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Ashley v. Abbott Laboratories: Reconfiguring the Personal Jurisdiction Analysis in Mass Tort Litigation

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RECENT DEVELOPMENTS

Ashley v. Abbott Laboratories: Reconfiguring the Personal Jurisdiction Analysis in Mass Tort Litigation

I. INTRODUCTION 190
II. THE *ASHLEY* LITIGATION AND THE CREATION OF A NEW JURISDICTIONAL STANDARD 191
III. THE DEVELOPMENT OF DES AND THE MARKET SHARE ANALYSIS ESTABLISHED BY *SINDELL V. ABBOTT LABORATORIES* 193
A. *The History of DES* 193
B. *DES Litigation and the Market Share Theory* 194
IV. JURISDICTION JURISPRUDENCE: THE TRADITIONAL FORMULATIONS 196
A. *The Foundational Cases:* Pennoyer *and* International Shoe 197
B. *The Importance of Fairness Under the Due Process Clause* 199
C. *The Continued Influence of Interstate Federalism* 202
V. RETURN TO THE *ASHLEY* LITIGATION: A REVISED APPROACH TO JURISDICTION IN MASS TORT LITIGATION 207
A. *The Uniqueness of a Mass Tort and the* Ashley *Situation* 207
B. *The* Ashley *Court's Procedural Approach* 208
1. The *Ashley* Departure: A Reflection of Substantive State Policy 208
2. New York's Long-Arm Statutes 209
C. *Difficulties in Applying Current Jurisdiction Doctrine to Mass Torts* 211
D. *The* Ashley *Test for Personal Jurisdiction in Mass Tort Litigation* 214
VI. IMPLICATIONS OF THE *ASHLEY* HOLDING 216
A. *The Impact of the* Ashley *Test on DES*

Litigation 217
B. *The Impact of the* Ashley *Test on Jurisdictional Theory* 220
1. The Sovereignty Focus, the Contacts Requirement, and Interstate Federalism 221
2. The Role of State "Interests" and Choice of Law 224
3. The Due Process Clause 228
4. Judicial Economy and Efficiency 230
VII. CONCLUSION 232

I. INTRODUCTION

The Supreme Court has struggled for over one hundred years to articulate a workable standard for determining whether a court may exercise personal jurisdiction[1] over a defendant without violating the Due Process Clause of the Fourteenth Amendment. Despite a substantial body of precedent, the Court has been unable to enunciate a consistent, intelligible test to govern personal jurisdiction. The Court's pronouncements swing between two bases: the territoriality, sovereignty, and power concerns established by *Pennoyer v. Neff*,[2] and the defendant-centered fairness analysis announced in *International Shoe Co. v. Washington*.[3] As a result of this inconsistency, lower courts adhere to vastly different jurisdictional principles. Commentators have become increasingly vocal about the need to establish a clear, concise jurisdictional test that achieves the ultimate goals of coherence, fairness, and judicial economy.[4]

A recent decision of the District Court for the Eastern District of New York attempted to define such a jurisdictional standard in the

1. The term "personal jurisdiction" refers to a court's power to exercise control over the individual litigants before it. *Leroy v. Great W. United Corp.*, 443 U.S. 173, 180 (1979). In contrast, "subject matter jurisdiction" refers to a court's power to adjudicate a particular type of case. See *Murrell v. Stock Growers' Nat'l Bank*, 74 F.2d 827, 831 (10th Cir. 1934).

2. 95 U.S. 714 (1877).

3. 326 U.S. 310 (1945).

4. See, for example, Russell J. Weintraub, *Due Process Limitations on the Personal Jurisdiction of State Courts: Time for Change*, 63 Or. L. Rev. 485, 522 (1984) (claiming that it is "time to shape a doctrine of state court jurisdiction that focuses on fairness to the defendant under all circumstances") (footnote omitted); Frederick S. Mandler, *Federal Practice and Procedure: Personal Jurisdiction and Class Action*, 1 Ann. Surv. of Am. L. 51, 53 (1986) (noting "a new trend in personal jurisdiction doctrine in which limitations on state jurisdiction derive from individual liberty interests and state sovereignty is protected through constitutional constraints on choice of law").

context of DES litigation. *Ashley v. Abbott Laboratories (In re DES Cases)*[5] proposed a two-part test designed to guide courts in their determination of personal jurisdiction over nonresident defendants in DES litigation; the court suggested that the *Ashley* test might function equally well in other mass tert litigation. The *Ashley* test and the principles that underlie it signify a renewed commitment on the part of courts to seek congruous, effective jurisdictional standards. *Ashley* represents a laudable attempt to reconcile the disparate and often conflicting pronouncements of the Supreme Court in this confused area.

This Recent Development examines the *Ashley* litigation and the jurisdictional standard proposed by the *Ashley* court against the background of Supreme Court jurisdiction jurisprudence, particularly in the context of multiparty, mass tort litigation. Part II introduces the procedural history of the *Ashley* litigation and the jurisdictional standard established by the court. Part III traces the history and development of diethylstilbestrol (DES) and the resulting litigation. Part IV surveys the major Supreme Court pronouncements on personal jurisdiction, focusing on the interrelated strands of sovereignty, fairness, interest, and contacts. Part V then analyzes the *Ashley* court's analytical approach to the jurisdictional inquiry in light of Supreme Court precedent and academic commentary. Finally, Part VI examines the implications of the *Ashley* holding both for DES and other mass tort litigation and for jurisdictional inquiry generally.

II. THE *ASHLEY* LITIGATION AND THE CREATION OF A NEW JURISDICTIONAL STANDARD

In the *Ashley* litigation, numerous plaintiffs brought claims in federal court in the Eastern District of New York based on diversity of citizenship, alleging injury due to exposure to DES in utero.[6] Approximately one-half of the plaintiffs in *Ashley* were residents of New York.[7] The named defendants were manufacturers and distributors of DES, or successors to such companies.

Two defendants filed motions to dismiss, alleging that the district court could not exercise personal jurisdiction over them consis-

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5. 789 F. Supp. 552 (E.D.N.Y. 1992).

6. The plaintiffs' allegations included claims based on negligence, strict liability, and warranty. Id. at 559.

7. Id. The *Ashley* court limited the effectiveness of its pronouncements to residents of New York. Id. at 559-60.

tent with the requirements of due process.[8] The defendants' motions presented the court with a dilemma. New York had taken a special interest in DES litigation and had developed a policy of providing compensation to DES victims.[9] Yet the court found that traditional formulations for establishing personal jurisdiction over nonresident defendants were inadequate to address the concerns raised in the *Ashley* litigation. The *Ashley* court concluded that the mass tort setting of the litigation required a re-examination of the fundamental principles of personal jurisdiction analysis.[10] In response to the need for a revised jurisdictional standard for mass tort litigation, the *Ashley* court developed a two-part analysis. The court relied on Supreme Court precedent but focused on the fairness and interest elements present in Supreme Court jurisdiction jurisprudence. The test as articulated by the *Ashley* court incorporates both an interest and a burden inquiry:

> I. The court must first determine if the forum state has an appreciable interest in the litigation, i.e., whether the litigation raises issues whose resolution would be affected by, or have a probable impact on the vindication of, policies expressed in the substantive, procedural or remedial laws of the forum. If there is an appreciable state interest, the assertion of jurisdiction is prima facie constitutional.
>
> II. Once a prima facie case is made, the assertion of jurisdiction will be considered constitutional unless, given the actual circumstances of the case, the defendant is unable to mount a defense in the forum state without suffering relatively substantial hardship.
>
> Evidence to be considered in determining the defendant's relative hardship includes, inter alia, (1) the defendant's available assets; (2) whether the defendant has or is engaged in substantial interstate commerce; (3) whether the defendant is being represented by an indemnitor or is sharing the cost of the defense with an indemnitor or co-defendant; (4) the comparative hardship defendant will incur in defending the suit in another forum; and (5) the comparative hardship to the plaintiff if the case were dismissed or transferred for lack of jurisdiction.[11]

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8. The plaintiffs alleged that defendant Boehringer Ingelheim Pharmaceuticals, Inc. (Boehringer) was responsible for Stayner Corporation (Stayner), a manufacturer of DES, although Boehringer itself never produced or sold DES. Stayner obtained DES from chemical companies across the nation and manufactured its DES pills in California. Stayner "never was licensed to do business in New York, never maintained an office or agent in New York, never solicited business in New York." Id. at 559. Boehringer, in contrast, was licensed to do business in New York and sold its products, which did not include DES, throughout the nation. Boehringer and Stayner merged in 1979. Id.

Boyle & Co. (Boyle) is a closely held California corporation that claimed to have manufactured and sold DES only in states west of the Mississippi River. Boyle asserted that it never marketed or sold DES in New York, was never licensed to do business in New York, never maintained an office or agent in New York, and never advertised in New York. Id.

9. See notes 108-15 and accompanying text.

10. *Ashley*, 789 F. Supp. at 577.

11. Id. at 587.

III. THE DEVELOPMENT OF DES AND THE MARKET SHARE ANALYSIS ESTABLISHED BY *SINDELL V. ABBOTT LABORATORIES*

A. The History of DES

The Food and Drug Administration (FDA) first approved DES, a synthetic estrogen, for use in the United States in 1941.[12] Researchers believed the drug was effective in treating the symptoms of menopause, vaginitis, and certain cancers.[13] The approved uses of the drug, however, initially did not include the prevention of miscarriage.[14]

In 1947 and 1948, numerous manufacturers sought FDA approval for the use of DES to aid in the prevention of miscarriage and fetal death.[15] Research had revealed that low levels of estrogen often accompanied miscarriage. In theory, therefore, a synthetic estrogen could alleviate the risk of miscarriage.[16] By 1952, the FDA considered DES safe for use in the prevention of miscarriage.[17] Manufacturers, encouraged by the drug's widespread acceptance, engaged in nationwide advertising and marketing campaigns.[18]

During the 1950s and 1960s, the drug was widely accepted as an effective means of preventing miscarriage. Millions of women ingested DES.[19] DES was sold nationally as a generic drug, produced by all manufacturers according to an identical formula,[20] and market-

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12. *Bichler v. Eli Lilly & Co.*, 55 N.Y.2d 571, 436 N.E.2d 182, 183 (1982).

13. *Bichler*, 436 N.E.2d at 183; *Ashley*, 789 F. Supp. at 558. Physicians use DES today to treat some of these non-pregnancy-related ailments. *Bichler*, 436 N.E.2d at 184.

14. *Ashley*, 789 F. Supp. at 558; *Bichler*, 436 N.E.2d at 183-84.

15. *Ashley*, 789 F. Supp. at 558. See also Arthur H. Downey and Kenneth G. Gulley, *Theories of Recovery for DES Damage*, 4 J. Legal Med. 167, 170 (1983).

16. *Ashley*, 789 F. Supp. at 558.

17. *Bichler*, 436 N.E.2d at 184. In 1952, the FDA eliminated the requirement that manufacturers continue to submit new drug applications and declared DES to be recognized generally as safe. Id.

18. Authorities estimate the number of DES manufacturers at approximately 200, although some estimates range as high as 300. Downey and Gulley, 4 J. Legal Med. at 171-72, 180 n.63 (cited in note 15). DES never was patented in the United States. Rather, manufacturers followed a standard formula. Because manufacturers often marketed DES under a generic rather than a brand name, and because all DES prescriptions shared an identical chemical composition, pharmacists frequently filled DES prescriptions with whichever manufacturer's product was available. See Note, *Market Share Liability: An Answer to the DES Causation Problem*, 94 Harv. L. Rev. 668, 670 (1981).

19. *Sindell v. Abbott Lab.*, 26 Cal.3d 558, 607 P.2d 924, 927 (1980) (estimating 1.5 to 3 million women took DES) (citing Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 Fordham L. Rev. 963, 964-67 (1978)). See also Note, 94 Harv. L. Rev. at 668 (cited in note 18).

20. The FDA requested that all DES manufacturers agree on a single, standard chemical formula for DES to lessen the administrative burden imposed on the agency by numerous new drug applications. See Downey and Gulley, 4 J. Legal Med. at 169 (cited in note 15).

ed nationally by a standard description.[21] Even local manufacturers that targeted small regional markets relied heavily on national marketing programs and public consensus regarding the drug's efficacy.[22] Because all manufacturers adhered to a standard formula, DES prescriptions were filled interchangeably with drugs produced by various manufacturers.[23] Although numerous companies produced and sold DES between 1949 and 1971, several DES manufacturers no longer exist.

By 1971, however, medical research had revealed that DES was responsible for the presence of a rare form of vaginal cancer, clear cell adenocarcinoma, in the daughters of several women who had ingested DES while pregnant.[24] Shortly thereafter, the FDA withdrew approval for the marketing of DES for use by pregnant women.[25]

B. DES Litigation and the Market Share Theory

DES litigation began to emerge during the 1970s.[26] Litigants filed a large number of DES lawsuits in New York.[27] However, plaintiffs in DES litigation faced an enormous burden: because of

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21. See, for example, *Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 539 N.E.2d 1069, 1072 (1989) (estimating 300 manufacturers of DES).

22. *Ashley*'s discussion of the need for a revised jurisdictional standard reflects the significance of the industry practice of nationwide marketing: "[T]he technology, marketing, sociology, and possible ill effects of DES knew no state boundaries. The national nature of the resulting toxic tort litigation must be reflected in the law's treatment of jurisdictional issues." *Ashley*, 789 F. Supp. at 558.

23. Downey and Gulley, 4 J. Legal Med. at 170 (cited in note 15). See also Note, 94 Harv. L. Rev. at 670 (cited in note 18).

24. Vaginal adenocarcinoma was, until this time, a rare disease. *Bichler*, 486 N.E.2d at 184. Medical evidence also indicates that DES is responsible for several other disorders in daughters of DES patients, including miscarriage, ectepic pregnancy, and uterine cancer. In addition, DES may cause problems such as undescended testicles, genital deformities, and sterility in male offspring exposed to the drug. Children exposed in utero to DES may continue to reveal medical problems linked to the drug as they age. Further evidence suggests that daughters of DES patients may pass on similar defects to their own female children. The long-term effects, including permanent, inheritable genetic defects, are uncertain. *Ashley*, 789 F. Supp. at 558. See also Note, 94 Harv. L. Rev. at 669 n.8 and authorities cited therein (cited in note 18).

25. However, some evidence exists that docters continued to prescribe DES to pregnant women throughout the 1970s. *Ashley*, 789 F. Supp. at 558. For a detailed history of the development and marketing of DES in the United States, see Downey and Gulley, 4 J. Legal Med. at 168-72 (cited in note 15).

26. One source estimated that by 1981, litigants had brought approximately 1000 lawsuits against DES manufacturers. Note, 94 Harv. L. Rev. at 669 (cited in note 18).

27. "In New York state alone, more than 500 DES cases against scores of defendants are pending in state and federal courts." *Ashley*, 789 F. Supp. at 559. An earlier case noted that "[i]n New York State alone it has been estimated that more than 100,000 women were injured by exposure to DES in utero." *Matter of DES Market Share Litigation*, 79 N.Y.2d 299, 591 N.E.2d 226, 227 (1992). In 1992, state and federal courts in New York appointed a special master-referee to coordinate settlement negotiations in pending DES litigation. *In re New York County DES Litigation*, 142 F.R.D. 58 (E.D.N.Y. 1992).

marketing techniques, the passage of time, and the period during which the effects of DES remained latent,[28] plaintiffs frequently were unable to identify the specific manufacturer of the drug their mothers had ingested.[29] Although several courts dismissed DES actions because plaintiffs were unable to satisfy the specific causation requirement,[30] other courts attemptod to manipulate existing tort liability doctrines in order to grant DES daughters relief.[31]

The California Supreme Court went one step further in *Sindell v. Abbott Laboratories*[32] when it modified the alternative liability theory established in *Summers v. Tice*[33] to conform to the DES situation. The *Summers* theory was based on a case in which all defendants who possibly could have caused a plaintiff's injury were before the court. Because DES plaintiffs generally were unable to bring all DES manufacturers before the court,[34] however, the *Sindell*

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28. Adenocarcinoma appears after a minimum latency period of 10 to 12 years. *Sindell*, 607 P.2d at 925. This latency period meant that pharmacy and medical records concerning DES prescriptions frequently had been lost or destroyed and that memories had faded by the time litigation commenced. See Downey and Gulley, 4 J. Legal Med. at 172 (cited in note 15).

