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Fall 1987

## Personal Jurisdiction after ASAHI: The Other (International) Shoe Drops

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### Recommended Citation

R. Lawrence Dessem, Personal Jurisdiction After Asahi: The Other (International) Shoe Drops, 55 Tenn. L. Rev. 41 (1987)

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# PERSONAL JURISDICTION AFTER *ASAHI*: THE OTHER (INTERNATIONAL) SHOE DROPS

R. LAWRENCE DESSEM\*

Over a quarter of a century ago, the Illinois Supreme Court made the following observation concerning the rules of personal jurisdiction:

Unless they are applied in recognition of the changes brought about by technological and economic progress, jurisdictional concepts which may have been reasonable enough in a simpler economy lose their relation to reality, and injustice rather than justice is promoted. Our unchanging principles of justice, whether procedural or substantive in nature, should be scrupulously observed by the courts. But the rules of law which grow and develop within those principles must do so in the light of the facts of economic life as it is lived today.<sup>1</sup>

This article analyzes the growth and development of the doctrine of personal jurisdiction and the Supreme Court's consideration and application of that doctrine in the recent case of *Asahi Metal Industry Co. v. Superior Court*.<sup>2</sup> *Asahi* is significant both because of the nature of the suit and the nationality of the third-party defendant. The Supreme Court for the first time directly addressed the constitutionality of the "stream of commerce" doctrine of personal jurisdiction, a jurisdictional theory that has been employed increasingly in recent years in products liability actions.<sup>3</sup> *Asahi* also is one of the few cases in which the Court has considered the assertion of personal jurisdiction over a foreign country defendant.<sup>4</sup>

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1. *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 443, 176 N.E.2d 761, 766 (1961).

2. 107 S. Ct. 1026 (1987).

3. For an explanation of the stream of commerce doctrine, see *infra* note 58.

4. The phrase "foreign country defendant" is borrowed from Dean Peter Hay and is used to distinguish non-United States defendants from "foreign defendants"—United States defendants from a state or district other than the one in which the forum court sits. Hay, *Judicial Jurisdiction Over Foreign-Country Corporate Defendants—Comments on Recent Case Law*, 63 OR. L. REV. 431 (1984). The Supreme Court's previous considerations of the assertion of personal jurisdiction over a foreign country defendant had come in *Helicopteros Nacionales de Colombia, S. A. v. Hall*, 466 U.S. 408 (1984), and *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952).

This article considers not only the *Asahi* decision itself, but also the personal jurisdiction cases leading up to that decision and the implications of the case for the future development of the stream of commerce doctrine. Thus, in the first section of the article, personal jurisdiction cases prior to *Asahi* are set forth and analyzed. The second section of the article then presents the *Asahi* decision itself. In the third section of the article, the stream of commerce doctrine is discussed and analyzed, insofar as that doctrine applies to cases involving domestic defendants. The next section of the article discusses the additional problems presented by any attempted application of the stream of commerce doctrine to cases involving foreign country defendants. The final major section of the article then considers some possible limitations upon the stream of commerce doctrine other than those imposed by constitutional due process.

Both the stream of commerce doctrine and the attempts to assert that doctrine against foreign country defendants should continue to grow in importance as this country, and the world economic order of which it is one part, approach the twenty-first century. The manner in which the courts employ this doctrine will have profound significance not only for our legal system, but for our economy and nation as well. The Supreme Court's recent decision in *Asahi* gives at least some preliminary indication of the manner in which these significant issues will be addressed.

## I. PERSONAL JURISDICTION CASES PRIOR TO *ASAHI*

### A. *Personal Jurisdiction Doctrine in the Supreme Court*

In order to fully appreciate the Supreme Court's recent decision in *Asahi*, a short history of the development of personal jurisdiction doctrine in the United States Supreme Court should prove helpful.<sup>5</sup>

Until midway through the twentieth century, the leading case concerning the constitutionality of personal jurisdiction was the Supreme Court's 1877 decision in *Pennoyer v. Neff*.<sup>6</sup> One commentator

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5. For general discussions of the evolution of personal jurisdiction doctrine in the Supreme Court, see Hay, *Refining Personal Jurisdiction in the United States*, 35 INT'L & COMP. L.Q. 32 (1986); Lilly, *Jurisdiction Over Domestic and Alien Defendants*, 69 VA. L. REV. 85, 87-107 (1983); Weintraub, *Due Process Limitations on the Personal Jurisdiction of State Courts: Time for Change*, 63 OR. L. REV. 485, 488-512 (1984); Weisburd, *Territorial Authority and Personal Jurisdiction*, 63 WASH. U.L.Q. 377, 380-83 (1985).

6. 95 U.S. 714 (1877). The fact that a court constitutionally can exercise personal jurisdiction over a defendant does not necessarily mean that the substantive law of that forum also constitutionally can be applied. Instead, the commentators and the courts have differentiated between "judicial jurisdiction" (which concerns the constitutional limitations on personal jurisdiction) and "legislative jurisdiction"

has described *Pennoyer* as “not merely a venerable case. It represents a particular way of looking at the law of jurisdiction.”<sup>7</sup>

Mr. Justice Field’s majority opinion in *Pennoyer* was premised upon “two well-established principles of public law respecting the jurisdiction of an independent State over persons and property.”<sup>8</sup> These principles were (1) “that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory” and (2) “that no State can exercise direct jurisdiction and authority over persons or property without its territory.”<sup>9</sup> It was this latter principle, established as controlling law in *Pennoyer*, that was to shape the next sixty-eight years of personal jurisdiction doctrine.<sup>10</sup>

*Pennoyer*’s physical presence test, however, eventually proved inadequate for a growing industrial nation.<sup>11</sup> Consequently, working

(which concerns the constitutional limitations on choice of law). Martin, *Personal Jurisdiction and Choice of Law*, 78 MICH. L. REV. 872, 874 (1980).

The Supreme Court has held that “for a State’s substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.” *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-23 (1981). See also *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 814-23 (1985); *John Hancock Life Ins. Co. v. Yates*, 299 U.S. 178, 182 (1936); *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930).

Moreover, “[t]he Court has recognized that examination of a State’s contacts may result in divergent conclusions for jurisdiction and choice-of-law purposes.” *Allstate*, 449 U.S. at 317 n.23. See also *Phillips Petroleum*, 472 U.S. at 821; *Hanson v. Denckla*, 357 U.S. 235, 254 n.27 (1958); *Lauritzen v. Larsen*, 345 U.S. 571, 590-93 (1953). For an interesting discussion of “accommodation through choice of law” upon jurisdictional analysis, see von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1128-34 (1966). For an examination of the interrelationship of personal jurisdiction and choice of law concerns in the *Asahi* case itself, see Cox, *The Interrelationship of Personal Jurisdiction and Choice of Law: Forging New Theory Through Asahi Metal Industry Co. v. Superior Court*, 49 U. PITT. L. REV. 189 (1987).

7. Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241. For a recent analysis of *Pennoyer* and the facts giving rise to that case, see Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction in Pennoyer Reconsidered*, 62 WASH. L. REV. 479 (1987).

8. *Pennoyer*, 95 U.S. at 722.

9. *Id.*

10. Refusing to recognize the possibility of in personam jurisdiction over a defendant not physically present within the forum state, the Supreme Court in *Pennoyer* held that an Oregon court could not render a valid judgment against an out-of-state defendant who had neither appeared nor been personally served within Oregon. *Pennoyer*, 95 U.S. at 736. The Court, however, did recognize that a valid in rem judgment might have been rendered had the Oregon court’s assertion of jurisdiction been based upon an initial attachment of defendant’s real property within the state. *Id.* at 727.

11. “*Pennoyer*’s principle limiting the reach of state-court process proved highly inconvenient in automobile accident cases and in actions against corporations. The adjustment of these inconveniences culminated in an abandonment of the principle.” Hazard, *supra* note 7, at 272.

within the conceptual framework established by *Pennoyer*, the Supreme Court gradually expanded the situations in which a defendant would be considered physically present within a state and thus subject to personal jurisdiction.<sup>12</sup>

It was against this background that the Supreme Court in 1947 decided *International Shoe Co. v. Washington*.<sup>13</sup> The defendant International Shoe was a Delaware corporation, with its principal place of business in Missouri.<sup>14</sup> The corporation challenged service upon it by mail of a notice of assessment of delinquent contributions to the Washington unemployment compensation system.<sup>15</sup> International Shoe argued that although it had systematically solicited orders through a sales force within Washington, "its activities within the state were

12. Thus, in *Hess v. Pawloski*, 274 U.S. 352 (1927), the Supreme Court upheld the assertion of personal jurisdiction by a Massachusetts court over a nonresident motorist in an automobile accident suit. Jurisdiction was asserted pursuant to a state statute providing that the acceptance of the rights and privileges of driving within Massachusetts was deemed to constitute the appointment of a local official as an agent to receive process in any case involving an accident within the state. *Id.* at 354.

With respect to suits against foreign corporations, "For a long time the inquiry was whether the local activity was sufficient so that it could be said that the corporation was 'present' in the state, in deference to *Pennoyer's* major theoretical premise that presence was required." Hazard, *supra* note 7, at 273. See generally Note, *Due Process, Jurisdiction Over Corporations, and the Commerce Clause*, 42 HARV. L. REV. 1062 (1929). Moreover, the Supreme Court narrowly interpreted corporate "presence" in some cases, thereby disapproving attempted exercises of jurisdiction over corporate defendants. *Lumiere v. Mae Edna Wilder, Inc.*, 261 U.S. 174 (1923); *Rosenberg Bros. & Co. v. Curtis Brown Co.*, 260 U.S. 516 (1923).

