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# Contacts, Fairness and State Interests: Personal Jurisdiction after *Asahi Metal Industry Co. v. Superior Court of California.*

**Bruce N. Morton†**

## I. Introduction

On February 24, 1987, the Supreme Court decided the case of *Asahi Metal Industry Co. v. Superior Court of California.*[1] This case is now the Supreme Court's most recent pronouncement[2] in the area of personal jurisdiction.[3] Unfortunately, *Asahi* has only further obfuscated a realm of law already confusing and uncertain. The law of personal jurisdiction involves several theoretical issues more complex than simplistic reference to "minimum contacts" would lead one to expect.[4]

This Article will set forth the current state of the law of personal jurisdiction, focusing on some of these complexities and issues. Part II delineates two fundamental, threshold issues un-

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1. 480 U.S. 102 (1987).

2. The only Supreme Court case to cite *Asahi* is Bendix Autolite Corp. v. Midwesco Enter., 108 S. Ct. 2218 (1988), however, *Bendix* relates not to personal jurisdiction, but to the constitutionality of an Ohio statute tolling the statute of limitations while a defendant is not present within the state.

3. "Personal jurisdiction," as used here, refers to the authority of a court to adjudicate the rights, interests and obligations of a party against whom a claim has been asserted. In general, personal jurisdiction is required in both state and federal courts, and the issues and problems are the same in both systems. Personal jurisdiction is to be contrasted with "subject matter jurisdiction," which refers to the power or competence of the court to hear the type of case before it. J. FRIEDENTHAL, M. KANE, A. MILLER, *Civil Procedure* § 2.1 (1985).

4. International Shoe v. Washington, 326 U.S. 310, 316 (1945), *see infra* notes 7-32 and accompanying text.

derlying all personal jurisdiction questions. The first is whether the minimum contacts test is ultimately concerned with contacts or with fairness. The second, related issue, questions whether restrictions on the power of a court to assert jurisdiction over a defendant are grounded solely on the due process clause of the fourteenth amendment, or whether the concept of state sovereignty provides a separate and independent source of those restrictions. This Article takes the position that the minimum contacts test is ultimately about fairness, and that the sole source of restrictions on the assertion of personal jurisdiction is the due process clause. Part II also discusses three significant Supreme Court decisions which set the stage for *Asahi*.

Part III of this Article sets forth the facts and procedural underpinnings of *Asahi*, and analyzes the Court's reasoning. Part III also evaluates the impact of the case by examining several later opinions from the lower federal courts.

This Article argues throughout that two widely held views on personal jurisdiction should be rejected. The first doctrine holds that a necessary condition to the assertion of personal jurisdiction is that the defendant must have "purposefully availed" himself of the benefits and protections of the laws of the forum state.[5] This doctrine should be rejected because the ultimate basis upon which personal jurisdiction may be asserted should remain the defendant's presence, whether literal or metaphorical, in the forum state. The determination of where one is cannot be analyzed, ultimately, in terms of where one intends to be, or in terms of one's purposes.

A second widely accepted doctrine is the "state interest" theory[6] or the view that the right of a court to assert jurisdiction over a defendant rests in part on the interests of a forum state in resolving a particular controversy. This doctrine should also be rejected. Since the sole source of restriction on personal jurisdiction is the due process clause, and since considerations of state interest are unrelated to the due process rights of the defendant, it follows that forum state interests are irrelevant to questions of personal jurisdiction.

It is an unusual combination of views to affirm that the ulti-

5. Hanson v. Denckla, 357 U.S. 235, 253 (1958).

6. *See infra* notes 33-55 and accompanying text.

mate basis for personal jurisdiction is fairness, and simultaneously to reject the state interest theory. On the contrary, most people who would affirm the fairness basis for jurisdiction do so in order to affirm the importance of considerations other than the defendant's contacts with the forum, especially state interest. But, accepting "fairness" as the ultimate test of personal jurisdiction in no way implies acceptance of the state interest doctrine. Rather, the fairness test is wholly consistent with the view that the defendant's contacts with the forum are and should be the only relevant factor in determining what is fair.

## II. Background

### A. *Traditional Threshold Issues Underlying Personal Jurisdiction*

#### 1. *Contacts and Fairness*

The basic test of whether an assertion of personal jurisdiction is constitutional[7] is the well-known "minimum contacts" test, articulated in *International Shoe v. Washington* :[8]

> [D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'[9]

This test was extended in *Shaffer v. Heitner*,[10] where Justice Marshall wrote: "We . . . conclude that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."[11]

The *International Shoe* minimum contacts standard, as ex-

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7. Assertions of jurisdiction are subject to both constitutional and statutory limitations. If a state statute does not go to the limits of what is constitutionally permitted, then the state statute may present a further limitation on the assertion of jurisdiction beyond federal constitutional limitations. This Article focuses on federal constitutional issues.

8. 326 U.S. 310 (1945).

9. *Id.* at 316 (quoting Hutchinson v. Chase & Gilbert, 45 F.2d 139, 141 (1930)).

10. 433 U.S. 186 (1977).

11. *Id.* at 212. The point of the word "all" in this passage is that the minimum contacts standard now applies not only to jurisdiction traditionally termed "in personam," but also to that traditionally termed "in rem" and "quasi-in-rem." *Id.*

tended by *Shaffer*, is both broad, in respect to the number of cases which call for its application, and general, in that the language of the standard gives little guidance as to how it is to be applied in particular cases.[12] But *International Shoe* was a carefully crafted opinion which clearly, if cryptically, pointed in the right direction for the future evolution of the law. Subsequent courts have either misunderstood the code, or chosen not to follow the directions. The author's rejection of much of what later courts have said about personal jurisdiction is based upon a careful return to the letter and spirit of *International Shoe*, with its focus upon fairness to the defendant, based upon the defendant's presence in the forum.[13]

The common sense basis for the minimum contacts test is easily discerned. In general, it is fair to expect a defendant to answer a suit in a jurisdiction where he is present, unfair otherwise.[14] At the very least, a defendant must have some contacts or connection with a forum in order to be deemed legally present for the purposes of asserting jurisdiction over him.[15] But, was the essence of the test in *International Shoe* intended to be contacts or fairness? That is, was the ultimate inquiry intended to be whether the defendant had certain objective contacts with the forum, such that if they were present, fairness would be presumed, or was the ultimate inquiry intended to be whether the assertion of jurisdiction was fair?

The *International Shoe* Court takes for granted that what is at stake in jurisdictional analysis is what due process requires, and that all that is required is that an absent defendant have such minimum contacts that the maintenance of the suit does

12. Professor Hazard has written that the *International Shoe* test is a good one but has noted that "because of its generality, it must be subjected to a process of 'arbitrary particularization' in order to come up with workable rules." Hazard, *A General Theory of State Court Jurisdiction*, 1965 SUP. CT. REV. 241, 277-88, *cited in* LANDERS, MARTIN & YEAZELL, CIVIL PROCEDURE 173 (1988).

13. It is true, of course, that the minimum contacts test refers to the circumstance where the defendant is not present within the forum, but the opinion makes clear that it in no way rejects presence as the essential basis for jurisdiction. Rather, the opinion expands the concept of presence to include more than literal physical presence. *See* International Shoe v. Washington, 326 U.S. 310, 316-17 (1945).

14. *See* Pennoyer v. Neff, 95 U.S. 714, 733 (1877).

15. *International Shoe*, 326 U.S. at 316.

not offend fair play and substantial justice.[16] Due process is a normative or a moral concept. Due process is the process to which one is entitled; the process to which one has a right; the process which it would be wrong to deprive one of. Normative concepts, such as due process, are notoriously resistant to definition or analysis in non-normative, descriptive terms. There is an inevitable gap between factual premises describing how things are, and normative conclusions as to how they ought to be. Some philosophers have argued that it is inherently impossible to bridge this gap, and they have spoken of the "fallacy" of attempting to do so.[17] Whether or not these arguments are sound, they help explain why the normative concept of due process is analyzed in *International Shoe* by means of another normative concept, fairness to the defendant, and why the minimum contacts test must be interpreted as ultimately focusing on fairness, rather than on the purely factual, descriptive notion of contacts. It is only the normative concept of fairness which captures the elements of entitlement and obligation built into the constitutional standard of due process.[18]

The same issues of how to bridge the gap between the normative and the non-normative reappear when one considers how to apply the standard of fairness to particular cases. One cannot just look at a situation and perceive fairness as one perceives descriptive characteristics. The minimum contacts test of *International Shoe* ties together the concepts of fairness and contacts by requiring sufficient contacts so that the maintenance of the suit is not unfair.[19] It is clear that the Supreme Court was pro-

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16. *Id.*

17. *See, e.g.*, G. E. MOORE, PRINCIPIA ETHICA, *passim* (1986).

18. This is the answer to Justice Black's insistent rejection, in his dissent, of a standard for jurisdiction based upon "fair-play," or any idea of "natural justice." Justice Black states:

> I believe that the Federal Constitution leaves to each State, without any "ifs" or "buts," a power to . . . open the doors of its courts for its citizens to sue corporations whose agents do business in those States. . . . I think it a judicial deprivation to condition its exercise upon this Court's notion of "fair play," however appealing that term may be.

*International Shoe*, 326 U.S. at 324-25 (Black, J., dissenting). But since the constitutional standard of due process includes within its meaning the notion of right or entitlement, there is no alternative to an essentially normative inquiry into how it is just or fair to treat that defendant.

19. *Id.*, at 316.

posing some kind of relation between the concepts of contacts and fairness. The Court's language cannot reasonably be interpreted, as courts today routinely interpret it,[20] to mean that there are two separate and independent constitutionally based tests, the contacts test and the fairness test, both of which must be met in order for jurisdiction to be constitutional.[21]

Does the Court unequivocally assert that the defendant's contacts with the forum are the sole factors relevant to the jurisdictional analysis, and may one thereby conclude that the introduction of other factors, such as state interests, is unfaithful to the spirit of *International Shoe*? The only language which suggests otherwise is the Court's reference to convenience, (actually "inconvenience"),[22] and the Court's remark that "[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."[23] Perhaps it could be argued that this reference to "fair and orderly administration of laws" is the peg needed to support the introduction of the state interest doctrine.[24] But the Court immediately limits the scope of the "fair and orderly" language by tying it to the purpose of the due process clause.[25] This is why the elaborate state interest doctrines now in fashion go far beyond any reasonable interpretation of this language. If these doctrines may be justified at all, it must be on some basis other than faithfulness to the minimum contacts test as originally propounded.

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20. The following cases are typical of the due process analysis currently implemented by lower federal courts applying the two-part *International Shoe* test: Irving v. Owens-Corning Fiberglass Corp., 864 F.2d 383 (5th Cir. 1989); Benally v. Amon Carter Museum of Modern Art, 858 F.2d 618 (10th Cir. 1988); Williams Electric Co., Inc. v. Honeywell, Inc., 854 F.2d 389 (11th Cir. 1988); East Vail Townhomes Inc., v. Eurasian Development D.A., Inc., 716 F.2d 1346 (10th Cir. 1983); Hedrick v. Daiko Shoji Co., 715 F.2d 1355 (9th Cir. 1983); DeMelo v. Touche Marine, Inc., 711 F.2d 1260 (5th Cir. 1983).

21. *International Shoe*, 326 U.S. 310. It is consistent to treat certain objective contacts as guidelines or rules of thumb, in the presence of which the assertion of jurisdiction will normally be fair. But the *International Shoe* Court stressed that the degree of contacts required cannot be determined in a way which is "simply mechanical or quantitative." *Id.* at 319.

22. *Id.* at 317.

23. *Id.* at 319 (emphasis added).

24. *Id.*

25. *Id.*

Undeniably, the Court's reference to "convenience" introduces a factor other than objective defendant-forum contacts. The Court states: "An 'estimate of the inconveniences' which would result to the [defendant][26] from a trial away from its 'home' or principal place of business is relevant *in this connection.*"[27] The "connection" to which the Court refers is explained in the preceding sentence: "Those demands may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there."[28] And the sentence preceding this states that the "demands" at issue are the "demands of due process."[29]

Whatever the Court meant by the curious phrase "to make it reasonable, in the context of our federal system of government," the key point again is that this language is tied to satisfying the demands of due process, that is, the due process rights of the defendant, and that the convenience referred to is the convenience of the defendant. This passage cannot reasonably be interpreted as endorsing a grand convenience and reasonableness theory of jurisdiction where one tabulates many different interests — the preferences of all the parties, the convenience of witnesses, the congestion of the courts, the social policies of the states.[30] These factors are more appropriately invoked under the heading of venue. The reference to the "federal system of government," in view of the limitation of the phrase to the due process rights of the defendant, can only be understood as making the modest point that we have a complex system of courts and that some courts are likely to be more convenient than others to the defendant.

It may be convenient for a defendant to appear in a forum in which he has never been present, in which he conducts no

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26. The phrase "to the corporation," and the pronoun "its" plainly refer to the defendant. The minimum contacts test was extended to defendants other than corportions in Hanson v. Denckla, 357 U.S. 235, 251 (1958) (Court referred to the minimum contacts test as applying generally to a defendant).

27. *International Shoe*, 326 U.S. at 317 (emphasis added) (quoting Hutchinson v. Chase & Gilbert, 45 F.2d 139, 141 (1930)).

28. *Id.*, at 317.