29. Although DES plaintiffs can prove both that DES caused their injuries and that certain defendants manufactured DES for pregnancy-related uses, they are frequently unable to establish which company manufactured the drug ingested by their mothers. See generally Note, 94 Harv. L. Rev. 668 (citod in note 18). A plaintiff who is able to identify the exact manufacturer of the drug that caused her injuries typically may proceed under traditional tort liability principles. *Hymowitz*, 539 N.E.2d at 1073.

30. See, for example, *Gray v. United States*, 445 F. Supp. 337 (S.D. Tex. 1978); Note, 94 Harv. L. Rev. at 670 n.17 (cited in note 18).

31. Courts have relied on various theories te enable plaintiffs te overcome pleading barriers. For example, New York courts initially adopted the concert of action theory te aid plaintiffs in overceming the causation barrier. *Bichler*, 436 N.E.2d at 182. In contrast, several courts have accepted the alternative liability theory initiated in *Summers v. Tice*, 33 Cal. 2d 80, 199 P.2d 1 (1948) (en banc), as a basis for liability of DES manufacturers. See *Abel v. Eli Lilly & Co.*, 94 Mich. App. 59, 289 N.W.2d 20 (1979); *Ferrigno v. Eli Lilly & Co.*, 175 N.J. Super. 551, 420 A.2d 1305 (1980). For a discussion of the alternative liability theory, see notes 33, 35, 39, and accompanying text. Plaintiffs alternatively have alleged manufacturer liability under enterprise liability and conspiracy theories. For a thorough discussion of the various tert liability theories and their shortcomings in the DES context, see Downey and Gulley, 4 J. Legal Med. at 173-90 (cited in note 15). See also *Sindell*, 607 P.2d 924 (rejecting alternative liability, enterprise liability, and concert of action theories as inappropriate in the DES context).

32. 607 P.2d 924 (1980).

33. 199 P.2d 1 (1948). In *Summers*, two hunters negligently fired teward the plaintiff, who was unable to establish which defendant actually injured him. The *Summers* court held that when two or more defendants, acting independently, have breached a duty of care teward the plaintiff, but only one defendant actually caused the plaintiff's injury, the court will hold the defendants jointly liable unless each defendant is able te prove that he did not cause the injury. Id. at 3-5.

34. Numerous DES manufacturers entered and exited the DES market between 1947 and 1971; many are no longer in existence. See Note, 94 Harv. L. Rev. at 672 (cited in note 18). Further, plaintiffs would be hard-pressed te find a forum able te obtain jurisdiction over all existing manufacturers. *Sindell*, 607 P.2d at 936. In *Sindell*, only five of approximately 200 DES manufacturers were before the court. The possibility that any one defendant actually manufactured the drug that caused the plaintiff's injuries was so slight that the court concluded it would

court felt that unmodified alternative liability was not suitable for DES litigation.[35]

Sindell modified the *Summers* doctrine to create a theory of liability based on market share: plaintiffs must join manufacturers that represent a "substantial share" of the relevant market and submit a prima facie case to support their allegations.[36] The burden of proof then shifts to the defendants. Each defendant must demonstrate that it could not have produced the drug that injured the plaintiff; a defendant unable to offer such proof is liable for that portion of the judgment representing its market share.[37] *Sindell* rested on the rationale that negligent defendants, rather than innocent plaintiffs, should bear the costs of injuries because defendants are in a better position to bear costs that are caused by defective products.[38] The court concluded that a market-share approach most closely approximated an equitable distribution of liability.[39] The *Sindell* theory greatly improved the judicial system's capacity to manage complex DES litigation, yet courts continued to face difficulties unique to mass tort litigation, including their frequent inability to obtain jurisdiction over all potential defendants.

IV. JURISDICTION JURISPRUDENCE: THE TRADITIONAL FORMULATIONS

For well over one hundred years, both federal and state courts have struggled to establish a coherent formulation of the due process requirements for personal jurisdiction. Although the jurisdictional inquiry has responded to social and technological change, courts have yet to articulate a clear and intelligible formulation with which to

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be unfair to shift the burden of proof to the defendants in accordance with the *Summers* rationale. *Sindell*, 607 P.2d at 931.

35. Further, alternative liability is based on cases of simultaneous conduct by all defendants. Conduct of DES defendants, in contrast, spans several decades. In addition, alternative liability requires joint liability of defendants; the theory offers no means by which to apportion liability among defendants based on the amount of DES manufactured by each defendant. Note, 94 Harv. L. Rev. at 672 (cited in note 18).

36. *Sindell*, 607 P.2d at 937.

37. Id.

38. Id. at 936.

39. The *Sindell* court reasoned that "[u]nder this approach, each manufacturer's liability would approximate its responsibility for the injuries caused by its own products." Id. at 937. One commentator defended the market-share theory as "structurally sound and basically fair to all parties." Note, 94 Harv. L. Rev. at 677 (cited in note 18). See also David A. Fischer, *Products Liability—An Analysis of Market Share Liability*, 34 Vand. L. Rev. 1623, 1626 (1981) (stating that "if the court apportioned damages according to each defendant's market share, then theoretically each defendant would be held liable only for approximately as much harm as it caused").

analyze whether the exercise of personal jurisdiction over a defendant conforms to the requirements of the Due Process Clause.[40] Aware of the imprecision and disarray that continue to dominate jurisdictional due process law, *Ashley* attempted to clarify the course of the constitutional inquiry and posed a test for personal jurisdiction in mass tort litigation that complies with the fundamental dictatos of Supreme Court jurisprudence and the requirements of due process. A brief examination of the seminal jurisdiction cases, focusing on the fairness, interest, and contacts elements, will clarify the *Ashley* court's approach.[41]

A. The Foundational Cases: Pennoyer *and* International Shoe

In 1877 the Supreme Court articulated a bright-line standard for personal jurisdiction founded solely on stato sovereignty interests as defined by state territorial boundaries. *Pennoyer v. Neff*[42] established that a state could not exercise jurisdiction over a nonresident defendant unless the defendant was served with process while physically present within the forum. In *Pennoyer,* the Supreme Court held a default judgment against a nonresident defendant invalid because the state court could not assert personal jurisdiction over a defendant not present in the state.[43] *Pennoyer* sanctioned the rule that a state could not extend its jurisdiction beyond its territorial boundaries; the constitutional exercise of jurisdiction must be premised on a defendant's territorial nexus with the forum.[44]

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40. *Ashley,* 789 F. Supp. at 577.

41. Because the history of jurisdiction jurisprudence is well documented elsewhere, this Recent Development focuses only on those elements that are relevant to the *Ashley* formulation.

42. 95 U.S. 714 (1877).

43. "[N]o tribunal . . . can extend its process beyond [the Stato's] territory so as te subject either persons or property to its decisions." Id. at 722. The Court did indicate, however, that a stato could require nonresident corporations and associations te consent te jurisdiction as a condition of transacting business within the forum. This consent would validato a court's exercise of jurisdiction over the nonresident as long as the nonresident actually received notico of the legal proceedings at issue. Id. at 735.

44. The *Pennoyer* Court based its territorial conception of jurisdiction on two principles of public law derived from Justice Story's writings on international conflicts of laws: first, "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territery," and secend, "no Stato can exercise direct jurisdiction and authority over persons or property without its territory." Id. at 722. See also Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation,* 75 Nw. U. L. Rev. 1112, 1116 (1981). However, as *Ashley* pointed out, until *Pennoyer,* a state's ability to render an effective judgment within that state was viewed as a purely domestic exercise of power and did not pose any threat to intorstate "comity." Whether other states would give full faith and credit to the forum state's judgment was treated as a separato question. *Ashley,* 789 F. Supp. at 578. *Pennoyer* combined the two concerns te find that the judgment of a state court without jurisdiction over a defendant was ineffective within the rendering state as well. Id. The *Ashley* court found the arguments in support of *Pennoyer*'s "comity" rationale unpersuasive. Id. at 578-79.

In 1945[45] the Supreme Court in *International Shoe Co. v. Washington*[46] appeared to replace the *Pennoyer* power-and-presence framework with a jurisdictional analysis founded not on notions of territorialism and sovereignty but on notions of fairness to the defendant.[47] *International Shoe* upheld a Washington court's assertion of jurisdiction over a Delaware corporation that did business in the state for the purpose of assessing a state unemployment compensation tax against the defendant. Although the corporation was neither incorporated nor registered to do business in the forum, the Court found that the defendant had demonstrated a sufficient level of activity within the forum such that the Washington court's exercise of jurisdiction would not offend "traditional notions of fair play and substantial justice."[48]

Although the Court appeared te abandon the *Pennoyer* sovereignty inquiry in favor of a fairness analysis, the Court's formulation inevitably relied on notions of "presence" within the forum. By virtue of conducting a "systematic and continuous"[49] level of business activities within the forum, the Court found the defendant had rendered itself amenable te the forum's jurisdiction. That is, the Court found the defendant, through its activities within the forum, to be "present" within the forum.[50]

The *International Shoe* minimum contacts test, which established the baseline for personal jurisdiction inquiry throughout the twentieth century, was fundamentally little more than a flexible conception of *Pennoyer's* "presence" inquiry.[51] The exercise of jurisdiction

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45. In the interim between *Pennoyer* and *International Shoe*, the Supreme Court began to move cautiously away from an approach to jurisdiction based strictly on power and presence by entertaining "fictions" such as implied consent as a basis for jurisdiction when the defendant was not physically served with process under the *Pennoyer* model. See, for example, *Hess v. Pawloski*, 274 U.S. 352 (1927) (holding that a nonresident motorist "consents" te the forum stato's jurisdiction when using the forum's highways); see also *Ashley*, 789 F. Supp. at 580-81 (discussing the fictions of "implied consent," "corporate presence," and "doing business" as bases for jurisdiction).

46. 326 U.S. 310 (1945).

47. The now-famous *International Shoe* test stated that "due process requires only that in order te subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have cortain minimum contacts with it such that the maintenanco of the suit does not offend 'traditional notions of fair play and substantial jnstice.'" Id. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

48. *International Shoe*, 326 U.S at 316. The Court concluded that the defendant had carried on "systematic and continuous" activities in the forum state throughout the years in question. Id. at 320.

49. Id.

50. Id. at 316-17.

51. *Ashley* noted that both components of personal jurisdiction inquiry under *International Shoe*—sovereignty and fairness—employed a territorial nexus, contacts-based requirement adoptod from *Pennoyer*. *Ashley*, 789 F. Supp. at 579. *International Shoe* separatod the

comported with due process only if the defendant exhibited certain contacts within the forum. Although the Court purported to evaluate the assertion of jurisdiction according to principles of fairness to the defendant, in reality, *International Shoe* retained significant elements of *Pennoyer*'s power-based framework.[52] Supreme Court decisions following *International Shoe*[53] vacillated between *Pennoyer*'s power-and-territorialism concepts and *International Shoe*'s concern with fairness to defendants.

B. The Importance of Fairness Under the Due Process Clause

A significant body of jurisprudence following *International Shoe* has continued to emphasize the centrality of a fairness inquiry. *McGee v. International Life Insurance Company*[54] adopted a fairness-centered approach in its jurisdiction analysis. In *McGee*, a California court assumed jurisdiction over a Texas insurance company based on a California statute that conferred jurisdiction over nonresident defendants who had insurance contracts with California residents.[55] The *McGee* court found the insurance contract itself a sufficient "contact" to support the assertion of jurisdiction. Much of the Court's analysis, however, focused on the forum state's overriding interest in providing a forum to its residents for redress when insurers refused to pay their claims.[56] The Court recognized that although acknowledgment of the forum's interest may cause some inconvenience to the defendant company, this inconvenience certainly did not amount to a denial of due

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"sovereignty" analysis into two components: an interest inquiry, in which the forum state may exert jurisdiction to vindicate its intorest in acts having consequences within the forum, and a presence inquiry, which limits this authority to exercise jurisdiction te instances in which the defendant's acts occurred within the forum. Id. at 583. *Ashley* pointod out the flaws in this conception, stating that "[t]he Court does not explain why the stato's ability to impose these obligations [to defend within the forum] steps at its borders when many out-of-state acts undoubtedly have consequences sufficient to give the state an interest, if one be needed, to support imposition of such obligations." Id.

52. The *International Shoe* Court stated, "[W]hether due process is satisfied must depend . . . 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 stato has no contacts, ties, or relations." *International Shoe*, 326 U.S. at 319.

53. In 1977 the Supreme Court in *Shaffer v. Heitner*, 433 U.S. 186 (1977), declared that henceforth "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny." Id. at 212. The Court's proclamation stemmed from its attempt to clarify the appropriate jurisdictional test for in rem and quasi in rem jurisdiction.

54. 355 U.S. 220 (1957).

55. Id. at 221.

56. Id. at 223.

process,[57] because the California forum was a fair one and the defendant would suffer little inconvenience in being called to defend there. The California court's assumption of jurisdiction in *McGee* satisfied due process despite the arguable absence of significant contacts between the defendant and the forum. The Court attributed its generous jurisdictional standard to the impact of technological and social changes upon the jurisdiction inquiry.[58]

Insurance Corporation of Ireland v. Compagnie des Bauxites de Guinee (CBG)[59] underscored the importance of a fairness inquiry in evaluating the constitutionality of a forum's assertion of personal jurisdiction. The *CBG* Court noted that despite initial pronouncements that the jurisdictional inquiry served to limit state power, jurisdiction ultimately was a function of the individual liberty interest that was preserved by the Due Process Clause rather than a function of federalism concerns.[60] Significantly, the Court noted that the Due Process Clause, as the source of constitutional limitations on personal jurisdiction,[61] spoke not to state sovereiguty but to individual rights.[62]

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57. Id. at 224.

58. *McGee* recognized that

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

Id. at 222-23.

59. 456 U.S. 694 (1982). In *CBG*, the Court upheld a sanction imposed on the defendant under F.R.C.P. 37(b)(2)(A) for failure te comply with a discovery order; the sanction determined as a matter of law the existence of personal jurisdiction over the nonresident defendant. Id. at 706-07. The Court permitted the assertion of jurisdiction based on a Rule 37(b)(2)(A) sanction despite the record's failure to demonstrato defendant-forum contacts otherwise sufficient to uphold jurisdiction. Id. at 709.

60. Id. at 702-03 n.10. Commentators rejoicod that *CBG* had sounded the death lnell for sovereignty inquiry in jurisdictional analysis and had recognized the singular importance of fairness to the litigants. See, for example, Johu N. Drobak, *The Federalism Theme in Personal Jurisdiction*, 68 Iowa L. Rev. 1015 (1983). This celebration was premature. Only three years after the *CBG* decision, the Court reinstated the minimum contacts test as the fundamental jurisdictional standard. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985). See also notes 79-85 and accompanying toxt.