As in the case of nonresident motorist statutes, however, the Supreme Court did uphold state statutes requiring foreign corporations to appoint a state official as a corporate agent to receive service of process. *Louisville & N. R.R. v. Chatters*, 279 U.S. 320, 324-29 (1929); *Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917). The decisions in such cases were anticipated by Justice Field's explanation of the Court's holding in *Pennoyer*:

Neither do we mean to assert that a State may not require a nonresident entering into a partnership or association within its limits, or making contracts enforceable there, to appoint an agent or representative in the State to receive service of process and notice in legal proceedings instituted with respect to such partnership, association, or contracts, . . . and provide, upon their failure, to make such appointment or to designate such place that service may be made upon a public officer designated for that purpose. . . . Nor do we doubt that a State, on creating corporations . . . may provide a mode in which their conduct may be investigated, their obligations enforced, or their charters revoked, which shall require other than personal service upon their officers or members.

95 U.S. 714, 735 (1877).

13. 326 U.S. 310 (1945).

14. *International Shoe*, 326 U.S. at 313.

15. *Id.* at 312.

not sufficient to manifest its 'presence' there and that in its absence the state courts were without jurisdiction."<sup>16</sup>

While agreeing with *International Shoe* that "[h]istorically the jurisdiction of courts to render judgments *in personam* is grounded on their de facto power over the defendant's person,"<sup>17</sup> the Supreme Court nevertheless rejected the company's challenge to personal jurisdiction. The Court concluded:

[N]ow that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due 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."<sup>18</sup>

The Court gave little guidance concerning when constitutionally sufficient minimum contacts would be found to exist, merely stating 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."<sup>19</sup> The Court found that, in the case before it, *International Shoe's* "systematic and continuous" activities in Washington satisfied the minimum contacts test and that the corporation had received constitutionally sufficient notice of the action against it.<sup>20</sup>

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16. *Id.* at 315.

17. *Id.* at 316.

18. *Id.* (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

19. *International Shoe*, 326 U.S. at 319. The *International Shoe* minimum contacts test was formulated to test the constitutionality of the exercise of personal jurisdiction over the defendant, rather than the plaintiff. The Supreme Court has held that "a forum State may exercise jurisdiction over the claim of an absent class-action plaintiff, even though that plaintiff may not possess the minimum contacts with the forum which would support personal jurisdiction over a defendant." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811 (1985).

20. *International Shoe*, 326 U.S. at 320. In its analysis of *International Shoe's* contacts with Washington, the Supreme Court noted that "[t]he obligation which is here sued upon arose out of those very activities [constituting the defendant corporation's "minimum contacts" with the forum state]." *Id.* The case therefore presented an example of that aspect of personal jurisdiction known as "specific jurisdiction." See *Helicopteros Nacionales de Columbia, S. A. v. Hall*, 466 U.S. 408, 414 n.8 (1984); von Mehren & Trautman, *supra* note 6, at 1136, 1144-63.

The *International Shoe* majority, however, cited cases "in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." 326 U.S. at 318. Subsequently, the Supreme Court has reaffirmed such cases, noting that "[e]ven when the cause of action does not arise out of or relate to the foreign corporation's activities in the forum State, due process is not offended by a State's subjecting the corporation to its *in personam* jurisdiction

Supreme Court decisions subsequent to *International Shoe* have been described by Professor Hazard as a "pointillist process of locating particular cases on one side of the line or the other."<sup>21</sup> In *McGee v. International Life Insurance Co.*,<sup>22</sup> the Court noted "a trend . . . toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents."<sup>23</sup> The Court explained this trend as follows:

In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. . . . At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.<sup>24</sup>

In the case before it, the *McGee* Court found that the defendant insurance company's solicitation of a reinsurance agreement with the California insured, the acceptance of that agreement within California, and the defendant's receipt of insurance premiums mailed from

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when there are sufficient contacts between the State and the foreign corporation." *Helicopteros*, 466 U.S. at 414. See also *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952). These latter cases represent examples of that aspect of personal jurisdiction known as "general jurisdiction." *Helicopteros*, 466 U.S. at 414 n.9; Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 80-81; von Mehren & Trautman, *supra* note 6, at 1136-44.

For a recent critique of the distinction between general and specific jurisdiction, see Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610 (1988).

21. Hazard, *supra* note 7, at 274. After its decision in *International Shoe*, the Supreme Court not only applied the minimum contacts test in various factual settings, but also stressed the constitutional necessity of notice and opportunity to be heard. As two commentators have noted:

To the extent that the common law approached jurisdiction to adjudicate in terms of personal service on the defendant within the territory of the judicial system, notice did not emerge as a separate problem. The asserted basis of jurisdiction served a double function, both establishing the propriety of exercising jurisdiction and notifying the defendant of the proceedings. When other bases of jurisdiction are asserted that do not of themselves notify the defendant, notice becomes a separate matter, and appropriate notice will be necessary to satisfy due process requirements.

von Mehren & Trautman, *supra* note 6, at 1134.

Thus, in *Mullane v. Central Hanover Bank & Trust Co.*, the Supreme Court held that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." 339 U.S. 306, 314 (1950).

22. 355 U.S. 220 (1957).

23. *McGee*, 355 U.S. at 222.

24. *Id.* at 222-23.

California constituted constitutionally sufficient minimum contacts.<sup>25</sup>

By its decision only one year later in *Hanson v. Denckla*,<sup>26</sup> however, the Supreme Court made it clear that there remained constitutional due process boundaries beyond which a state could not go in asserting personal jurisdiction.<sup>27</sup> In *Hanson* the Court held that a Florida court could not constitutionally assert personal jurisdiction over a Delaware trustee, even though the trust settlor had moved to Florida and carried on trust administration from that state. With respect to the settlor's activities in Florida, the Court said:

The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. . . . [I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.<sup>28</sup>

Twenty-two years later, in *World-Wide Volkswagen Corp. v. Woodson*,<sup>29</sup> the Supreme Court relied upon *Hanson v. Denckla* in striking down the attempted exercise of personal jurisdiction by an Oklahoma state court over a foreign defendant. The plaintiffs in this action had purchased an Audi automobile from the defendant retailer Seaway in New York and subsequently moved from New York to Arizona.<sup>30</sup> As they were driving this car through Oklahoma, there was an accident which plaintiffs contended was due, at least in part, to a defect in the car.<sup>31</sup> The plaintiffs filed suit in an Oklahoma state court against Seaway, World-Wide Volkswagen (which was the regional Audi distributor for New York, New Jersey, and Connecticut), Audi's American importer, and the foreign manufacturer of the car.<sup>32</sup>

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25. *Id.* at 223-24.

26. 357 U.S. 235 (1958).

27. The Supreme Court warned:

[I]t is a mistake to assume that this trend [of liberalization of personal jurisdiction requirements] heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. . . . However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the "minimal contacts" with that State that are a prerequisite to its exercise of power over him.

*Hanson*, 357 U.S. at 251 (citations omitted).

28. *Id.* at 253.

29. 444 U.S. 286 (1980). Two years before its decision in *World-Wide Volkswagen*, the Supreme Court had relied upon *Hanson v. Denckla* in *Kulko v. Superior Court*, 436 U.S. 84 (1978). In *Kulko* the Court held that the defendant father's mere acquiescence in his children's move from New York to California to live with their mother was not a "purposeful act" subjecting him to personal jurisdiction in a California action for an increase in child support. 436 U.S. at 94.

30. *World-Wide Volkswagen*, 444 U.S. at 288.

31. *Id.*

32. *Id.*



Writing for a majority of the United States Supreme Court, Justice White concluded that Oklahoma's attempted assertion of personal jurisdiction over Seaway and World-Wide Volkswagen was violative of the due process clause of the fourteenth amendment. The *World-Wide Volkswagen* majority "[found] in the record before [it] a total absence of those affiliating circumstances that are a necessary predicate to any exercise of state-court jurisdiction."<sup>33</sup>

The Court also refused to uphold personal jurisdiction merely because it was "foreseeable" that plaintiffs' Audi would cause injury in Oklahoma:

"[F]oreseeability" alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause. . . .<sup>34</sup> [T]he 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 reasonably anticipate being haled into court there.<sup>35</sup>

By so restricting the foreseeability relevant for due process purposes, the Court intended to permit "potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit"<sup>36</sup> and to prevent a situation in which "[e]very seller of chattels would in effect appoint the chattel his agent for service of process."<sup>37</sup> Under this

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33. *Id.* at 295. Justice White's majority opinion also delineated several factors that a court should consider in determining whether a state's attempted exercise of jurisdiction over a defendant with minimum forum contacts is constitutionally reasonable. These factors included "the burden on the defendant," "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.* at 292.

The Supreme Court reiterated these same factors in its subsequent decision in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-77 (1985). At least one professor has criticized the Court for suggesting that "less than sufficient contacts can be 'made up for' by a strong state or plaintiff interest in the forum." Sonenshein, *The Error of a Balancing Approach to the Due Process Determination of Jurisdiction Over the Person*, 59 TEMP. L.Q. 47, 57 (1986). The use of just such a balancing approach to determine the constitutionality of personal jurisdiction, however, has been suggested by others. Jay, *Minimum Contacts as a Unified Theory of Personal Jurisdiction: A Reappraisal*, 59 N.C.L. REV. 429 (1981); von Mehren & Trautman, *supra* note 6, at 1172. The Supreme Court, though, made it clear in *Burger King* that only "[o]nce it has been decided that a defendant purposefully established minimum contacts within the forum State" is a court to consider "whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'" 471 U.S. at 476 (emphasis added).

34. *World-Wide Volkswagen*, 444 U.S. at 295.

35. *Id.* at 297.

36. *Id.*

37. *Id.* at 296.

restricted view of due process foreseeability, the Court reversed the judgment of the Oklahoma Supreme Court that had upheld personal jurisdiction over the New York retailer and distributor.<sup>38</sup>

Justices Brennan, Marshall, and Blackmun each filed dissents.<sup>39</sup> In his dissent, Justice Brennan argued that a defendant should not possess "an unjustified veto power over certain very appropriate fora—a power the defendant justifiably enjoyed long ago when communication and travel over long distances were slow and unpredictable and when notions of state sovereignty were impractical and exaggerated."<sup>40</sup>

In his dissent Justice Marshall argued that it would not be unconstitutionally unfair to subject the New York automobile retailer and distributor to suit in Oklahoma:

[A] distributor of automobiles to a multistate market and a local automobile dealer who makes himself part of a nationwide network of dealerships can fairly expect that the cars they sell may cause injury in distant States and that they may be called on to defend a resulting lawsuit there.<sup>41</sup>

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38. *Id.* at 299.

