respects. First, the component's ultimate location by itself does not affect the foreign defendant's contacts with the forum state so that its presence or place of execution will suddenly confer or deny jurisdiction.¹⁷⁶ Second, where the defendant never purposefully availed itself of the forum state in the first place, the defendant cannot constitutionally be subject to that forum's jurisdiction.¹⁷⁷ For a state to assert jurisdiction then, the role of the product's presence in the forum must have occurred as a result of the defendant's intentional conduct to place the product in that forum.

Justice Brennan's dissent in *World-Wide Volkswagen* illustrated why such a focus should be reliable: "business people, no matter how local their business, cannot assume that goods remain in the business' locality. Customers and goods can be anywhere in the country usually in a matter of hours and always in a matter of a very few days."¹⁷⁸ This statement arguably is even more applicable to the component manufacturer. The very nature of the component means that it will be incorporated into another product which, in turn, will end up in a number of markets, not necessarily of the component manufacturer's choice.

According to this theory, a foreign manufacturer could conceivably be subject to jurisdiction in any state where the component assembler ships the finished product. To subject the *independent distributor*¹⁷⁹ of the finished product to the forum state's jurisdiction is an easy question since it has obviously purposefully availed itself of the forum. However, to hale the foreign *component manufacturer* into the forum, as well, goes against the "traditional notions of fair play and substantial justice"¹⁸⁰ when the defendant did not and could not realistically control the component assembler.¹⁸¹

174. *World-Wide Volkswagen*, 444 U.S. at 313-19 (Marshall, J., & Blackmun, J., dissenting).

175. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 487 (1985) (White, J., & Stevens, J., dissenting).

176. *See supra* note 5.

177. *Id.*

178. *World-Wide Volkswagen*, 444 U.S. at 309.

179. In this case, Cheng Shin.

180. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). *See supra* note 24.

181. There are genuine policy considerations that if the component is what caused the

IV. THE PRAGMATIC CONCERNS: THE U.S. FOREIGN TRADE DEFICIT

The majority of Justices in the United States Supreme Court apparently will permit jurisdiction over a foreign corporation whose product enters the stream of commerce.¹⁸² The only way a foreign corporation can be assured that it will not be subject to jurisdiction is where the circumstances make jurisdiction so unreasonable as to be unconstitutional, as was the case in *Asahi*.

However, not even this standard may be clear enough to let a defendant know whether it will be subject to jurisdiction. The United States Supreme Court has left open the question of whether the presence of defendant's property alone will be a sufficient contact in cases where the plaintiff has no alternative forum.¹⁸³ For example, a court may search more deeply to find a defendant's contacts, if the court is cognizant that the plaintiff has no other United States forum available. In this manner, the court may decide that the defendant's "contact" was the presence of his property in the forum. The court could assert jurisdiction by reasoning that since the defendant foresaw its product's ultimate destination, it would be reasonable to subject the

product failure, that component manufacturer should be held accountable as well as the assembler. However, this does not, *a fortiori*, subject the the component manufacturer to that forum state's jurisdiction.

Rather, the appropriate remedy is for the component assembler to seek indemnification from the manufacturer in a forum where the defendant is under jurisdiction. Mere risk of inconsistent obligations will not automatically change the nature and quality of the defendant's contacts.

However, this was not a problem in *Asahi*. Justice Lucas' dissent states the plaintiffs settled with all of the named defendants. *Asahi Metal Indus. Co. v. Superior Court*, 39 Cal. 3d 35, 55, 702 P.2d 543, 555, 216 Cal. Rptr. 385, 397 (1985). Furthermore, Justice Lucas stated: "even before settlement the California plaintiffs showed no interest in *Asahi*. Plaintiffs never sought to serve *Asahi* as an additional defendant although it must have been apparent . . . that *Asahi* was potentially liable." *Id.*

182. In addition to the Justices who joined Justice Brennan's opinion in *Asahi*, Justice Stevens' focus on the instrumentality itself most likely indicates he would vote for a stream of commerce rationale. However, Justice Stevens also rejected a "mere awareness" standard that a defendant's knowledge may be enough. *Asahi Metal Indus. Co. v. Superior Court*, 107 S. Ct. 1026, 1031 (1987). If the product involved was one of many in the forum and of a fairly hazardous nature, then Justice Stevens would probably allow jurisdiction coupled with the defendant's foreseeability as a contact. *Id.*