29. *Id.*

30. *See generally* World-Wide Volkswagon Corp. v. Woodson, 444 U.S. 286, 292-94 (1980), for an example of a case in which these factors are considered.

business, in which he has no agent or representative, in short, in which he has none of the contacts traditionally thought necessary as described in *International Shoe* and its progeny. The simplest illustration is one where the defendant's activities are conducted exclusively within the boundaries of his home state, but the courthouse of an adjoining state is located within a few miles from his home and place of business. Consistent with the *International Shoe* Court's discussion of convenience, the adjoining state court might allow the assertion of jurisdiction over the defendant on the basis of fewer objective contacts than might otherwise be required. Conversely, a defendant may be grossly inconvenienced if required to appear in a forum where traditional contacts are present. In the latter case, the inconvenience must be weighed against the factors favoring jurisdiction to decide whether allowing jurisdiction would be fair. Ultimately, it does not matter whether one treats convenience to the defendant as a kind of contact, or whether one treats it as a separate factor other than contacts, as long as one keeps in mind that the basic standard is fairness and that convenience is one factor subsumed under that heading.

To what extent should courts consider the circumstances peculiar to a specific defendant when estimating whether the inconvenience to the defendant makes an assertion of jurisdiction unfair? It may be more inconvenient for one defendant than for another to submit to jurisdiction in a forum under otherwise identical conditions. The status of the defendant as a corporation, natural person, or other legal entity, and the financial means of the defendant are the factors to be considered in this analysis. Since the ultimate test is fairness to the defendant, and since the emphasis in *International Shoe* is on avoiding mechanical determinations by considering the facts of each case,[31] courts should be permitted to take such factors into account. The Supreme Court has endorsed this position in *Burger King Corp. v. Rudzewicz*.[32]

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31. 326 U.S. at 319.

32. 471 U.S. 462 (1985). *See infra* notes 107-132 and accompanying text. Another recent case which appears to take into account the relative means and status of the parties in assessing a jurisdictional issue is Sollinger v. Nasco International, Inc., 655 F. Supp. 1385 (D. Vt. 1987). The court refers to the plaintiff as a "Vermont craftperson" and although the court does not explicitly refer to the corporate status of defendant in

### 2. *Due Process and State Sovereignty*

The minimum contacts test today functions primarily, and perhaps solely, as an implementation of the due process clause of the fourteenth amendment. The basic statement in *International Shoe* of the minimum contacts test assumes that what is at stake is due process, and by implication, that the due process rights involved are those of the defendant.[33] But traditionally, limitations on the assertion of state court jurisdiction were based upon the concept of sovereign rights possessed by states within the federal system.[34] The argument for limitations based on federalism is as follows: the states stand as coequal sovereigns, and possess rights against each other. Therefore, a state may not assert jurisdiction over a person or property located in another state, because to do so would violate a right possessed by another, coequal sovereign.[35]

This territorial sovereignty theory of jurisdiction is traditionally traced to the celebrated case of *Pennoyer v. Neff*,[36] but even there, the authority for the territorial theory is less persuasive than one might have hoped. The argument is based on the contention that the several states of the United States are in all respects like independent countries, except insofar as the federal constitution is to the contrary.[37] The *Pennoyer* Court then stated that there are "two well-established principles of public law" respecting the jurisdiction of an independent state over persons and property.[38] These are the propositions that "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory"[39] and that "no State can exercise direct jurisdiction and authority over persons or property without its territory."[40] The *Pennoyer* Court never asserted

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this context, it states that "[d]efendant would face only minor inconvenience in coming to Vermont to resolve the dispute." *Id.* at 1388.

33. 326 U.S. at 320.

34. Pennoyer v. Neff, 95 U.S. 714, 722 (1877).

35. *Id.*

36. 95 U.S. 714.

37. *Id.* at 722. "[E]xcept as restrained and limited by [the Constitution], they possess and exercise the authority of independent States, and the principles of public law. . . are applicable to them." *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

that there was a direct constitutional basis for the territorial theory of jurisdiction, but rather assumed that this theory followed from the concept of sovereignty rooted in international law as that concept extended to the United States' federal system.[41]

But the *Pennoyer* argument for the territorial-sovereignty theory based upon the international analogy is unsound. Under the international model, where one sovereign exercises jurisdiction for a wrong committed elsewhere, without the consent of that nation, the objection is not that this is unfair to the alleged wrongdoer, but rather that such an exercise is an affront or insult to the sovereign nation where the wrong was committed.[42] In other words, the injured party is the second sovereign nation, not the person over whom jurisdiction is asserted. The right to assert immunity from jurisdiction does not, therefore, belong to the defendant. The immunity must be asserted by, and may be waived by, the offended nation. Thus, the territorial-sovereignty model of personal jurisdiction does not provide a theoretical underpinning for the right of a defendant to move for a dismissal of an action on the grounds of absence of personal jurisdiction.

*Pennoyer* implicitly recognized that in international law, immunity belongs to the nation, not to the individual defendant.[43] The Court noted that while the valid judgments of a nation may have indirect effects elsewhere, any direct attempt by

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41. For a discussion of the Court's theory of jurisdiction based on "principles of general, if not universal, law" see *id.* at 720.

42. *See, e.g.*, P. SIEGHART, THE INTERNATIONAL LAW OF HUMAN RIGHTS (1983). In a discussion of the traditional law as to the rights in general of an individual against a state, the author observed that international law has always "demanded substantial protection for aliens within a State." *Id.* § 1.5, at 12. Sieghart goes on to state:

> But even that demand flowed from the doctrine of national sovereignty itself — so that, if a State fell short of the requirement to protect another State's nationals, for example by expropriating their property, the compensation was due to the other State whose "personal" sovereignty had been violated, not to the individual whose property had been taken.

*Id.* While this treatise analyzed the inroads on this traditional doctrine in the field of international human rights, by implication, the broad principle still applies generally, and in particular to the case of an individual litigant claiming immunity from the jurisdiction of a foreign sovereign.

43. "The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so . . . the laws of one State [nation] have no operation outside of its territory, *Except so far as is allowed by comity*." Pennoyer v. Neff, 95 U.S. 714, 722 (1877) (emphasis added).

one nation to affect persons or property located elsewhere or to give extraterritorial operation to that nation's own laws "would be deemed an encroachment upon the independence of the State in which the persons are domiciled or the property is situated, and be resisted as usurpation."[44] The *Pennoyer* Court recognized that in the international context, jurisdiction over the individual defendant may be consented to by the nation, even over the objection of the individual. Therefore, the international model does not provide a basis for an individual defendant to claim a personal immunity from jurisdiction.[45]

The Supreme Court has repeatedly flipflopped on the issue of whether the territorial-sovereignty theory provides an independent basis for limitations on jurisdiction. In *World-Wide Volkswagen Corp. v. Woodson*,[46] for example, the Court affirmed that the territorial-sovereignty theory provided such a limitation,[47] but in the recent case of *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*,[48] the Court reversed itself, stating:

> The restriction on state sovereign power described in *World-Wide Volkswagen Corp.*, however, must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns. Furthermore, if the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement: Individual actions cannot change the powers of sovereignty, although the individual can subject himself to powers from which he may otherwise be protected.[49]

Citing *World Wide* with approval, however, the Court held

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44. *Id.* at 723.

45. *See, e.g.*, Lewis, *The Three Deaths Of "State Sovereignty" and the Curse of Abstraction in the Jurisprudence of Personal Jurisdiction*, 58 NOTRE DAME L. REV. 699 (1983); Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U.L. REV. 1112 (1981). Professor Redish provided a careful historical analysis demonstrating the absence of any basis for a link between federalism and due process concerns.

46. 444 U.S. 286 (1980).

47. *Id.* at 293-94.

48. 456 U.S. 694 (1982).

49. *Id.* at 703 n.10.

in *Asahi Metal Industry Co. v. Superior Court of California*,[50] that the determination of the reasonableness of the exercise of jurisdiction depends among other things upon the "shared interest of the several States in furthering fundamental substantive social policies."[51] At least one court[52] has suggested that the *Asahi* holding amounts to a retreat by the Supreme Court from its position in *Insurance Corp. of Ireland*.[53] This conclusion does not necessarily follow. One may consistently hold that the shared interest of the states in fostering substantive social policies is a relevant factor in determining the constitutionality of an exercise of jurisdiction, without being committed to the territorial-sovereignty theory of jurisdiction.[54] That is, one could argue (though we do not) that the interest of the states in fostering policies is a factor relevant to the fairness to the defendant, under the due process clause, of an exercise of jurisdiction.[55] The law on this point unfortunately remains uncertain, and the Supreme Court has yet to write the final chapter.

## B. *Setting the Stage for* Asahi

### 1. World-Wide Volkswagen Corp. v. Woodson

#### a. *Majority Opinion*

*World-Wide Volkswagen Corp. v. Woodson*[56] illustrates some of the issues and problems alluded to above and provides

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50. 480 U.S. 102, 113 (1987).

51. *Id.* (quoting *World-Wide Volkswagen*, 444 U.S. 286, 292 (1980)).

52. *See* Bearry v. Beech Aircraft Corp., 818 F.2d 370, 373 (5th Cir. 1987); *see also infra* notes 209-18 and accompanying text.

53. 456 U.S. 694, 703 n.10 (1982).

54. *See infra* notes 33-45 and accompanying text.

55. This point is emphasized because at least one very recent case confuses the issue of whether forum state interest is relevant to the jurisdictional analysis with the issue of whether state sovereignty is a source of jurisdictional restrictions. *See* Simmons v. Seatide Int'l Inc., 693 F. Supp. 510 (E.D. La. 1988). There the court stated:

> With its decision in *International Shoe*, the Supreme Court rejected the conception of personal jurisdiction based solely on notions of state sovereignty. But in no way has the Court abandoned this conception as a partial basis for its decisions on personal jurisdiction. The Court continues to explain its holdings on grounds of fairness by looking at burdens and convenience to the parties *and* at interest of the states in the litigation.

*Id.* at 514 (citations omitted).

56. 444 U.S. 286 (1980).

the necessary foundation for examining the most recent law. In *World-Wide*, Harry and Kay Robinson brought a products liability action in Oklahoma state court as a result of an automobile accident in Oklahoma in which their Audi automobile was struck in the rear.[57] The resulting fire severely burned Kay Robinson and her two children.[58] Among the named defendants were Audi NSU Auto Union Aktiengesellschaft, the manufacturer of their automobile; Volkswagen of America, Inc., its importer; World-Wide Volkswagen Corporation (World-Wide), its regional distributor; and Seaway, the retail dealer from which the Robinsons purchased the Audi automobile.[59] Both World-Wide and Seaway were incorporated and had their principal place of business in New York; World-Wide distributed vehicles, parts, and accessories to retail dealers in New York, New Jersey, and Connecticut.[60]

Seaway and World-Wide entered special appearances contending that "Oklahoma's exercise of [personal] jurisdiction over them would offend limitations on the State's jurisdiction imposed by the due process clause of the fourteenth amendment."[61] The Oklahoma district court rejected this contention and held that it could validly assert jurisdiction over these defendants.[62] The defendants sought a writ of prohibition to restrain Woodson, the Oklahoma judge, from exercising jurisdiction over them, but the Supreme Court of Oklahoma denied the writ and upheld personal jurisdiction.[63] The court made the arguments that: (a) given the nature and purpose of the product involved (an automobile), it is reasonably foreseeable that the product would find its way to Oklahoma and cause injury, and (b) given the retail value of an automobile, it is reasonable to infer that defendants "derive substantial income from automobiles which from time to time are used in the State of Oklahoma."[64]

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57. *Id.* at 288.
58. *Id.*
59. *Id.*
60. *Id.* at 288-89.
61. *Id.* at 288.
62. *Id.*
63. *Id.* at 289-90.
64. *Id.* at 290.

Upon certiorari, the United States Supreme Court reversed and denied jurisdiction.[65] One difficulty faced by the Court is that the lower court was not explicit as to the logical status of the two arguments (a) and (b) above. Did the Oklahoma court hold that each point was individually sufficient to support the result and that the two arguments were therefore cumulative? Did it believe that the two arguments were jointly, but not individually sufficient and were somehow related to each other? Or did it consider one of the two arguments to be the key, and the other merely additional support? In concrete terms, did the Oklahoma court believe that it was sufficient to support jurisdiction that, because of the inherent mobility of the automobile, petitioners could reasonably foresee that the Robinsons' automobile, after being injected into the stream of commerce, would make its way to Oklahoma and cause injury there? Or was it necessary to the Oklahoma court's holding that the defendants derive substantial revenue from products used in Oklahoma? If that finding was necessary, to what extent did the Supreme Court reject the lower court's reasoning solely because the finding was based upon a reasonable inference, rather than an explicit showing, that the defendants derived such revenue?

With respect to the Oklahoma court's foreseeability argument, (a) above, the Supreme Court stated categorically that " 'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction . . . ."[66] The Court pointed out that if this were the rule, "amenability to suit would travel with the chattel,"[67] and the Court analogized this to the abandoned rule of *Harris v. Balk*.[68] But the Court continued with perhaps the most quoted passage in the opinion:

> This is not to say, of course, that foreseeability is wholly irrelevant. But the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should rea-

65. *Id.* at 291.

66. *Id.* at 295.

67. *Id.* at 296.