39. *World-Wide Volkswagen*, 444 U.S. at 299 (Brennan, J., dissenting); *id.* at 313 (Marshall, J., dissenting); *id.* at 317 (Blackmun, J., dissenting).

40. *Id.* at 312 (Brennan, J., dissenting). Despite Justice Brennan's concern with "impractical and exaggerated" notions of state sovereignty, the *World-Wide Volkswagen* majority asserted that the minimum contacts test was necessitated, at least in part, by concerns for such state sovereignty:

The concept of minimum contacts . . . can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.

*World-Wide Volkswagen*, 444 U.S. at 291-92.

More recently, however, the Supreme Court has redefined the rationale for the minimum contacts test as follows: "The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty." *Insurance Corp. of Ireland v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 702 (1982). See also *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807 (1985); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985); Hay, *supra* note 5, at 34 ("Despite earlier language in Supreme Court cases, it is now indeed accepted that the jurisdictional due process issue does not implicate concerns of federalism."). See generally von Mehren, *Adjudicatory Jurisdiction: General Theories Compared and Evaluated*, 63 B.U.L. REV. 279 (1983).

For an argument that personal jurisdiction doctrine should reflect notions of territorial sovereignty, see Weisburd, *supra* note 5. For arguments to the contrary, see Weintraub, *supra* note 5; Braveman, *Interstate Federalism and Personal Jurisdiction*, 33 SYRACUSE L. REV. 533 (1982); and Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U.L. REV. 1112 (1981).

41. *World-Wide Volkswagen*, 444 U.S. at 316 (Marshall, J., dissenting).

Justice Blackmun joined in this dissent, and in his own short dissent argued that the unique mobility of the automobile made Oklahoma's exercise of jurisdiction constitutional.<sup>42</sup>

Although *World-Wide Volkswagen* subsequently became the major precedent relied upon by both parties in *Asahi*,<sup>43</sup> the Supreme Court decided several other personal jurisdiction cases in the years between those two cases. In *Helicopteros Nacionales de Colombia, S. A. v. Hall*,<sup>44</sup> the Court considered the minimum contacts doctrine in a suit brought against a Colombian corporation in a Texas state court. Finding that the foreign corporation's limited business dealings in Texas did not support general jurisdiction over plaintiff's unrelated tort claim, the Court held that the attempted assertion of jurisdiction over the corporation was violative of the due process clause.<sup>45</sup>

In two 1984 decisions, the Supreme Court considered the assertion of long arm jurisdiction in libel actions. In *Keeton v. Hustler Magazine, Inc.*,<sup>46</sup> the Court upheld the jurisdiction of a federal district court in New Hampshire over a foreign magazine based upon circulation of allegedly libelous magazines within the state. In *Calder v. Jones*,<sup>47</sup> the Court upheld the exercise of personal jurisdiction by a California state court in connection with libel claims asserted against the editor and a reporter of the *National Enquirer*. The Court rejected defendants' "suggestion that First Amendment concerns enter into the jurisdictional analysis," concluding instead that such concerns were adequately addressed in the substantive law governing libel claims.<sup>48</sup> The Court also refused to create a different minimum contacts standard with respect to claims against corporate employees, holding that the defendants' "status as employees does not somehow insulate them from jurisdiction."<sup>49</sup>

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42. *Id.* at 317 (Blackmun, J., dissenting).

43. *Asahi Metal Indus. Co. v. Superior Court*, 107 S.Ct. 1026 (1987). See *Asahi Metal Indus. Co. v. Superior Court*, 39 Cal. 3d 35, 47, 702 P.2d 543, 549, 216 Cal. Rptr. 385, 391 (1985).

44. 466 U.S. 408 (1984).

45. *Id.* at 418-19. The Supreme Court previously had held that a federal court could sanction such foreign country defendants for failure to comply with an order concerning discovery of jurisdictional facts by taking as established the existence of personal jurisdiction. *Insurance Corp. of Ireland v. Compagnie de Bauxites de Guinee*, 456 U.S. 694 (1982).

46. 465 U.S. 770 (1984).

47. 465 U.S. 783 (1984).

48. *Calder*, 465 U.S. at 790.

49. *Id.* Prior to *Calder*, some courts had adopted a "fiduciary shield rule" under which "actions performed on behalf of a corporate employer [could] not supply the necessary contacts for jurisdiction over an actor." Note, *Personal Jurisdiction and the Corporate Employee: Minimum Contacts Meet the Fiduciary Shield*, 38 STAN. L. REV. 813 (1986). In *Calder*, however, the Supreme Court implicitly rejected this rule, although it noted that corporate employees' "contacts

In two 1985 personal jurisdiction decisions, the Supreme Court applied the minimum contacts test in two other factual contexts. In *Burger King Corp. v. Rudzewicz*,<sup>50</sup> the Court held the minimum contacts test to be satisfied in a contract action by the defendant franchisee's business dealings with the out-of-state corporate franchisor. In *Phillips Petroleum Co. v. Shutts*,<sup>51</sup> the Court held that, while absent class plaintiffs in a class action suit are entitled to certain due process protections, they need not possess the same minimum contacts with the forum that are required before personal jurisdiction can be exercised over a party defendant.

Thus, while the Supreme Court has entertained many personal jurisdiction cases in recent years, it has not established any bright line test for determining the constitutional sufficiency of such jurisdiction. Instead, *International Shoe's* minimum contacts test has been applied by the Court in a variety of factual situations. Perhaps because of the flexibility and elasticity of this test, the lower federal and state courts reached varied results in the many stream of commerce cases decided both before and after the Supreme Court's decision in *World-Wide Volkswagen*.

#### B. Stream of Commerce Cases in the State And Lower Federal Courts

Prior to the Supreme Court's decision in *World-Wide Volkswagen*, the leading case involving the assertion of state long arm jurisdiction over a foreign defendant was *Gray v. American Radiator & Standard Sanitary Corp.*<sup>52</sup> *Gray* involved a tort suit brought by a

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with [the forum state] are not to be judged according to their employer's activities there" but must be based upon their own forum-related activities. *Calder*, 465 U.S. at 790. See also *Keeton*, 465 U.S. at 781 n.13.

Thus "the fiduciary shield appears to be nearing its demise as a constitutional doctrine," although "[s]tates with long-arm statutes that are not coextensive with due process may continue to recognize the fiduciary shield rule without doing violence to constitutional norms." Note, *supra*, at 839. See generally *id.*; Note, *The Fiduciary Shield Doctrine: Minimum Contacts in a Special Context*, 65 B.U.L. REV. 967 (1985); Sponsler, *Jurisdiction Over the Corporate Agent: The Fiduciary Shield*, 35 WASH. & LEE L. REV. 349 (1978).

50. 471 U.S. 462 (1985).

51. 472 U.S. 797 (1985).

52. 22 Ill. 2d 432, 176 N.E.2d 761 (1961). For a discussion of the *Gray* case and the Illinois long arm statute with which it deals, see Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. ILL. L.F. 533. As Professor Currie has acknowledged, "Illinois was the first State to enact a statute comprehensively dealing with personal jurisdiction and frankly attempting to occupy the entire field of its constitutional power under the [then] recent liberalization of the due process clause." *Id.* at 537.

Moreover, *Gray* itself is the type of case in which state courts have stretched long arm statutes the farthest. "When a court sees blood on the ground, it is very likely to find jurisdiction over a nonresident seller of the product that caused the injury." Weintraub, *supra* note 5, at 516.

woman who had been injured when a hot water heater exploded due to a defective safety valve.<sup>53</sup> Among the defendants was the company that had manufactured the valve in Ohio prior to its incorporation into the finished heater in Pennsylvania and ultimate shipment into Illinois.<sup>54</sup>

After concluding that the Illinois long arm statute extended to such out-of-state activity resulting in a tort within Illinois, the Illinois Supreme Court rejected the valve company's constitutional due process argument:

To the extent that [the valve company's] business may be directly affected by transactions occurring here it enjoys benefits from the laws of this State, and it has undoubtedly benefited, to a degree, from the protection which our law has given to the marketing of hot water heaters containing its valves. . . . As a general proposition, if a corporation elects to sell its products for ultimate use in another State, it is not unjust to hold it answerable there for any damage caused by defects in those products.<sup>55</sup>

In a second major long arm case decided by a state supreme court, *Buckeye Boiler Co. v. Superior Court*,<sup>56</sup> a manufacturer of pressure tanks was held subject to suit in California in connection with a claim arising from the explosion of one of its tanks. The California Supreme Court upheld the assertion of jurisdiction over this foreign defendant even though there were no records indicating how the tank came to be in California; jurisdiction was held constitutional because Buckeye Boiler had sold a different type of tank to another customer in California, thereby receiving approximately \$30,000 in annual sales.<sup>57</sup>

Within the last decade, the lower federal courts have resolved increasing numbers of the types of stream of commerce cases exemplified by *Gray* and *Buckeye Boiler*. As the Supreme Court noted in *Asahi*, "Since *World-Wide Volkswagen*, lower courts have been confronted with cases in which the defendant acted by placing a product in the stream of commerce, and the stream eventually swept defendant's product into the forum state."<sup>58</sup> These cases may have

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53. *Gray*, 22 Ill. 2d at 434, 176 N.E.2d at 762.

54. *Id.* at 438, 176 N.E.2d at 764.

55. *Id.* at 442, 176 N.E.2d at 766.

56. 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969).

57. 71 Cal. 2d at 904-907, 458 P.2d at 65-67, 80 Cal. Rptr. at 121-23.