183. The presence of the defendant's property in the forum as a contact was discussed in a footnote to *Shaffer v. Heitner*, 433 U.S. 186 (1977). The majority opinion, by Justice Marshall, stated "[t]his case does not raise, and we therefore do not consider, the question whether the presence of a defendant's property in a [s]tate is a sufficient basis for jurisdiction when no other forum is available to the plaintiff." *Id.* at 211 n.37 (emphasis added).

defendant to suit there.¹⁸⁴

Thus, the only bar left to asserting jurisdiction over the defendant would be the unreasonable burden on the defendant of defending in the forum state.¹⁸⁵ Resolution of the jurisdictional question by this means would implicate two concerns. First, the realities of the United States trade deficit¹⁸⁶ may play a significant role in the constitutional determination. Second, as the defendant's in *Helicopteros Nacionales de Colombia, S.A. v. Hall*¹⁸⁷ argued, there may be a denial of equal protection under the fourteenth amendment. The equal protection question is beyond the scope of this Comment and will not be discussed.¹⁸⁸

A. Foreign Trade

The United States trade deficit¹⁸⁹ raises pressing and immediate concerns.¹⁹⁰ Courts may feel inclined to deter foreign manufacturers from entering the U.S. market place because of the trade imbalance. For instance, Professor Weinberg suggests a "hidden agenda" was present behind the Court's decision in *Helicopteros*.¹⁹¹ The defendant's contacts in *Helicopteros* consisted mainly of purchases of the fo-

184. See, e.g., *Hedrick v. Daiko Shoji*, 715 F.2d 1355 (9th Cir. 1983). In addition, Professor Weinberg rationalizes this idea by stating "[foreign corporations] contemplate tort litigation somewhere." Weinberg, *supra* note 15, at 929 (emphasis in original). But see *supra* text accompanying notes 157-58.

185. See *infra* text accompanying notes 245-62.

186. The foreign trade deficit takes into account merchandise, investment earnings, tourism, and foreign aid. *L.A. Times*, Mar. 18, 1987, § IV, at 3, col. 4. However, in merchandise trade, the United States has been in a deficit for fifteen out of sixteen years. *Id.*

187. 466 U.S. 408 (1984).

188. The Court's consideration of the convenience factors also raises a constitutional problem. Professor Weinberg states that the defendants in *Helicopteros* alleged discriminatory intent by the lower court. Weinberg, *supra* note 15, at 931. She agrees that balancing each party's interests, "if it is to be permitted, does lead to different treatment of some defendants." *Id.* at 932.

189. A proposed trade bill was introduced by the House Ways and Means Committee Chairman Dan Rostenkowski (D-Ill.) and trade subcommittee Chairman Sam Gibbons (D-Fla.) in March 1987. *L.A. Times*, Mar. 11, 1987, § IV, at 1, col. 5. The proposed bill represented an effort to reduce the United States deficit without being unduly protectionist in nature. *Id.* Representative Gibbons was quoted as describing Japan's trade surplus "obscene, unwise and unsustainable" yet he would not propose automatic retaliation because of its illegality under international trade agreements. *Id.*

190. Weinberg, *supra* note 15, at 928-29; Weinberg states "if anxiety about foreign trade induced the Supreme Court to cast the *Helicopteros* widows and children abroad to seek relief, the Court did not say so. Instead, it manipulated abstract catch phrases in order to serve a purpose outside the concerns of the due process clause." *Id.* at 929.

191. Weinberg, *supra* note 15, at 929.

rum state's products.¹⁹² Weinberg proposes that the assertion of jurisdiction over a foreign defendant based on the defendant's purchases would implicate foreign trade policy by "creat[ing] unfavorable repercussions for the balance of payments."¹⁹³ Weinberg believed the assertion of jurisdiction would have "unfavorable repercussions" since the result would be to decrease foreign purchases of U.S. manufactured products.¹⁹⁴ However, she then proceeds to counter this argument by stating, "American products will continue to be purchased to the extent they fill needs on the international market at the right price."¹⁹⁵

Weinberg's legitimate concern regarding the effects on trade policy following the *Helicopteros* decision may certainly be adopted in a case such as *Asahi*. In fact, since *Asahi* involves foreign sales in the United States rather than purchases as in *Helicopteros*, Weinberg's concerns may be more relevant. For example, a trial court may exercise jurisdiction despite attenuated contacts because it wants to discourage sales of foreign merchandise in the United States. The court's rationale for this decision would range from a finding of minimum contacts, reasonableness to a defendant of defending in the forum,¹⁹⁶ jurisdiction by necessity,¹⁹⁷ and finally, public policy. Despite the defendant's lack of sufficient contacts, the court may be inclined to find jurisdiction to deter foreign corporations from manufacturing and distributing products for sale in the United States.