68. *Id.* (citing *Harris v. Balk*, 198 U.S. 215 (1905) (establishing the rule that a court could secure quasi-in-rem jurisdiction over an absent creditor by attaching the obligation to him of a debtor who was subject to a service of process within the forum)).

sonably anticipate being haled into court there.[69]

This "haled into court" standard is the closest the Supreme Court comes to articulating a general theory of personal jurisdiction. The reference to what the defendant should "reasonably anticipate" suggests that the Court is emphasizing the element of fairness to the defendant. But the standard borders on the vacuous. How does one know when one should reasonably anticipate being haled into court and subjected to personal jurisdiction? What one reasonably anticipates is that existing law will be fairly and consistently applied. But the existing law on the subject is whatever the Supreme Court says it is. Thus, the Supreme Court's purported new test for personal jurisdiction is useless and circular without independent substantive criteria to guide one's reasonable anticipations. Consequently, the old problems of determining what contacts are sufficient for personal jurisdiction reappear when one tries to identify substantive criteria for what should be reasonably anticipated.

What guidance does the Court give in providing such substantive criteria? Here the purposeful availment standard rears its head. The Court refers to the oft-quoted language from *Hanson v. Denckla*[70] that the "unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State,"[71] and that a defendant must purposely avail itself of the forum in order to be subject to jurisdiction there.[72] Here the plaintiffs themselves moved their automobile into the forum state. But, the Court asked, did the defendants do anything amounting to the purposeful activity necessary for jurisdiction? The Court then discusses at least four factors which might be relevant to the determination of whether a defendant has engaged in such purposeful activity: the intent of the defendant, the knowledge of the defendant, the expectation of the defendant, and the amount of financial benefit accruing to the defendant from the use of its products in the forum state.[73] The Court appears to stress the

69. *Id.* at 297.
70. 357 U.S. 235 (1958).
71. *Id.* at 253 (quoted in *World-Wide Volkswagen*, 444 U.S. at 298).
72. *Id.*
73. World-Wide Volkswagen v. Woodson, 444 U.S. 286, 297-98 (1980).

defendant's intent, and to downplay the objective financial benefit accruing to the defendant. That is, the Court suggests that it is sufficient for personal jurisdiction in a state that a defendant inject a product into the stream of commerce where he deliberately seeks to exploit the market of that forum state:

> [I]f the sale of a product of a manufacturer or distributor . . . is not simply an isolated occurrence, but arises from the *efforts* of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others.[74]

Taken literally, to subject a defendant to jurisdiction in a forum, this passage requires a causal connection between the sale of the product which causes the injury and the effort to serve the market "if the sale . . . *arises* from the efforts."[75] The phrase, "the sale," can only refer to the sale of the specific item which causes the injury. But how would the Court analyze the case where a sale is made and the defendant conducts promotional efforts in the forum state, but where there is no causal connection between the efforts and the sale? Suppose, for example, that World-Wide had run advertisements in newspapers in Tulsa and Oklahoma City, but that the Robinsons had never seen and were wholly unaware of these advertisements when they bought their Audi and drove it into Oklahoma. Two further possibilities exist

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74. *Id.* at 297 (emphasis added).

75. *Id.* (emphasis added). Presumably this causal language simply follows from the fact that the Court is concerned with specific, rather than general, jurisdiction. Where a cause of action arises out of or relates to defendant's conduct in the forum, "specific" jurisdiction is required and the "minimum contacts" standard applies. Where the cause of action is unrelated to defendant's conduct in the forum, "general jurisdiction" must be established over the defendant, and the more stringent test of "consistent and systematic" contacts with the forum must be met. *See* Helicopteros Nacionales de Colombia, S. A. v. Hall, 466 U.S. 408 (1984). For a recent case discussing the distinction between specific and general jurisdiction, *see, e.g.*, Dupont Tire Serv. Center, Inc. v. North Stonington Auto Truck Plaza, Inc., 659 F. Supp. 861 (D.R.I. 1987). There the court held that a single trip by an officer of defendant to the forum state constituted sufficient contacts for specific jurisdiction where the parties' negotiations were purposefully directed towards activities within the forum state, where the contract was physically negotiated while both parties were in the forum state, and where the parties' actual and contemplated course of dealing was purposefully directed towards the forum state. *See also* Huang v. Sentinel Gov't Sec. 657 F. Supp 485, 488-89 (S.D.N.Y. 1987).

on these facts: either the promotional activities had been successful, and some sales in Oklahoma had been generated, or they had been entirely unsuccessful, and absolutely no business had been generated for World-Wide by these ill-advised promotional activities in Oklahoma. If one takes the above quotation literally, the Supreme Court would not find specific jurisdiction in either of these situations, since the sale to the Robinsons was causally unrelated to the advertising in Oklahoma and thus did not arise from the defendant's efforts in Oklahoma.

But curiously, the Court continues: "The forum State does not exceed its powers under the due process clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the *expectation* that they will be purchased by consumers in the forum State."[76] This language suggests that the mere knowledge of a defendant that its products are likely to be sold in a foreign state is sufficient for specific jurisdiction over that defendant, since one may expect to make sales in a foreign market without making efforts to serve it. However, this statement by the Court which bases jurisdiction on expectation must be an aberration. The entire thrust of *World-Wide* is that the mere injection of a product into the stream of commerce, even where it is foreseeable and therefore within one's reasonable expectations that it may cause injury elsewhere, is not sufficient for jurisdiction in a foreign forum. Basing jurisdiction on expectation is inconsistent with requiring causal connection between the efforts and the sale.

This apparent inconsistency is illustrated by the situation where the seller-defendant makes no promotional or distributional efforts in the forum state, but does gain knowledge that a sale is intended for use there. Suppose, for example, that a customer of World-Wide had casually remarked that he was a resident of Oklahoma, soon to return, or that he was about to move, or travel there. Would World-Wide's voluntary consummation of this sale with this knowledge constitute sufficient purposeful availment to subject World-Wide to jurisdiction once the accident occurred in Oklahoma? Would it make a difference if this were a large sale of many vehicles for use in Oklahoma? If one takes the Court's words literally, jurisdiction would exist under

76. 444 U.S. at 297-98 (emphasis added).

the "expectation" language (the language previously termed an aberration). Under the "efforts" language, the answer would depend on whether a sale with knowledge of the intended place of use constituted an effort to serve that market. It is worth noting that the Court referred to "the efforts of the manufacturer . . . to serve [the market], *directly or indirectly* . . . ."[77] It would have helped had the Court provided more guidance as to what constituted an indirect effort to serve the market, and as to how much effort amounts to deliberate exploitation or purposeful availment sufficient to confer jurisdiction. It would be tempting to conclude that the sale of a product with the expectation that it would be consumed in a foreign market, but without any direct effort to serve that market, is what the Court meant by an indirect effort to serve the market. This would harmonize the two inconsistent quotations above, and would be consistent with earlier law and with common sense. But there is no textual reason to suppose that this is what the Court intended. And when the Court came to write the various opinions in *Asahi*,[78] there was disagreement as to what the "purposeful availment — effort to serve the market" theory of *World-Wide* actually meant.

What does the Court say about the importance of financial benefit derived by a defendant? Did the Court mean to imply that even if World-Wide did a thriving business in Oklahoma, as a result of its efforts, that the Robinsons could not have secured jurisdiction over World-Wide if their purchase of their Audi had been unrelated to World-Wide's promotional activities in Oklahoma, regardless of the magnitude of financial benefit World-Wide derived from its activities? Interestingly, the Court remarks that "[t]here is no evidence of record that any automobiles distributed by World-Wide are sold to retail customers outside this tristate area [New York, New Jersey and Connecticut]."[79] Would it have made a difference if there had been evidence of record of sales by World-Wide outside of the

77. *Id.* at 297 (emphasis added); *see also supra* note 64 and accompanying text.

78. *See infra* notes 155-208 and accompanying text.

79. 444 U.S. at 298. Specifically, the Court states that:

> The Oklahoma Supreme Court . . . found [that petitioners earn substantial revenue from goods used in Oklahoma], drawing the inference that because one automobile sold by petitioners has been used in Oklahoma, others might have been used there also. While this inference seems less than compelling on the facts of the

tri-state area, and in particular, in Oklahoma? Upon careful reading, the Court resolved this issue. Although the Court remarked that the Oklahoma court merely inferred that World-Wide earned substantial revenue from goods used in Oklahoma, and while the Court characterized this inference as "less than compelling,"[80] it is crucial to an understanding of this case to realize that the Supreme Court accepts, for the sake of argument, the conclusion that World-Wide does earn substantial revenues from activities in Oklahoma, and that the Court rejects jurisdiction nevertheless. It would be a serious mistake to interpret this case as holding that one reason why jurisdiction was lacking was that the defendant had not been shown to derive financial benefit from its activities in the state of Oklahoma. On the contrary, the Court explicitly accepts the finding of the lower court that World-Wide *did* derive substantial financial benefits,[81] and the Court's analysis assumed the conclusion as a material fact upon which its analysis is based.[82] The Court also appeared to accept, for the sake of argument, the factual contention that World-Wide derives benefit from "an extensive chain of Volkswagen service centers throughout the country, including some in Oklahoma,"[83] and concluded that, even upon these assumptions, there were not sufficient contacts to support jurisdiction.[84]

One wonders whether the Court meant to downplay financial benefit to the defendant as a predicate for jurisdiction to the extent that it did. How would the Court deal with the unknown and unsolicited financial benefit situation, where the benefit is considerable? Suppose that World-Wide made a large sale in New York of many vehicles to a single purchaser. Unknown to World-Wide, the purchaser was a fleet owner from Oklahoma where the vehicles were intended to be used, and where in fact

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instant case, *we need not question the court's factual findings in order to reject its reasoning.*

*Id.* (citation omitted) (emphasis added).

80. *Id.*

81. *Id.*

82. *Cf.* Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161 (1930), *reprinted in* G. CHRISTIE, JURISPRUDENCE (1973).

83. 444 U.S. at 298-99.

84. *Id.* at 299.

they were used. Suppose that the purchaser was injured in an accident while driving one of these vehicles in Oklahoma. In this hypothetical situation, the seller would have derived substantial benefit from sales of goods for use in Oklahoma, but would neither have solicited sales in Oklahoma, nor would have had knowledge at the time of the sale that the goods were purchased for use in that state. In short, World-Wide would have done nothing to satisfy the purposeful availment standard. The Court appears committed to rejecting jurisdiction on the grounds that the defendant had not made a deliberate, knowing effort to exploit the market, and that the connection with the forum stemmed from the unilateral activity of the purchaser.

The Robinsons argued that the financial benefits acknowledged by the Court to have flowed to World-Wide were sufficient to support jurisdiction, but the Court made the following crucial, but unsatisfactory response: "[F]inancial benefits accruing to the defendant from a collateral relation to the forum State will not support jurisdiction if they do not stem from a constitutionally cognizable contact with that State."[85] But what does the Court mean by a "collateral relationship," and by "financial benefit accruing from a collateral relationship," and why does the Court deprecate such a benefit in its jurisdictional analysis? Contrary to the Court's implications, the law has always been that a financial benefit accruing to a defendant from activities within a jurisdiction is *in itself* a constitutionally cognizable contact tending to support jurisdiction, regardless of the type of relationship from which that benefit accrues."[86] In the instant case, the entry of defendant's product into Oklahoma where it caused injury, combined with the reasonable foreseeability that it might do so, is itself a contact relevant to the issue of jurisdiction. In effect, when the Court referred to financial benefits accruing to defendant from a collateral relationship, the Court leapt to the conclusion that these financial benefits achieved by the defendant do not support jurisdiction. The Court is using

85. *Id.*

86. *See, e.g.*, Buckeye Boiler Co. v. Superior Court, 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969); Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961). *See also* Gelfand, *A Dissenting View of Asahi Metal Industry Co., Ltd. v. Superior Court*, 39 S.C.L. REV. 873, 881 n.37 (1988).

the label "collateral relationship" as a substitute for an argument for that conclusion.

The result in this case is deplorable, and the arguments of the majority are even more so. By emphasizing the intent of defendant, as analyzed by the purposeful availment theory, and by downplaying the importance of the financial benefits to defendant, the Court set forth a doctrine capable of two interpretations, both of which are unsatisfactory as a basis for analyzing personal jurisdiction. Under the first interpretation, intents are voluntary choices or declarations; under the second interpretation, the term "intent" is used not in the sense of an actual psychological purpose or objective, but rather, as a shorthand for the objective and discernable manifestations of intent.[87] The first interpretation gives the potential defendant tremendous unilateral control over the fora in which it will be subject to personal jurisdiction, since the Court's analysis implies that the objective nature of the relationship between defendant and forum does not matter so much as the design and plan of the defendant as to where it will arrange its affairs to permit itself to be sued.[88] On this interpretation, the potential defendant may insulate itself from suit merely by limiting its promotional and distributional efforts in a jurisdiction, and by disavowing any intent to avail itself of that market, regardless of its actual activities in that jurisdiction, and the actual benefits it reaps.[89]

But due process does not go so far as to require that a litigant have the power to determine where it will or will not permit itself to be sued. The Court reiterated, reasonably enough, that the unilateral activity of a plaintiff is not sufficient to subject a defendant to jurisdiction,[90] but the Court wrongly concluded that the only alternative to basing jurisdiction solely on the plantiff's unilateral activity is to base jurisdiction upon the pur-

87. These are not two interpretations which the Court distinguishes, setting them forth clearly in two different places. On the contrary, there is a continual equivocation on the term "intent" throughout the opinion.

88. *See* 444 U.S. at 297.

89. *See infra* notes 209-71 and accompanying text for a discussion of cases which interpret the purposeful availment standard so as to give defendant excessive control over the jurisdictions in which it will be amenable to suit.