58. *Asahi*, 107 S. Ct. at 1032. A federal appellate court has explained the stream of commerce doctrine and its development as follows:

The stream-of-commerce theory developed as a means of sustaining jurisdiction in products liability cases in which the product had traveled through an extensive chain of distribution before reaching the ultimate consumer. Under this theory, a manufacturer may be held amenable to process in a forum in which its products are sold, even if the products

been spurred, at least in part, by the dictum in *Volkswagen* acknowledging the constitutionality of stream of commerce jurisdiction:

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. *Cf. Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E. 2d 761 (1961).<sup>59</sup>

The federal courts of appeals were not in agreement concerning the proper interpretation of this dictum in *World-Wide Volkswagen* or whether the mere placement of a product into the stream of commerce with the knowledge that the product would travel to the forum state was a sufficient basis for personal jurisdiction.<sup>60</sup>

Decisions in a majority of the federal appellate circuits upheld an expansive exercise of stream of commerce jurisdiction, in several cases premised solely upon a manufacturer's foreseeability or awareness.<sup>61</sup> In *Bean Dredging Corp. v. Dredge Technology Corp.*,<sup>62</sup> the United States Court of Appeals for the Fifth Circuit found that the minimum contacts test was satisfied on just such a basis. The court held that the Louisiana trial court could assert personal jurisdiction over a Washington corporation that manufactured between 1000 and

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were sold indirectly through importers or distributors with independent sales and marketing schemes.

*DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280, 285 (3d Cir.), *cert. denied*, 454 U.S. 1085 (1981).

59. *World-Wide Volkswagen*, 444 U.S. at 297-98.

60. The validity, and scope, of the stream of commerce doctrine was frequently litigated in the federal appellate courts, with every federal circuit deciding at least one such case in the period between the Supreme Court's decisions in *World-Wide Volkswagen* and *Asahi*. See cases cited *infra* notes 61-81, and accompanying text. See also *Montalbano v. Easco Hand Tools*, 766 F.2d 737, 740-41 (2d Cir. 1985) (discussing stream of commerce cases and remanding for a further consideration of whether stream of commerce theory of personal jurisdiction was applicable to defendant importer).

61. In addition to the cases discussed in the text, two other federal appellate courts adopted expansive interpretations of the stream of commerce doctrine subsequent to *World-Wide Volkswagen*. In an opinion rendered only two months after *World-Wide Volkswagen*, the United States Court of Appeals for the Sixth Circuit upheld the exercise of long arm jurisdiction by a Kentucky federal court over a German manufacturer of a pistol that paralyzed the tort plaintiff. *Poyner v. Erma Werke, GMBH*, 618 F.2d 1186 (6th Cir.), *cert. denied*, 449 U.S. 841 (1980).

The United States Court of Appeals for the District of Columbia Circuit subsequently also rejected the argument that minimum contacts were not established merely because the products of the defendant Australian wine producers were imported and distributed in the United States by an independent concern. *Stabilisierungsfonds fur Wein v. Kaiser Stuhl Wine Distrib. Pty. Ltd.*, 647 F.2d 200, 203-07 (D.C. Cir. 1981).

62. 744 F.2d 1081 (5th Cir. 1984).

15,000 steel castings per year, two of which were sold to a California manufacturer and incorporated into a dredge that later malfunctioned in Louisiana.<sup>63</sup> As in *Asahi*, it was the defendant manufacturers, rather than the original plaintiff, that brought third-party actions against the castings manufacturer.<sup>64</sup>

Perhaps the most far-reaching federal appellate decision prior to *Asahi* was the Ninth Circuit's 1983 decision in *Hedrick v. Daiko Shoji Co.*<sup>65</sup> In *Hedrick* the court of appeals held that an Oregon district court could exercise personal jurisdiction over the Japanese manufacturer of a defective cable splice that snapped, resulting in severe injury to an Oregon longshoreman who was working on the ship.<sup>66</sup> The court held that the Japanese manufacturer "performed a forum-related act when it produced a splice that it knew was destined for ocean-going vehicles serving United States ports, including those of Oregon"<sup>67</sup> and that "[t]he splice caused an injury to Hedrick in a port that was within the expected service area of [the manufacturer's] customers."<sup>68</sup> Thus the Ninth Circuit concluded that the requisite minimum contacts with the Oregon forum existed, despite the fact that the defective cable was merely used, rather than sold, within the forum state.<sup>69</sup>

63. *Bean Dredging*, 744 F.2d at 1083-85.

64. In resolving this case, the Fifth Circuit relied upon its earlier decision in *Oswalt v. Scripto, Inc.*, 616 F.2d 191 (5th Cir. 1980). In this earlier decision the court had upheld personal jurisdiction over a Japanese corporation that had manufactured several million cigarette lighters, one of which allegedly malfunctioned and injured plaintiff. The Fifth Circuit, writing shortly after the Supreme Court's decision in *World-Wide Volkswagen*, held that although there was nothing in the record indicating any *actual* knowledge by the defendant corporation that one of its lighters would be sold in the forum state of Texas, the manufacturer "should have known" that its products would reach that forum because of its use of a nationwide distributor and sale of its lighters to a corporation with "national retail outlets." 616 F.2d at 198-200.

65. 715 F.2d 1355 (9th Cir. 1983), *modified, in part, on other grounds*, 733 F.2d 1335 (9th Cir. 1984).

66. *Hedrick*, 715 F.2d at 1356.

67. *Id.* at 1358.

68. *Id.*

69. *Id.* The *Hedrick* court also concluded not only that the necessary minimum contacts were present, but also that the exercise of personal jurisdiction over the Japanese manufacturer would not be unreasonable. *Id.* at 1358-59. In making this determination, the court considered the seven factors previously set forth in *Insurance Co. of N. America v. Marina Salina Cruz*:

(A) the extent of the purposeful interjection into the forum state . . . ; (B) the burden on the defendant of defending in the forum . . . ; (C) the extent of conflict with the sovereignty of defendant's state . . . ; (D) the forum state's interest in adjudicating the dispute . . . ; (E) the most efficient judicial resolution of the controversy . . . ; (F) the importance of the forum to plaintiff's interest in convenient and effective relief . . . ; and (G) the

The United States Court of Appeals for the Seventh Circuit also upheld personal jurisdiction against a foreign country defendant in *Nelson ex rel. Carson v. Park Industries, Inc.*<sup>70</sup> The claim in *Nelson* was brought by Wisconsin plaintiffs against, *inter alia*, the Hong Kong companies that manufactured and distributed to an American retailer a flannel shirt that ignited and burned a child. The court of appeals distinguished the Hong Kong defendants from the automobile distributor and retailer in *World-Wide Volkswagen* "because [the Hong Kong companies] are early actors in a distribution system which places and moves the product in the stream of commerce. *World-Wide Volkswagen* is also different because the allegedly defective product here not only caused the injury in the forum, but it was also purchased here."<sup>71</sup>

In contrast with the above decisions were opinions in the Third, Eighth, and Eleventh Circuits that adopted a significantly narrower interpretation of the stream of commerce doctrine.<sup>72</sup> Contrary to the determination of the Ninth Circuit in *Hedrick v. Daiko Shoji Co.*,<sup>73</sup> the United States Court of Appeals for the Third Circuit held that

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existence of an alternative forum.  
*Insurance Co. of N. America v. Marina Salina Cruz*, 649 F.2d 1266, 1270 (9th Cir. 1981).

70. 717 F.2d 1120 (7th Cir. 1983), *cert. denied*, 465 U.S. 1024 (1984).

71. *Nelson*, 717 F.2d at 1126. Contrasting the Hong Kong defendants with the petitioners in *World-Wide Volkswagen*, the court of appeals also noted:

[T]he relevant scope is generally broader with respect to manufacturers and primary distributors of products who are at the start of a distribution system and who thereby serve, directly or indirectly, and derive economic benefit from a wider market. Such manufacturers and distributors purposely conduct their activities to make their product available for purchase in as many forums as possible. For this reason, a manufacturer or primary distributor may be subject to a particular forum's jurisdiction when a secondary distributor and retailer are not, because the manufacturer and primary distributor have intended to serve a broader market and they derive direct benefits from serving that market.

*Id.* at 1125-26.

72. In addition, prior to *Asahi* several federal appellate decisions in other circuits had rejected stream of commerce personal jurisdiction based on the facts of particular cases. *Chung v. NANA Dev. Corp.*, 783 F.2d 1124 (4th Cir.), *cert. denied*, 107 S. Ct. 431 (1986) (Alaska corporation had not subjected itself to long arm jurisdiction of Virginia by single shipment of reindeer antlers into that state); *Dalmau Rodriguez v. Hughes Aircraft Co.*, 781 F.2d 9 (1st Cir. 1986) (manufacturer's sale of two helicopters, one of which ultimately crashed in Puerto Rico, was an "isolated splash" rather than the placement of a product into the stream of commerce so as to subject manufacturer to personal jurisdiction in Puerto Rico); *Fidelity & Casualty Co. v. Philadelphia Resins Corp.*, 766 F.2d 440 (10th Cir. 1985), *cert. denied*, 106 S. Ct. 853 (1986) (Pennsylvania manufacturer had insufficient contacts with Utah to subject it to tort suit in that state).

73. 715 F.2d 1355 (9th Cir. 1983), *modified, in part, on other grounds*, 733 F.2d 1335 (9th Cir. 1984).



a New Jersey federal court could not constitutionally assert jurisdiction over a Japanese corporation that, in Japan, had converted a ship into an automobile carrier.<sup>74</sup> The court of appeals held that even though the Japanese defendant "could have foreseen that a ship of this size was capable of transporting cars to any port in the world, . . . [t]he fortuitous circumstance that the owners chose to dock in New Jersey [where the plaintiff longshoreman was injured] is insufficient to support the assertion of jurisdiction over Hitachi under the New Jersey long-arm rule."<sup>75</sup>

The United States Court of Appeals for the Eleventh Circuit, very shortly before the Supreme Court's decision in *Asahi*, also refused to uphold the assertion of personal jurisdiction by an Alabama corporation over a Nebraska manufacturer.<sup>76</sup> The court held that the Nebraska corporation had insufficient contacts with Alabama, even though it had had business dealings with the Alabama plaintiff for five years and had shipped 2400 allegedly defective pulleys to the plaintiff in Alabama.<sup>77</sup>

Finally, the United States Court of Appeals for the Eighth Circuit had adopted a rather restrictive interpretation of the stream of commerce theory of personal jurisdiction both before<sup>78</sup> and after<sup>79</sup> the Supreme Court's decision in *World-Wide Volkswagen*. The latter of these decisions, *Humble v. Toyota Motor Co.*,<sup>80</sup> involved an attempt to assert a products liability claim against a Japanese manufacturer of component parts. The Eighth Circuit held that personal jurisdiction could not be constitutionally asserted even though a substantial portion of the defendant's business was attributable to sales of automobile seats to Toyota Motor Company, which incorporated many of these seats into cars exported to the United States.<sup>81</sup>

It was against this backdrop of differing interpretations of the stream of commerce doctrine of personal jurisdiction that the Su-

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74. *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280 (3d Cir.), *cert. denied*, 454 U.S. 1085 (1981).