61. See notos 217-25 and accompanying toxt.

62. The Court forcefully stated that the Due Process Clause "represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty." *CBG*, 456 U.S. at 702 (footnote omitted). *CBG* recognized that personal jurisdiction logically could not be considered an instrument of interstate sovereignty, because a defendant can waive the jurisdiction requirement by submitting to the forum's jurisdiction. The Court recognized that if federalism concepts presented an independent restriction on state court jurisdiction, individual litigants would be unable to waive the jurisdiction requirement, because individual actions are not capable of changing sovereign powers. Id. at 703 n.10. See also Daan Braveman, *Interstate Federalism and Personal Jurisdiction*, 33 Syracuse L. Rev. 533, 554 (1982) (declaring that claiming that a

Phillips Petroleum Co. v. Shutts[63] clarified the centrality of the burden inquiry in personal jurisdiction analysis. *Shutts* involved a class action brought by royalty owners against the defendant, a producer and purchaser of natural gas, for recovery of interest payments. The company alleged that certification of the plaintiffs' class was improper, because class members had been provided notice and an opportunity to opt out but had not been required affirmatively to "opt in." Therefore, the defendant alleged that the forum state could exercise jurisdiction over out-of-state class members only if those members possessed sufficient minimum contacts with the forum.[64]

The *Shutts* Court rejected the defendant's assertions, noting that the minimum contacts requirement existed to protect defendants from having to defend in distant forums, unless their contacts with the forum made it fair to require them to defend there.[65] The protections afforded defendants by personal jurisdiction are not necessary, however, to protect the interests of plaintiffs, particularly members of a plaintiff class in a class action who face none of the burdens or potential liabilities encountered by out-of-state defendants.[66] Significantly, the Court attributed the parties' differing needs for the protections afforded by the jurisdiction requirement to the degree of burden placed on each party by litigation in the forum state.[67]

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forum state's exercise of judicial authority threatens the sovereign interests of another state and then allowing an individual to waive the interests of that state simply by consenting te the forum's jurisdiction is illogical); Drobak, 68 Iowa L. Rev. at 1018-19 (cited in note 60).

63. 472 U.S. 797 (1985).

64. Id. at 806.

65. Id. at 807. The Court notod numerous substantial burdens defendants face when called te litigate in a distant forum, such as the costs of travel, the necessity of retaining ceunsel in the forum state, the possibility of liability for damages, and ceurt costs and attorney's fees. Id. at 808.

66. Id. at 808-09. Furthermore, procedural requirements for certification of a class, including adequacy of representation and commonality of interest, protect plaintiffs in class action suits. See Fed. R. Civ. P. 23.

67. *Shutts*, 472 U.S. at 811. For an excellent analysis of the impact of *Shutts* on personal jurisdiction theory, see Mandler, 1 Ann. Surv. of Am. L. at 64-74 (cited in note 4). Mandler concludes that

> [t]he *Shutts* opinion represents a significant change in personal jurisdiction doctrine. It clearly indicates that the only purpose of personal jurisdiction analysis is to protect a defendant from being unfairly haled inte a distant forum. Thus, it seems to reject the basis of personal jurisdiction doctrine set forth in every case from *Pennoyer* to *Volkswagen*—protecting interstato federalism or state sovereignty. This does not mean that *Pennoyer* is dead; the sovereignty concerns of *Pennoyer* may be reappearing in choico-of-law doctrine. However, it does seem that, after *Shutts*, personal jurisdiction analysis is less encumbered by territerial notions of stato sovereignty.

Id. at 70-71 (footnotes omitted).

C. The Continued Influence of Interstate Federalism

In contrast to cases such as *Shutts* and *CBG*, a distinct, significant body of jurisdiction jurisprudence continues to emphasize the territorialism and contacts concerns first announced in *Pennoyer* and *International Shoe*. *Hanson v. Denckla*[68] noted that developments in communication and transportation have continued to ease the burdens of defending in an out-of-state forum;[69] nonetheless, the *Hanson* Court refused to depart entirely from the rigid formulations established in *Pennoyer*.[70] The *Hanson* Court indicated that state territorial boundaries are of paramount importance in personal jurisdiction analysis. The cases that followed *Hanson* continued to fortify the role of interstate federalism in personal jurisdiction analysis.

In *World-Wide Volkswagen Corp. v. Woodson*,[71] the Court applied the minimum contacts test to a stream-of-commerce case in which the defendants, a retailer and a distributor of automobiles, challenged the assertion of jurisdiction by an Oklahoma court.[72] The defendants claimed to have had no contacts with the forum sufficient to support an assertion of in personam jurisdiction.[73] The *World-Wide* Court agreed, re-emphasizing the importance of territoriality and

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68. 357 U.S. 235 (1958).

69. Id. at 250-51.

70. The Court argued that restrictions on the exercise of personal jurisdiction do more than guarantee immunity from litigation in an inconvenient forum; they result from territorial limitations on the power of the states. Id. at 251. The Court, however, later downplayed the significance of this statement in *Shaffer v. Heitner*, 433 U.S. 186, 204 n.20 (1977) (declaring that the *Hanson* Court's statement that restrictions on the exercise of personal jurisdiction result from territorial limitations on states' power simply clarifies the fact that states are defined by their geographical boundaries) (citations omitted). Once again the Court waivered in its commitment to the role of state sovereignty in jurisdictional analysis.

71. 444 U.S. 286 (1980). One commentater described *World-Wide Volkswagen* as the jurisdiction case that "has had the most inhibiting effect to date on the exercise of state court jurisdiction." Weintraub, 63 Or. L. Rev. at 499 (footnote omitted) (cited in note 4). See also Drobak, 68 Iowa L. Rev. at 1040-41 (cited in note 60) (claiming that *World-Wide* "gave the federalism branch [of jurisdiction analysis] greater prominence than any Supreme Court opinion since *Pennoyer*").

72. The plaintiffs purchased an Audi automobile from a retailer in Massena, New York, in 1976. *World-Wide Volkswagen*, 444 U.S. at 288. One year later, while the plaintiffs were traveling through Oklahoma en route to Arizona, another car struck the vehicle in the rear, causing a fire that severely burned several passengers. Id. The purchasers institutod a products liability action against the manufacturer, importer, regional distributor, and retailer of the automobile. Id. Both the retail dealer and the distributer challenged Oklahoma's assertion of jurisdiction. Id.

73. The Court found that the defendants conducted no sales activities in the forum stato, performed no services there, neither advertised nor solicited business there, and took no action to avail themselves of the benefits and privileges of Oklahoma law. Id. at 295.

sovereignty in questions of personal jurisdiction.[74] *World-Wide Volkswagen* implied that interstate federalism[75] could prohibit the exercise of jurisdiction over a nonresident defendant, even if haling the defendant into the forum caused no inconvenience to the defendant, the forum had a significant interest in the resolution of the controversy, and the forum provided the most convenient location for the litigation.[76] Thus, *World-Wide Volkswagen* established federalism as the ultimate criterion for testing the constitutionality of jurisdiction.[77]

Further, the *World-Wide* Court announced a particularly narrow interpretation of minimum contacts to be applied in stream-of-commerce cases. The Court asserted that although foreseeability alone never has been sufficient te support personal jurisdiction under the Due Process Clause, it is not completely irrelevant. The foreseeability with which the Court was concerned, however, was not the mere likelihood that a product will make its way into a particular state. Rather, the Court was concerned that the defendant should be reasonably able to foresee being haled into the forum state based on her conduct and connections with that state. Jurisdiction premised on a corporation's placement of products into the stream of commerce, with the expectation that consumers in the forum state will use the products, satisfies due process. However, mere "unilateral activity" on

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74. The Court claimed that it never had accepted the theory that state lines are irrelevant in jurisdictional analysis, stating that it could not do so while remaining faithful to constitutional principles of interstato federalism. Id. at 293. The Court underscored the importance of territerial concerns in jurisdictional analysis through its insistence on minimum contacts as the standard for establishing jurisdiction. According to the Court, the contacts test serves two purposes: First, it protects the defendant from the incenvenience associated with litigation in a foreign forum, and second, it assures that sister states will not infringe on one another's sovereignty by assuming jurisdiction "beyond the limits imposed on them by their status as coequal sovereigns in a federal system." Id. at 292.

75. The Court made no histerical, textual, or policy reference te support its finding of a system of interstate federalism implicit in the Constitution. See Redish, 75 Nw. U. L. Rev. at 1130-32 & n.137 (cited in note 44) (denying that concepts of interstate federalism can be found implicit in the Constitution). See also note 222 and accompanying text.

76. *World-Wide Volkswagen*, 444 U.S. at 294. Critics decried *World-Wide*'s apparent expansion of the role of sovereignty considerations in personal jurisdiction analysis. See, for example, Braveman, 33 Syracuse L. Rev. 533 (cited in note 62). The decision in *CBG*, 456 U.S. 694 (1982), which focuses on the centrality of individual liberty interests to the jurisdictional inquiry, inspired hope in many scholars that the Court was at last departing from its rigid territerialism-based formulation. Any such hopes were dashed, however, by *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), which claimed that the minimum contacts test remained the central inquiry in personal jurisdiction analysis. See notes 79-85 and accompanying text; note 60.

77. The Court claimed that the Due Process Clause, as an instrument of interstate federalism, may divest a state of its power te render a valid judgment. *World-Wide Volkswagen*, 444 U.S. at 294 (citing *Hanson*, 357 U.S. at 251, 254). Both *Hanson* and *World-Wide* indicate that the burden or fairness inquiry is secondary te concerns of interstate federalism in the jurisdictional analysis.

the part of those who claim some relationship with the defendant will not provide a sufficient contact to sustain the forum's exercise of jurisdiction.[78] The "unilateral activity" and purposeful availment standards created a particularly exacting test for jurisdiction over manufacturers and distributors whose goods reach regional or national markets beyond their place of business.

Burger King Corp. v. Rudzewicz[79] upheld Florida's exercise of jurisdiction over a Michigan defendant sued by a franchisor located in Miami. The Court in *Burger King* noted *CBG*'s observation that the proper focus of the jurisdictional inquiry is the individual liberty interest protected by the Due Process Clause.[80] The *Burger King* Court recognized that a court may exercise personal jurisdiction over a defendant who "purposefully directs" activities toward the forum or one who "purposefully derives benefit" from interstate activities. The forum state in these cases has a "manifest interest" in providing a convenient forum for its residents to redress injuries inflicted by nonresident defendants.[81]

Despite elaboration on the liberty interests implicated by the Due Process Clause, however, the *Burger King* Court ultimately returned to the territorial prong of the *International Shoe* test. Despite consideration of liberty interests, the Court stated that the constitutional standard remains whether the defendant purposefully created minimum contacts with the forum state.[82] The Court rejected mere "foreseeability of causing injury in another state" as a sufficient contact upon which to base the assertion of personal jurisdiction; rather, the appropriate test remained that established by *World-Wide Volkswagen*—foreseeability that a defendant's conduct in relation to the forum was such that the defendant reasonably could anticipate being haled into court there.[83] The Court in *Burger King* reaffirmed the purposeful availment test established by *World-Wide Volkswagen*,[84] explaining that this test protects defendants against jurisdiction based only on random or attenuated contacts with the forum.[85]

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78. *World-Wide Volkswagen*, 444 U.S. at 295, 297-98 (quoting *Hanson*, 357 U.S. at 253). See Weintraub, 63 Or. L. Rev. at 501 (cited in note 4) (maintaining that *World-Wide*'s "foreseeability" analysis has restricted the exercise of jurisdiction in lower courts).

79. 471 U.S. 462 (1985).

80. Id. at 472 n.13. See notes 59-62 and accompanying text.

81. *Burger King*, 471 U.S at 473 (citations omitted).

82. Id. at 474.

83. Id.

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

85. *Burger King*, 471 U.S. at 475. Further, *Burger King* clarified the two-pronged nature of the Supreme Court's jurisdictional test. The jurisdictional analysis begins by inquiring whether

The 1987 decision in *Asahi Metal Industry Co. v. Superior Court*[86] marked the first occasion upon which the Court actually applied the multi-factor balancing test to which it alluded in *World-Wide Volkswagen* and *Burger King*.[87] The *Asahi* Court denied a California court's assertion of jurisdiction over a foreign manufacturer in an indemnification action against another foreign corporation.[88] The Court analyzed the factors noted in both *World-Wide Volkswagen* and *Burger King* and concluded that the exercise of jurisdiction over the foreign manufacturer would not be "reasonable" since it would impose a significant burden on the foreign defendant called to litigate in the United States.[89] Further, the interests of the plaintiff and the forum state in the California court's exercise of jurisdiction were slight,[90] and the interests of the several states in the efficient resolution of the dispute were minimal because the procedural and substantive policies implicated by the *Asahi* litigation were those of other nations.[91] Yet, despite explicit consideration of fairness and interest

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the defendant has sufficient minimum contacts with the forum. Id. at 475-76. After these contacts have been established, the Court may consider additional factors, such as the burden on the defendant, the plaintiff's interest in a convenient forum, and the interests of the forum and the several states in efficient resolution of the dispute, to determine whether the exercise of jurisdiction comports with "fair play and substantial justice." Id. at 476-77. The Court did note that "[t]hese considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be necessary." Id. at 477 (citing, inter alia, *McGee*, 355 U.S. at 223-24). The clear implication of this admission, however, is that some degree of minimum contacts always will be necessary. *World-Wide* also had listed these considerations, stating that "the burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors . . . ." *World-Wide Volkswagen*, 444 U.S. at 292. The *Burger King* Court only briefly discussed application of these factors to the case before it, however; the Court preferred to analyze the assertion of jurisdiction purely in terms of the minimum contacts test. See text accompanying note 82.

86. 480 U.S. 102 (1987).

87. See note 85.

88. In *Asahi*, a California resident was injured and his wife killed when the motorcycle on which they were riding exploded following a collision. *Asahi*, 480 U.S. at 105-06. The plaintiff sued the manufacturer of the motercycle tire, alleging that an explosion of the rear tire was responsible for the accident. Id. at 106. Among the named defendants was Cheng Shin Rubber Industrial Co., Ltd., the Taiwanese manufacturer of the tire tube. Id. Cheng Shin filed a cross-complaint seeking indemnification from the manufacturer of the tube's valve assembly. Id. The underlying tort claims settled, leaving only the indemnification claim between the foreign defendants. Id.

89. Id. at 114. The Court noted that significant weight should be given to the unique burdens faced by a defendant who must litigate in a foreign legal system when evaluating the reasonableness of extending the reach of personal jurisdiction across national borders. Id.

90. The *Asahi* Court noted that after minimum contacts are established, the interests of the plaintiff and the forum often will justify even significant burdens placed on the defendant. Id. The Court concluded, however, that the only claim remaining in *Asahi*, an indemnification action between foreign manufacturers in which the forum state had no significant interest, was not sufficient to justify the burdens placed on the defendant by the California court's exercise of jurisdiction. Id.

91. Id. at 115.

factors, minimum contacts remained the foundational inquiry.[92] *Asahi* reaffirmed the *World-Wide* purposeful availment test[93] and rejected the mere placement of a product into the stream of commerce as a basis for jurisdiction.[94]

The 1990 reaffirmation of transient jurisdiction in *Burnham v. Superior Court*[95] restored the presence and power framework first articulated in *Pennoyer* in 1877.[96] The *Burnham* Court upheld jurisdiction over a New York resident in a divorce proceeding filed in California. The defendant was served with process while in California both to transact business and to visit his children.[97] The Court appears to have come full circle, only to return to *Pennoyer*'s sovereignty-based conceptions of jurisdiction.[98] Despite efforts such as *CBG*, it appears that territoriality and power concepts continue to overshadow the fairness branch of jurisdictional doctrine. In attempting to muddle through this confusion, the *Ashley* court

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92. The Court denied jurisdiction based on its finding that the facts of the case did not establish minimum contacts. Id. at 116.

93. Id. at 112 (holding that "[t]he 'substantial connection' . . . between the defendant and the forum State necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully directed toward the forum State*") (emphasis in original) (citations omitted).

94. Id. Only Chief Justice Rehnquist, Justice Powell, and Justice Scalia joined the portion of Justice O'Connor's opinion in *Asahi* dealing with the purposeful availment standard. Dissenting opinions authored by Justices Brennan and Stevens found fault with the plurality's analysis of the purposeful availment standard. Justice Brennan reiterated his position, first expressed in his dissenting opinion in *World-Wide*, that delivery of a product into the stream of commerce should itself be sufficient to establish jurisdiction over a nonresident defendant. Id. at 117 (Brennan, J., dissenting).

95. 110 S. Ct. 2105 (1990).

96. See Pamela J. Stephens, *Sovereignty and Personal Jurisdiction Doctrine: Up the Stream of Commerce Without a Paddle*, 19 Fla. St. U. L. Rev. 105, 129 (1991) (noting that in *Burnham* the Court returned to territoriality and physical presence as the bases for establishing personal jurisdiction).