If the defendant lacks sufficient contacts, the court nevertheless may feel inclined to find any contact to be a "sufficient" one. An example of a contact used in this manner would be the defendant's awareness that its product's ultimate destination was the forum state. The court would justify this as a sufficient contact based on a "foreseeability" rationale. Since this "purposeful" act is hardly intentional, the court would then have to *confirm* the assertion of jurisdiction by relying on the fairness factors that the defendant is not unduly burdened by defending in the forum.

Ultimately, the court must engage in balancing each party's interests to justify its decision to allow jurisdiction. At this point, the

192. *Helicopteros*, 466 U.S. at 410-11.

193. Weinberg, *supra* note 15, at 929. She bases this argument on amicus curiae briefs filed by the Justice Department. *Id.*

194. *Id.*

195. *Id.*

196. *See infra* text accompanying notes 231-34.

197. *See infra* text accompanying notes 263-71.

court will then consider all types of factors, even those that it constitutionally should not consider. Specifically, the foreign trade deficit concern may enter into the balancing analysis under the guise of the state's interests. The forum's interests would be asserted as a need to deter foreign manufacturers from making unsafe products for sale in the U.S. However, as Professor Weinberg has suggested, the real deterrent effect may center more on remedying the trade imbalance rather than protecting residents from injury.¹⁹⁸

Additionally, the court may also show a genuine concern for the injured plaintiff. As part of the plaintiff's interests, the court would consider whether the plaintiff may lack any other United States forum should there be no jurisdiction in the case before it.¹⁹⁹ Yet, neither the state's need to deter sales, nor jurisdiction by necessity create sufficient contacts by which the court may properly assert jurisdiction.

V. THE FUTURE OF THE MINIMUM CONTACTS ANALYSIS

A. *The Ninth Circuit Approach*

*Data Disc, Inc. v. Systems Technology Associates*²⁰⁰ recognized three crucial factors in the minimum contacts assessment:

- 1) The non resident defendant must do some act or consummate some transaction with the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws.
- 2) The claim must be one which arises out of or results from the defendant's forum-related activities.
- 3) Exercise of jurisdiction must be reasonable.²⁰¹

These requirements sought to insure that the assertion of jurisdiction over the non-resident defendant was constitutional.²⁰² The problem with the *Data Disc* test is its lack of precise standards.²⁰³ Additionally, the *Data Disc* court did not assign the relative weights of these various factors in the jurisdictional determination, nor did it sufficiently comply with the basic constitutional requirements concerning the defendant's due process rights.²⁰⁴ Nevertheless, the *Data Disc* test helps in presenting a solution to the present confusion of the

198. See *supra* text accompanying notes 190-95.

199. See *infra* text accompanying notes 263-71.

200. 557 F.2d 1280 (9th Cir. 1977).

201. *Id.* at 1287.

202. *Id.*

203. See, e.g., *Hedrick v. Daiko Shoji*, 715 F.2d 1355 (9th Cir. 1983).

204. See *supra* note 1.

courts by laying a foundation for a more precise inquiry. Moreover, by redefining and fine-tuning these three *Data Disc* criteria, the inquiry will become more meaningful.

B. A Possible Solution

Many commentators have written on the various analyses used by the courts in the jurisdiction determination. This Comment proposes a solution by assimilating these various viewpoints in light of the Supreme Court's language. Additionally, this Comment also proposes to borrow tort concepts to clarify "minimum contacts." The principles in the various Supreme Court cases are enforced when each of these ideas are brought together.

1. The Intentional Conduct Requirement

The threshold inquiry necessarily must be whether the defendant purposefully availed itself of the forum state by some intentional, forum-directed act.²⁰⁵ Essentially, this requirement seeks to define what are the quality and nature of the defendant's contacts. There are two important considerations in this assessment.