75. *DeJames*, 654 F.2d at 286. Subsequently, in *Max Daetwyler Corp. v. Meyer*, 762 F.2d 290 (3d Cir. 1985), *cert. denied*, 474 U.S. 980 (1985), the Third Circuit again refused to uphold personal jurisdiction premised upon "an expansive application of the 'stream of commerce' theory" under which "jurisdiction [would exist] because [the German manufacturer] . . . participated in a distributive chain which might reasonably anticipate sales of [the manufacturer's] products in major industrial markets." *Meyer*, 762 F.2d at 298.

76. *Banton Indus., Inc. v. Dimatic Die & Tool Co.*, 801 F.2d 1283 (11th Cir. 1986).

77. *Dimatic Die*, 801 F.2d at 1284.

78. *Hutson v. Fehr Bros., Inc.*, 584 F.2d 833 (8th Cir.) (en banc), *cert. denied*, 439 U.S. 983 (1978).

79. *Humble v. Toyota Motor Co.*, 727 F.2d 709 (8th Cir. 1984) (per curiam).

80. 727 F.2d 709 (8th Cir. 1984) (per curiam).

81. *Id.* at 710-11.

preme Court was presented with the case of *Asahi Metal Industry Co. v. Superior Court*.<sup>82</sup>

## II. THE ASAHI CASE

### A. *The Facts*

In September 1978, Gary Zurcher was seriously injured, and his wife was killed, when the motorcycle that they were riding crashed into a tractor trailer on a California highway.<sup>83</sup> Zurcher filed a products liability action in the California state courts, alleging that the accident had been caused by the explosion of the rear tire of his motorcycle due to defects in the motorcycle tire, tube, and sealant.<sup>84</sup> Among the defendants named by Zurcher was Cheng Shin Rubber Industrial Co., Ltd., the Taiwanese corporation that had manufactured the motorcycle tube.<sup>85</sup>

Cheng Shin subsequently filed a third-party cross-complaint against Asahi Metal Industry Co., Ltd., the Japanese corporation that manufactured the valve assembly of the allegedly defective motorcycle tube.<sup>86</sup> When Zurcher's original action subsequently was settled and dismissed, the indemnity claim of Cheng Shin remained pending in the California courts against Asahi.<sup>87</sup>

Asahi filed a motion to quash the service of this third-party complaint, arguing that the California courts could not constitutionally exercise personal jurisdiction over a foreign country corporation with no direct contacts with California.<sup>88</sup> In support of this motion, Asahi filed affidavits indicating that, although it had sold motorcycle tire valves to Cheng Shin for a period of several years, all such sales were made in Taiwan and all the shipments of the valves were from Asahi in Japan to Cheng Shin in Taiwan.<sup>89</sup> Additionally, these sales

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82. 107 S.Ct. 1026 (1987).

83. *Asahi Metal Indus. Co. v. Superior Court*, 107 S. Ct. 1026, 1029 (1987).

84. *Id.* at 1029.

85. *Id.*

86. *Id.* at 1029-30.

87. *Id.* at 1030.

88. *Id.* Normally, in determining the constitutionality of a state court's exercise of personal jurisdiction, two separate questions must be answered: (1) whether the state's long arm statute provides for the exercise of personal jurisdiction in the instant case; and (2) if the long arm statute does contemplate the exercise of personal jurisdiction, whether such jurisdiction is constitutional. See *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 290 (1980). However, the California long arm statute employed in *Asahi* authorizes the exercise of personal jurisdiction "on any basis not inconsistent with the Constitution of this state or of the United States." CAL. CIV. PROC. CODE § 410.10 (West 1973). Accordingly, the issue in *Asahi* concerned only the constitutionality of the assertion of jurisdiction over Asahi.

89. *Asahi*, 107 S. Ct. at 1030.

of tire valves to Cheng Shin accounted for only 1.24 percent of Asahi's total income for 1981 and only 0.44 percent of Asahi's total income for 1982.<sup>90</sup> Finally, as the President of Asahi stated in one of his affidavits:

ASAHI does not do business in California. It has no office in California. It has no agents in California. It has no employees in California. It does not advertise in California. It does not solicit business in California. It owns no property in California. . . . It would be extremely inconvenient and burdensome for ASAHI to enter into this litigation in California for a claim unrelated to any conduct of ASAHI outside of JAPAN.<sup>91</sup>

In opposing the motion to quash, Cheng Shin relied upon the fact that it had purchased from 100,000 to 500,000 valve assemblies from Asahi each year from 1978 through 1982.<sup>92</sup> Moreover, a Cheng Shin official stated in an affidavit that "Asahi was fully aware that valve stem assemblies sold to my Company and to others would end up throughout the United States and in California."<sup>93</sup> In addition to this affidavit, one of Cheng Shin's attorneys filed declarations with the California Superior Court in which he described surveys of two California businesses dealing in motorcycle tires.<sup>94</sup> At the first of these stores the attorney counted approximately 250 motorcycle tire tubes with Asahi valves, while at the other California business twenty-two percent of the approximately 100 tubes manufactured in either Japan or Taiwan had Asahi valves.<sup>95</sup>

Based upon this record, the California Superior Court denied Asahi's motion to quash,<sup>96</sup> but the Court of Appeal of the State of California granted a writ of mandate compelling the Superior Court to quash the summons.<sup>97</sup> The case then was appealed to the California Supreme Court.<sup>98</sup>

### *B. The Decision of the California Supreme Court<sup>99</sup>*

In a majority opinion written by Chief Justice Bird, the California Supreme Court reversed the Court of Appeal, finding no constitu-

90. *Id.*

91. November 30, 1982, Affidavit of Kazuo Matsuoka in Support of Motion to Quash Service, at 3, *Zurcher v. Dunlop Tire & Rubber Co.*, No. 76180 (Cal. Super. Ct. April 20, 1983).

92. *Asahi*, 107 S. Ct. at 1030.

93. *Id.*

94. Respondent's Brief, apps. B, C, *Asahi Metal Indus. Co. v. Superior Court*, 107 S. Ct. 1026 (1987) (No. 85-693). *See also* 107 S. Ct. at 1030.

95. Respondent's Brief, apps. B, C, *Asahi Metal Indus. Co. v. Superior Court*, 107 S. Ct. 1026 (1987) (No. 85-693). *See also* 107 S. Ct. at 1030.

96. *Asahi*, 107 S. Ct. at 1030; *Zurcher v. Dunlop Tire & Rubber Co.*, No. 76180 (Cal. Super. Ct., April 20, 1983).

97. *Asahi*, 107 S. Ct. at 1030; *Asahi Metal Indus. Co. v. Superior Court*, No. A022366 (Cal. Ct. App., Sept. 15, 1983).

98. *Asahi*, 107 S. Ct. at 1030.

99. For commentary on the California Supreme Court's decision in *Asahi*,

tional problem with the Superior Court's exercise of personal jurisdiction over Asahi.<sup>100</sup> The court distinguished *World-Wide Volkswagen v. Woodson*<sup>101</sup> on the grounds that the defective car in that case had not been sold within the forum state but had been brought into that state by the car's purchaser.<sup>102</sup> The majority held that "[g]iven the substantial nature of Asahi's indirect business with California, and its expectation that its product would be sold in the state, Asahi 'should reasonably [have] anticipate[d] being haled into court [here].'"<sup>103</sup>

The court also rejected Asahi's argument that it had not "purposefully avail[ed] itself of the privilege of conducting activities within the forum State."<sup>104</sup> The majority instead concluded:

That requirement is satisfied where, as here, a component parts manufacturer intentionally sells its products to another manufacturer, knowing that the component parts will be incorporated into finished products sold in the forum state. In such a situation, the component part manufacturer can structure its conduct to protect itself from the risk of liability in the forum state.<sup>105</sup>

Not only did the California Supreme Court therefore find that Asahi possessed constitutionally sufficient minimum contacts with California, but the majority also held that exercise of jurisdiction over Asahi was both "fair and reasonable."<sup>106</sup> Accordingly, the California Supreme Court concurred with the superior court that the summons served upon Asahi should not be quashed.<sup>107</sup>

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see Kennedy, *Stretching the Long-Arm in Asahi Metal Industry Co., Ltd. v. Superior Court: Worldwide Jurisdiction After World-Wide Volkswagen?*, 4 B.U. INT'L L.J. 327 (1986); Note, *Asahi Metal Industry Co. v. Superior Court: Minimum Contacts in California Become Minimal*, 22 WILLAMETTE L. REV. 589 (1986); *California Supreme Court Survey: June 1985-August 1985*, 13 PEPPERDINE L. REV. 427, 443-48 (1986).

100. *Asahi Metal Indus. Co. v. Superior Court*, 39 Cal. 3d 35, 702 P.2d 543, 216 Cal. Rptr. 385 (1985).

101. 444 U.S. 286 (1980).

102. *Asahi*, 39 Cal. 3d at 47-48, 702 P.2d at 549, 216 Cal. Rptr. at 391.

103. *Id.* at 48, 702 P.2d at 549-50, 216 Cal. Rptr. at 392 (quoting *World-Wide Volkswagen*, 444 U.S. at 297).

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

105. *Asahi*, 39 Cal. 3d at 50, 702 P.2d at 551, 216 Cal. Rptr. at 393.