90. 444 U.S. at 298.

poseful, intentional activity of the defendant.[91] But this is not the only alternative. One may instead base jurisdiction upon the real relationships between defendant and forum sufficient to constitute actual or metaphorical presence in the forum. The concept of a real relationship obviously requires analysis by the courts, just as *International Shoe* anticipated. The presence of an incorporeal business entity (which exists, after all, for the purpose of financial gain) is best measured by the extent of the financial benefit it derives from its activities in the forum, combined, perhaps, with some degree of knowledge, expectation, or reasonable foreseeablity of such benefit.

The concept of "intent" or "purpose" is not, and cannot be, an adequate starting point for an analysis of the concept of "presence." The fundamental error of the entire purposeful availment doctrine is to suppose that intent is an adequate starting point for analysis. *International Shoe* teaches that jurisdiction is based on fairness to defendant;[92] fairness is based upon presence; and presence, with some qualifications, is based upon contacts. Intentions, however, are not contacts. Where I am does not depend upon where I intend to be. A defendant no more disappears from a jurisdiction by declaring an intention not to be there than an ostrich disappears when it buries its head in the sand. Something has gone seriously wrong with the Court's analysis when it allows a defendant to determine unilaterally, simply by declaring its intentions, whether it will submit to jurisdiction.

At several places in the opinion, in order to discern World-Wide's intent, the Court looked to such objective evidence as the defendant's promotional activities and distributional organization within the forum state. At these places the Court focused not on intent in the first sense, but rather on objective contacts of a very specific and limited sort. By examining these arbitrarily limited restricted contacts, the Court inferred the defendant's subjective intent. The Court's reason for its conclusion was that "petitioners have no 'contacts, ties, or relations' with the State of Oklahoma."[93] This factual conclusion is demonstrably

91. *See id.* at 297-99.

92. *See supra* notes 7-32 and accompanying text.

93. 444 U.S. at 299 (quoting *International Shoe*, 326 U.S. 310, 319 (1945)).

false unless one arbitrarily limits contacts to exclude financial benefits derived from the injection of an intrinsically mobile product into the stream of commerce, where it is not only foreseeable, but overwhelmingly probable that the product will migrate to and cause injury in a foreign jurisdiction. The Court gave no argument for limiting the definition of contact, other than the tendentious label "collateral relationship."[94] Professor Hazard's phrase "arbitrary particularization" was prophetic.[95] The Court gave little more than an arbitrary set of examples of contacts it considers relevant to purposeful availment.

The Court's use of the intent and purposeful availment language is thus doubly unsatisfactory. If the intent and purposeful availment language refers to the defendant's actual subjective intentions, then this language does not adequately analyze the legal standards of fairness and presence. On the other hand, if the Court meant the intent and purposeful availment language to refer indirectly to a specific set of objective factors, then the listing of these factors fails to provide clear general standards, and the limited list of factors, therefore, fails to provide a test which satisfies the demands of fairness.

b. *Justice Brennan's Dissent*

Justice Brennan's dissenting opinion provides an interesting contrast to the majority's point of view. His view is closer to a fairness-centered conception of jurisdiction, but he also stresses the "interest of the forum state," a consideration bearing even less relation to fairness to defendant than an arbitrary list of contacts.[96] Thus, he referred disapprovingly to the Court's tight focus "on the existence of contacts between the forum and the defendant,"[97] and he stated that the Court accorded too little weight to such other factors as the forum state's interest in the case and the actual inconvenience to defendant.[98]

The majority referred to these other factors,[99] notwithstand-

94. *Id.*
95. *See supra* note 12.
96. 444 U.S. at 300 (Brennan, J., dissenting).
97. *Id.* at 299 (Brennan, J., dissenting).
98. *Id.* at 300-01 (Brennan, J., dissenting).
99. *Id.* at 292. The Court stated:

ing Justice Brennan's conclusion that the majority did not pay sufficient attention to them. Brennan pointed out that the *International Shoe* Court focused on fairness and reasonableness and declined to establish a mechanical test based on quantum of contacts. He states that "contacts [are but] . . . one way of giving content to the determination of fairness and reasonableness."[100] This conclusion is correct and is faithful to the original language of *International Shoe* which clearly tied the contacts analysis to the constitutional goal of fairness.[101] Even if one were to eliminate Justice Brennan's references to forum-state interests, he correctly concluded that the majority, denying jurisdiction, focused too restrictively and insensitively on a narrow list of defendant's forum contacts. He argued persuasively that the contacts with defendant are sufficient for jurisdiction.[102]

The focal point of the disagreement between Justice Brennan and the majority, is captured in the following words of Brennan's opinion: "Surely *International Shoe* contemplated that the significance of the contacts necessary to support jurisdiction would diminish if some other consideration helped establish that jurisdiction would be fair and reasonable. The interests of the State and other parties in proceeding with the case in a particular forum are such considerations."[103] But Justice Brennan gives no explanation of why *International Shoe* "surely" contemplated these other considerations. The only "other consideration" the Court mentioned was convenience to defendant.[104]

The notions of "plaintiff's interest" and "forum state interest" are often raised together (as in Brennan's dissent) as if the analysis of their relevance to jurisdiction raised essentially simi-

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> [T]he burden on the defendant, while always a primary concern, will, in an appropriate case be considered in the light of other relevant factors, including the forum State's interest in adjudicating the dispute; the plaintiff's interest in obtaining convenient and effective relief . . . ; the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.

*Id.* (citations omitted).

100. *Id.* at 300 (Brennan, J., dissenting).

101. *International Shoe*, 326 U.S. 310, 319 (1945).

102. 444 U.S. at 312-13 (Brennan, J., dissenting).

103. *Id.* at 300 (Brennan, J., dissenting).

104. *See supra* notes 7-32 and accompanying text.

lar issues. But in fact, the analysis is very different. Plaintiff's interest ought not, and cannot, be discounted entirely. From the point of view of a potential defendant, the most troublesome aspect of Brennan's position is his contention that the "significance of [defendant's forum] . . . contacts . . . would diminish if some other consideration helped establish that jurisdiction would be fair . . . ."[105] Focusing solely on plaintiff's interest as one of the other considerations, Brennan contended that jurisdiction may be asserted over defendant on the basis of objectively smaller contacts if the plaintiff has a strong interest in asserting jurisdiction.[106] But this is not likely to please the defendant. From the defendant's point of view, the plaintiff's possession of an interest does not change the weight and magnitude of defendant's contacts with the forum. The defendant will be unimpressed by the argument that the court may assert jurisdiction on a showing of *lesser* contacts than would ordinarily be necessary, merely because plaintiff has an especially strong interest in its chosen forum. This is all the more true inasmuch as many of the factors which give the plaintiff a greater interest in the forum (e.g. substantive or procedural law favorable to plaintiff) will be the same factors which disincline the defendant to litigate in that forum and motivate the defendant to resist jurisdiction aggressively.

But a strong case could be made that the jurisdictional standard of fairness to defendant necessarily and inevitably implicates considerations of fairness to the plaintiff. The usual situation where an issue of personal jurisdiction arises is where a plaintiff is attempting to establish jurisdiction over defendant, and defendant resists. In other words, plaintiff and defendant have contradictory interests which cannot both be satisfied and

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105. *Id.*

106. Justice Brennan made this point explicitly in Burger King v. Rudzewicz, 471 U.S. 462 (1985).

> Thus courts in "appropriate case[s]" may evaluate "the burden on the defendant, . . . the plaintiff's interest in obtaining convenient and effective relief, . . . the interstate judicial system's interest in obtaining the most efficient resolution of controversies, [and] . . . the shared interest of the several States in furthering fundamental substantive social policies." These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required."

*Id.* at 477. (quoting *World-Wide Volkswagen*, 444 U.S. at 292).

which generally cannot be compromised or adjusted. If a defendant prevails in a jurisdictional defense, the result may be great inconvenience and expense to the plaintiff, just as the plaintiff's chosen forum may cause inconvenience and expense to the defendant. Assuming that my interest necessarily conflicts with yours, and that our interests should be given the same weight and dignity, then the question of what is fair to me cannot be logically resolved without considering what is fair to you. It is built into the notion of fairness that it may be fair to provide one person with a benefit if the interests of another are only slightly impaired. Thus, Justice Brennan's view as to the relation between the interests of defendant and plaintiff is not only correct, but is required by the logic of the fairness standard.

2. Burger King Corp. v. Rudzewicz

In *Burger King Corp. v. Rudzewicz*,[107] Justice Brennan had occasion to write a majority opinion finding sufficient contacts for jurisdiction in a contract context. Rudzewicz, a resident of Michigan, and his partner, MacShara, negotiated with Burger King, a Florida corporation, to enter into a franchise agreement for a Burger King restaurant in Drayton Plains, Michigan.[108] Rudzewicz negotiated with both the Burger King headquarters in Miami, Florida, and with the local Michigan Burger King representative.[109] " 'The only face-to-face or even oral contact Rudzewicz had with Burger King throughout months of protracted negotiations was with representatives of the Michigan office.' "[110] These negotiations eventually culminated in a written agreement which Rudzewicz entered into with "some misgivings," after obtaining "limited concessions."[111] The agreement obligated Rudzewicz personally for payments exceeding one million dollars over a twenty year period.[112] When Rudzewicz fell behind in his payments under the agreement, Burger King first negotiated, and then brought suit in the United States District

107. 471 U.S. 462 (1985).
108. *Id.* at 466.
109. *Id.* at 467.
110. *Id.* at 488 (Stevens, J., dissenting) (citation omitted).
111. *Id.* at 467.
112. *Id.*

Court for the Southern District of Florida.[113] After the trial court awarded both damages and injunctive relief, the Eleventh Circuit reversed on the grounds that the exercise of personal jurisdiction over Rudzewicz was unfair.[114]

A six to two majority[115] of the Supreme Court reversed and upheld jurisdiction notwithstanding a persuasive dissent by Justice Stevens.[116] The dissent pointed out that Rudzewicz sold his products in a local market, with no reason to think that they would ever be delivered or consumed in Florida.[117] His business was intrinsically and exclusively local.[118] He never went to Florida[119] although his partner attended a training session there.[120] The franchise relationship typically involves parties with great disparity in economic power, and is "fraught with potential for financial surprise."[121] The revenues of a local business, and its limited geographical scope do not prepare the franchisee for distant litigation.[122]

Nevertheless, the majority concluded that the agreement between the parties amounted to a continuing relationship, entered into voluntarily by defendant, which justified the assertion of jurisdiction.[123] The Court emphasized that the mere existence of a contract does not in itself assure sufficient contacts for jurisdiction. Instead, jurisdiction is predicated upon the total, extended business relationship, comprising negotiations, agreement, and contemplated future dealings.[124] Thus, the Court stressed that Rudzewicz "deliberately 'reach[ed] out beyond' Michigan," and sought the "manifold benefits that would derive from affiliation with a nationwide organization."[125] The Court

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113. *Id.* at 468.

114. *Id.* at 469-70.

115. Justice Powell did not participate.

116. Justice White joined Justice Stevens in endorsing the opinion of the Eleventh Circuit.

117. 471 U.S. 462, 487 (1985) (Stevens, J., dissenting).

118. *Id.* (Stevens, J., dissenting).

119. *Id.* at 488 (Stevens, J., dissenting).

120. *Id.* at 466.

121. *Id.* at 489 (Stevens, J., dissenting) (quoting Burger King Corp. v. McShara, 724 F.2d 1505, 1512 (1984)).

122. *Id.* at 489 (Stevens, J., dissenting).

123. *Id.* at 479-80.

124. *Id.* at 478-79.

125. *Id.* at 479-80 (quoting Travelers Health Assoc. v. Virginia, 339 U.S. 643, 647

noted that the Burger King agreement stated that operations would be supervised and directed from Miami, that notices and payments were to be sent there, and that disputes would be governed by Florida law.[126]

This case underscores that there is no obvious answer to the question of when one should "reasonably anticipate being haled into court."[127] *World-Wide* and *Burger King* taken together tell us that when a businessperson negotiates to operate a local restaurant affiliated with a national chain, where the agreement between the parties is drafted by the national chain for its own benefit and protection containing boilerplate provisions regulating the relationship between the parties, and where these provisions are offered on a "take-it-or-leave-it" basis, then the local businessperson should reasonably anticipate being haled to a distant forum.[128] On the other hand, a distributor of a product whose very nature is to have extended, far-removed effects should not reasonably anticipate being haled into court in a jurisdiction where the product foreseeably causes injury even though the distributor by its direct efforts serves a broad geographical range extending across state boundaries. But there is no obvious reason why the one anticipation is more reasonable than the other. While it is impossible to argue conclusively that *Burger King* was wrongly decided, the juxtaposition of these two cases illustrates the futility of an appeal to reasonable expectation of being haled into court as a standard for determining jurisdiction.

The most obvious difference between the two cases is that in *World-Wide*, the plaintiff was the ultimate consumer — the "lowest" end of the distribution chain — whereas in *Burger King*, the plaintiff was the manufacturer-franchisor, occupying

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(1950)).

126. *Id.* at 480.

127. *See supra* note 69 and accompanying text.