97. *Burnham*, 110 S. Ct. at 2109. The *Ashley* court considered jurisdiction based on "presence" problematic because it appears to grant each state too great a jurisdictional reach. *Ashley*, 789 F. Supp. at 580-81. *Ashley* did note, however, that jurisdiction based on transient presence, which was reaffirmed in *Burnham*, traditionally has not been applied to corporations; rather, courts have required "more than a minimal quantum of in-state activity by corporate officers and agents" to support jurisdiction. Id. at 581. When courts analyzed corporate contacts to determine whether a corporation was amenable to jurisdiction, they viewed contacts as indices of fairness. Id. After *Pennoyer*, courts began to use the fiction of "implied consent" to obtain jurisdiction over nonresident corporations. Id. This fiction incorporated notions of "presence" in the forum, a state interest in regulating activities that produce effects within the forum, and concerns about fairness to nonresident corporate defendants, measured by the defendant's quantum of contacts with the forum state. Id.

98. "To determine whether the assertion of personal jurisdiction is consistont with due process, we have long relied on the principles traditionally followed by American courts in marking out the torritorial limits of each State's authority." *Burnham*, 110 S. Ct. at 2110.

doubted whether "a unitary, coherent jurisdictional due process standard" currently existed.[99]

V. RETURN TO THE *ASHLEY* LITIGATION: A REVISED APPROACH TO JURISDICTION IN MASS TORT LITIGATION

A. The Uniqueness of a Mass Tort and the Ashley *Situation*

The court in *Ashley* attempted to supply this coherent jurisdictional standard for mass tort litigation. The *Ashley* modification, however, must be analyzed in light of the unique factual situation confronting the court: mass tort litigation involving multiple defendants scattered throughout the United States.[100] The court noted several characteristics that define a "mass tort";[101] these characteristics hinder efficient judicial resolution of mass tort litigation by making it difficult for plaintiffs successfully to bring a tort action against a defendant manufacturer and receive compensation for their injuries.[102] The court observed that despite these difficulties, no federal legislation exists to oversee mass tort litigation,[103] leaving the responsibility for ensuring compensation of mass tort victims to the courts and state legislatures.[104]

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99. *Ashley*, 789 F. Supp. at 573 (citing *Burger King*, 471 U.S. at 471-78 (listing alternative formulations)).

100. The *Ashley* court defined a "true" mass tort as one which "typically involve[s] the torts of a post-industrial age, the so-called mass toxic torts . . . ." *Ashley*, 789 F. Supp. at 561-62. The *Ashley* court did qualify its definition, however, by asserting that "not all toxic torts have required doctrinal innovation and some non-toxic torts have." Id. at 562.

101. The *Ashley* court cited the following facters:

> (1) geographically widespread exposure to potentially harmful agents that (2) affects a large or indeterminate number of plaintiffs, (3) possibly over long time periods, even generations, (4) in different ways such that (5) there is difficulty in establishing a general theory of causation and (6) an inability te link a particular defendant's actions to a particular plaintiff's injuries, as well as (7) difficulty in determining the number of potentially responsible defendants and (8) in determining their relative culpability, if any, which often results in (9) multiple litigations that burden the courts and cause huge transactional costs, including heavy legal fees, and (10) which threatens the financial ability of many companies or of whole industries te respond to traditional damage awards.

Id. Whether *Ashley*'s test would apply to other "mass toxic terts," such as asbestos litigation, without some modification is unclear.

102. Id.

103. The legal community has begun to address the need for this legislation. See American Law Instituto, *Complex Litigation Project*, Tentative Draft No. 3 (March 31, 1992); notes 176-80 and accompanying text.

104. See Downey and Gulley, 4 J. Legal Med. at 196-200 (cited in note 15) (proposing a federal legislative solution to ensure compensation of DES victims).

Mass tort litigation is riddled with difficulties: causation and proof problems; difficulty in establishing a "locus" state; complex questions concerning jurisdiction, choice of law, and damage apportionment; the danger of duplicative litigation; excessive punitive damage awards that result in defendant bankruptcy; inconsistent results and damage awards for similarly situated plaintiffs; and overcrowded court dockets.[105] These difficulties have inspired modification of traditional tort law.[106] No corresponding modifications have been made in traditional personal jurisdiction doctrine, however, to accommodate the unique problems of complex litigation.[107] The *Ashley* court formulated a practical and efficient solution to fill this gap in personal jurisdiction law in the unique setting of mass toxic tort litigation.

B. The Ashley *Court's Procedural Approach*

1. The *Ashley* Departure: A Reflection of Substantive State Policy

New York, at the time of the *Ashley* litigation, had enacted quasi-substantive legislation indicative of important state policies, including a policy of providing compensation for victims of toxic torts.[108] Recognizing this policy, the *Ashley* court adopted an approach it believed to be consistent with what the New York Court of Appeals would decide in a similar factual framework.[109] It noted that the Court of Appeals already had taken steps to adapt traditional tort law principles to the unique DES situation and that New York law favored full compensation to injured plaintiffs.[110]

Further, the New York Court of Appeals in *Hymowitz v. Eli Lilly & Co.*[111] had adopted a *Sindell*-like[112] market-share approach for apportioning liability among DES defendants based on a national market. According to *Hymowitz*, DES manufacturers should be held severally liable for a share of a plaintiff's damages according to each

105. *Ashley*, 789 F. Supp. at 562.

106. Id. (recognizing modifications such as concerted action, enterprise liability, and market-share liability). See notes 30-31 and accompanying text.

107. *Ashley*, 789 F. Supp. at 563 (acknowledging proposals for nationwide service of process in mass litigation). The *Ashley* court suggested that similar considerations underlie nationwide interpleader actions, for which nationwide jurisdiction is provided by 28 U.S.C. § 2361, and mass tort cases. Id.

108. Id. (citing modifications in statutes of limitations for Agent Orange and other toxic tort cases to provide for the running of the statute from the date of discovery of the injury).

109. Id. at 571.

110. Id. at 572.

111. 539 N.E.2d 1069 (N.Y. 1989).

112. See notes 32-39 and accompanying text.

defendant's share of the national market at the time of the plaintiff's exposure.[113] To allocate the costs of DES-related injuries, the *Hymowitz* rule essentially converted geographically dispersed DES manufacturers into a single national industry.[114] To justify its expansion of jurisdictional due process standards, the *Ashley* court relied heavily on the policy of ensuring compensation to DES victims that had been articulated by New York's legislature and courts.[115]

2. New York's Long-Arm Statutes

The *Ashley* court began its analysis by examining the New York long-arm jurisdictional statutes.[116] These statutes provided New York courts with jurisdiction over out-of-state defendants who should have foreseen that their tortious acts committed outside the state

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113. *Hymowitz*, 539 N.E.2d at 1078. In contrast to the *Sindell* approach, however, *Hymowitz* does not allow for exculpation of a defendant who can prove that it did not manufacture the DES that injured the plaintiff. The court reasoned that such exculpation would amount to a "windfall" when liability is apportioned according to overall risk created. Id. A defendant is excused from liability only when it can demonstrate that "it did not participate in the marketing of DES for pregnancy use." Id.

114. *Ashley*, 789 F. Supp. at 564. A subsequent case, however, indicated that the *Hymowitz* rule may be available only te persons that have a substantial connection to New York. See *Besser v. E. R. Squibb & Sons*, 539 N.Y.S.2d 734, 743 (N.Y. App. Div. 1989), aff'd, 552 N.E.2d 171 (N.Y. 1990) (holding that a New York statute reviving time-barred DES actions did not apply to shorter statutes of limitations that controlled causes of action arising outside New York; justifying the decision as a means of preventing plaintiffs exposed te DES in other states from litigating in New York).

115. *Ashley* found support for its holding in case law and legislation: "*Hymowitz*, *Besser*, and the legislative modifications te New York's statutes of limitations for DES plaintiffs evince New York's intent te provide as full a recovery as is practicable to those of its residents injured by DES. New York and its residents therefore have a strong interest in the assertion of jurisdiction [over nonresident defendants in DES litigation in New York]." *Ashley*, 789 F. Supp. at 576. *Ashley* concluded that "the continued reliance [on a territerial contacts requirement] creates significant obstacles te [the] resolution [of mass tert cases]. This is particularly evident in a case such as [*Ashley*], where New York substantive law empowers plaintiffs te bring in all industry participants te achieve a full and economical resolution of their lawsuits, yet jurisdictional law may prevent the very result envisioned by the state's substantive, remedial and procedural laws." Id. at 586-87.

116. New York Civil Practice Law and Rules (C.P.L.R.) §§ 301 and 302(a)(3) provided two bases for jurisdiction over defendants by New York courts. C.P.L.R. § 301 granted jurisdiction based on consent and on "continuous and systematic" business activities within the forum. More importantly, C.P.L.R. § 302, New York's long-arm provision, did not extend to the limits of jurisdiction permissible under the Constitution. Section 302(a)(3)(ii), however, specifically provided for jurisdiction over defendant companies who have conducted no business in New York but whose out-of-state tertious acts have caused injury te a person within the state, so long as the defendant "should have expected its act to have consequences in the state and it derives substantial revenue from interstate or international commerce." *Ashley*, 789 F. Supp. at 569. *Ashley* noted that the "'reasonable expectation' element of section 302(a)(3)(ii) requires that a defendant foresee that its tertious act will have some consequences in New York, although not necessarily the consequences that occurred." Id. at 570. See id. at 569 for a detailed analysis and interpretation of the New York long-arm provisions.

would have consequences within the state.[117] Lower New York courts, anxious to avoid conflict with constitutional due process limits on jurisdiction, had incorporated into the statutory jurisdiction standard the purposeful availment test established in *World-Wide Volkswagen* and its progeny.[118]

The *Ashley* court, however, rejected the reasonable expectation and purposeful availment requirements, finding them inappropriate tests for jurisdiction.[119] When section 302(a)(3)(ii) is interpreted as written, the court found that it provides a workable framework for efficient resolution of jurisdictional questions in mass tort litigation.[120] *Ashley* held that a DES manufacturer's participation in the national marketing of a generic drug should lead it to "reasonably expect" this act of selling to have "consequences in the state" as required under C.P.L.R. § 302(a)(3)(ii).[121] The court was dissatisfied, however, with existing case law interpreting section 302(a)(3)(ii) as applied to tort litigation. Based on its analysis of policy and existing case law interpreting New York's long-arm statutes, the court concluded that *Hymowitz*, the New York Civil Practice Law and Rules, and legislative policy must be interpreted to favor the national market-share jurisdictional analysis and the adoption of several liability.

Having concluded that *Hymowitz* and C.P.L.R. § 302(a)(3)(ii) support a broad base for New York courts' exercise of personal jurisdiction over DES defendants, the *Ashley* court turned to an analysis of existing Supreme Court jurisprudence interpreting due process limitations on the exercise of jurisdiction. The court attempted to draw common elements from the confusing and often contradictory standards enunciated in Supreme Court jurisdictional case law from *Pennoyer* to *Burnham*.[122]

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117. *Ashley*, 789 F. Supp. at 569.

118. Id. at 571.

119. The court found the reasonable expectation test circular because the reasonableness of a defendant's expectation is entirely dependent on the content of the forum state's jurisdiction laws. Id. This statement reflects the observation made by Justice Brennan in his dissenting opinion in *World-Wide* that the "reasonable anticipation" test "begs the question . . . . A defendant cannot know if his actions will subject him to jurisdiction in another State until we have declared what the law of jurisdiction is." *World-Wide Volkswagen*, 444 U.S. at 311 n.18 (Brennan, J., dissenting).

120. *Ashley*, 789 F. Supp. at 571.

121. Id. at 572. The court concluded that the fact that DES manufacturers engaged in national marketing of the drug should have alerted them to the likelihood that their actions would have "economic and trade flow consequences" throughout the nation, including New York. Id. *Hymowitz* simply recognized that this feature of the DES market necessarily influenced an equitable apportionment of liability among DES defendants. Id.

122. See id. at 573-74 (collecting authorities that reflect the lack of a unitary, coherent jurisdictional standard).

C. Difficulties in Applying Current Jurisdiction Doctrine to Mass Torts

The *Ashley* court concluded that it could not apply traditional jurisdiction doctrine directly to mass tort litigation without serious difficulties. It summarily rejectod the applicability of the stream-of-commerce theory to the litigation before it,[123] since the stream-of-commerce paradigm prohibits a court from exercising jurisdiction based exclusively on the contacts created between a forum and a defendant through the operation of a national chain of distribution.[124] The *Ashley* court found this limitation on jurisdiction unworkable in the mass tort context. DES litigation is distinguishable from traditional tort litigation in that it does not consist simply of actions by an individual plaintiff or plaintiffs against a local or foreign business; many foreign entities reasonably could claim that they never anticipatod their business dealings to affect New York residents.[125] DES defendants, in contrast, manufactured generic goods and participated in a national market.[126] The stream-of-commerce rationale, as applied to DES litigation, effectively converts an issue of venue into a restriction on the assertion of jurisdiction,[127] a restriction the *Ashley* court found inappropriate.

More importantly, the *Ashley* court rejected the *Asahi* and *World-Wide* purposeful availment paradigms, developed in traditional product liability actions by single plaintiffs against single defendants, as inapplicable in the context of mass DES litigation.[128] Rather,

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123. Id. at 571.

124. Id. at 574.

125. Compare Comment, *Personal Jurisdiction in the Post*-World-Wide Volkswagen *Era—Using a Market Analysis to Determine the Reach of Jurisdiction*, 60 Wash. L. Rev. 155, 164 (1984) (proposing a market analysis for assertion of jurisdiction in stream-of-commerce cases in which jurisdiction exists if the defendant receives a "sizable benefit" from the forum's markets).

126. *Ashley*, 789 F. Supp. at 572. Alternatively, the *Ashley* court stated that DES manufacturers, by virtue of their "participation in the national marketing of a generic drug, should 'reasonably expect' [their] act[s] of selling in the national market 'to have . . . consequencos in the [forum] state.'" Id. *Ashley* placed great emphasis on the fact that the defendant manufacturers knowingly participated in and encouraged the development of a national market for DES that inevitably had censequences throughout the country, including New York. Id.

127. Id. at 575. Compare Leslie W. Abramson, *Clarifying "Fair Play and Substantial Justice": How the Courts Apply the Supreme Court Standard for Personal Jurisdiction*, 18 Hastings Const. L. Q. 441, 451 (1991) (noting that "the Ninth Circuit 'recognizes that once minimum contacts have been established, inconvenience to the defendant is more appropriately handled not as a challenge to jurisdiction, but as a factor supporting a change in venue'") (citing *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 387 (9th Cir.), rev'd on other grounds, 111 S. Ct. 1522 (1991)).

128. *Ashley*, 789 F. Supp. at 575. See Weintraub, 63 Or. L. Rev. at 502, 526 (cited in note 4) (declaring that a "foreseeability" analysis is appropriate in the contoxt of small, local retailers of inexpensive goods, but cannot logically be extended to "large, multi-stato seller[s] of high-priced goods," particularly when the forum does not inconvenience or burden the defendant. The author

Ashley expressed a clear preference for the multi-factor reasonableness test alluded to in *World-Wide Volkswagen* and applied in *Asahi.*[129]

The jurisdiction case most closely resembling mass tort litigation, *Keeton v. Hustler Magazine, Inc.*,[130] supported a finding of jurisdiction. *Keeton* is not perfectly analogous to *Ashley*'s mass tort situation, however, because, in contrast to *Keeton,* not all DES defendants had purposefully availed themselves of the benefits of the forum state's laws.[131]

Traditional jurisdiction doctrine developed with no consideration of the unique demands of mass litigation. The *Ashley* court found it difficult to accommodate mass tort jurisdictional issues into the literal requirements of tests such as purposeful availment.[132] Supreme Court jurisdiction case law did not provide answers sufficient to resolve jurisdictional questions in DES tort litigation;[133] the *Ashley* court concluded that modifications of jurisdictional analysis are no less appropriate than substantive and quasi-substantive modifications of tort law already made by legislatures and state courts.[134]

The *Ashley* court sought a conceptual framework for analyzing personal jurisdiction that both accommodates the distinct requirements of mass tort litigation and respects the traditional nexus requirement present in personal jurisdiction jurisprudence since *Pennoyer.* Jurisdiction jurisprudence since *International Shoe* has continued to incorporate two distinct inquiries, sovereignty and

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concludes that large, transjurisdictional corporations are less likely to be inconvenienced by litigation in a distant forum.).