106. *Id.* at 52-53, 702 P.2d at 552-53, 216 Cal. Rptr. at 394-95. Though the California plaintiff had settled his claims, the court found that California had several interests in asserting jurisdiction over Asahi. The court held that California had a strong interest in adjudicating claims such as Cheng Shin's in order to (1) protect its consumers by insuring compliance by foreign manufacturers with California safety standards, (2) efficiently resolve litigation in which most of the evidence lies within California, and (3) prevent inconsistent verdicts by adjudicating all third-party cross-claims in the same forum. *Id.* at 53, 702 P.2d at 553, 216 Cal. Rptr. at 395.

107. *Id.* at 53-54, 702 P.2d at 553, 216 Cal. Rptr. at 396.

Justices Lucas and Mosk dissented, arguing that personal jurisdiction could not be constitutionally exercised because "Asahi at best foresaw that some valves would be sold in California but it in no way purposefully availed itself of conducting business in California nor exerted any effort to serve the California market."<sup>108</sup> Moreover, the dissenting justices disagreed with the majority's conclusion "that California may fairly and reasonably exercise jurisdiction."<sup>109</sup> Justice Lucas criticized the majority's holding as follows:

The net result of the majority's decision is that a Taiwanese corporation can litigate in California against a Japanese corporation that has absolutely no connection with California in a case in which the California plaintiffs have declared themselves made whole. Surely our overburdened courts should be concerned with disputes that more directly involve California.<sup>110</sup>

Subsequently, the United States Supreme Court granted a writ of certiorari to review this decision of the California Supreme Court.<sup>111</sup>

### C. *The Decision of the United States Supreme Court*

In her Supreme Court opinion, Justice O'Connor described the issue in *Asahi* as:

[W]hether the mere awareness on the part of a foreign defendant that the components it manufactured, sold, and delivered outside the United States would reach the forum state in the stream of commerce constitutes "minimum contacts" between the defendant and the forum state such that the exercise of jurisdiction "does not offend 'traditional notions of fair play and substantial justice.'"<sup>112</sup>

Although all nine justices agreed that the exercise of personal jurisdiction offended constitutional due process on the particular facts of this case,<sup>113</sup> the Supreme Court was badly divided on the other jurisdictional aspects of the case.

All but Justice Scalia joined in that portion of Justice O'Connor's opinion concluding that the exercise of personal jurisdiction over

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108. *Id.* at 55, 702 P.2d at 554, 216 Cal. Rptr. at 396 (Lucas, J., dissenting).

109. *Id.* at 55, 702 P.2d at 555, 216 Cal. Rptr. at 397 (Lucas, J., dissenting).

110. *Id.* at 56, 702 P.2d at 555, 216 Cal. Rptr. at 397 (Lucas, J., dissenting).

111. *Asahi Metal Indus. Co. v. Superior Court*, 106 S. Ct. 1258 (1986).

112. *Asahi Metal Indus. Co. v. Superior Court*, 107 S. Ct. 1026, 1029 (1987) (quoting *International Shoe*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940))).

113. *Asahi*, 107 S. Ct. at 1033-35. Although Justice Scalia did not join with the other eight justices in holding that California's attempted exercise of personal jurisdiction was constitutionally unreasonable and unfair, *id.*, he concurred with that portion of Justice O'Connor's opinion finding constitutionally insufficient minimum contacts. *Id.* at 1031-33.

Asahi "would offend 'traditional notions of fair play and substantial justice.'"<sup>114</sup> In reaching this conclusion, the Court considered the burden on the defendant of defending in the forum state, the interests of the forum state and plaintiff, and the interests of other states and nations in the resolution of the controversy.<sup>115</sup>

Justice O'Connor initially considered the "severe" burden California litigation would place upon Asahi and noted that "[t]he unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders."<sup>116</sup>

In contrast to the heavy burden placed upon Asahi, the Court believed that the interests of both "the plaintiff and the forum in California's assertion of jurisdiction over Asahi are slight."<sup>117</sup> The Court found to be particularly significant both the fact that the claims of the California plaintiff had been settled and the absence of any showing that it would be more convenient for Cheng Shin to litigate its claim against Asahi in California rather than in Japan or Taiwan.<sup>118</sup>

Finally, the Supreme Court was very concerned about the "procedural and substantive policies of other *nations* whose interests are affected by the assertion of jurisdiction by the California court."<sup>119</sup> The Court therefore concluded that "[c]onsidering the international context, the heavy burden on the alien defendant, and the slight interests of the plaintiff and the forum State, the exercise of personal jurisdiction by a California court over Asahi in this instance would be unreasonable and unfair."<sup>120</sup>

In contrast to the consensus among the justices concerning the unfairness of California's assertion of personal jurisdiction over

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114. *Id.* at 1033 (quoting *International Shoe*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940))).

115. *Asahi*, 107 S. Ct. at 1033-35.

116. *Id.* at 1034.

117. *Id.*

118. *Id.* The Court also questioned the conclusion of the California Supreme Court that California "had an interest in 'protecting its consumers by ensuring that foreign manufacturers comply with the state's safety standards.'" *Id.* (quoting *Asahi Metal Indus. Co. v. Superior Court*, 39 Cal. 3d at 49, 702 P.2d at 550, 216 Cal. Rptr. at 392). The Supreme Court suggested that "it is not at all clear at this point that California law should govern the question whether a Japanese corporation should indemnify a Taiwanese corporation on the basis of a sale made in Taiwan and a shipment of goods from Japan to Taiwan." *Asahi*, 107 S. Ct. at 1034.

119. *Id.* The Court sounded a note of caution on this point: "Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." *Id.* at 1035 (quoting *United States v. First Nat'l City Bank*, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting)).

120. *Asahi*, 107 S. Ct. at 1035.

Asahi, there was no majority opinion with respect to the question of whether Asahi's contacts with California satisfied *International Shoe's* minimum contacts test.<sup>121</sup> Justice O'Connor, writing for herself, Chief Justice Rehnquist, and Justices Powell and Scalia, concluded that any attempt by California to exercise personal jurisdiction over Asahi would be unconstitutional because of the insufficiency of Asahi's contacts with that state.<sup>122</sup>

In her opinion, Justice O'Connor rejected Cheng Shin's reliance on lower court stream of commerce decisions:

The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State [necessary for a finding of constitutionally sufficient minimum contacts] . . . . [A] defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.<sup>123</sup>

Because of Asahi's lack of direct contacts with California, Justice O'Connor concluded that "the exertion of personal jurisdiction over Asahi by the Superior Court of California exceeds the limits of Due Process."<sup>124</sup>

Although concurring in the Court's judgment and in the conclusion that California's attempted exercise of personal jurisdiction was unreasonable and unfair, Justice Brennan wrote a separate opinion in which he disagreed with Justice O'Connor's resolution of the stream of commerce issue.<sup>125</sup> In this separate concurrence, in which Justices White, Marshall, and Blackmun joined, Brennan rejected any requirement that there be "additional [defendant] conduct" beyond merely "placing [a] product into the stream [of commerce]" before the forum contacts are considered constitutionally sufficient.<sup>126</sup> Justice Brennan argued, instead, that *World-Wide Volkswagen* "preserved the stream-of-commerce theory" for cases such as *Asahi* in

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121. Indeed, one commentator has suggested that "[t]he uncertainties involved in deciding whether minimum contacts exist probably will lead courts to avoid the issue whenever they can rule out jurisdiction on the ground of unreasonableness." *The Supreme Court, 1986 Term—Leading Cases*, 101 HARV. L. REV. 119, 266 (1987). Another author has suggested that "the doctrinal division over the stream of commerce theory in *Asahi* makes assertion of jurisdiction uncertain and consequently increases the costs of doing business." Recent Development, *Personal Jurisdiction*, 27 VA. J. INT'L L. 915, 929 (1987). See also *id.* at 930, n.76 (collecting state and lower federal court cases adopting differing interpretations of *Asahi*).

122. *Asahi*, 107 S. Ct. at 1031-33.

123. *Id.* at 1033.

124. *Id.*

125. *Id.* at 1035 (Brennan, J., concurring, in part, and concurring in the judgment).

126. *Id.*

which the allegedly defective goods "reach a distant State through a chain of distribution" rather than "because a consumer . . . took them there."<sup>127</sup>

Justice Stevens also filed a short and somewhat cryptic concurrence, in which he, too, agreed that the decision of the California Supreme Court should be reversed because the exercise of personal jurisdiction over Asahi would be unreasonable and unfair.<sup>128</sup> However, Justice Stevens disagreed with Justice O'Connor's stream of commerce analysis for two reasons.

First of all, Stevens argued that, because the Court was in agreement that subjecting Asahi to suit in California would be unreasonable and unfair, it was unnecessary to consider the sufficiency of Asahi's contacts with California.<sup>129</sup> Secondly, Stevens asserted that even if the "purposeful availment" test had been properly formulated by Justice O'Connor, such a test was not correctly applied in this case.<sup>130</sup> Instead, Stevens contended that Asahi's conduct constituted more than "mere awareness" that its valves had entered the stream of commerce, and he proposed a test for determining "purposeful availment" under which "the volume, the value, and the hazardous character of the components" would be considered.<sup>131</sup> Without definitely resolving the issue, Stevens suggested that "in most circumstances" similar to those presented in *Asahi* he would find that a "purposeful availment" test for minimum contacts was satisfied.<sup>132</sup>

Accordingly, although resolving the case before it, the Supreme Court in *Asahi* provided no definitive answers concerning the difficult issues posed by the stream of commerce doctrine of personal jurisdiction. In the following sections of this article, those issues will be considered.

### III. DOMESTIC STREAM OF COMMERCE JURISDICTION AFTER ASAHI

With five justices rejecting Justice O'Connor's application of a strict "purposeful availment" test in *Asahi*, the Court apparently is prepared to endorse a fairly liberal stream of commerce doctrine of

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127. *Id.* at 1037 (Brennan, J., concurring, in part, and concurring in the judgment) (quoting *World-Wide Volkswagen*, 444 U.S. at 306-07 (Brennan, J., dissenting)).