128. 471 U.S. 462. The Court agreed with the court of appeals dissent and argued that the defendant purposefully availed itself of the benefits and protections of Florida law by entering into an agreement providing that Florida law should govern disputes, and that such agreement amounts to a contract which supports the finding of jurisdiction. *Id.* at 480. But this disingenuous argument, suggesting that Rudzewicz reached out eagerly for the protective umbrella of Florida law, ignores the reality that the choice of law provision was inserted into the agreement by Burger King, for Burger King's benefit, and that it in no way reflected a choice or interest of Rudzewicz.

the opposite end of the chain. In both cases, the party who lost was presumably the party least able to withstand the burdens of the loss. But the Court was more concerned with the nature of the underlying relationships between retailer and customer, on the one hand, and manufacturer and retailer on the other. Retailers have many customers. Transactions with customers happen on one discrete occasion with no ongoing regulation and control, and customers disperse themselves widely and unpredictably after the sale. The *World-Wide* Court was concerned with protecting the seller from the vexation of defending multiple lawsuits in widely separated fora. Conversely, the manufacturer and retailer have an ongoing, regulated contractual relationship, and this was the factor on which the *Burger King* decision was ultimately based.[129]

Notwithstanding the harsh result to the defendant, the Court in *Burger King* demonstrated some sympathy with the small consumer by agreeing with the court of appeals that to allow jurisdiction here might be perceived as an endorsement of the exercise of jurisdiction over (and the award of default judgments against) all out-of-state consumers and franchisees owing small debts.[130] The Court, therefore, emphasized that each case must be weighed on its own facts and that *Burger King* did not imply that jurisdiction could be exercised where a contractual agreement had been secured by " 'fraud, undue influence or overweening bargaining power,' "[131] or where the exercise of jurisdiction would be " 'so gravely difficult and inconvenient' " to the defendant as to effectively make it impossible for the defendant to litigate.[132] The Supreme Court has thus clearly endorsed the view, in carefully considered dictum, that the circumstances and financial means of a particular defendant are relevant in determining when the exercise of jurisdiction over him is so inconvenient as to be unfair under the fourteenth amendment.

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129. For a recent case discussing and applying the *Burger King* standard, see Corporate Inv. Business Brokers v. Melcher, 824 F.2d 786, 789 (9th Cir. 1987).

130. *Burger King*, 471 U.S. at 485-86.

131. *Id.* at 486 (quoting Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12 (1972)).

132. *Id.* (quoting Bremen v. Zapata Off-Shore Co., 407 U.S. at 18).

3. Keeton v. Hustler Magazine

The Supreme Court in *Keeton v. Hustler Magazine*[133] recently addressed the relevance of the relation between plaintiff, forum, and litigation in jurisdictional analysis. Plaintiff Kathy Keeton, a New York resident, brought a libel action against magazine publisher, Hustler magazine, and others in the United States District Court for the District of New Hampshire.[134] Defendant Hustler was an Ohio corporation with its principal place of business in California.[135] Defendant's only connection with the state of New Hampshire consisted of the sale there of 10,000 to 15,000 copies a month of its nationally published and circulated magazine.[136] The circulation of defendant's magazine in New Hampshire amounted to less than one percent of its total United States circulation.[137]

The district court explicitly found that the defendant's conduct was "purposefully directed at New Hampshire and inevitably affected persons in the state,"[138] and concluded, in effect, that the "purposeful availment" test of *World-Wide* for minimum contacts was satisfied.[139] Nevertheless, the district court held that under the fourteenth amendment the assertion of jurisdiction would be unfair and dismissed plaintiff's suit.[140]

The First Circuit affirmed the dismissal of the plaintiff's complaint and identified three overlapping respects in which the case was out of the ordinary. First, New Hampshire had the longest applicable statute of limitations in the country, and, in fact, was the only jurisdiction in which plaintiff's action would not have been time-barred.[141] Second, because of the applicable single-publication rule, the plaintiff was seeking damages for in-

133. 465 U.S. 700 (1984).

134. *Id.* at 772.

135. *Id.*

136. *Id.*

137. Keeton v. Hustler Magazine, 682 F.2d 33, 33 (1st Cir. 1982), *rev'd*, 465 U.S. 700 (1984).

138. 465 U.S. at 774.

139. *Id.*

140. *Id.* at 772.

141. 682 F.2d at 33. Plaintiff had originally brought suit for libel and invasion of privacy in Ohio state court, but both claims had been dismissed as time-barred by the application of the Ohio Statute of Limitations to the libel claim and the New York Statute to the invasion of privacy claim.

juries suffered throughout the entire country, the major portion of which could not be attributed to the defendant's contacts with New Hampshire.[142] Third, the plaintiff's contacts with New Hampshire were less than minimal and insufficient to justify an assertion of personal jurisdiction in a libel action.[143]

The court of appeals concluded that since most of the damages plaintiff sought arose from injury taking place outside of New Hampshire, and since New Hampshire had no special interest in protecting a nonresident from such out-of-state injury, the assertion of jurisdiction would be unfair, or, in the colorful words of the court of appeals, "the New Hampshire tail is too small to wag so large an out-of-state dog."[144]

In reversing the court of appeals and holding that the New Hampshire court had jurisdiction, the Supreme Court accepted the district court's finding that defendant Hustler had purposefully directed its conduct at New Hampshire, and agreed that it is "unquestionable" that "ordinarily" this contact would be sufficient to support jurisdiction.[145] But the Supreme Court did not share the "concerns" of the court of appeals which led that court to reject jurisdiction.[146] The defendant had persuaded the court of appeals that the plaintiff's obvious forum-shopping motive in selecting the New Hampshire forum was a basis for holding the

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142. *Id.* at 35. The single-publication rule, as summarized by the Court, provides that with respect to a single publication, only one action for damages may be maintained, that damages for injuries suffered in all jurisdictions may be recovered in that action, and that the judgment bars further actions for damages in all other jurisdictions.

143. *Id.* at 34-35. The Supreme Court summarized this aspect of the holding as follows: "[plaintiff's] lack of contacts with New Hampshire rendered the state's interest in redressing the tort of libel to [plaintiff] too attenuated for an assertion of personal jurisdiction over [defendant]." 465 U.S. at 773. This quotation illustrates the imprecision which infects court discussions of these topics. The words quoted suggest that the plaintiff's lack of contacts is not directly relevant to the jurisdictional analysis, but that this factor matters only derivatively — only insofar as it relates to the analysis of the state's interest in redressing the plaintiff's grievance. But elsewhere, the Supreme Court speaks as if the magnitude of the plaintiff's contacts may be independently relevant to the jurisdictional analysis. Nowhere in its opinion did the court of appeals state that it was considering the plaintiff's contacts only to the extent that they related to the forum state's interest in the litigation, as the Supreme Court's summary suggests.

144. 682 F.2d at 36.

145. 465 U.S. at 774.

146. *Id.* at 775. *See supra* notes 141-43 and accompanying text for the three concerns identified by the court of appeals.

assertion of jurisdiction to be unfair.[147] The court of appeals had argued that states adopt statutes of limitations to protect defendants from delayed lawsuits and to penalize plaintiffs who sleep on their rights.[148] That court concluded that to allow Keeton to sue in New Hampshire for injury suffered in jurisdictions where the statute of limitations on her claim had run would be to thwart and frustrate these policies.[149]

In response, the Supreme Court argued persuasively that the question of the applicability and effect of the New Hampshire statute of limitations was a question which arose only after jurisdiction had been established and was not related to that inquiry.[150] It is only sound litigation strategy for a plaintiff to select a forum with favorable substantive and procedural laws. The fact that a forum is the sole jurisdiction with law favorable to the plaintiff could arguably cut either way. The defendant would argue that this renders the assertion of jurisdiction unfair. On behalf of the plaintiff, one could argue that the plaintiff's interest in the forum is one factor entering into the jurisdictional analysis; therefore, plaintiff's great interest in this forum and the absence of any alternative forum is a factor tending to *favor* jurisdiction. The sounder view, and the view adopted by the Supreme Court, is that the plaintiff will presumably choose its own forum based upon a variety of strategic considerations, including any advantage it expects to obtain in the application of substantive or procedural law, and that such strategic considerations have nothing to do with the presence or absence of ju-

147. 682 F.2d at 35.

148. *Id.* at 35-36.

149. *Id.* at 36. It is not clear what this argument, dealing with the thwarting of *other* states' policies, has to do with New Hampshire's interests. This argument appears to be a throwback to federalism-based concerns, or to some vague notion of the general integrity of the several state's court systems of the several states. This argument implies that it would somehow be an affront to other states if New Hampshire allowed plaintiff to recover for injuries attributable to the defendant's activities in other states, where those states would not have permitted recovery. Certainly, this argument would have no force against the power of the New Hampshire court to assert jurisdiction over the defendant for recovery of the plaintiff's damages attributable to the defendant's sales in that state. The Supreme Court's analysis of the single-publication rule supports the conclusion that the plaintiff's claims for other damages should be litigated in the same forum. *See supra* notes 141-43 and accompanying text.

150. 465 U.S. at 778.

risdiction.[151] One might even agree that the plaintiff has been unwise in waiting to sue until the statute of limitations has expired in all other jurisdictions, but this failure is not the kind of misdeed sufficient to bear on jurisdictional analysis.

The most interesting issue in *Keeton* was the effect on the jurisdictional analysis of the single-publication rule and the fact that the plaintiff sued primarily for injury suffered outside the forum state. Again, this factor illustrates the uncertainty of jurisdictional doctrine, since the court of appeals and the Supreme Court took the same facts, described them similarly, and determined that they cut in opposite directions insofar as jurisdiction is concerned. The court of appeals concluded that, because the applicable single-publication rule had the consequence that the plaintiff was suing primarily for injury suffered outside the forum state, this attenuated New Hampshire's interest in the action and made it unfair to allow the plaintiff to proceed against the defendant in New Hampshire.[152] The Supreme Court, on the other hand, argued that since the purpose of the single-publication rule is that all injuries suffered as a result of an alleged defamation must be sued for and all damages collected in one action, it follows that states adopting this rule, including New Hampshire, have an interest in cooperating with each other to assure that a forum is available to redress injury sustained as a result of a defamation both within and without the forum state.[153] In other words, the Supreme Court concluded that the single-publication rule generated an interest in the forum state which tended to support, rather than militate against, the assertion of jurisdiction.[154]

## III. *Asahi* and Beyond

### A. Asahi Metal Industry Co. v. Superior Court of California

#### 1. *Minimum Contacts*

The Supreme Court's most recent major pronouncement on personal jurisdiction, *Asahi Metal Industry Co. v. Superior*

151. *Id.*
152. 682 F.2d at 35.
153. 465 U.S. at 777-78.
154. *Id.*

*Court of California*,[155] reexamines many of the issues we have encountered so far. In *Asahi*, Gary Zurcher, the original plaintiff, was seriously injured when the motorcycle he was driving was involved in an accident with a truck.[156] The accident occurred because of an alleged defect in the tube, sealant, and rear tire of the motorcycle.[157] Zurcher brought suit in Superior Court of the State of California for the County of Solano, against, among others, the Cheng Shin Rubber Industrial Co. (Cheng Shin), the Taiwanese manufacturer of the tube.[158] Cheng Shin filed a cross-complaint for indemnification against its codefendants, also naming Asahi Metal Industry Co. (Asahi), a Japanese corporation and the manufacturer of the tube's valve assembly.[159] Asahi moved to quash Cheng Shin's service of summons, arguing that the state's exercise of jurisdiction over it would be unconstitutional.[160] The facts showed that Asahi shipped tire valve assemblies from Japan to Cheng Shin in Taiwan for use in finished tire tubes.[161] As the Court recited,

> Asahi's sales to Cheng Shin took place in Taiwan. The shipments from Asahi to Cheng Shin were sent from Japan to Taiwan. Cheng Shin bought and incorporated into its tire tubes 150,000 Asahi valve assemblies in 1978; 500,000 in 1979; 500,000 in 1980; 100,000 in 1981; and 100,000 in 1982. Sales to Cheng Shin accounted for 1.24 percent of Asahi's income in 1981, and 0.44 percent in 1982. Cheng Shin alleged that approximately 20 percent of its sales in the United States are in California. Cheng Shin purchases valve assemblies from other suppliers as well, and sells finished tubes throughout the world.[162]

After the California superior court denied Asahi's motion and upheld jurisdiction, the Court of Appeal of the State of Cal-

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155. 480 U.S. 102 (1987).

156. *Id.* at 105.

157. *Id.* at 106.

158. *Id.* at 105-06.

159. *Id.* at 106. Because of a vagary of California procedure, the complaint against Asahi is styled throughout the case as a "cross-complaint." The claim against Asahi is not a cross-claim since Asahi was not an original defendant. Asahi could be described as an additional defendant on a cross-claim, but functionally, Cheng Shin's claim against Asahi was a third-party (impleader) claim for indemnification.

160. *Id.*

161. *Id.*

162. *Id.*

ifornia reversed and denied jurisdiction on the ground that the mere foreseeability that tires incorporating Asahi's valve assemblies would be marketed in California was an insufficient contact to uphold jurisdiction.[163] The Supreme Court of California acknowledged that Asahi made no direct sales in California and solicited no business there. Nevertheless, that court reversed and upheld jurisdiction on the basis that Asahi performed the *intentional act* of injecting its products into the stream of commerce, *knew* that some of its valve assemblies sold to Cheng Shin would be sold in California, and *benefited* indirectly from sales in California.[164]

The United States Supreme Court reversed and denied jurisdiction.[165] Although the judgment of reversal was concurred in unanimously, the three different opinions reveal wide analytical and philosophical disagreements. The plurality opinion, written by Justice O'Connor, contains two analytical sections, Parts II-A[166] and II-B.[167] Part II-A discusses the nature of the contacts required for jurisdiction and analyzed the stream of commerce and purposeful availment theories set forth in *World-Wide Volkswagen Corp. v. Woodson*[168] and elsewhere. Part II-B discuss other factors besides contacts between defendant and forum, and analyzes their relevance to the jurisdictional issue.