First, the minimum contacts analysis must be made from the defendant's perspective vis-a-vis the forum state. This focus derives from the principles enunciated in *International Shoe Co.*²⁰⁶

One scholar has presented a suggested minimum contacts analysis based on the *International Shoe Co.* language which revolves solely around a defendant's due process rights. The defendant is the only party at the jurisdictional inquiry who possesses due process rights.²⁰⁷ Professor Sonenshein further states that plaintiffs cannot argue a denial of due process based on their inability to bring a lawsuit because the "state is free to close its doors to any or all litigation."²⁰⁸ However, defendants have a legitimate due process concern when they are haled into a forum where they have no contacts.²⁰⁹ Therefore, the

205. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985); see also Ottonello, *supra* note 4, at 21. This commentator suggests that the sole question in the jurisdictional analysis should be whether the defendant purposefully availed itself of the benefits and protections of the forum's laws. *Id.*

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

207. See Sonenshein, *supra* note 4, at 48; see also *infra* notes 244-47 and accompanying text; see also *Burger King*, 471 U.S. at 472 n.13; *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408 (1984); *Chung v. Nana Dev. Corp.*, 783 F.2d 1124, 1129-30 (4th Cir. 1986).

208. Sonenshein, *supra* note 4, at 48.

209. *Id.*

only material relationship at the jurisdictional inquiry is the defendant's relation to the forum state.²¹⁰

The second important consideration to ascertain whether the defendant possesses minimum contacts involves the "intentional" versus "negligent" standards of the defendant's conduct.²¹¹ This Comment proposes that this first prong of the test be characterized as the "intentional conduct requirement" rather than "purposeful availment." The "intentional" approach analyzes a defendant's *affirmative, forum-directed* activity.²¹²

Where the defendant intentionally directs himself, a forum may constitutionally assert jurisdiction over the defendant because this intentional activity demonstrates he has "purposefully avail[ed] himself of the privilege of conducting activities in the forum."²¹³

In contrast, a "negligence" analysis falls short of the constitutional directives. No state shall "make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations."²¹⁴ For this reason, the *World-Wide Volkswagen* opinion disapproved a negligence-type foreseeability standard as the test in the minimum contacts analysis.²¹⁵ Consequently, courts should refrain from an analysis which mirrors this "negligence" type of inquiry.

Another commentator, however, has advocated an approach which would abandon the minimum contacts requirement in its entirety. Instead, his analysis would focus on the fairness to a defendant in defending in the forum state.²¹⁶ Professor Weintraub believes that the due process concerns of the fourteenth amendment apply to these fairness factors.²¹⁷ His approach would take into account advances in technology. Such advances would lessen the burden a foreign defendant would confront. This radical approach of abandoning the minimum contacts analysis in its entirety contradicts the Supreme Court's

210. *But see* Weinberg, *supra* note 15, at 925.

211. *See supra* text accompanying notes 83-87.

212. *See supra* text accompanying notes 83 & 85.

213. *Data Disc Inc. v. Systems Technology Assoc.*, 557 F.2d 1280, 1287 (9th Cir. 1977); *see supra* notes 85-86.

214. *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945) (citing *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877)).

215. *See supra* text accompanying note 45.

216. Weintraub, *supra* note 4, at 522. Weintraub frames the issue as "whether it is so unfair to exercise jurisdiction over the defendant that his due process rights are violated." *Id.* at 522-23.

217. Weintraub, *supra* note 4, at 522-23.

language in the cases construing specific personal jurisdiction which require a purposeful act by the defendant.²¹⁸

Professor Weintraub further posits that the foreign corporate defendant has more funds to expend than the injured plaintiff.²¹⁹ As a result, Weintraub believes the minimum contacts analysis should be abandoned because it does not consider each parties' interests.²²⁰ However, Weintraub's model is not viable because the Supreme Court requires the defendant to possess minimum contacts with the forum state. Such contacts must be of an intentional nature to meet the Supreme Court's requirements.²²¹

2. The "Arising Out Of" Requirement

The next *Data Disc* prong requires that the plaintiff's cause of action result from the defendant's intentionally directed conduct. If a court concludes that a foreign defendant has intentionally directed its activities toward the forum state, then the court must require a connection between the defendant's forum-directed activity and the plaintiff's cause of action before asserting jurisdiction.²²² A problem arises if a court does not clearly distinguish between the plaintiff's cause of action being "related to"²²³ the defendant's activity (*i.e.*, the contact does not breed the cause of action) and "arising out of"²²⁴ the defendant's purposeful activity (*i.e.*, the cause of action is a creation of the contact).²²⁵

218. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-77 (1985).

219. Weintraub, *supra* note 4, at 526.

220. *Id.*

221. See *supra* text accompanying notes 83-84.

222. *Data Disc Inc. v. Systems Technology Assoc.*, 557 F.2d 1280, 1287 (9th Cir. 1977); see also *supra* note 3.