128. *Asahi*, 107 S. Ct. at 1038 (Stevens, J., concurring, in part, and concurring in the judgment).

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*



personal jurisdiction.<sup>133</sup> Moreover, even the four justices adopting a strict purposeful availment test for minimum contacts would find that test satisfied by “[a]dditional conduct of the defendant” other than mere placement of a product into the stream of commerce.<sup>134</sup> As examples of such constitutionally sufficient purposeful availment, Justice O’Connor listed “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.”<sup>135</sup> In addition to providing guidance for such specific factual situations, the opinions in *Asahi* also are suggestive of the potential scope of any future development of stream of commerce jurisdiction.

In this section of the article, such potential future development of stream of commerce jurisdiction will be analyzed. Initially, this section will consider the significance of direct versus indirect placement of a product into the stream of commerce, sale versus use of the product in the forum, the amenability to suit of both distributors and manufacturers, and claims predicated upon the manufacture and

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133. In his separate concurrence, in which Justices White, Marshall, and Blackmun joined, Justice Brennan adopted a mere awareness standard for minimum contacts: “As long as a participant in this process is aware that the final product is being marketed in the forum State, [the minimum contacts test should be considered to be satisfied].” *Asahi*, 107 S. Ct. at 1035 (Brennan, J., concurring, in part, and concurring in the judgment). In his separate concurrence, in which Justices White and Blackmun joined, Justice Stevens argued that any “purposeful availment” test had been “misapplie[d]” and that “[i]n most circumstances” conduct such as *Asahi*’s should be held to constitute purposeful availment satisfying the minimum contacts test. *Id.* at 1038 (Stevens, J., concurring, in part, and concurring in the judgment).

In addition to the above disagreement with a strict purposeful availment test, Justice Powell, one of the three justices who concurred with Justice O’Connor, subsequently resigned from the Supreme Court.

134. *Id.* at 1033.

135. *Id.* Before *Asahi*, the state and lower federal courts had premised findings of minimum contacts upon just such “[a]dditional conduct of the defendant” as hypothesized by the Supreme Court. *E.g.*, *Noel v. S.S. Kresge Co.*, 669 F.2d 1150 (6th Cir. 1982) (allegedly defective pliers delivered in United States mounted on cards identifying them as having been manufactured in Korea for United States retailer); *Poyner v. Erma Werke, GMBH*, 618 F.2d 1186 (6th Cir.), *cert. denied*, 449 U.S. 841 (1980) (German firearms manufacturer promoted its products in the United States through a national distributor that, *inter alia*, conducted nationwide advertising on manufacturer’s behalf); *Hicks v. Kawasaki Heavy Indust.*, 452 F. Supp. 130 (M.D. Pa. 1978) (Japanese motorcycle manufacturer sold motorcycles to exclusive United States sales agent with knowledge that motorcycles would be brought to forum state and sold through fifty-five retail dealers); *Volkswagenwerk, A. G. v. Klippan, GMBH*, 611 P.2d 498 (Alaska), *cert. denied*, 449 U.S. 974 (1980) (German seat belt manufacturer specifically designed allegedly defective seat belt to comply with United States safety standards).

distribution of component parts. After this analysis, the stream of commerce minimum contacts test suggested by Justice Stevens in his short concurrence in *Asahi* will be considered as a possible means of analyzing stream of commerce jurisdictional issues.<sup>136</sup>

### A. *Specific Variants of Domestic Stream of Commerce Jurisdiction*

Among the questions left unanswered by *Asahi* is whether personal jurisdiction can be predicated upon a stream of commerce theory in various factual settings. Some of the major factual variants, and stream of commerce requirements, now will be considered.

#### 1. Directness of Contacts, Purposeful Availment, and Knowledge

Although endorsing a restrictive view of personal jurisdiction, Justice O'Connor's *Asahi* opinion quoted language from *World-Wide Volkswagen* indicating that even manufacturers and distributors who indirectly place products in the forum state can be subject to the jurisdiction of that forum: "If the sale of a product . . . 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 . . . ."<sup>137</sup>

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136. For more than two decades, commentators have criticized the defendant bias inherent in the minimum contacts test. Weintraub, *supra* note 5; Lilly, *supra* note 5; McDougal, *Judicial Jurisdiction: From a Contacts to an Interest Analysis*, 35 VAND. L. REV. 1 (1982); Jay, *supra* note 33; von Mehren & Trautman, *supra* note 6. In his dissent in *World-Wide Volkswagen*, Justice Brennan also questioned the "defendant focus" of the minimum contacts test and asserted that, because of the subsequent "nationalization of commerce and the ease of transportation and communication . . . [t]he model of society on which the *International Shoe* Court based its opinion is no longer accurate." *World-Wide Volkswagen*, 444 U.S. at 308, 309 (Brennan, J., dissenting).

Despite such criticism, the Supreme Court does not appear poised to repudiate the requirement of minimum forum contacts as a prerequisite for personal jurisdiction. "[T]he constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum State." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985) (quoting *International Shoe*, 326 U.S. at 316). Accordingly, the analysis in this article presumes a continued adherence to a minimum contacts requirement.

137. 107 S. Ct. at 1032 (quoting *World-Wide Volkswagen*, 444 U.S. at 297 (emphasis added)). Before its decision in *International Shoe*, the Supreme Court had adopted a "corporate separateness" test under which a foreign corporation would not be held to be doing business within a forum by reason of the activities of a fully owned domestic subsidiary. *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925). See generally, Note, *Jurisdiction Over Alien Corporations Based on the Activities of their Subsidiaries in the Forum: Whither the Doctrine of Corporate Separateness?* 9 FORDHAM INT'L L.J. 540 (1986); Brillmayer & Paisley,

Indeed, the stream of commerce doctrine is to cover exactly those situations in which a product has not been manufactured, sold, and used within the forum state, but has been carried to the forum by "the regular and anticipated flow of products from manufacture to distribution to retail sale."<sup>138</sup>

While accepting the possibility of personal jurisdiction premised upon indirect forum contacts, Justice O'Connor proposed to restrict stream of commerce jurisdiction by requiring "an action of the defendant purposefully directed toward the forum State" rather than a mere "awareness that the stream of commerce may or will sweep the product into the forum State. . . ."<sup>139</sup> However, as Justice Bren-

*Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency*, 74 CALIF. L. REV. 1 (1986).

At least some courts have continued to apply this doctrine and therefore have refused to uphold state long arm jurisdiction over a foreign corporation based upon the presence of a domestic subsidiary. *Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1158-61 (5th Cir. 1983); *Allen v. Toshiba Corp.*, 599 F. Supp. 381, 389-92 (D.N.M. 1984). Other courts, however, have suggested that "[i]n light of *International Shoe* and its progeny, reliance on the rule of *Cannon* and on alter ego principles of corporation law to determine a nonresident's 'presence' is no longer relevant to the constitutional inquiry into whether an exercise of jurisdiction offends traditional notions of fair play." *Brunswick Corp. v. Suzuki Motor Co.*, 575 F. Supp. 1412, 1419 (E.D. Wis. 1983). See also *Graco, Inc. v. Kremlin, Inc.*, 558 F. Supp. 188 (N.D. Ill. 1982); *Energy Reserves Group v. Superior Oil Co.*, 460 F. Supp. 483, 495-512 (D. Kan. 1978). Cf. *Schlunk v. Volkswagenwerk Aktiengesellschaft*, 145 Ill. App. 3d 594, 503 N.E.2d 1045 (1986), cert. granted, 108 S. Ct. 226 (1987) (wholly owned United States subsidiary is an agent of West German corporation for purposes of service of process and personal jurisdiction).

This latter view is more consistent with the modern view of due process, so long as it is remembered that "jurisdiction over a parent corporation [does not] automatically establish jurisdiction over a wholly owned subsidiary, . . . but each defendant's contacts with the forum State must be assessed individually." *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n.13 (1984).

138. *Asahi Metal Indus. Co. v. Superior Court*, 107 S. Ct. 1026, 1035 (1987) (Brennan, J., concurring, in part, and concurring in the judgment). Nor would it make sense to distinguish manufacturers that directly sell products within the forum state from those that merely place their products into the stream of commerce knowing that the products will reach the forum through the efforts of an intermediate manufacturer, dealer, or distributor. The Illinois Supreme Court recognized this fact over twenty-five years ago in *Gray v. American Radiator & Standard Sanitary Corp.*:

With the increasing specialization of commercial activity and the growing interdependence of business enterprises it is seldom that a manufacturer deals directly with consumers in other States. The fact that the benefit he derives from its laws is an indirect one, however, does not make it any the less essential to the conduct of his business; and it is not unreasonable, where a cause of action arises from alleged defects in his product, to say that the use of such products in the ordinary course of commerce is sufficient contact with this State to justify a requirement that he defend here.

*Gray*, 22 Ill. 2d 432, 442, 176 N.E.2d 761, 766 (1961). See also von Mehren & Trautman, *supra* note 6, at 1147.

139. *Asahi*, 107 S. Ct. at 1033 (italics omitted).

nan suggested in his *Asahi* concurrence, Justice O'Connor's proposed "purposeful direction" test appears to be a more restrictive interpretation of stream of commerce jurisdiction than that endorsed in *World-Wide Volkswagen*.<sup>140</sup>

In *World-Wide Volkswagen*, the Court specifically noted that "[t]he forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State."<sup>141</sup> It is difficult to reconcile this language predicating personal jurisdiction upon a defendant's "expectation" of forum purchases with Justice O'Connor's disclaimer in *Asahi* that "a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State."<sup>142</sup>

Not only is the language of *World-Wide Volkswagen* inconsistent with that of the O'Connor opinion, but that opinion is not consistent with the rationale of the earlier decision. The *World-Wide Volkswagen* majority explained the rationale for the purposeful availment test as follows:

When a corporation "purposefully avails itself of the privilege of conducting activities within the forum State," . . . it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State.<sup>143</sup>

The notice rationale for the purposeful availment test thus is satisfied so long as the defendant is aware of the possibility of suit in the foreign forum. Even more significantly, the mere awareness that a product will reach the forum will permit a defendant to take the necessary precautionary measures to preclude, or at least lessen, the risk of litigation in the foreign forum.<sup>144</sup> There is thus little or

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140. *Id.* at 1036-37 (Brennan, J., concurring, in part, and concurring in the judgment).