129. *Ashley*, 789 F. Supp. at 575.

130. 465 U.S. 770 (1984). In *Keeton*, the plaintiff, a New York resident, sued *Hustler* magazine for libel in New Hampshire. Because the plaintiff alleged injury in every state, the Court focused its analysis on whether it would be fair to compel the defendant to litigate in New Hampshire. Id. at 775. The Court upheld jurisdiction, although the publication had only *de minimis* contacts with the forum, because New Hampshire had an interest in redressing injuries that occurred within the state and the several states had an interest in efficient adjudication of the action in a single proceeding. Id. at 776-77.

131. *Ashley*, 789 F. Supp. at 576. *Ashley* concluded, however, that the establishment of a national DES market created a sufficient "indirect benefit" arising from New York's markets to justify the exercise of jurisdiction over all DES defendants on the grounds of purposeful availment. Id. The court claimed that "the United States constitutes a common economic pond that knows no state boundaries. A substantial interjection of products at any point of the national market has ripple effects in all parts of the market." Id. Compare *World-Wide Volkswagen*, 444 U.S. at 306-07 (Brennan, J., dissenting) (discussing the appropriate reach of jurisdiction premised on stream-of-commerce-based contacts).

132. *Ashley*, 789 F. Supp. at 576.

133. Id. See also Luther L. McDougal, *Judicial Jurisdiction: From a Contacts to an Interest Analysis*, 35 Vand. L. Rev. 1, 33 (1982) (arguing that "states should embrace jurisdictional doctrines that are flexible enough to react to the facts of any case").

134. *Ashley*, 789 F. Supp. at 576.

fairness, both of which require some territorial nexus[135] between the defendant and the forum state.[136] Although the *Ashley* court agreed that some forum-litigation nexus is appropriate in the jurisdictional analysis, it disagreed with the traditional analysis that requires a territorial nexus to satisfy the fairness inquiry.[137]

The *Ashley* court concluded that a nexus requirement is more appropriate as an element of sovereignty inquiry than as a factor in evaluating fairness te the defendant and that the nexus requirement should be eliminated entirely from the fairness inquiry.[138] *Ashley* distinguished *Pennoyer* and its progeny on the basis of the character of this nexus requirement. Rather than demanding a territorial nexus with the forum state, the court concluded that a nexus sufficient to justify the exercise of jurisdiction exists if the forum stato has a tangible interest in litigation founded on the acts of a nonresident defendant, despite the fact that those acts may not have occurred within the state.[139] *Ashley* thus established, as an appropriate nexus, a state interest rather than a territorial connection. The *Ashley* analysis encompasses both a fairness-to-defendants inquiry, no longer evaluated solely on the basis of forum-defendant contacts, and a sovereignty inquiry, centering around the forum state's intorest in asserting jurisdiction.

The traditional two-pronged sovereignty and fairness analysis evolved from cases with, at most, a few parties on each side. The Supreme Court never has had occasion to apply its jurisdictional analysis to mass tort litigation arising from the national marketing of a generic good.[140] The *Ashley* court declared that the "irrationality" of

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135. The term "territorial nexus" is used here to indicate the forum-defendant contact requirement introduced in *International Shoe*, 326 U.S. at 316, and alluded to in *World-Wide Volkswagen*, 444 U.S. at 292-93, as protecting the concept of interstate federalism implicit in the Constitution.

136. *Ashley*, 789 F. Supp. at 585. A forum's assertion of jurisdiction over a defendant is deemed "fair" only if the defendant has sufficient territorial contacts with the forum state. Additionally, the sovereignty prong is satisfied and the state is deemed te have an "interest" in the litigation (and thus is able to assert jurisdiction without affront te another sovereign state) only if such territorial contacts are present. Id.

137. The *Ashley* court claimed that a territorial nexus requirement remained only in the fairness element of the jurisdictional analysis. The court concluded that modern jurisdiction jurisprudence requires only an interest nexus in the sovereignty inquiry to support jurisdiction. Id. at 584-85.

138. Id. at 579. *Ashley* would not validate a contact or nexus between the defendant and the forum state as a means te protect the defendant's interest in a fair forum.

139. Id. at 580. This requirement stems from the belief that "a state may not impose obligations on nonresidents without a reason.... [A] state [must] have at least some interest in a controversy before it may demand that a non-resident incur the burden of defending a suit in the state." Id. at 585.

140. Id. The closest the Court has come te analyzing personal jurisdiction doctrine in the context of mass litigation was *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). *Shutts*

a territorial nexus requirement is most evident in mass tort litigation[141] and concluded that the prevailing jurisdictional analysis could not be applied to such litigation.[142]

D. The Ashley *Test for Personal Jurisdiction in Mass Tort Litigation*

The *Ashley* court found it necessary to alter existing jurisdictional standards to meet the unique difficulties of DES litigation.[143] The court therefore fashioned a two-prong test[144] that focuses first on the forum state's interest in the litigation[145] and then on the burden to the defendant in being called to litigate in the forum.[146] The *Ashley* test not only embraces the components reflected in Supreme Court pronouncements on the fairness standard,[147] but also incorporates proposals made by scholars and critics urging the abandonment of the territorial nexus as a basis for personal jurisdiction.[148]

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indicated the Court's willingness to stretch traditional jurisdictional standards to accommodate the unique factual setting of mass litigation. *Ashley*, 789 F. Supp. at 585. See also text accompanying notes 63-67.

141. Because mass tort actions generally are brought against large corporate defendants, the theory that a territorial nexus is a reliable indicator of convenience is particularly weak. See *Ashley*, 789 F. Supp. at 586.

142. Id. at 585 (rejecting the territorial nexus requirement as inappropriate to a fairness inquiry in the mass tort context). The *Ashley* court held that incorporation of a territorial nexus requirement into the jurisdictional analysis was "an historical accident," and that a "territorial nexus doctrine is a particularly inadequate mechanism for protecting mass producers from undue litigation burdens." Id. Rather, the doctrine of forum non conveniens and the law of venue protect defendants against unfairness and inconvenience. Id. at 586.

143. The court stated, "Given that New York law has evolved to promote the efficient resolution of mass DES torts, and given the problems of applying prevailing traditional jurisdictional concepts to such cases, a modification of established standards to determine the constitutionality of jurisdictional statutes that incorporates an interest nexus inquiry but not a territorial nexus inquiry is necessary in the DES context—and perhaps in other mass tort cases." Id. at 587.

144. See text accompanying note 11.

145. "Principle I incorporates the 'interest' nexus requirement of cases like *Keeton*, *Burger King* and *Asahi* . . . . The first principle also links jurisdictional and choice-of-law inquiries." *Ashley*, 789 F. Supp. at 588. See notes 195-216 and accompanying text.

146. The second factor measures the fairness of requiring the defendant to litigate in the forum state, focusing on the specific hardships to the defendant. *Ashley*, 789 F. Supp. at 589. *Ashley* stated that, under the mass tort jurisdiction test, a court will presume that the assertion of jurisdiction is fair "unless the defendant informs it of potential litigation burdens and the desirability of transfer or dismissal." Id.

147. See, for example, *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee (CBG)*, 456 U.S. 694 (1982); *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957).

148. See, for example, McDougal, 35 Vand. L. Rev. 1 (cited in note 133). A comparison of the *Ashley* test with the fairness-centered jurisdictional statute proposed by Professor Weintraub highlights the role that state interests play in the *Ashley* formulation. See Weintraub, 63 Or. L. Rev. at 527-28 (cited in note 4).

More importantly, the *Ashley* test is not a complete departure from Supreme Court precedent.[149] Rather, the test reflects distinct strands of jurisdiction jurisprudence that appear throughout the Court's jurisdiction cases. *Ashley* attempts to identify those strands of jurisdictional analysis that are most germane to the litigation before the court and to organize those factors into an intelligible, flexible test for establishing jurisdiction over DES, and perhaps other mass tort, defendants.

Significantly, the *Ashley* test reflects proposals offered by several of the Justices in jurisdiction cases. In his dissenting opinion in *World-Wide Volkswagen*, Justice Brennan posits that the Court's purposeful availment test is circumscribed too narrowly and that even the *International Shoe* minimum contacts test may be outdated.[150] Indeed, the test proposed by Justice Brennan is nearly identical to that established in *Ashley*: he focuses on inconvenience to the defendant and the strength of the forum state's interest rather than on contacts.[151]

The *Ashley* test further finds support in *Mullane v. Central Hanover Trust Co.*,[152] which emphasized the importance of the forum state's interest in the litigation and the enforcement of its own laws and social policies, and in *Phillips Petroleum Co. v. Shutts*,[153] which underscored the importance of the burden inquiry in the jurisdictional analysis.[154] Significantly, *Ashley* does not propose a completo departure from traditional personal jurisdiction analysis in all litigation

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149. The court in *Ashley* proclaimed that "[t]he mass tert standard does incorporate several factors acknowledged in Supreme Court case law and by academic commentaters as relevant te the constitutional inquiry." *Ashley*, 789 F. Supp. at 587.

150. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 308 (1980) (Brennan, J., dissenting).

151. Justice Brennan's test resembles *Ashley* in a number of respects. Significantly, both tests would diminish the importance of contacts if some other interest, such as the forum state's interest in the litigation, supported the exercise of jurisidiction. Similarly, both tests allow the lack of any real injury to the defendant's consitutionally protectod interests to weigh in favor of the fairness of jurisdiction. In words remarkably similar to the *Ashley* test, Justico Brennan concluded that "[i]f a plaintiff can show that his chosen forum State has a sufficient interest in the litigation . . . then the defendant who cannot show some real injury to a constitutionally protected interest . . . should have no constitutional excuse not to appear." Id. at 300-01, 309, 312 (Brennan, J., dissenting). The *Ashley* test also bears remarkable similarities to the jurisdictional analysis proposed by Justice Black in *Hanson v. Denckla*, 357 U.S. 235, 258-59 (1958) (Black, J., dissenting) (suggesting that the forum state should have jurisdiction over a nonresident defendant in a case in which the state has a significant interest unless litigation there would burden the defendant so heavily that it would offend "traditional notions of fair play and substantial justice").

152. 339 U.S. 306 (1950).

153. 472 U.S. 797 (1985).

154. The *Ashley* court read *Shutts* as a Supreme Court recognition of the need for modification of the jurisdictional analysis in the contoxt of mass litigation. *Ashley*, 789 F. Supp. at 576-77.

contexts. Rather, the *Ashley* test is narrowly tailored to accommodate the unique circumstances surrounding DES litigation.

Finally, *Ashley* responds to proposals offered by many scholars calling for modification of personal jurisdiction doctrine to reflect both modern social realities and the appropriate role of the Due Process Clause in protecting against burdens placed on individual litigants.[155] The *Ashley* test is remarkably similar to jurisdictional analyses suggested by numerous scholars who seek to clarify the roles of sovereignty, interests, and fairness in the jurisdiction inquiry.[156] Significantly, *Ashley* represents a judicious first step toward modification of personal jurisdiction doctrine along the lines suggested by these commentators. *Ashley,* however, does not propose to expand its analysis beyond the mass tort litigation scenario and thus represents a more discerning approach to modification of jurisdictional analysis. The *Ashley* test may provoke renewed attention te the proper scope of the personal jurisdiction inquiry. However, the court was unwilling to extend its analysis beyond the scope of the litigation before it, preferring to leave further modification of the doctrine to the Supreme Court.[157]

VI. IMPLICATIONS OF THE *ASHLEY* HOLDING

The *Ashley* court adopted a fairly cautious approach, recognizing that it could not entirely abandon well-established personal jurisdiction doctrine when developing a due process standard for mass tort litigation.[158] Rather, the court stated that its aim was to clarify the role of the nexus requirement in Due Process Clause cases involving new substantive law.[159] Thus, *Ashley* claimed to adopt a conservative stance, despite its willingness to rewrite longstanding personal jurisdiction jurisprudence.[160]

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155. See, for example, McDougal, 35 Vand. L. Rev. at 30 (cited in note 133) (suggesting that if the defendant will not be unduly burdened by litigation in the forum selected by the plaintiff, the forum state should have the authority te decide the dispute).

156. These proposals are explored more fully in Part VI.B. below.

157. See *Ashley,* 789 F. Supp. at 587; note 202.

158. *Ashley,* 789 F. Supp. at 577 (citations omitted).

159. Id. See also notes 217-25 and accompanying text (discussing the role of the Due Process Clause in personal jurisdiction analysis).

160. *Ashley* suggests that its position will be adopted by the New York Court of Appeals. *Ashley,* 789 F. Supp. at 571.

A. *The Impact of the* Ashley *Test on DES Litigation*

The court in *Sindell v. Abbott Laboratories*[161] determined that a market-share approach is most just and most likely to provide compensation to an injured plaintiff. *Sindell* recognized, however, that the market-share theory departs significantly from traditional tort law principles and thus concluded that it should be limited to the unique factual context of DES litigation.[162] Likewise, the *Ashley* test is tailored carefully to meet the needs and satisfy the equities of DES litigation. For this reason, the *Ashley* personal jurisdiction standard should be extended to other instances of mass tort litigation only with great caution.[163]

Unlike *Sindell*, the *Ashley* court did not tie its jurisdictional framework to the market-share theory of liability. Rather, the jurisdictional concepts proposed by the *Ashley* court are based on the need for specifically tailored, guiding principles in multiple defendant, mass tort litigation. Asbestos and other types of mass tort litigation share enough characteristics with DES litigation to make a broader jurisdictional standard desirable. Among such considerations are the burdens of identification; the desirability of resolving complex, multiparty litigation in a single, efficient proceeding; and the states' common interest in providing compensation to severely injured plaintiffs.

By virtue of strengthening the enforceability and applicability of the *Sindell* market-share liability theory, the *Ashley* holding enhances policies such as the desire to provide compensation to DES victims. In fortifying the applicability of market-share liability by ensuring jurisdiction over all manufacturers named, the *Ashley* test has begun to eradicate ill effects such as overdeterrence and liability in the absence of moral blame that can flow from a market-share liability test imposed on a small number of manufacturers. Critics of the market-share theory often focus on the potential for imposing liability in the absence of fault and consequently overdeterring manufacturers in cases in which not all possible defendants are before the

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161. 607 P.2d 924 (Cal. 1980). See notes 32-39 and accompanying text.

162. "Where, as here, all defendants produced a drug from an identical formula and the manufacturer of the DES which caused plaintiff's injuries cannot be identified through no fault of plaintiff, a modification of the rule of *Summers* is warranted." *Sindell*, 607 P.2d at 936. See also *Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 539 N.E.2d 1069, 1075 (1989). For a detailed discussion of the limitations of market-share liability, see Note, 94 Harv. L. Rev. at 677-79 (cited in note 18).