223. An example of plaintiff's cause of action which relates to the defendant's contact is illustrated by the facts in *Helicopteros*. The plaintiffs instituted a wrongful death action which was related to the defendant's alleged negligent acts in South America. However, the defendant's contacts in Texas consisted primarily of equipment purchases in Texas. *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 409-10 (1984).

224. An example of plaintiff's cause of action which arises out of the defendant's contact is illustrated by *Burger King*. The defendant's contact with the forum state was his intentional solicitation to contract with a Florida corporation. Plaintiff's lawsuit arose out of the defendant's conduct in a subsequent breach of contract suit.

225. See Terez, *supra* note 6, at 941-42 for a discussion on how much of a relationship is necessary; see also Note, *supra* note 31, at 840. The *Helicopteros* Court was criticized for determining whether plaintiff's cause of action arose out of or related to the defendant's contacts. However, the Note states that the "Court would require a substantive or legal connection, in contrast to a mere factual relation, between the cause of action and the forum contacts to satisfy the exercise of specific jurisdiction." *Id.*

One commentator has categorized the distinction as being between general and specific jurisdiction.²²⁶ For example, if the court were to find that the defendant possessed the requisite minimum contacts, but the plaintiff's cause of action was only related to and did not arise out of that contact, then the court, in effect, would be exercising a form of general jurisdiction.²²⁷ In essence, the courts would be applying a "but for"²²⁸ test, even though there would be an absence of the "systematic and continuous"²²⁹ activity that has traditionally justified such jurisdiction.²³⁰ For this reason, it is imperative that the courts find that plaintiff's cause of action arose out of the defendant's *purposeful* activity.

3. The Role of the Plaintiff's and State's Interests

Finally, the third prong of the *Data Disc* test relates to the so-called "reasonableness" or "convenience" aspect of asserting jurisdiction.²³¹ This factor takes into account each of the parties' interests in having the matter tried in the forum state. The courts presently consider this prong by balancing each parties' interests.²³² While there may be strong policy arguments²³³ for employing a balancing or sliding scale²³⁴ approach, there nevertheless exists more pressing and fundamental constitutional arguments against it.²³⁵

Professor Sonenshein has advocated what this Comment believes is the appropriate role of the plaintiff's and the forum state's interests.²³⁶ In theory, he uses the language in *Shaffer v. Heitner*²³⁷ to create a tripartite nexus of the plaintiff's interests, the state's interests, and the defendant's interests.²³⁸ Similar to the *Data Disc* nexus requirement that the plaintiff's cause of action arise out of the defend-

226. Terez, *supra* note 6, at 936.

227. *Id.*

228. *Id.*

229. See *supra* note 24 and accompanying text.

230. Terez, *supra* note 6, at 936.

231. *Data Disc Inc. v. Systems Technology Assoc.*, 557 F.2d 1280, 1287 (9th Cir. 1977).

232. The reasonableness factors are also called the convenience factors.

233. See *infra* Part IV of text; see also Weintraub, *supra* note 4, at 516. Professor Weintraub states, "[w]hen a court sees blood on the ground, it is very likely to find jurisdiction over a non-resident seller of the product that caused the injury." *Id.*; see also Hay, *supra* note 20, at 38.

234. *E.g.*, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-78 (1985).

235. See *supra* note 3; see also *infra* text accompanying notes 251-54.

236. Sonenshein, *supra* note 4, at 52-53.

237. 433 U.S. 186 (1977); see also Terez, *supra* note 6, at 937.

238. Sonenshein, *supra* note 4, at 52.

ant's intentional, forum-directed conduct, Sonenshein requires that the litigation be connected—or have a relationship—to the forum.²³⁹ However, he states that this connection alone is insufficient to establish jurisdiction over the defendant when there is no connection between the defendant and forum state as well.²⁴⁰ Consequently, the triad is completed by the defendant-forum nexus. This relationship essentially is the requisite minimum contacts the defendant must possess with the forum state.

Thus, the third aspect of the specific personal jurisdiction analysis ultimately is concerned with the defendant's intentional conduct in the forum state.²⁴¹ The nexus between the plaintiff's litigation and the forum state, and the defendant's relation to the forum, illuminate the extent to which the defendant may have intentionally directed its activities at the forum. However, the litigation-forum connections do not by themselves support jurisdiction.²⁴²

Moreover, to credit the plaintiff's interests and state's interests with more weight than proposed above would be, in effect, a premature venue and *forum non conveniens* analysis.²⁴³

C. *Fine-Tuning the Analysis*

1. Constitutionalized Venue²⁴⁴

When the analysis proceeds to narrowly focus on the defendant's intentional contacts with the forum, the plaintiff's interests and the forum's interests are not crucial. In fact, to afford the other interests