Part II-A represents the opinion of a minority of the Court.[169] In this part, after asserting that the "constitutional touchstone" of personal jurisdiction is "whether the defendant purposefully established 'minimum contacts' in the forum state,"[170] the Court goes on to consider the correct interpretation of the stream of commerce test[171] as set forth in *World-Wide*. The plurality rejected the view of the California Supreme Court that the defendant's injection of a product into the stream of

163. *Id.* at 107-08.

164. *Id.* at 108.

165. *Id.*

166. *Id.* at 108-13.

167. *Id.* at 113-16.

168. 444 U.S. 286 (1980). *See supra* notes 56-106 and accompanying text.

169. Part II-A was joined by Chief Justice Rehnquist and Justices Powell and Scalia.

170. *Id.* at 108-09 (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985) (quoting International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945))).

171. *Id.* at 109.

commerce with the knowledge that the stream would "sweep the product into the forum state" was a sufficient contact for jurisdiction.[172] The Court instead stated that in order to amount to a minimum contact for jurisdictional purposes, the defendant must perform some action "purposefully directed toward the forum State" and, further, that "[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State."[173] The Court suggested as examples of actions indicating purposeful intent: "designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State."[174]

A majority of the Court rejected the analysis and conclusion of the plurality opinion with respect to the stream of commerce theory and would not have reversed on that ground. Two other opinions were written, one by Justice Brennan[175] and the other by Justice Stevens.[176]

Justice Brennan rejected the plurality's interpretation of the stream of commerce theory and of *World-Wide*.[177] He concluded that Asahi's commercial activities did amount to purposeful availment, and that Asahi did have minimum contacts with the forum.[178] Absent other factors, these activities and contacts would be sufficient to support jurisdiction.[179] Justice Brennan argued that *World-Wide* did not control the instant case, as the plurality had contended, but rather, he argued that *World-Wide* had been careful to preserve the distinction between the situation where a consumer had taken the product to the forum state, as in *World-Wide*, and the situation where the product reached the forum through a chain of distribution, as in the in-

172. *Id.* at 112.

173. *Id.* (emphasis omitted).

174. *Id.*

175. *Id.* at 116 (Brennan, J., concurring in part). Justice Brennan's opinion was joined by Justices White, Marshall, and Blackmun.

176. *Id.* at 121 (Stevens, J., concurring in part). Justice Stevens' opinion was joined by Justices White and Blackmun.

177. *Id.* at 116-17 (Brennan, J., concurring).

178. *Id.*

179. *Id.* at 116-21 (Brennan, J., concurring).

stant case.[180] Justice Brennan further admitted that he did not see any constitutional significance to the distinction between the situations where the product reaches the forum through the chain of distribution, and where it is taken there by the foreseeable act of the consumer.[181] Justice Brennan argued that *World-Wide* stood only for the proposition that jurisdiction would be rejected where the product arrived in the forum state through the fortuitous circumstances of *one isolated occurrence* of consumer use.[182] Justice Brennan further argued that if a product flows along a stream of commerce in a "regular and anticipated" chain of distribution where the manufacturer is aware of this, derives benefits from sales in the forum state, and "benefits from the State's laws that regulate and facilitate commercial activity," then no further purposeful activity is required to support jurisdiction.[183] Notwithstanding these contacts which he found to be sufficient, Justice Brennan concluded that the assertion of jurisdiction would be unreasonable and unfair.[184] Consequently, he joined in the Court's judgment of reversal for the reasons set forth in Part II-B of the plurality opinion, discussed below.

Justice Stevens reached no conclusion at all with respect to the stream of commerce theory,[185] and the interpretation of *World-Wide*.[186] But, he explicitly concluded that "[a]n examination of minimum contacts is not always necessary to determine whether a state court's assertion of personal jurisdiction is constitutional."[187] On the contrary, he argued that we may conclude directly, without an intervening analysis of contacts, that the assertion of jurisdiction in this case would be unreasonable and

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180. *Id.* at 120 (Brennan, J., concurring).

181. *Id.* at 120 n.3 (Brennan, J., concurring).

182. *Id.* Justice Brennan did not advocate that *World-Wide* be overruled. Rather, he asserted that the plurality's interpretation of it amounted to an endorsement of "what appears to be the minority view among Federal Courts of Appeals . . . ." *See id.* at 117 n.1 (Brennan, J., concurring) for the extensive case citations designed to document the conclusion that the plurality's opinion is a minority view.

183. *Id.* at 117 (Brennan, J., concurring).

184. *Id.* at 116 (Brennan, J., concurring).

185. *Id.* at 121.

186. *Id.* He did suggest, without concluding, that normally "a regular course of dealing that results in deliveries of over 100,000 units annually over a period of several years would constitute 'purposeful availment' . . . . " *Id.* at 122 (Stevens, J., concurring).

187. *Id.* at 121 (Stevens, J., concurring).

unfair, even if the defendant had met the plurality's purposeful availment standard of contacts with the forum state.[188]

In order to find the basis for the Court's agreement in the result that the California court did not possess jurisdiction over Asahi, we must look to the arguments in Part II-B of the plurality opinion. This section considers arguments against the assertion of jurisdiction other than the stream of commerce doctrine, and the degree of contact between defendant and forum. Part II-B was concurred in by the four members of the plurality plus Justices Brennan, White, Marshall and Blackmun. From the point of view of the plurality, Part II-B is cumulative and unnecessary given the arguments of Part II-A; from the point of view of the other four concurring Justices, Part II-B contains the fundamental, sufficient arguments on which the denial of jurisdiction is based. Interestingly, the members of the plurality also affirmed that the arguments in that section are sufficient in themselves to support the denial of jurisdiction.[189]

In Part II-B the Court concluded there were several factors which justify the denial of jurisdiction over Asahi. First, the Court asserted that the interest of the plaintiff in this forum is slight. The Court pointed out that the transactions on which the indemnification claim is based had little connection with the State of California, and further, that the plaintiff for this claim, Cheng Shin, "has not demonstrated that it is more convenient for it to litigate. . . in California" than elsewhere.[190] This remark is astonishing in its implications, suggesting, as it does that, in order for the assertion of jurisdiction over defendant to be fair, plaintiff bears the burden of demonstrating that it has chosen the most convenient forum for itself. Second, the Court argued that the forum State has little interest in the assertion of jurisdiction. Third, the Court pointed out that the burdens on the

188. *Id.* at 121, 122 (Stevens, J., concurring).

189. The Court writes: "A consideration of these [additional] factors in the present case clearly reveals the unreasonableness of the assertion of jurisdiction over Asahi, even apart from the question of the placement of goods in the stream of commerce." *Id.* at 114. The four Justices who concurred in both Parts II-A and II-B of the plurality opinion are therefore advancing the doctrine that jurisdiction may be denied if either (a) minimum contacts between forum and defendant are not present, or (b) the assertion of jurisdiction would be unreasonable and unfair based upon an analysis of other factors enumerated in Part II-B.

190. *Id.* at 114.

alien defendant would be great. Fourth, the Court argued that the international context of this case, in which the substantive interests of other nations are implicated, also militates against the assertion of jurisdiction.[191] The plurality opinion concludes that given these factors, "the exercise of personal jurisdiction by a California court over Asahi in this instance would be unreasonable and unfair."[192]

Ultimately, it is the last two factors, both related to the international setting of the case, which best explain and justify the result. As has been set forth in a recent article,[193] assertions of jurisdiction over foreign defendants can affect United States foreign relations by offending foreign nations, creating the possibility of retaliatory actions by other nations, and, generally, by involving individual states in foreign affairs to a constitutionally impermissible degree.[194] Because of this special factual setting, *Asahi* is not the best case from which to derive general legal conclusions. As far as general legal doctrine is concerned, the most interesting outcome of *Asahi* is the apparent acceptance by a majority of the Supreme Court of Justice Brennan's view that the injection of a product into the stream of commerce with the knowledge that the product will make its way into the forum state is sufficient for purposeful availment, and the rejection of the *World-Wide* interpretation which would have required something more.[195] The unusual distribution of opinions makes

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191. *See id.* at 115.

192. *Id.* at 116.

193. *See* Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. OF INT'L & CORP. L. 1 (1987). These and other issues relating to the assertion of jurisdiction over foreign defendants have been discussed by Professor Gary Born. He presents an interesting argument that special jurisdictional rules and principles are appropriately applied where a foreign defendant is involved.

194. *See* Newport Components, Inc. v. NEC Home Electronics, 671 F. Supp. 1525 (C.D. Cal. 1987), for a recent case interpreting *Asahi* as standing for the proposition that "courts must apply a higher standard of review to the forum contacts of foreign defendants than they do to the contacts of domestic defendants." *Id.* at 1532 n.7.

But in Mason v. F. LLI Luigi, 832 F.2d 383 (7th Cir. 1987), the court found jurisdiction over a foreign defendant, distinguishing *Asahi* on the grounds that the interest of the plaintiff and the forum state were substantial, and that defendant "purposefully availed itself of the privilege of conducting activities within the forum state," *id.* at 386, by sending its employee into the jurisdiction to demonstrate and set up the machine that was the subject of the action. *Id.*

195. 444 U.S. at 295.

it difficult to classify this conclusion as either holding or dictum, but this view is clearly expressed by four Justices and appears to be shared by one other. Justice Brennan, in his opinion concurred in by three other Justices, wrote that the plurality would require a plaintiff "to show '[a]dditional conduct' directed toward the forum before finding the exercise of jurisdiction over the defendant to be consistent with the Due Process Clause. I see no need for such a showing, however."[196]

I referred equivocally to the apparent acceptance by the Court of the Brennan view. Justice Stevens becomes the tie-breaker between the plurality, and the three Justices who joined in Justice Brennan's opinion. Unfortunately, Justice Stevens' position on this issue is not entirely certain. He makes the perceptive suggestion that the distinction between " 'mere awareness' that a [product] will find its way into the forum State and 'purposeful availment' " is not always clear.[197] As discussed below, Justice Stevens goes beyond the disagreement between the two factions, and argues that the purposeful availment test need not be satisfied in every case, but rather that a conclusion as to fairness may sometimes be achieved without any conclusion as to purposeful availment.[198] In that sense, at least, Justice Stevens does not require any additional conduct beyond placing a product into the stream of commerce to find personal jurisdiction.

One result of *Asahi* is to weaken the link between the minimum contacts analysis and the conclusion that jurisdiction may or may not be asserted. A majority of the Supreme Court reiterated that a finding of minimum contacts between the defendant and the forum is not sufficient for the assertion of personal jurisdiction by the forum.[199] The five justices who joined in the two partial concurring opinions agreed that, even where minimum contacts are present, jurisdiction need not be allowed.[200] Justice Stevens' opinion made this point explicitly,[201] and Justice Bren-

196. 480 U.S. at 117 (citation omitted).

197. *Id.* at 122.

198. *Id.*

199. *Id.* at 116, 121-22 (the existence of minimum contacts is not sufficient for jurisdiction).

200. *Id.*

201. *Id.* at 121-22.

nan concluded that the California courts lacked jurisdiction notwithstanding the existence of minimum contacts, even when tested under the plurality's purposeful availment theory.[202]

What does the Court hold the relation to be between the minimum contacts analysis and the other factors which, in the Court's view, are relevant to the inquiry into fairness? The entire Court, with the exception of Justice Stevens, agreed that the minimum contacts test, as analyzed by the purposeful availment doctrine, is a threshold inquiry. A finding that this test is satisfied creates a prima facie showing that jurisdiction exists and operates to shift the burden to the defendant to produce evidence, related to fairness, to show why jurisdiction would be unfair. Has this analysis opened the door for a court to conclude that it would be fair to a defendant, and reasonable in the circumstances present, for a court to assert jurisdiction even in the absence of a threshold finding that minimum contacts exist? Justice Stevens suggested this conclusion: "I see no reason in this case for the Court to articulate 'purposeful direction' or any other test as the nexus between an act of a defendant and the forum State that is necessary to establish minimum contacts."[203]

Justice Stevens stopped short of concluding that jurisdiction may be asserted without engaging in the minimum contacts analysis, and without a finding that such contacts exist. In fact, his language implies that it remains necessary to establish some form of minimum contacts. Rather, Stevens emphasized that it is not necessary or possible to specify any particular formulation by which the presence of such contacts may be determined. This is consistent, of course, with the existence of rules of thumb, or guidelines, based upon types of contacts, which in most cases will point the way to a satisfactory result. This opinion is a clear rejection of the view expressed by the plurality in the words: " '[T]he constitutional touchstone' of the determination whether an exercise of personal jurisdiction comports with due process remains whether the defendant purposefully established minimum contacts in the forum."[204]

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202. *Id.* at 116.

203. *Id.* at 122.

204. *Id.* at 108-09 (quoting from *Burger King*, 471 U.S. 462 (1985)).