163. The market-share liability test has not been applied to asbestos litigation. See Downey and Gulley, 4 J. Legal Med. at 188 n.102 (cited in noto 15) (distinguishing DES from asbestos litigation).

court.[164] The *Ashley* test undermines such objections to market-share liability by enabling plaintiffs (and cross-claiming defendants) to join significantly greater numbers of defendants; the greater the number of defendants before the court, the more equitable the distribution of liability resulting from application of a market-share theory.[165]

The court in *Sindell* noted that DES plaintiffs in a market-share liability proceeding must join defendants representing only a "substantial share" of the relevant market.[166] The *Sindell* court admitted that the market-share approach may result in liability that is slightly out of proportion to the mathematical market share; however, the court noted that defendants named by the plaintiff would be free to cross-complain against other DES manufacturers to ensure that the maximum number of manufacturers possible are before the court.[167] Assuming the desirability of a market-share proceeding as an equitable method for allocating liability,[168] the *Ashley* test enhances the fairness of a market-share proceeding by ensuring that the forum can obtain jurisdiction over all manufacturers still in existence. Thus, the *Ashley* approach approximates the policies underlying Congress's grant of nationwide jurisdiction in federal interpleader proceedings.[169] Jurisdiction over all defendants who should be before the court guarantees a more equitable distribution of liability. Indeed, the dissenting opinion in *Sindell* argued that

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164. One critic has stated that "[p]laintiffs can respond to the distortion [of liability] argument by contending that defendants are free to bring in third party defendants by cross-complaint if they wish to have a larger market share represented in the suit. The problem with this response is that many manufacturers may not be amenable to suit in the jurisdiction where the plaintiff brings the action." Fischer, 34 Vand. L. Rev. at 1646 (cited in note 39). Professor Fischer claims that the market-share theory results in "inherent distortion of defendants' actual liability." Id.

165. The *Ashley* test further will eliminate any unfairness arising from deliberate marketing strategies of certain DES manufacturers. As Professor Fischer has noted, "some DES manufacturers intentionally catered to local and regional markets. Therefore, a manufacturer who produced a high percentage of the DES used in the locality where the plaintiff's mother obtained the drug may not do business in the jurisdiction where suit is filed." Id. at 1646-47 (footnotes omitted). A jurisdiction test based on an interest-and-fairness analysis rather than a contacts, doing business, or purposeful availment standard will help ensure that defendants are not insulated from liability because of the fortuity of marketing and distribution strategies.

166. *Sindell*, 607 P.2d at 937.

167. Id.

168. Compare Downey and Gulley, 4 J. Legal Med. at 196-200 (cited in note 15) (proposing a legislative solution to the problem of compensation for DES victims).

169. See 28 U.S.C. § 1335, 1397, 2361 (1988). One scholar has noted that these provisions "indicate[] that the Supreme Court's territorial conception of due process limitations may not be absolute." McDougal, 35 Vand. L. Rev. at 23 (cited in note 133) (footnote omitted). For an interesting discussion of a proposed revision to Rule 4 of the Federal Rules of Civil Procedure that would provide for nationwide service of process in federal question (and perhaps certain diversity) cases, see Howard M. Erichson, *Nationwide Personal Jurisdiction in All Federal Question Cases: A New Rule 4*, 64 N.Y.U. L. Rev. 1117 (1989).

manufacturers who are amenable to suit in the forum state will face a disproportionately high percentage of the market-share liability.[170] Application of the *Ashley* standard will help eradicate unfair distribution of liability based solely on lack of minimum contacts with the forum.

Further, under the *Ashley* test, plaintiffs more likely will receive full compensation.[171] If the market-share theory dictates that a plaintiff may recover from each defendant only that percentage of the judgment equal to its percentage share of the DES market,[172] the more generous *Ashley* standard will allow plaintiffs to recover their fair share of the judgment from defendants previously not amenable to jurisdiction; defendants no longer will be insulated from liability by lack of jurisdiction under a contacts test.[173]

The *Sindell* court asserted that an alternative liability theory may apply to DES litigation when it is substantially likely that the defendant who supplied the drug that injured the plaintiff was before the court.[174] A broader jurisdictional standard would help ensure that all (or at least all available) defendants could be brought before the court. In such a case, a court could apply more traditional principles of tort law to the resolution of liability.[175]

Perhaps more importantly, the *Ashley* decision represents a significant stop toward establishing jurisdictional and other rules for complex litigation, a need for which the legal community has recognized and currently is addressing.[176] As the incidence of complex

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170. *Sindell*, 607 P.2d at 940 (Richardson, J., dissenting).

171. "Given the *Hymowitz* court's decision to forgo joint and several liability, a DES plaintiff's full recovery would be frustrated if all manufacturers for pregnancy use could not be brought into court." *Ashley*, 789 F. Supp. at 572.

172. See *Hymowitz*, 539 N.E.2d at 1078 (holding that "liability of DES producers is several only, and should not be inflated when all participants in the market are not before the court in a particular case").

173. See Note, 94 Harv. L. Rev. at 673 (cited in note 18) (arguing that liability in proportion to market share "would give plaintiffs incentive to bring in as many defendants as practical, so courts could be reasonably certain that all defendants who could be efficiently joined were present") (footnote omitted).

174. Downey and Gulley, 4 J. Legal Med. at 183 (cited in note 15).

175. See id. at 184 (stating that it is "critical to ensure that at least one defendant [is] before the court, whose breach of a duty owing to the plaintiff resulted in plaintiff's harm, before the burden of causation [can] justifiably be shifted to the defendants" under a theory of alternative liability).

176. See, for example, American Law Institute, *Complex Litigation Project* (cited in note 103). Judge Weinstein, the author of the *Ashley* opinion, currently is serving on the Complex Litigation Project's Advisory Committee. The numerous issues and problems raised by the increasing incidence of complex litigation are beyond the scope of this Recent Development. For a comprehensive treatment of the problems of multiparty, multiforum litigation, see Thomas D. Rowe, Jr., and Kenneth D. Sibley, *Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction*, 135 U. Pa. L. Rev. 7 (1986) (proposing the creation of federal subject matter jurisdiction to resolve complex, scattered litigation).

litigation increases,[177] courts more frequently are confronted with problems unique to mass litigation. The judicial system currently faces a crucial problem: the unavailability of any one forum in which scattered but related litigation can be consolidated.[178] The restrictions imposed on state court jurisdiction by *World-Wide Volkswagen* and its progeny often are an underlying cause of the system's inability te consolidate complex, multiforum litigation.[179] *Ashley* proposes a singular solution to this difficulty, at least in the context of DES litigation. By broadening the jurisdictional reach of state courts in mass tort litigation, the *Ashley* test facilitates consolidation of what otherwise would amount to scattered individual actions.[180]

B. The Impact of the Ashley *Test on Jurisdictional Theory*

The *Ashley* test also carries implications for general personal jurisdiction doctrine. A significant body of commentary suggests the need to revise current personal jurisdiction analysis to distinguish sovereiguty and fairness concerns and to clarify the meaning and role of the Due Process Clause in jurisdiction analysis.[181]

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177. The incidence of "complex" (multiparty, multiforum) litigation has increased greatly in recent years, due largely to continued improvements in transportation, industrial growth, and increasingly nationalized markets. Current rules on joinder, jurisdiction, and choico of law do not address adequately the problems engendered by mass litigation.

178. Rewe and Sibley, 135 U. Pa. L. Rev. at 9 (cited in note 176).

179. See id. (noting that "relatod proceedings arising out of the same events are often conducted as a multi-ring circus in two or more forums. . . . [C]onsolidation cannot take place in the courts of any one state because of the due process holding against stato court jurisdiction in *World-Wide Volkswagen*") (footnote omitted).

180. The American Law Institnte proposes yet another solution to the problems arising from multiparty, multiforum litigation: the creation and adoption of federal legislation permitting consolidation of complex litigation in a single forum. See American Law Institute, *Complex Litigation Project* § 8 at 326-46 (citod in note 103) (setting forth the personal jurisdiction provision). The ALI proposal would (1) allow the "transferee" state to exercise jurisdiction according to current constitutional limits, based on contacts with a state participating in the complex litigation legislation, and (2) permit nationwide jurisdiction in the "transferee" state if authorized by Congress, based on a "national contacts test." Id. at 335-36, 341. A comprehensive scheme for the management of complex litigation "will lead to considerable savings of judicial resources, and increased fairness. . . ." Id. at 344. The Reporter's Notes to Comment f explain the ALI's willingness to relax the contacts standard for complex litigation: "[C]rossing state boundaries does not accurately measure the practical degree of hardship or inconvenience to litigants because their circumstances may be so different. State boundaries cannot always be used as a substitute for fairness. Actual hardship on the litigants should guide . . . in deciding whether a particular litigant should be exempt from transfer for consolidation." Id. at 346.

181. In particular, the decision in *World-Wide Volkswagen*, which suggestod that sovereignty considerations alone could divest a court of judicial jurisdiction (see notes 75-77 and accompanying text), sparked a rash of scholarly criticism of the Court's jurisdiction formulation. See, for example, Braveman, 33 Syracuse L. Rev. 533 (cited in note 62); Redish, 75 Nw. U. L. Rev. 1112 (cited in note 44).

1. The Sovereignty Focus, the Contacts Requirement, and Interstate Federalism

Many scholars recommend revising personal jurisdiction doctrine te eliminate the contacts requirement that undergirds the concept of interstate federalism recognized in *World-Wide Volkswagen.*[182] Rather than a contacts-based inquiry, these scholars propose that the jurisdictional analysis focus on the individual interests implicated by the assertion of jurisdiction—namely, fairness to the litigants, which generally is analyzed in terms of the burden[183] or inconvenience to the parties.

The minimum contacts requirement[184] arose from the Supreme Court's concern with the interstate federalism concepts it has found implicit in the Constitution.[185] The Court's insistence on territorial contacts confuses notions of territorialism and sovereignty. The

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182. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980). See also Redish, 75 Nw. U. L. Rev. at 1115 (cited in note 44) (proposing a jurisdiction test that examines three factors: inconvenienco te the defendant, inconvenience te the plaintiff, and forum state interests); McDougal, 35 Vand. L. Rev. 1 (cited in note 133); Weintraub, 63 Or. L. Rev. at 486-87 n.14 (cited in note 4) (listing scholarly proposals for fairness-based jurisdiction standards that do not take inte account territerial boundaries).

Other commentaters disagree, asserting that a contacts requirement remains essential te personal jurisdiction analysis. See, for example, Mollie A. Murphy, *Personal Jurisdiction and the Stream of Commeree Theory: A Reappraisal and a Revised Approach*, 77 Ky. L. J. 248, 284 (1988-89) (arguing that "jurisdiction analysis must . . . recegnize the existence of sovereignty limits and the consistoncy of the Court's 'purposeful' connection requirement with those limitations"). Murphy claims that although convenience to the defendant is an important element of fairness, jurisdiction ultimately is fair only when the defendant has an "adequate connection" with the forum state. Id. at 286. Murphy concludes that "[t]he existence of sovereignty limitations on a state's authority te assert jurisdiction is readily supported whether on the basis of structural considerations or the due process clause itself." Id. at 290 (footnote omitted).

183. Professor Redish notos several elements of the possible "burden" on a defendant, including litigation inconvenience and surprise at the existenco of jurisdiction. Redish, 75 Nw. U. L. Rev. at 1133-34 (citod in note 44). Redish is not persuaded that "unfair surprise" is a valid concern, because even surprise cannot be considered an injustice to a defendant who is not inconvenienced by defending in the forum and is not prejudiced by the substantive law applied by the forum state. Id. at 1134.

184. Professor McDougal describes the Court's doctrine as a "neo-territerial minimum contacts theory." McDougal, 35 Vand. L. Rev. at 59 (cited in note 133).

185. See *World-Wide Volkswagen*, 444 U.S. at 291-92, stating that "[t]he concept of minimum contacts . . . can be seen te perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the Statos, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." The latter "function" is disturbing. The requirement that defendants have some "contact" within the territorial bonndaries of a state seeking to assert jurisdiction over them misdirects the jurisdictional inquiry from its appropriate focus on due process, which is concerned with fairness te the defendant. Certainly a defendant is not deprived of due process of law when called te defend in a forum that is neither burdensome nor incenvenient, because such a forum in no way hinders the defendant's ability to present a viable defense. Contacts within a forum state, which might indicate that a particular forum is fair, nonetheless should not serve as a substitute for meaningful due process analysis.

requirement that a defendant have some tangible, physical contact within a state's territorial boundaries implies that the states are territorial units that are competent only to adjudicate matters "touching" their territory.[186] The concept of state sovereignty is not necessarily this limited. *Ashley* professes to address sovereignty concerns by requiring not a territorial but an interest nexus among forum, litigation, and defendant. This focus on a forum state's interest, rather than a preoccupation with territorial boundaries, both addresses the interests of the several states as sovereign units and recognizes that the several states can and should operate as components of a nationwide legal system with a shared interest in the resolution of interstate controversies.[187]

The contacts requirement would not be so troubling if the Court did not require the existence of contacts within the territorial boundaries of the forum state to serve as a prerequisite to the exercise of jurisdiction. Indeed, several commentators have proposed using a contacts inquiry to measure the fairness of asserting jurisdiction over a nonresident[188] but have rejected a contacts requirement that, by itself, can divest a court of jurisdiction.[189]

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186. See Geoffrey C. Hazard, Jr., *Interstate Venue*, 74 Nw. U. L. Rev. 711 (1979). Professor Hazard presents a succinct analysis of the cencept of "sovereign states" underlying the minimum contacts requirement:

> The federal union is made up of separate states; the states are endowed severally with sovereign power te administer civil justice; state sovereignty is delimited by state territery; and only such matters as can be considered "within" the state's territory are within the state's judicial sovereignty. In this limited view of things, the modern "minimum contacts" principle is merely a constraint on a theory of jurisdiction that is based on a concept of the states as independent polities. The state ceurt systems are thus te be autenomous, self-sufficient, self-regarding, and preoccupied with their separate legal existence, even at the cost of being collectively ineffective to dispose of complicated multistate cases.

Id. at 720.

187. As Professor Hazard notes,

> [O]ne can view each state's court system as a constituent of a national legal system whose common objective is to supply an appropriate forum for every domestic case, however complicated. Under this view, the proper measure of a state's judicial authority is not what the state as an independent polity might legitimately do, but what it ought to do in tacit collaboration with courts of other states in order to establish a coherent national system of civil justice.

Id.

188. Although most federal and state courts have adhered te the Supreme Court's "minimum contacts-purposeful availment" paradigms, at least one court has refused te apply the two-tiered contacts-and-fairness inquiry established by *Burger King* and *World-Wide*. See Abramson, 18 Hastings Const. L. Q. at 445 n.21 (cited in note 127) (noting that "[u]nlike other circuits, the Ninth Circuit incorporates the minimum contacts analysis into its evaluation of the fairness factors. The 'extent of the defendant's purposeful interjection inte the forum state' is a Ninth Circuit facter deemed pertinent te the reasonableness of personal jurisdiction.") (quoting *Rocke v. Canadian Auto. Sport Club*, 660 F.2d 395, 399 (9th Cir. 1981)).

189. See, for example, Drobak, 68 Iowa L. Rev. at 1017 (cited in note 60) (arguing that "[a]lthough the requirement of minimum contacts serves useful purposes . . . the preservation of

In eliminating the minimum contacts requirement from its jurisdictional analysis, the *Ashley* court acknowledged that the territorial-based contacts analysis does not reflect modern social and economic activity.[190] In particular, the *Ashley* test recognizes the realities of mass tort litigation, which is a product of increasingly nationalized markets, improvements in transportation and communication, more far-reaching advertising and distribution chains, and national marketing of a generic product by several manufacturers. The requirement that a mass tort defendant have territorial contacts within the forum state only serves to fragment complex litigation and prevent the consolidation and efficient resolution of multistate controversies.

Modern social and economic realities have curtailed the importance and efficacy of a contacts requirement.[191] Moreover, the contacts requirement is ineffective as a protector of state sovereignty interests.[192] The Supreme Court has been unable to articulate, with any precision, the federalism interests served by a contacts analysis.[193] At least one commentator has noted that the retention of a federalism theme in jurisdictional analysis does not serve potential state interests, such as protection of a state's own citizens, protection of property

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federalism and state sovereignty is not one of them"); McDougal, 35 Vand. L. Rev. at 59 (cited in note 133) (claiming that "[t]he Supreme Court should abandon the minimum contacts approach because contacts, apart from the interests [that] they engender, are meaningless occurrences. Rather than totally abandoning the existing doctrines, however, the Court can shift its emphasis to the fairness or reasonableness aspects of its doctrines."); Weintraub, 63 Or. L. Rev. at 503 (cited in note 4) (stating that "[t]he time has come to remove the federalism cloud from due process limitations on state court jurisdiction so that the 'minimum contacts' requirement can be examined in the clear light of fairness to the defendant"). Professor Weintraub proposes that contacts with the forum state should become relevant only if the defendant has made a prima facie showing of unfairness. Id. at 523. Similarly, in its footnote in *CBG*, the Court indicated a willingness to retain the minimum contacts standard as a measure of fairness to the defendant, rather than as a protector of interstate sovereignty concerns. See *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee (CBG)*, 456 U.S. 694, 702-03 n.10 (1982).