239. *Id.*

240. *Id.*

241. Ottonello, *supra* note 4, at 30. Ottonello states that the "outcome of the minimum contacts test, therefore, necessarily determines the fairness of exercising jurisdiction in light of the defendant's inconvenience [T]he inconvenience of the parties should not be weighed against the constitutional requirement of minimum contacts." *Id.*

242. See Terez, *supra* note 6, at 937-38. Terez makes the defendant-forum relationship the base of his triangular analysis, involving the defendant's, forum's, and plaintiff's interests. Professor Sonenshein did not include the plaintiff's interests as a separate consideration. Sonenshein, *supra* note 4, at 53. Rather, plaintiff's interests, along with the state's interests, composes the litigation-forum connection. *Id.* Furthermore, the "plaintiff's interests" in the litigation-forum connection is in part dependent on the *Data Disc* second prong requirement that the plaintiff's cause of action arise out of the defendant's conduct. Louis, *The Grasp of Long-Arm Jurisdiction Finally Exceeds its Reach: A Comment of World-Wide Volkswagen Corp. v. Woodson and Rush v. Savchuk*, 58 N.C.L. REV. 407, 421 (1980).

243. See *infra* text accompanying notes 244-62; see also Sonenshein, *supra* note 4, at 55; Ottonello, *supra* note 4, at 22, 23.

244. This is termed "constitutionalized venue" because these venue factors are afforded constitutional weight via the due process clause.

greater weight than already relegated, would be improper. Several commentators²⁴⁵ have proposed that consideration of a defendant's claim of unreasonable jurisdiction during the jurisdictional analysis ultimately is a *forum non conveniens* inquiry.

Typically, a defendant's claim that jurisdiction is unreasonable would arise in the following manner: under the current Ninth Circuit *Data Disc* test,²⁴⁶ plaintiffs would initially specify the defendant's contacts with the forum state. Plaintiff would also demonstrate that his cause of action arose out of the defendant's contacts, as well as that jurisdiction over the defendant would be reasonable. However, plaintiff's primary burden is establishing defendant's contacts.²⁴⁷ The defendant is then left with two alternatives to challenge the jurisdiction. First, he will argue that he lacks contacts with the forum. In the alternative, defendant will argue that even if he is found to possess the requisite contacts with the forum, the individual circumstances of his case make the assertion of jurisdiction unreasonable.

If the extent of the defendant's contacts with the forum state are questionable, then under the *Data Disc* approach, the courts must apply the remaining two prongs. One of these requirements is the "nexus" factor. The courts generally have not analyzed this point very carefully.²⁴⁸ Thus, the courts are left to the "reasonableness" prong. One commentator considers the elements involved in this third prong to be "virtually identical to those evaluated under the doctrine of *forum non conveniens* when a court is asked to decline to exercise the jurisdiction it concededly possesses."²⁴⁹

Ottonello further suggests that the plaintiff and forum interests add nothing to the analysis once the defendant's minimum contacts

245. Sonenshein, *supra* note 4, at 55; Ottonello, *supra* note 4, at 23; but see Weintraub, *supra* note 4, at 523.

246. See *supra* text accompanying notes 200-01.

247. *Data Disc Inc. v. Systems Technology Assoc.*, 557 F.2d 1280, 1285, 1287 (9th Cir. 1977).

248. *E.g.*, *Hedrick v. Daiko Shoji*, 715 F.2d 1355 (9th Cir. 1977).

249. Ottonello, *supra* note 4, at 23. To illustrate his theory, Ottonello cites the California Supreme Court case of *Buckeye Boiler v. Superior Court*, 71 Cal. 3d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969). The court in *Buckeye* implemented a two-prong test where the plaintiff first had to establish the defendant's contacts. *Id.* at 898, 458 P.2d at 62, 80 Cal. Rptr. at 118. Then, the court considered the "propriety" of asserting jurisdiction based on whether the forum state was the most convenient forum. *Id.* However, as Ottonello points out, the lower California courts have not embraced *Buckeye's* convenience factor component. Ottonello, *supra* note 4. Furthermore, the California Supreme Court in *Asahi* cited to *Buckeye*, but did not rely on it.

are demonstrated.²⁵⁰ In fact, assessing the defendant's convenience factors at the jurisdictional stage may actually work to the plaintiff's and forum's *detriment*.²⁵¹ Ottonello presents the following example: if the convenience factors carried the weight the *Asahi* majority apparently affords them, then any defendant who is constitutionally amenable to suit may still be able to defeat jurisdiction.²⁵² The defendant would have to show that the assertion of jurisdiction would be so unreasonable in its case that it infringes on his due process right.²⁵³ If the court is convinced that jurisdiction would be unreasonable, the court lacks jurisdiction and must dismiss the case.