### 2. *Forum State Interest*

We are left with the inescapable fact that the Justices who deny that minimum contacts are sufficient for jurisdiction do so not to insist upon a conception of jurisdiction restricted to the due process rights of defendant, but rather to defend the relevance of "other factors," notably the interest of the forum state. The forum state interest analysis is regarded by some as a modern, sophisticated, enlightened advancement in the law of personal jurisdiction.[205] But why should state interests be relevant at all? One difficulty in assessing interest theories (whether plaintiff's interest or forum-state interest) is the ambiguity of the term "interest." "Interest" is in one sense the antonym of "uninterested," and in another sense, the antonym of "disinterested." That is, in one sense, interest refers to a psychological inclination or desire, as when one has an interest in playing rugby, and in another sense, it refers to an objective share of, or participation in some advantage, as when one has a financial interest in a real estate development project. In the first sense, the plaintiff always has an interest in litigating in the forum, having

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205. *See e.g.*, McDougal, *Judicial Jurisdiction: From a Contacts to an Interest Analysis*, 35 VAND. L. REV. 1 (1982). Professor McDougal proposes that an analysis of the various interests at stake provides an adequate general theory of personal jurisdiction, and he further argues that all private interests are included within and accommodated by a sufficiently sensitive and detailed consideration of the various state interests involved. McDougal's chief objection to the fairness criterion is that it is vague and difficult to apply in particular cases. *Id.* at 10-12. McDougal presents a detailed and elaborate classificiation and analysis of the various interests he deems relevant to personal jurisdiction in different kinds of cases. The very complexity of his analysis raises doubts as to whether the "interest" analysis will be any easier to apply to particular cases than the "fairness" test. But his entire discussion of interests is moot, unless there is some argument, or some solid ground supporting the interest analysis as a fundamental standard for deciding questions of personal jurisdiction in preference to the standard of fairness to defendant. At this crucial juncture, McDougal presents no argument. He states

> [t]he failure of the present fairness standard suggests that courts should establish jurisdictional policies that are either abstract or sufficiently flexible to account for all the competing interests at stake. This proposition leads to the final major inadequacy of the minimum contacts approach — its failure to consider sufficiently all the relevant interests at stake in controversies concerning a state's constitutional authority to exercise jurisdiction.

*Id.* at 11-12. But the fairness theory fails to consider competing interests only if there are any such interests, and this is the question in controversy. To simply assume that there are such competing interests is not an argument.

selected it.[206] But when courts consider the degree of interest a plaintiff has in a forum, the evidence presented is rarely that of the intensity of plaintiff's desire to litigate in that forum, but rather, the evidence relates to objective connections between the plaintiff and the forum.[207]

With respect to the Court's argument that the plaintiff has little interest in the forum, the most obvious response is that the plaintiff seeks adjudication of this claim in this forum, and in that sense has an interest in the forum. The Court's argument that plaintiff has little interest in the forum is based upon an objective analysis of the connections between the forum state and the transactions underlying plaintiff's claim.[208]

By focusing on the objective nature of the transactions at issue in the litigation, forum state interest arguments against jurisdiction subtly convert subject matter jurisdiction concerns into restrictions on personal jurisdiction. When a court concludes that the forum lacks interest in a piece of litigation, it is actually saying that this is a type of case, based upon its subject matter, which the court ought not to decide, or prefers not to decide, regardless of the desire of the plaintiff to have the case decided in that forum, and regardless whether there are sufficient contacts between defendant and forum to justify the Court's imposition of a judgment on the defendant. This amounts to the court's substituting its judgment as to whether it wishes to hear a certain type of case (a case with a certain subject matter), for the constitutionally-based inquiry into the fairness to defendant of plaintiff's chosen forum. It is possible, of

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206. This oversimplifies the *Asahi* situation, where the "plaintiff" on the claim in question, Cheng Shin, was a defendant in the original lawsuit. Still, we may say that Cheng Shin "selected" the forum in the sense of resisting the attempt by *Asahi* to avoid the jurisdiction of that forum. *See supra* notes 158-62 and accompanying text.

207. In *Asahi*, for instance, the Court considers whether the Japanese defendant should be required to defend in California. In arguing that jurisdiction does not exist, the Court states:

> [T]he interests of the plaintiff and the forum in California's assertion of jurisdiction over Asahi are slight . . . The transaction on which the indemnification claim is based took place in Taiwan; Asahi's components were shipped from Japan to Taiwan. Cheng Shin has not demonstrated that it is more convenient for it to litigate its indemnification claim against Asahi in California rather than in Taiwan or Japan.

480 U.S. at 114.

208. *See id.*

course, that lack of state interest in the litigation and absence of objective connections between the plaintiff and the forum will be related to the contacts between the defendant and the forum. If the litigation is relatively unrelated to the plaintiff's chosen forum, this may make it less likely that there are sufficient contacts between defendant and forum for the assertion of jurisdiction over defendant to be fair.

The interest arguments advanced by the Court are at odds not only with the due process basis of personal jurisdiction, and not only with the distinction between subject matter jurisdiction and personal jurisdiction, but also with the traditional function of the court in our adversarial system. The court, in our system of jurisprudence, is traditionally a neutral, unbiased arbiter, not a quasi-party having concerns and interests to be vindicated during the course of, and perhaps at the expense of, the interests of private parties to a dispute. To say that the forum state has no interest in the litigation means that the forum does not expect any of its policies to be advanced by the litigation, or bluntly, that it does not anticipate any corresponding benefit from its investment of resources to adjudicate the dispute. Considerations of benefits to the state have nothing to do with the fairness of the litigation to the litigants, or of the propriety of conducting the litigation in that forum.

### B. *Post-*Asahi *Cases in the Lower Federal Courts*

The main issue which has occupied the courts since *Asahi* is the attempt to interpret and apply the purposeful availment standard. The following cases reflect and illustrate the confusion and uncertainty which *Asahi* has spawned.

In *Ag Chem Equip. Co. v. AVCO Corp.*[209] the district court referred to the debate within the Supreme Court regarding the meaning of the stream of commerce theory and applied the Brennan interpretation, not the plurality standard.[210] In *Ag Chem*, the plaintiff brought suit against Stabilimenti Meccanici VM ("VM"), the Italian manufacturer of the diesel engines plaintiff had purchased for use in its industrial sprayers, alleging

209. 666 F.2d 1010 (6th Cir. 1987).
210. *Id.* at 1014.

damages suffered as a result of problems with engines.[211] VMGA, the American representative of VM and AVCO, the distributor which initiated the contact with plaintiff were joined as defendants.[212] Upon motion by defendants VM and VMGA to dismiss for lack of personal jurisdiction, the court found the contacts between defendants and the forum sufficient to conclude that there had been purposeful availment by the defendants of the benefits of the state of Michigan.[213] The court pointed out that VM engaged AVCO "as its exclusive dealer . . . in the United States and Canada," that VM "agreed to refer all inquiries regarding its engines to AVCO," that VM agreed "to provide AVCO with . . . catalogs . . . and other promotional materials, . . . and further that VM agreed to provide a six-month warranty on all its products sold by AVCO."[214] The court also stressed that both AVCO and its subdistributors were authorized by VM to perform service on its products.[215] The court concluded that defendants must have known that AVCO's efforts included attempts to sell in Michigan, and therefore that under Justice Brennan's stream of commerce analysis, defendants knew they were availing themselves of the privilege of doing business in Michigan.[216]

In dictum, the court opined that defendant's activities also met Justice O'Connor's more demanding test for purposeful availment.[217] As conduct going beyond the mere placing of a product into the stream of commerce, the court pointed to "AVCO's contractual obligation to market VM engines nationwide, . . . its promise to provide VM with annually updated lists of its [sub]distributors," and to the exclusivity of AVCO's arrangement with VM.[218] The court's conclusion that even the O'Connor standard was met underscores the length to which the court went to reject it since either standard would yield the same result.

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211. *Id.* at 1011-12.
212. *Id.*
213. *Id.* at 1016.
214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.*
218. *Id.*

In *Sinatra v. National Enquirer, Inc.*,[219] Frank Sinatra sued the tabloid newspaper, The National Enquirer, and the Clinic La Prairie, a Swiss corporation operating in Montreux, Switzerland.[220] The action related to an article published in the Enquirer which stated falsely that Sinatra had sought youth treatments, involving the injection of "live cells from black sheep fetuses."[221] The gist of the claim against the Clinic was that Clinic employees had cooperated with the Enquirer by "fabricat[ing] an elaborate story calculated to link Sinatra's name with their services."[222] The embarrassing details of this fabrication were calculated to obtain publicity for the Clinic.[223]

The Ninth Circuit held that the California district court possessed jurisdiction over the Clinic,[224] but the court's purposeful availment analysis was not entirely clear. The court repeated the *Asahi* plurality view that the awareness of the product's entry into California and economic benefit was insufficient for jurisdiction. The court also noted that there were sufficient additional activities[225] which consisted of efforts by the Clinic to promote its business in California, through such acts as:

> (1) the misappropriation of the value of Sinatra's name through interviews conducted in Switzerland between Clinic employees and Enquirer reporters, in which the Clinic supplied false information about Sinatra's treatment at the Clinic; (2) the Clinic's California advertising efforts to attract patients; and (3) the Clinic's knowledge of Sinatra's residence in California.[226]

This analysis appears to be a straightforward attempt to satisfy the *Asahi* plurality's "awareness-of-effects-plus" standard. But the *Sinatra* court also states that it is sufficient for purposeful availment if the defendant has "performed some type of affirmative conduct which allows or promotes the transaction of business within the forum state."[227]

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219. 854 F.2d 1191 (9th Cir. 1988).
220. *Id.* at 1193.
221. *Id.* at 1195.
222. *Id.* at 1196.
223. *Id.*
224. *Id.* at 1202.
225. *Id.* at 1195.
226. *Id.*
227. *Id.* (citing Decker Coal Co. v. Commonwealth Edison Co., 805 F.2d 834, 840

This language appears to require a lesser showing for purposeful availment than the *Asahi* plurality standard. If it is sufficient for purposeful availment that conduct merely "allow" the transaction of business within the forum state, then, on any reasonable analysis of "allow," a subjective intent to do business in the forum is not required. This language would also rule out attempts by potential defendants to immunize themselves from jurisdiction by such devices as entering into contracts with distributors outside the jurisdiction where they are located. A manufacturer who appoints distributors in a state "allows" (and probably even "promotes") the transaction of business in that state regardless of where the contract is signed.

Other courts have applied the plurality's "awareness plus" test, but have allowed the amount of additional conduct required to shrink almost to the vanishing point. For example, in *Morris v. SSE, Inc.*,[228] the administratrix of the estate of a parachutist who had been killed in a jumping accident in Alabama, brought suit in Alabama federal court against the Pennsylvania manufacturer of a safety device designed to open the chute automatically if necessary.[229] Although defendant placed the safety device in the national stream of commerce, defendant's contacts with Alabama were minimal.[230] The court found sufficient "additional conduct" for jurisdiction in that defendant had repaired the device which allegedly caused this injury, and inasmuch as there was a "reasonable inference" that defendant had advertised in national trade journals.[231] The court considered the repair of the device to be analogous to "designing the product for the [market in the] forum state," one of the factors which the *Asahi* plurality indicated might constitute sufficient "additional conduct."[232] But surely the *Asahi* court was referring to the adapting or retooling of a product to meet the particular circumstances and needs of a particular market, not to a mere single repair job on one item.[233]

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(9th Cir. 1986)).

228. 843 F.2d 489 (11th Cir. 1988).

229. *Id.* at 490.

230. *Id.* at 493-94.

231. *Id.* at 494.

232. *Id.*

233. Edmonton World Hockey Enter. Ltd. v. Charles L. Abrahams, 658 F. Supp.

Several other cases do not hesitate to allow defendant, by the unilateral declaration of its intentions, and the clever structuring of its activities, to manipulatively avoid personal jurisdiction notwithstanding defendant's extensive activities in the forum.[234] The case of *Bearry v. Beech Aircraft Corp.*[235] is astonishing in its result and cloudy in its reasoning. In *Bearry*, the survivors of two Louisiana decedents brought suit in Texas state court, claiming that decedents' death in a plane crash (which occurred near McComb, Mississippi) resulted from the defective design of defendant-manufacturer's aircraft.[236] Defendant Beech is a Delaware corporation with its principal place of business in Kansas.[237] The United States Court of Appeals for the Fifth Circuit reversed the district court, and held that the contacts between the forum and the defendant were insufficient for the exercise of general jurisdiction.[238] This holding was in spite of the findings that Beech distributed its products in Texas through seventeen distibutors, one of whom was a wholly owned subsidiary of Beech; that Beech did $250,000,000 of business in Texas through these distributors during the period 1980 to 1985; and that Beech was a party to sales contracts exceeding $72,000,000 with Bell Helicopters of Fort Worth, Texas.[239] Beech

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604, 608 (D. Minn. 1987), was decided on the basis of a lenient test for purposeful availment (that is, a test which could be satisfied on the basis of relatively slight defendant-forum contacts). In *Edmonton*, the court stated that the purposeful availment test is satisfied where "the defendant 'deliberately' has engaged in significant activities within a State or has created the 'continuing obligations' between himself and residents of the forum." *Id.* at 608 (quoting *Burger King*, 471 U.S. 462, 475-76 (1985)). If this test were applied in *Kostuch*, 665 F. Supp. 474 (M.D. La. 1987), the court would surely conclude that defendant had both deliberately engaged in "significant activities,' and had created "continuing obligations." *See supra* notes 134-39 and accompanying text.

234. *See, e.g.*, Scott v. Breeland, 792 F.2d 925, 927 (9th Cir. 1986) (contacts included occasional musical performances, record distribution to state retailers, and boarding a flight within the state); Fidelity and Casualty Co. v. Philadelphia Resins Corp., 766 F.2d 440, 447 (10th Cir. 1985), *cert. denied*, 474 U.S. 1082 (1986) (contacts included advertising in a national trade publication and sales of other products within the state); Singletary v. B.R.X., Inc., 828 F.2d 1135, 1136, *reh'g denied*, 834 F.2d 1025 (5th Cir. 1987) (contacts consisted of advertising in national trade magazines, some of which reached the state, and sale of the product to a state resident).

235. 818 F.2d 370 (5th Cir. 1987).