190. See McDougal, 35 Vand. L. Rev. at 8 (cited in note 133) (arguing that "[b]ecause state lines are of such little importance to the activities of the people in this country, reliance on the territorial boundaries of states as a basic limit on the states' authority to exercise judicial jurisdiction is destructive of relevant interests").

191. As one commentator has noted, "[w]ith the diminishing importance of state borders in personal jurisdiction doctrine, it would seem only natural that the Court would move away from minimum contacts as a measure of personal jurisdiction. The Court's refusal to require that plaintiffs have minimum contacts with the forum reflects the diminished importance of state sovereignty." Mandler, 1 Ann. Surv. of Am. L. at 71 (cited in note 4) (analyzing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985)).

192. See Drobak, 68 Iowa L. Rev. at 1050 (cited in note 60) (stating that "the Court would be wise to . . . end the federalism theme. The theme is virtually useless as a protection for federalism and state sovereignty.").

193. See Braveman, 33 Syracuse L. Rev. at 548-53, 562 (cited in note 62) (noting "two possible threats to interstate harmony," an affront to the rights of each sovereign to try cases in its own courts and a burden on interstate business transactions, and concluding that one state's exercise of judicial jurisdiction does not pose a significant threat to important interests of its sister states).

located within the state, and the state's interest in regulating conduct within the state.[194]

2. The Role of State "Interests" and Choice of Law

The *Ashley* analysis raises significant questions about the appropriate role of state "interests"[195] in jurisdictional inquiry. Several scholars have taken the position that "a systematic interest analysis requires the identification of all relevant interests that potentially are at stake in a controversy."[196] According to this view, the forum state's interest in the litigation (presumably an interest in having the state's own law applied to the controversy to further that state's substantive social policies)[197] is an important consideration in the jurisdiction analysis.[198] Other commentators have proposed eliminating all "interest" analysis from the personal jurisdiction

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194. Drobak, 68 Iowa L. Rev. at 1050-58 (cited in note 60). Drobak notes that a state's interest in protecting the rights of its citizens is served fully when those citizens protect their own rights. Therefore, a due process analysis that focuses solely on the individual interests of litigants serves this arguable state interest fully; the state should not be permitted to assert greater rights on behalf of its citizens than are afforded by due process. Id. at 1050. Indeed, Drobak asserts that "it would be unconstitutional for a state to prevent its residents from defending in courts of other states when due process would permit personal jurisdiction." Id. at 1051-52 n.145.

195. One scholar has defined "state interests" as interests existing "whenever either the events precipitating the controversy or the ultimate decision significantly affects the state's people, resources, or institutions." McDougal, 35 Vand. L. Rev. at 17 (cited in note 133). Professor McDougal notes that "[t]he substantiality of a state interest in exercising jurisdiction turns on the potential impact that a failure to exercise jurisdiction may have on the state's internal value processes." Id. at 15.

196. See, for example, id. Professor McDougal claims that "[a] court should consider the strength of the forum state's need to exercise judicial jurisdiction in its final accommodation of interests in a controversy over the state's constitutional authority to have the matter litigated in its courts." Id. Professor McDougal's "interest" analysis does not, however, take account of the interests of individual litigants. See id. at 16.

197. Professor McDougal has identified six categories of potentially "interested" states: "(1) the state of residence of each claimant; (2) the state of residence of each defendant; (3) a state in which any of the resources that are the subject of the controversy are located; (4) states in which all or part of the events engendering the controversy occurred; (5) states in which nonparties whom the ultimate decision may significantly affect reside; and (6) the forum state." Id. at 18.

198. See *Hanson v. Denckla*, 357 U.S. 235, 258 (1958) (Black, J., dissenting) (stating that "the question whether the law of a State can be applied to a transaction is different from the question whether the courts of that State have jurisdiction to enter a judgment, but the two are often closely related and to a substantial degree depend upon similar considerations"); *Shaffer v. Heitner*, 433 U.S. 186, 225 (1977) (Brennan, J., concurring in part and dissenting in part) (stating that "the decision that it is fair to bind a defendant by a State's laws and rules should prove to be highly relevant to the fairness of permitting that same State to accept jurisdiction for adjudicating the controversy"). Compare Drobak, 68 Iowa L. Rev. at 1056 n.157 (cited in note 60) (arguing that a forum state's interest in regulating the transaction at issue or applying its substantive law to the resolution of the dispute should be considered in the initial jurisdictional inquiry); Weintraub, 63 Or. L. Rev. at 524-25 (cited in note 4) (claiming that a forum's interests, triggered by the plaintiff's residence in the forum or the convenience of the forum when the plaintiff cannot obtain jurisdiction over all defendants elsewhere, as well as the forum's interest in applying its own substantive law, are relevant to the jurisdictional inquiry).

inquiry and have suggested that states' interests in litigation be addressed solely through choice-of-law analysis.[199]

The *Ashley* court did incorporate a "forum state interest" analysis as the first prong of its jurisdiction standard.[200] *Ashley* adopted the reasoning of scholars who claim that the forum's interest in adjudicating a dispute should be central in the determination of the reasonableness of asserting jurisdiction over a nonresident defendant.[201] Indeed, the *Ashley* court considered the forum's concern with

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199. See, for example, Harold S. Lewis, Jr., *The Three Deaths of "State Sovereignty" and the Curse of Abstraction in the Jurisprudence of Personal Jurisdiction*, 58 Notre Dame L. Rev. 699, 701 (1983) (arguing that "government interests should find expression in the resolution of choice-of-law issues rather than as limitations on personal jurisdiction"); Mandler, 1 Ann. Surv. of Am. L. at 64 (cited in note 4) (asserting that "forum state interests and state interests in substantive policy have no impact on the costs of litigating in a particular forum and thus have no place in a personal jurisdiction determination based solely on considerations of individual liberty") (footnote omitted). Professor Lewis concludes that state sovereignty, whether measured in terms of defendant-forum contacts or forum state interests, should play no role in the jurisdiction analysis:

> If the sole ultimate concern of jurisdictional due process is to ensure a forum that is relatively fair as between the parties, then the presence or absence of a forum state or other governmental interest—of whatever kind or degree and whether or not articulated through legislation—should come to be seen as utterly irrelevant to the personal jurisdiction decision, since those interests have no necessary bearing on the single pertinent factor of party fairness.

Lewis, 58 Notre Dame L. Rev. at 739-40 (footnote omitted). Compare *Hanson*, 357 U.S. at 254 (declaring that a state "does not acquire . . . jurisdiction by being the 'center of gravity' of the controversy, or the most convenient location for litigation. The issue is personal jurisdiction, not choice of law."). As *Hanson* indicates, the Supreme Court has struggled to distinguish personal jurisdiction and choice-of-law analyses.

200. See text accompanying note 11. Under the *Ashley* test, the forum state's interest in the litigation is an important factor in determining the constitutionality of jurisdiction. This interest, according to *Ashley*, largely depends upon the applicability of the forum state's law. *Ashley*, 789 F. Supp. at 588 (stating that "a forum state's interest in any matter will normally be determined by reference to the policies expressed in its substantive laws"). *Ashley* declined to determine "[w]hether a court can and should assert jurisdiction where mass tort choice-of-law principles favor application of another forum's law . . . ." Id. Arguably, a court could exercise jurisdiction in such a case, particularly if the forum were the only one available in which the litigation could be resolved in a single proceeding.

Professor Redish argues that a forum state's decision to apply its own law should not itself be sufficient to constitute a state "interest," but rather that the inquiry should focus on other relevant factors such as "whether the party seeking a remedy is a resident of the state, whether a decision granting or denying relief will affect state economic or regulatory policy, or whether the decision will in any other way diminish the state's ability to protect its citizens." Redish, 75 Nw. U. L. Rev. at 1140 (cited in note 44) (footnotes omitted). According to Redish's analysis, the *Ashley* court could have asserted an interest in the litigation even if New York's substantive law were not applicable, based on such factors as the number of plaintiffs who were New York residents and the impact their injuries would have on New York's economic and social policy if they did not receive compensation. See id. Compare McDougal, 35 Vand. L. Rev. at 45 (cited in note 133) (explaining that "jurisdictional policies and interests seek to allocate judicial business in trans-state controversies properly; substantive interests deal with the application of the appropriate policies to resolve trans-state controversies").

201. See Abramson, 18 Hastings Const. L. Q. at 451 (cited in note 127). The *Ashley* test also is consistent with the approach advocated by Professor Redish, who declares that federalism concerns should be addressed through enhanced choice-of-law rules, yet argues that a "state

the outcome of the litigation a crucial inquiry; this hurdle must be overcome before engaging in a "burdens" analysis.[202] The state's interest, once demonstrated, establishes that the assertion of jurisdiction is prima facie constitutional.[203] A court then may consider criteria such as convenience and administrative feasibility in determining whether it should retain jurisdiction.[204]

In eliminating the minimum contacts requirement from its jurisdictional analysis, the *Ashley* court implicitly recognized that pure territorialism concerns are addressed appropriately through choice-of-law analysis[205] and should not limit the reach of the forum's jurisdiction.[206] One state's interests are infringed by a sister state's assertion of jurisdiction only when the sister state applies its own substantive law rather than the law of the state claiming an interest in the litigation.[207] Arguably, that state's interests are in no way infringed

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interest" analysis may be relevant to the jurisdiction inquiry. Redish, 75 Nw. U. L. Rev. at 1132-33, 1139-42 (cited in note 44).

202. See text accompanying note 11. The *Ashley* court did note, however, that its test reflects "a conservative view of precedents" and claimed that "a more radical position eliminating the state interest requirement, thus allowing a neutral forum to accept jurisdiction, could be developed were the Supreme Court to revisit precedent." *Ashley*, 789 F. Supp. at 587.

203. *Ashley*, 789 F. Supp. at 587. *Ashley*'s interest requirement indicates that the forum has the necessary "stake" in the litigation: a "legitimate concern with the outcome of the litigation." Abramson, 18 Hastings Const. L. Q. at 452 (cited in note 127). Professor Abramson notes that the forum's "interest often finds expression in the need to protect a forum state's citizen or in the forum state's interest in the application of its own law." Id. Both these concerns seem to be present in *Ashley* and in DES litigation in general, particularly when the forum state has enacted legislation indicative of a particular social policy in relation to victims of DES exposure, as had New York. See id. at 454-55 (noting that "a state may have articulated its interest in protecting its citizens by enacting a comprehensive statutory scheme intended to reach nonresidents in furtherance of this interest") Further, the Supreme Court has noted that a forum state has a significant interest in providing a convenient forum in which forum residents might seek compensation for injuries inflicted by nonresidents. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 483 (1985). This interest is particularly strong when the economic impact of injury to forum residents will be felt in the forum. See Abramson, 18 Hastings Const. L. Q. at 454 & n.77.

204. The court may consider motious te transfer or dismiss the litigation based on improper venue or forum non cenveniens. *Ashley*, 789 F. Supp. at 587.

205. See Mandler, 1 Ann. Surv. of Am. L. at 72 n.148 (cited in note 4) (noting that "[t]he censtitutional source of protection for state substantive law interests would seem to be the full faith and credit clause"); Redish, 75 Nw. U. L. Rev. at 1123 (cited in note 44) (declaring that "[t]he primary censtitutional provision dealing with problems of interstate friction is the full faith and credit clause").

206. Professor Weintraub analyzes the appropriate role of choice of law in the jurisdictional inquiry, and concludes that analysis of conflicts in the substantive law of potential forum states "should be eliminated from jurisdictional consideration by dealing with it directly. A regime of constitutionally mandated conflicts rules that select a single law as the one permissible choice for each transjurisdictional problem would fulfill this purpose . . . . At this time, [however,] the Supreme Court is far more likely te be able to shape wise and useful jurisdictional rules than choice-of-law rules." Weintraub, 63 Or. L. Rev. at 525 (cited in note 4). Professor Weintraub concludes that unless serious questions of unfairness arise, a forum generally should apply its own substantive law rather than attempting to master the law of another state. Id.

207. See Redish, 75 Nw. U. L. Rev. at 1114 (cited in note 44):

> If friction with or affront to one state does result from the exercise of jurisdiction by another state, it is because the laws of the first state, not its courts, have been disre-

by a sister state's assertion of jurisdiction in a conflict in which the original state either has no interest or has expressed its interest in substantive social policies identical to those of the forum asserting jurisdiction. The jurisdiction inquiry, then, should focus not on whether the exercise of jurisdiction offends a co-equal sovereign in a federal system, but on considerations of fairness to the litigants and the potential forum state's interest in the litigation.[208]

The *Ashley* test most closely resembles the jurisdictional standard proposed by Professor Pamela J. Stephens.[209] Professor Stephens concludes that the Court is committed to the continuing role of the concept of sovereignty in personal jurisdiction analysis,[210] but she proposes to address state sovereignty concerns through an analysis of the forum's ability to apply its own substantive law, rather than through a requirement of physical contacts within the territorial boundaries of the forum state.[211] Under this standard, an interest sufficient to justify application of the forum state's law also provides authority for the forum to assert judicial jurisdiction.[212] Professor Stephens' proposal differs from the *Ashley* test in only one respect: she would balance state interests against burdens imposed on the defendant, whereas the *Ashley* test establishes state interest as a prerequisite to the burden analysis.[213] *Ashley*, however, does invite the Supreme Court to eliminate the state interest inquiry altogether.[214] Under this alternative formulation, *Ashley* would provide for an entirely neutral forum to assume jurisdiction over a controversy as

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garded, for it is through its laws that a state's policies are brought to fruition. Thus, if the Supreme Court is truly concerned with avoiding lateral friction within the federal system, it should consider giving considerably closer scrutiny te a state's choice of law than to its assertion of personal jurisdiction.

208. A detailed analysis of the appropriate relationship between personal jurisdiction and choice of law is beyond the scope of this Recent Development. However, in analyzing the forum state's interest, both *Ashley* and Professor Pamela J. Stephens consider whether the forum has an interest in applying its own substantive, procedural, or remedial law to the litigation. See notes 209-16 and accompanying text. *Ashley*, more specifically, would allow a forum te assert jurisdiction when the outcome of the litigation would "affect" or "impact . . . policies expressed in the . . . laws of the forum." *Ashley*, 789 F. Supp. at 587. Thus, a forum theoretically could assert jurisdiction although it would not be bound to apply its own law, as long as the requisite "effects" on the forum exist. In such a scenario, concise choice-of-law rules would be of paramount importance. Indeed, in refining jurisdictional standards, ceurts are certain to confront close questions regarding the appropriate role of choice-of-law considerations in personal jurisdiction doctrine. This analysis ceuld very well result in improved choico-of-law rules te guide courts in both choice of law and jurisdiction analyses.