In contrast, if the convenience factors were left to their proper status in the *forum non conveniens* analysis, then the court would maintain jurisdiction over the defendant in any event. If the defendant presented the same claim of unreasonableness, the action would not be dismissed for lack of jurisdiction. Rather, the action would be transferred and the plaintiff could still have his day in court.²⁵⁴ Therefore, to ensure fairness to both the plaintiff²⁵⁵ and the defendant,²⁵⁶ this Comment suggests the convenience factors should be stricken from the jurisdictional inquiry. These factors arise once the court possesses jurisdiction over the defendant. Then, the court is free to scrutinize the competing interests involved by implementing a proper *forum non conveniens* analysis.

However, under Professor Weintraub's proposal²⁵⁷ to abandon

250. Ottonello, *supra* note 4, at 35.

251. The defendant's detriment is of a constitutional dimension and has already been discussed.

252. *Id.* at 37.

253. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 309 (1980) (Brennan, J., dissenting).

254. Professor Sonenshein reads the *Burger King* opinion as approval that the defendant's inconveniences will be resolved by applying the *forum non conveniens* standards. Sonenshein, *supra* note 4, at 57; *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477-78 (1985). Additionally, since the *forum non conveniens* analysis also assesses the forum state's interests, a transfer of the action could, presumably, remove the action to a forum which possesses a *greater* interest in the action than the original forum.

255. Fairness is discussed in the context of the plaintiff's interests as being equated with the plaintiff's ability to bring a lawsuit against a defendant who does possess minimum contacts. A *forum non conveniens* inquiry at the jurisdictional stage may rob the court of jurisdiction if the defendant can assert enough facts to make jurisdiction unreasonable. Plaintiff's case would then be dismissed; *see also supra* text accompanying note 208.

256. The fairness standard afforded a defendant relates to whether due process permits a forum to assert jurisdiction over a defendant where the defendant has no contacts with the forum, but would not be inconvenienced by defending there.

257. *See supra* text accompanying notes 216-20.

the minimum contacts analysis and focus instead on the fairness of asserting jurisdiction over a defendant, the role of the convenience factors is unclear. Weintraub asserts that under his proposed analysis, *forum non conveniens* is still crucial.²⁵⁸ He posits a hypothetical where jurisdiction over a defendant, though reasonable, may nevertheless be unwise.²⁵⁹ He states: “[t]he defendant may be able to show that suit in another available forum will be more convenient for the parties and witnesses and will avoid placing unnecessary burdens and expenses on local courts.”²⁶⁰

The *forum non conveniens* role in Professor Weintraub’s model reveals the model’s flaw. Since his inquiry has already analyzed the fairness of asserting jurisdiction over a defendant, jurisdiction is presumptively constitutional.²⁶¹ Necessarily then, if by assessing the plaintiff and state convenience factors, the court concludes the present forum is “unwise,” then these convenience factors defeat the constitutionality of even asserting jurisdiction. Part of the original assessment whether jurisdiction was fair must have included the defendant’s convenience factors in defending in a *particular* forum.

Professor Weintraub’s theory allows a *forum non conveniens* inquiry to switch forums because of *plaintiff’s* interests. The entire set of conditions which made jurisdiction fair to begin with are now completely different. In effect, Professor Weintraub’s jurisdictional reform has collapsed into solely a constitutionalized venue approach.²⁶² His model illustrates the importance of separating the minimum contacts requirement from the conveniences/fairness factors.

2. Jurisdiction by Necessity²⁶³

In the international market, the concept of jurisdiction by necessity is more readily apparent in actions brought by injured plaintiffs in the United States. The facts in *Asahi* and *Helicopteros* illustrate a scenario implicating this doctrine. The plaintiff, an individual suffering personal injuries, sues a large, international manufacturer in the plain-

258. Weintraub, *supra* note 4, at 523.

259. *Id.*

260. *Id.*

261. According to Professor Weintraub’s reform, fairness is equated with constitutional due process concerns. *Id.* at 486.

262. *See supra* note 244.