236. *Id.* at 372.

237. *Id.*

238. *Id.* at 376.

239. *Id.* at 372-73.

had also engaged in a nationwide marketing campaign during this period, and Beech representatives had "visited the Texas dealers on occasion to assist them with maintenance problems, to demonstrate new aircraft, and to offer sales incentives . . . ."[240] The appellate court also found Beech's business activities in Texas were enormous and that Beech conducted a significant portion of general business affairs within the forum.[241]

The appellate court begins its analysis with a brief but obscure discussion of the power of the Texas court to serve process on the defendant.[242] The court first revived the notion of the "federalism concerns of state sovereignty" as an independent limitation on personal jurisdiction, but it appears to regard these concerns only as a limitation on the power of a court to serve process, not as a limitation on the power to adjudicate the rights of a defendant once he is before the court.[243] The court abandoned the discussion of service of process as abruptly as it began it, launching into a contacts-fairness analysis, without reaching

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240. *Id.* at 373.

241. *Id.* at 375.

242. *Id.* at 373.

243. The court makes the following confusing remarks:

> First there are the federalism concerns of state soverignty — in which we inquire about the power of one state to subject to its process the citizen of another state. The restriction on state sovereign power limits the power of a state to compel a citizen of a sister state to submit to its process. This restriction does not affect the subject-matter jurisdiction of the state's courts — the power to adjudicate the matter once consent is given. Accordingly, non-residents may consent to litigation in a foreign state without raising federalism concerns.

*Id.* at 373.

Later the court states that sovereignty-federalism concerns are a "limit upon states implicit in their very membership in the federation enforceable by residents." *Id.* at 374. Apparently the court is suggesting that the constitutionality of a long-arm statute authorizing the assertion of jurisdiction over a non-resident is logically independent of the constitutionality of a statute authorizing service of process on a non-resident in implementation of the long-arm statute. In other words, the court argues, a long-arm statute may be constitutional under the due process clause, but, because of federalism-sovereignty restrictions, there may be no constitutional means for the state to actualize this jurisdictional power by enacting a statute authorizing service on the non-resident defendant. *See id.* But the court gives no authority for this implausible suggestion. Nor does the court give any explanation of why it supposes that a "limit upon states," based upon rights supposedly possessed by states against each other, generates rights "enforceable by resident" in the absence of the assertion of such right by its possessor, the state. *Id.* at 373. Furthermore, it is unclear what the court meant by its reference to subject matter jurisdiction. Apparently the court's point is that purported sovereignty-federalism limitations on service of process do not affect the power of a court to hear a case if

any conclusion as to whether the Texas court could constitutionally serve process under the restrictions purportedly imposed by the sovereignty doctrine.[244] It is unclear how the court could fail to reach a conclusion on this issue, having raised it initially, and having insisted that it is a separate and independent constitutional restriction upon which the case presumably could turn.

The court begins its contacts analysis by setting forth the distinction between general and specific jurisdiction, and by arguing that the continuous and systematic test for general jurisdiction must here be satisfied, since the cause of action does not arise from or relate to the defendant's contacts with the forum state.[245] The appellate court rejected the district court's conclusion that where a defendant has "continuously and systematically injected an enormous stream of commerce into the forum, it is subject to general *in personam* jurisdiction in the forum," inasmuch as under those circumstances (the district court argued) the defendant has "availed itself of the privilege of doing business in the forum and the protection of [its] laws to the extent that it can fairly anticipate the forum's exercise of general jurisdiction over it."[246] The district court also argued that where a defendant's activities in the forum are as extensive as they are here, this generates an interest in the state in regulating defendant's conduct generally, and in providing a forum for the resolution of claims against the defendant.[247]

The appellate court's arguments for overruling and rejecting jurisdiction are unpersuasive. The appellate court stated that:

> A conclusion that there is a stream of commerce ensures that the contact that caused harm in the forum occurred there through the defendant's conduct and not the plaintiff's unilateral activi-

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consent to personal jurisdiction is given by defendant.

244. *Id.* at 374.

245. *Id.* The court made the gratuitous and misleading remark that "more contact is required [in a general jurisdiction case] with the forum state because the state has no direct interest in the cause of action." *Id.* But nowhere in *Helicopteros Nacionales S.A. v. Hall*, 466 U.S. 408 (1984), the Supreme Court's most recent extended discussion of general jurisdiction, does the Court suggest that this is the reason why more contact is required. On the contrary, *Helicopteros* argues throughout that more contacts are required in a general jurisdiction case in order to satisfy the due process rights of defendant. *See id.* at 413-14.

246. 818 F.2d at 375.

247. *Id.*

> ties; it does not ensure that defendant's relationship with the forum is continuous and systematic, such that it can be sued there for unrelated claims.[248]

But this ignores the district court's argument, which was not that the existence of a stream of commerce "ensures" sufficient contacts for general jurisdiction, but rather, that where a stream of commerce may, on the facts, be characterized as "enormous," it is reasonable to subject the defendant to jurisdiction.[249]

The most troublesome element of the opinion is the court's willingness to allow the form imposed upon the transactions by defendant to take the place of a flexible, fact-based inquiry into fairness. The court attached great importance to the fact that the sales agreements between Beech and its Texas dealers were carefully negotiated in Kansas, with delivery of all goods accepted in Kansas, and that Beech had no control over the activities of its retailers.[250] The court acknowledged unabashedly that Beech "exercised its right to structure its affairs in a manner calculated to shield it from the general jurisdiction of the courts of other states," and therefore, that "Beech has not afforded itself the benefits and protection of the laws of Texas, but instead has calculatedly avoided them."[251] But the defendant's "enormous" contacts with the state of Texas do not magically lessen merely because of defendant's unilateral characterization of its business activities in that state, or defendant's attempts to pretend that they do not exist. Where a defendant engages in "enormous" activity within a state, the laws of that state regulate and control defendant's business activities, regardless of defendant's attempts to pretend otherwise.[252]

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248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.* at 375-76.

252. In another recent case against the same defendant, Hayworth v. Beech Aircraft, 690 F. Supp. 962 (D. Wyo. 1988), the court found the contacts sufficient for jurisdiction. In *Hayworth*, the plaintiff, an airplane mechanic, sued for injuries which occurred when the landing gear on the airplane on which he was working collapsed, pinning him underneath. Although the airplane was sold and delivered in Kansas, and although defendant had few contacts in Wyoming, the court found the contacts sufficient, relying primarily

In *Kostuch v. Southtrust Bank*,[253] the court held that financial benefit obtained by defendant from its activities in a jurisdiction, even when defendant knew it was receiving such financial benefit, is insufficient to satisfy the purposeful availment test.[254] In *Kostuch*, the plaintiff, a seller of group health insurance plans, brought suit against defendant Southtrust Bank as trustee of a Health Benefit Group Trust ("AAH"), alleging that defendant mismanaged the funds of the AAH trust and that plaintiff sustained injury to its business as a consequence.[255] The defendant moved to dismiss for lack of personal jurisdiction on the ground that it was an Alabama business with no office and no employees in Louisiana and with no other contacts within the state of Louisiana sufficient for personal jurisdiction.[256]

Defendant admitted that it received funds from contributors to the trust from the state of Louisiana, and that it "make[s] disbursements to individuals and institutions in [Louisiana] when directed to do so by the [trust] administrator," but defendant denied that such contacts amounted to purposeful availment under applicable law.[257] Plaintiff, of course, characterized these activities as doing business in Louisiana, as maintaining a persistent course of conduct in Louisiana, and as providing services in Louisiana.[258] In rejecting jurisdiction, the court did not dispute plaintiff's recitals that defendant knowingly derived "substantial economic benefit" from contributions from Louisiana, and that defendant "could have foreseen causing injury in Louisiana."[259] But the court responded that plaintiff failed to show that defendant actively solicited those funds or that it advertised in Louisiana, and the court therefore concluded that the purposeful availment test was not met and that the court there-

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on the fact that defendant sold the aircraft to a "known out-of-state customer" and the further fact that defendant also advertised in Wyoming. *Id.* at 965. The court distinguished *Bearry* on the grounds that it involved general, rather than specific jurisdiction. *Id.* at 966 n.1.

253. 665 F. Supp. 474 (M.D. La. 1987).

254. *Id.* at 477.

255. *Id.* at 474.

256. *Id.* at 475.

257. *Id.*

258. *Id.* at 475-76.

259. *Id.* at 476.

fore lacked jurisdiction.[260]

*Kostuch* is wrongly decided, and the mistake stems from the misconception of the purposeful availment test which has its source in the four-person plurality opinion in *Asahi*. *Kostuch* affords defendants grossly excessive power to declare unilaterally where they will permit themselves to be sued. The misconception is to suppose that purposes can be declared arbitrarily rather than inferred from conduct and behavior. Sometimes one purposefully avails oneself of a benefit by knowingly and continuously accepting the benefit, and by continuing the activities which generate that benefit, whether or not the intent to accept that benefit is ever articulated. (It could be argued that this is within the meaning of an "indirect effort" to exploit a market contemplated by *World-Wide*). The compensation paid to a trustee of a fund is based upon the contributions to that fund. There is nothing subtle or hidden or indirect about that compensation; that is the way the trustee conducts its business. Sometimes a businessperson is fortunate enough to be able to generate profits without needing to advertise, or to take other steps to solicit or generate business. It hardly follows from being in this fortunate position that one does not avail oneself of the markets in which one does business and from which one benefits. This is all the more true when, as here, the market in question is in a state adjacent to the defendant's principal place of business and where the benefit is substantial.

*MMR Holding Corp. v. Sweetser*[261] is another case where the court allowed a defendant, this time an individual, to structure his activities so as to avoid personal jurisdiction. The defendant was a Virginia resident, who had been employed as president of Foley Enterprises, (Foley), a District of Columbia corporation based in Virginia, which operated a business as an electrical and mechanical contractor. Foley became bankrupt and unable to perform outstanding construction contracts. MMR, a Delaware corporation with its principal place of business in Louisiana, entered into an agreement with Foley whereby MMR undertook to perform certain of Foley's outstanding contractual obligations, one of which was located in

260. *Id.*

261. 675 F. Supp. 326, 330 (M.D. La. 1987).

Louisiana. Pursuant to a written contract, Sweetser was hired by MMR as president of this newly created Foley Group Division. After less than six months, MMR terminated Sweetser's employment and brought suit against him in Louisiana state court seeking recission of the employment contract, damages, and other relief. Sweetser moved to dismiss on the grounds of lack of personal jurisdiction.[262] The action was subsequently removed to the United States District Court for the Middle District of Louisiana.[263]

The case required the interpretation and application of the *Burger King* analysis of the significance of a contractual relationship as a contact for jurisdictional purposes. The court concluded that it lacked jurisdiction notwithstanding the contract between the parties.[264] The court stressed that the principal terms of the contract had been negotiated in Virginia, that Sweetser "was to be employed 'at the Foley Group's headquarters in the . . . Washington D.C. area,' " that he was not to be moved from that area without his consent, and that the "parties would be governed by the laws of Virginia."[265] The court recited that Sweetser never visited Louisiana in the performance of his duties under the contract and that his contacts with Louisiana were limited to telephone conversations.[266] Strangely, the court asserted without argument that it was "insignificant" that "defendant's salary, medical benefits and an automobile were funded from MMR in Louisiana."[267]

There are several curious features about this opinion. The first is the court's lack of care and concern in distinguishing the facts of *MMR* from *Burger King*. Unlike the defendant in *Burger King*, Sweetser had been an employee of plaintiff.[268] Arguably, the language in *Burger King* stressing the voluntary affiliation of defendant in an ongoing relationship with a foreign corporation applies with even greater force to one who enters into an employment relationship with that corporation. Further-

262. *Id.* at 326.
263. *Id.* at 326-27.
264. *Id.* at 330.
265. *Id.* at 329.
266. *Id.* at 330.
267. *Id.*
268. *Id.*

more, the employment relationship itself arguably provides a contact relevant to jurisdiction. Secondly, the court noted that defendant Sweetser, had taken the initiative to seek out and solicit the sale of Foley to MMR, and that this solicitation was a contact tending in favor of jurisdiction.[269] But the court did not reach the legal question of whether an initial solicitation by Sweetser would have been a sufficient basis for jurisdiction.[270] Rather, the court rejected the factual premise of this argument, concluding that the initial contact had been made by MMR.[271]

## IV. Conclusion

The principal issue with which the courts are now wrestling is the interpretation of the purposeful availment — stream of commerce theory as set forth in the various opinions in *Asahi*. Unfortunately, the courts generally take for granted that the contacts analysis and the fairness analysis are two separate and independent states of the jurisdictional inquiry, and they further take for granted that "purposeful availment" is the basic test for determining the sufficiency of the contacts. The courts further assume without serious questioning that under the heading of "fairness," various considerations other than convenience to defendant are relevant, including, principally, the forum state's interest in resolving the dispute, and the plaintiff's interest in the chosen forum. These assumptions should be rejected and the Supreme Court should reaffirm the basic principle of *International Shoe* that personal jurisdiction is based upon fairness to defendant as measured by defendant's presence in the forum.

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269. *Id.* at 328.

270. *Id.*

271. *Id.* at 327-29. Another recent case which addresses the relevance for jurisdictional purposes of the initiation of contact by a foreign defendant is American Greetings Corp. v. Cohn, 839 F.2d 1164 (6th Cir. 1988). The Sixth Circuit considered this prescise issue again in Lanier v. American Board of Endodontics, 843 F.2d 901 (6th Cir. 1988).