209. See Stephens, 19 Fla. St. U. L. Rev. 105 (cited in note 96).

210. Id. at 106.

211. Id. at 107.

212. Id. at 129.

213. Id. at 134-35. Compare text accompanying note 11.

214. See note 202. If the interest analysis were eliminated from the *Ashley* test, *Ashley* would resemble scholarly proposals te assess jurisdiction solely by reference te inconvenience to the defendants. See, for example, Lewis, 58 Notre Dame L. Rev. 699 (cited in note 199).

long as the assertion of jurisdiction did not impose significant litigation burdens on the defendants.[215] Indeed, a neutral forum might be particularly desirable in the resolution of scattered, complex litigation.[216]

3. The Due Process Clause

The *Ashley* test both responds to and provokes questions concerning the proper role of due process in personal jurisdiction analysis.[217] The Court in *CBG* concluded that the restrictions imposed on state court jurisdiction in *World-Wide Volkswagen* ultimately derive from the individual liberty interests with which the Due Process Clause is concerned. *CBG* underscored the fact that the Due Process Clause, the sole source of the personal jurisdiction requirement, nowhere mentions federalism concerns.[218] That Clause[219] governs the relationship between an individual and a sovereign, and serves to

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215. Professor Lewis agrees that forum state interests should play no role in the jurisdiction determination: "The presence of a strong forum interest in opening its courts to a plaintiff's claim is wholly fortuitous from the standpoint of the defendant and does not even tend te show that the forum is fair to him. By the same token, if a forum is fair to the defendant, the absence of a forum state interest in hearing the case should not preclude the plaintiff from pursuing his claim there." Id. at 705-06.

216. See notes 176-80 and accompanying text (discussing proposals for legislation that would provide for transfer and consolidation of complex litigation in a single forum). If this jurisdictional standard were adopted, choice-of-law considerations would become of primary importance, because a neutral forum in theory would have no reason to apply its own substantive law.

217. The Court's conception of the constitutional boundaries of personal jurisdiction is based on the Due Process Clauses of the Fifth and Fourteenth Amendments. The Court first linked the personal jurisdiction doctrine to notions of due process in *Pennoyer*'s famous dictum: "Since the adoption of the Fourteenth Amendment . . . proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constituto due process of law." *Pennoyer v. Neff*, 95 U.S. 714, 733 (1878). The Fourteenth Amendment could not apply to *Pennoyer*, however, because it was not ratified until 1868, after the plaintiff had obtained his judgment against nonresident defendant Neff. See also *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee (CBG)*, 456 U.S. 694, 702 (1982) (stating that "[t]he requirement that a court have personal jurisdiction flows not from Art. III but from the Due Process Clause"); *Hanson v. Denckla*, 357 U.S. 235, 250 (1958) (proclaiming that "[w]ith the adoption of [the Fourteenth] Amendment, any judgment purporting to bind the person of the defendant over whom the court had not acquired in personam jurisdiction was void within the [forum] State as well as without"). See also Drobak, 68 Iowa L. Rev. 1015 (cited in note 60) (tracing the historical development of the jurisdiction concept from its common-law origin to its application in Supreme Court case law); Redish, 75 Nw. U. L. Rev. 1112 (cited in note 44) (tracing the historical development of the "due process" concept).

218. *CBG*, 456 U.S. at 703 n.10. See also Drobak, 63 Iowa L. Rev. at 1032 n.72 (cited in note 60).

219. The Fourteenth Amendment, applicable to the statos, provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV. This Recent Development uses the torm "Due Process Clause" to refer te the Fourteenth Amendment, because the more common jurisdiction questions, as well as the *Ashley* situation, concern a state's assertion of jurisdiction.

protect individual liberty interests.[220] When read literally, the Due Process Clause has no application to interstate relations.[221] Critics of the Court's approach note that the Court's willingness to interject sovereignty considerations into the jurisdiction analysis is not supported by the text of the Due Process Clause itself, nor by the policies underlying it.[222]

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220. The personal jurisdiction requirement, according to *CBG*, "recognizes and protects an individual liberty interest." *CBG*, 456 U.S. at 702.

221. The Supreme Court in *Nevada v. Hall*, 440 U.S. 410 (1979), rejected a claim by one state that it was immune from suit in the courts of a sister state. Allowing the courts of one state to exercise jurisdiction over another sovereign certainly poses a greater threat to interstate harmony than could a court's exercise of jurisdiction over an individual nonresident defendant. The *Nevada* Court concluded, however, that no constitutional provision required one state to acknowledge the sovereign immunity of a sister state, warning that "caution should be exercised before concluding that unstated limitations on state powers were intended by the Framers." Id. at 425. The *World-Wide* Court apparently ignored this admonition when it stated that concepts of interstate federalism implicit in the Constitution served to limit a state's authority to assert jurisdiction over nonresident defendants. *World-Wide Volkswagen*, 444 U.S. at 294.

222. One scholar has noted that, although the Court has injected interstate federalism elements into the due process inquiry, "it has relied on neither the language, history, nor policy of the due process clause to justify its construction. Indeed, such notions of federalism as limitations on the reach of personal jurisdiction are found nowhere in the body of the Constitution, much less in the terms of the due process clause." Redish, 75 Nw. U. L. Rev. at 1114 (cited in note 44) (footnotes omitted).

Professor Redish offers a detailed and persuasive analysis of the proper scope of due process analysis in jurisdiction jurisprudence. Redish claims that the jurisdiction cases beginning with *Pennoyer* and culminating in the purposeful availment standard set by *World-Wide Volkswagen* have misconstrued the proper scope of the Due Process Clause in determining the reach of judicial jurisdiction. Both the Fifth and Fourteenth Amendment Due Process Clauses govern the relationship between a sovereign and an individual and are designed to protect individual liberty. Redish presents a strong argument that notions of federalism have been inappropriately grafted onto the Due Process Clause by Supreme Court jurisdiction jurisprudence:

> In virtually every other context, due process—in both its substantive and procedural manifestations—has been construed as a protection of private parties from some form of injustice. In the personal jurisdiction context, however, the Court has infused vague concepts of interstate sovereignty into the due process clause .... Although the Court has assumed since the time of *Pennoyer* that the due process clause embodies such notions of federalism, it has relied on neither the language, history, nor policy of the due process clause to justify its construction.

Id. at 1113-14 (footnotes omitted). Professor Redish concludes by proposing a new jurisdiction standard premised on analysis of inconvenience to the defendant and state interests. Id. at 1137-42. According to Professor Redish, any neutral forum should be permitted to exercise jurisdiction over a nonresident defendant as long as the defendant is not inconvenienced by the exercise of jurisdiction. Id. at 1137.

Professor Redish's test is remarkably similar to *Ashley*. His proposal differs in only one significant respect: he would apply a burden analysis at the outset, upholding jurisdiction as long as no meaningful inconvenience to the individual litigant would result. Id. Only if the exercise of jurisdiction would result in significant inconvenience to the defendant does Professor Redish examine the forum state's interest in the litigation. Id. at 1140-41 & n.176. This ordering reflects his belief that sovereignty concerns should play only a minimal role, if any, in the jurisdiction analysis. *Ashley*, in contrast, recognizes the relevance of a sovereignty inquiry, but focuses this inquiry on state interests rather than territorial contacts. See also Braveman, 33 Syracuse L. Rev. at 541-43, 548 (cited in note 62); Drobak, 68 Iowa L. Rev. at 1032-33 (cited in note 60).

For this reason, courts and scholars frequently have proposed that federalism concerns, served through the minimum contacts requirement, be removed from the jurisdictional inquiry entirely and addressed through improved choice-of-law rules.[223] The interstate federalism doctrine that formed the basis for *Pennoyer* and the "territorial contacts" analysis that has persisted in jurisdiction jurisprudence at most are connected remotely to due process.[224] *Ashley* therefore offers the prospect of a jurisdictional standard that focuses entirely on the liberty interests of litigants, with no regard for state sovereignty concerns.[225]

4. Judicial Economy and Efficiency

A final, and perhaps paramount, consideration weighs in favor of the more expansive jurisdictional standard advocated by *Ashley*. A broader test for personal jurisdiction will facilitate judicial economy by ensuring that a maximum number of plaintiffs' and defendants' rights are adjudicated in a single proceeding.[226] The Supreme Court has cited the interest of the interstate judicial system in resolving

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223. Indeed, *Burger King* noted that "the process of resolving potentially conflicting 'fundamental substantive social policies' . . . can usually be accommodated through choice-of-law rules rather than through outright preclusion of jurisdiction in one forum." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 483 n.26 (1985) (quoting *World-Wide Volkswagen*, 444 U.S. at 292). See also Mandler, 1 Ann. Surv. of Am. L. at 64 (cited in note 4) (claiming that "[t]he Supreme Court can best protect . . . state interests by formulating constitutional limitations on state choice-of-law rather than relying on personal jurisdiction limitations"); McDougal, 35 Vand. L. Rev. at 10 (cited in note 133) (arguing that "[t]he territorial foundation of the minimum contacts approach, as developed by the Supreme Court, not only bears little relation to the activities of people in their everyday lives, but also operates as a barrier to an appropriate consideration of due process protections for all the parties involved in a controversy"). Compare Drobak, 68 Iowa L. Rev. at 1046-48, 1058, 1065-66 (cited in note 60) (concluding that although interstate federalism cannot operate as an independent restriction on judicial jurisdiction, federalism concerns are preserved in the jurisdictional inquiry as a "by-product" of fairness or burden analyses).

224. "The traditional due process concerns—whether the defendant will suffer a deprivation of liberty or property without fair notice and a reasonable opportunity to defend—are at best only tangentially related to . . . sovereignty concerns." *Ashley*, 789 F. Supp. at 578. *Ashley* points out that this concern motivated Justice Hunt's dissent in *Pennoyer*: he repudiated the notion that due process required more than adequate notice and an opportunity to defend. Id. See *Pennoyer v. Neff*, 95 U.S. 714, 748 (1877) (Hunt, J., dissenting).

225. See note 202 (noting the *Ashley* proposal that the Supreme Court eliminate even an "interest" analysis from the jurisdiction standard, thus permitting a neutral forum to assert jurisdiction). The importance of clear choice-of-law rules in such a scenario is apparent.

226. See Note, 94 Harv. L. Rev. at 675 (cited in note 18) (arguing that "inequitable inconsistencies between DES decisions will be minimized if as many defendants and plaintiffs as possible have their rights adjudicated in the same proceeding"); Abramson, 18 Hastings Const. L. Q. at 456 (cited in note 127) (noting that "[c]ourts have expressed . . . concern regarding 'whether litigating in a particular forum will allow the plaintiff to join all parties in one suit.' In multiparty litigation, a plaintiff may be burdened substantially if forced to proceed in parallel or piecemeal actions, especially when the plaintiff has limited litigation resources.") (citation and footnotes omitted).

controversies most efficiently[227] as a relevant factor in assessing the reasonableness of a forum's assertion of jurisdiction.[228] This interest is best served by litigation in the state where the injury occurred and where witnesses are located[229] and in the court that can interpret the applicable law most competently.[230] Perhaps most importantly, efficient resolution of controversies is accomplished through avoidance of piecemeal litigation: if possible, all conflicts should be resolved in a single proceeding. Thus, a court with jurisdiction over some defendants should be permitted to exercise jurisdiction over all defendants in order to avoid duplicative litigation.[231]

These factors point to upholding jurisdiction over the defendant manufacturers in *Ashley*, because the plaintiffs were residents of New York, a substantial portion of relevant evidence was located in New York,[232] and New York courts would be most competent to interpret the applicable law—the substantive law of New York related to compensation of DES victims.[233] The *Ashley* court was particularly

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227. *World-Wide Volkswagen*, 444 U.S. at 292. One commentator has stated that "[t]he 'efficient resolution' interest takes several forms, emphasizing (1) the preference for the forum where the injury occurred and/or where the witnesses reside, (2) the avoidance of piecemeal litigation, and (3) the role of choice-of-law principles." Abramson, 18 Hastings Const. L. Q. at 461.

228. One scholar has emphasized the importance of efficiency considerations:

> The collective community of states . . . possesses an interest in providing the greatest possible economy in resolving trans-state controversies. Only in rare circumstances should due process require multiple litigation over identical, closely related, or overlapping factual issues. Such repetitive litigation in two or more states sacrifices judicial efficiency and imposes an obvious burden on individual claimants. The collective community of states, therefore, has an interest in precluding, to the maximum extent feasible, the unnecessary waste of individual and state resources on repetitive litigation.

McDougal, 35 Vand. L. Rev. at 24 (cited in note 133). Professor McDougal cites the class action as an example of the judicial system's concern for efficient resolution of multiparty controversies. Id. at 24-25. He further argues that minimum contacts should not be required to establish jurisdiction over class action defendants, because such a requirement would severely undermine the interests promoted by the class action device. Id.

229. Abramson, 18 Hastings Const. L. Q. at 460 (cited in note 127).

230. Id.

231. See id. at 463 (arguing that "[i]n litigation involving numerous defendants from diverse geographic locations, it would be onerous and cumbersome to require the plaintiff to proceed separately against each defendant in the defendant's home forum, particularly given the strong federal interest in allowing for efficient conduct of a complex lawsuit") (citing *Delong Equip. Co. v. Washington Mills Abrasive Co.*, 840 F.2d 843, 850-51 (11th Cir. 1988). Indeed, Professor McDougal claims that

> a free democratic society should seek to provide a claimant with at least one forum in which he may timely present his claim against *all* those who allegedly have caused . . . the claimant to suffer value deprivations. A failure to provide such a forum may subject the claimant to conflicting decisions that completely or substantially deny him any redress, even though at least one of a number of defendants clearly should bear responsibility for the claimant's plight.

McDougal, 35 Vand. L. Rev. at 22 (cited in note 133) (emphasis in original) (footnotes omitted).

232. The evidence located in New York included medical records of the DES plaintiffs.

233. For the *Ashley* court's analysis of choice-of-law issues raised by the DES litigation, see *Ashley*, 789 F. Supp. at 566-69.

troubled by the fact that, were it not to exercise jurisdiction over all defendants, the plaintiffs might find themselves barred from recovery against those defendants in any other court.[234] Similar concerns clearly would be present in other DES litigation, and presumably in a great deal of non-DES mass tort litigation as well.

Efficiency concerns are particularly important in complex litigation cases, in which the dangers of multiple actions and inconsistent judgments are especially potent.[235] An intelligible, concise test, such as that offered by *Ashley*, inevitably will further due process values, because a clear jurisdiction standard provides stability and predictability that allow potential defendants to structure their conduct with some minimum degree of certainty about whether and where that conduct will render them amenable to suit.[236]

Finally, the interest- and fairness-centered standard adopted by the *Ashley* court would not result in a significant increase in problems of interpretation and application, particularly given the uncertain history of the Supreme Court's minimum contacts and purposeful availment standards. The *Ashley* test is no more unpredictable than the contacts requirement established by *International Shoe* and its progeny.[237] Indeed, after *Burnham*, one wonders precisely how "predictable" the current jurisdictional framework can be.

VII. CONCLUSION

Ashley takes a confident step toward establishing a coherent formulation for judicial jurisdiction in mass tort litigation. The *Ashley* court has attempted to identify the prevailing jurisdictional doctrine most appropriate to mass tort jurisdiction analysis and has discarded those elements that should not play a role in the jurisdiction determination. Although *Ashley* is willing to abandon several elements that have been staples of jurisdiction law since *International Shoe*, the court does so with an eye toward adapting jurisdiction law to the

234. Id. at 576. The court was concerned that if the plaintiffs were forced to sue the nonresident defendants in another forum (such as California), that state's law would apply and the plaintiffs would be barred from recovery.

235. See McDougal, 35 Vand. L. Rev. at 37-40 (cited in note 133) (analyzing the difficulties of multiparty litigation and the importance of resolution in a single proceeding).

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

237. See Redish, 75 Nw. U. L. Rev. at 1142 (cited in note 44): "[A]pplication of the Supreme Court's confusing 'minimum contacts' test is likely to produce at least as many problems in interpretation and application as [a] new test. More importantly, once we accept the theoretical precepts about the proper concern of a due process limitation on the reach of personal jurisdiction . . . it is difficult te imagine a logical alternative te [such a] new test."

economic and social realities of modern America, particularly in the unique context of mass tert litigation. As Justice Marshall noted in *Shaffer v. Heitner*, "traditional notions of fair play and substantial justice" can be as readily offended by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures that are inconsistent with the basic values of our constitutional heritage.[238] The *Ashley* court should be applauded for its willingness to discard an ancient form that lacks substantial modern justification.

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238. *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977).