263. The doctrine of jurisdiction by necessity was raised in *Shaffer v. Heitner*, 433 U.S. 186, 211 n.37 (1977), where the Court left open the question of whether property could suffice as a contact if the plaintiff did not have an alternative forum. *Id.*

tiff's own state. Significantly, however, the foreign defendant lacks direct and purposeful ties with the plaintiff's forum, or any other forum, within the United States.²⁶⁴ In a sense, plaintiff's choice of forum is the only forum available to him. If he is not allowed to sue in that forum, he is faced with suing abroad.

However, when the forum state attempts to assert jurisdiction over the defendant, the court may not properly do so since the defendant did not conduct any purposeful activity. Under the analysis proposed by this Comment, the case would then have to be dismissed. Professor Weinberg has criticized this harsh result to the plaintiff.²⁶⁵

To illustrate, she feels that when balancing the conveniences, "the lack of an alternative forum in the United States for the widows and children in *Helicopteros* does make a difference."²⁶⁶ Professor Weinberg underscores the realities of plaintiffs suing abroad in terms of the damages²⁶⁷ and the foreign judicial proceedings²⁶⁸ they face.

Thus, as Professor Weintraub notes, in *Helicopteros*, "[i]f there is a jurisdictional problem, it is caused by the 'minimum contacts' requirement."²⁶⁹ This statement is precisely the issue. Minimum contacts assure constitutional due process to the defendant, who after all, has no control (subject to a default judgment) when the plaintiff initiates a lawsuit. The fact that the plaintiff may have no alternative forum will not suddenly confer jurisdiction over the defendant. If plaintiff's lack of an alternative forum forces a court to hold defendant amenable to suit, the due process requirements vanish.²⁷⁰ Rather than ignoring the constitutional guarantees assured through the minimum contacts approach, reforms in jurisdiction by necessity cases lie elsewhere.²⁷¹

264. See *infra* text accompanying notes 272-74.

265. Weinberg, *supra* note 15, at 932.

266. *Id.*; see also *supra* text accompanying notes 198-99.

267. *Id.* at 933.

268. *Id.* at 934.

269. Weintraub, *supra* note 4, at 510.

270. Essentially, jurisdiction by necessity cases exemplify where due process concerns apply. When the plaintiff is injured and has no alternative United States forum, the view that due process concerns should go to the defendant's inconveniences is much more palatable than focusing on the defendant's contacts alone. See *supra* note 3.

271. Hay, *supra* note 53, at 453. He states that there:

are policy considerations in favor of the exercise of jurisdiction by the forum [in jurisdiction by necessity cases]. But policy does not make for constitutionality. It is suggested, however, that a 'national contacts' approach safeguards the foreign defendant's due process rights as much as a forum state contacts approach is designed to safeguard due process rights of sister state defendants.

Id. at 453-54.

3. Aggregate Contacts

An aggregate contacts or national contacts approach applies a minimum contacts analysis to the foreign defendant's contacts with the United States as opposed to an individual forum state.²⁷² However, as Professor Weintraub notes, an aggregate contacts solution is still subject to the same flaws as a minimum contacts inquiry.²⁷³ He states that the convenience factors must still be weighed even after the court assesses the defendant's aggregate contacts.²⁷⁴

VI. CONCLUSION

The courts must return to the basic principles of the minimum contacts analysis that *World-Wide Volkswagen* and *Burger King* enunciate. To summarize, the courts must employ a three part test for a court to constitutionally assert jurisdiction over a non-resident defendant. First, the court must initially find that the defendant has engaged in intentional conduct with the forum state. Then, the court must analyze whether the plaintiff's cause of action arises out of or results from the defendant's conduct. The "nexus" must be more than a mere relation; rather, the cause of action must be a result of that contact. Finally, the court may look at the forum state and the plaintiff's concerns only to the extent that these factors illuminate either of the first two prongs. With such an analysis, the process afforded a defendant will be due process.

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272. Weintraub, *supra* note 4, at 510-11.

273. *Id.* at 511.

274. *Id.* Furthermore, Professor Weinberg raises additional questions emerging at the convenience stage. Weinberg, *supra* note 15, at 938-39. For example, when addressing the forum's interest, is it the particular forum state's interest which is being assessed, or the nation's interest? *Id.* at 939. The aggregate contacts doctrine and its difficulties are beyond the scope of this Comment. See generally Lilly, *Jurisdiction Over Domestic and Alien Defendants*, 69 VA. L. REV. 85 (1983); Note, *National Contacts as a Basis for In Personam Jurisdiction over Aliens in Federal Question Suits*, 70 CALIF. L. REV. 686 (1982).

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