141. *World-Wide Volkswagen*, 444 U.S. at 297-98.

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

143. *World-Wide Volkswagen*, 444 U.S. at 297 (citation omitted) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

144. In addition to structuring its business dealings to lessen the likelihood that its products will enter specific fora, modern corporations generally will obtain insurance or decide on a policy of self-insurance. Professor Weintraub therefore has argued that "[i]t makes no sense . . . to wax eloquent about unfairness to a localized defendant who will be defended and indemnified by an insurer that often engages in litigation in the forum." Weintraub, *supra* note 5, at 526. See also *World-Wide Volkswagen*, 444 U.S. at 303-304, 305 n.9; Lilly, *supra* note 5, at 108. Professor

no functional rationale for restricting stream of commerce jurisdiction to those defendants who have undertaken "[a]dditional conduct" beyond awareness of potential forum contacts.

Because there is no functional justification for a requirement of "[a]dditional conduct" beyond awareness, any such requirement must be based upon an assumption that the fairness of the forum (which the due process clause is to insure) is somehow dependent upon the special nature of affirmative intentional actions.<sup>145</sup> However, it is not immediately apparent why a distinction should be made between a defendant that intentionally insures that its products will be sold in the forum and a defendant that sells or distributes its products with the knowledge that the actions of others will result in forum sales.<sup>146</sup> To the extent that the value of a product is enhanced by its eventual distribution in the forum, both defendants will receive comparable benefits and protections from the forum and therefore should be treated comparably.<sup>147</sup>

In addition, to include the defendant's intent as an element of personal jurisdiction will further complicate an already complex

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Brilmayer, however, has noted that "[p]laintiffs as well as defendants may have insurance" which will moderate the burdens of litigating in a distant forum. Brilmayer, *supra* note 20, at 111.

145. Justice O'Connor noted in her *Asahi* opinion that "[a]dditional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State . . . ." *Asahi*, 107 S. Ct. at 1033.

146. As Professor Lilly has observed, "[T]he contact [required by constitutional due process] should not inevitably be confined to the deliberate, affirmative activity mandated by the Court in *Volkswagen*. It ought to suffice for purposes of determining adjudicatory power that the defendant could have reasonably foreseen the development of an affiliating link with the forum state." Lilly, *supra* note 5, at 114-15.

The Second Restatement of Conflicts also recognizes that there will be situations in which a state constitutionally can exercise jurisdiction over a foreign defendant who has committed an act "not done with the intention of causing effects in the state, [but which] could reasonably have been expected to do so." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37 comment a, at 157-58 (1971). *But see* 1986 PROPOSED REVISIONS TO RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37 comment e, at 74 (1986) ("[W]hen the defendant did not intend to cause the particular effect in the state . . . [t]he fact that the effect in the state was foreseeable will not, of itself, suffice to give the state judicial jurisdiction over the action.").

For scholarly commentary supporting and opposing an intent or causation requirement for personal jurisdiction compare Weisburd, *supra* note 5, at 405-06 (opposing such a requirement) with Brilmayer, *supra* note 20, at 94-96 (supporting such a requirement).

147. In fact, the Supreme Court's original focus on "purposeful availment" in *Hanson v. Denckla* was due to the benefits and protections such purposeful availment would engender. *Hanson*, 357 U.S. at 253 ("[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."). *See also* *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475-76 (1985).

determination. "Intent" is . . . one of the most often misunderstood legal concepts. The distinction between intentional and unintentional [actions] draws a bright line of separation among shadings of almost infinitely varied human experiences."<sup>148</sup> Thus the difficulty in applying an intent test is another reason to reject such an additional stream of commerce requirement.<sup>149</sup>

Accordingly, the fact that a defendant has not engaged in "[a]dditional conduct" beyond mere awareness that its products will reach the forum state in the stream of commerce should not, by itself, preclude the exercise of personal jurisdiction.<sup>150</sup>

## 2. Sale Versus Use of Product in Forum State

One of the obvious factual differences between *Asahi* and *World-Wide Volkswagen* is that the allegedly defective product was sold in the forum state in *Asahi*, while the automobile at issue in *World-Wide Volkswagen* was not.<sup>151</sup> *World-Wide Volkswagen's* qualified endorsement of stream of commerce jurisdiction thus was that "[t]he

148. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *PROSSER & KEETON ON THE LAW OF TORTS* § 8, at 33 (5th ed. 1984) [hereinafter *PROSSER & KEETON*].

149. For similar practical reasons, Professor Lewis has suggested that awareness or expectation of suit be determined by an objective, rather than a subjective, test:

As in the criminal law, it would often be impossible for courts to ascertain defendants' actual subjective expectations about place of suit. Evidence of actual subjective expectations is seldom available. Moreover, many defendants do not expect that their conduct will give rise to litigation anywhere . . . .

Lewis, *A Brave New World for Personal Jurisdiction: Flexible Tests Under Uniform Standards*, 37 *VAND. L. REV.* 1, 20 (1984). Dean Peter Hay recently has suggested that "[r]ather than basing jurisdiction on the defendant's 'awareness' of the [forum] market, it would be better to put it in terms that the [forum] was a 'reasonably anticipated market.'" Hay, *supra* note 5, at 37 n.35.

Even if an objective test is applied, however, there will remain difficult determinations concerning defendants' expectations and awareness. *Compare* *Giotis v. Apollo of the Ozarks, Inc.*, 800 F.2d 660 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 1303 (1987) (fireworks manufacturer and distributor held subject to personal jurisdiction of Wisconsin courts, even though fireworks were purchased in Minnesota by Minnesota resident; defendants neither sold nor distributed fireworks in Wisconsin, and fireworks were illegal in Wisconsin), *with* *People v. One 1953 Ford Victoria*, 48 Cal. 2d 595, 311 P.2d 480 (1957) (mortgagee was not subject to forfeiture of automobile lien in California, because car was transported to California in violation of express contractual prohibition against removing car from Texas).

150. However, in order for the minimum contacts test to be satisfied, the volume and value of the defendant's products reaching the forum in the stream of commerce still must be constitutionally sufficient. *See* notes 176-92 *infra* and accompanying text.

151. Indeed, the *World-Wide Volkswagen* Court stressed throughout its opinion that the automobile had been sold in New York rather than in the forum state of Oklahoma. *World-Wide Volkswagen*, 444 U.S. at 287, 288, 295, 298.

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."<sup>152</sup>

It is unclear whether this focus on forum sales was meant to constitute a *per se* rule requiring such sales as a prerequisite for stream of commerce jurisdiction. Federal appellate decisions subsequent to *World-Wide Volkswagen* differed concerning the significance of mere use, without sale, within the forum.<sup>153</sup> Justice Brennan has suggested that "the decision in *World-Wide Volkswagen* [did not] establish a *per se* rule against the exercise of jurisdiction where the contacts arise from a consumer's use of the product in a given State, but only a rule against jurisdiction in cases involving 'one, isolated occurrence [of consumer use, amounting to] . . . the fortuitous circumstance . . .'"<sup>154</sup>

Regardless of the justices' intent in *World-Wide Volkswagen*, a *per se* jurisdictional rule requiring forum sales has little to recommend it other than the certainty that such a bright line test would provide. "It is difficult to see why the Constitution should distinguish between a case involving goods which reach a distant State through a chain of distribution and a case involving goods which reach the same State because a consumer, using them as the dealer knew the customer would, took them there."<sup>155</sup> In both cases the seller presumably has received "benefits and protections of [the forum state's] laws."<sup>156</sup> Moreover, not only do many major metropolitan areas today extend across state lines, but "it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines."<sup>157</sup>

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152. *Id.* at 297-98 (emphasis added). However, the authority cited in support of this dictum was *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961), in which the allegedly defective valve (although not the hot water heater into which it was incorporated) was sold outside the forum state.

153. *Compare Hedrick v. Daiko Shoji Co.*, 715 F.2d 1355 (9th Cir. 1983), *modified, in part, on other grounds*, 733 F.2d 1335 (9th Cir. 1984) (personal jurisdiction upheld), *with DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280 (3d Cir.), *cert. denied*, 454 U.S. 1085 (1981) (personal jurisdiction unconstitutional).

154. *Asahi Metal Indus. Co. v. Superior Court*, 107 S. Ct. at 1037 n.3 (Brennan, J., concurring, in part, and concurring in the judgment) (quoting *World-Wide Volkswagen*, 444 U.S. at 295 (Brennan, J., dissenting)).

155. *World-Wide Volkswagen*, 444 U.S. at 306-07 (Brennan, J., dissenting).

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

157. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985). Indicative of the prevalence of purchases from out-of-state vendors, "[a]ll [forty-five] States [and the District of Columbia] that impose sales taxes also impose a corollary use tax on tangible property bought out of State." *National Geographic Soc. v. California Bd. of Equalization*, 430 U.S. 551, 555 & n.4 (1977).

Neither considerations of practicality nor fairness necessitate immunizing from suit defendants whose products are used, but not sold, within the forum state. To require forum sales as a per se jurisdictional prerequisite would be to afford a significantly greater legal significance to state boundaries than such boundaries possess in modern commercial practice.<sup>158</sup>

Rather than employ a per se rule precluding stream of commerce jurisdiction predicated upon mere use of a product in the forum, the focus should be upon "the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its products in other States . . . ." <sup>159</sup> The isolated use of a single product within the forum, such as the automobile in *World-Wide Volkswagen*, thus may not be sufficient to satisfy the minimum contacts test. Nevertheless, the nature of the contact with the forum (*i.e.*, use, rather than sale, of the product) should not be determinative. Therefore, in appropriate circumstances, either use or sale of a product within the forum may provide a constitutionally sufficient predicate for stream of commerce jurisdiction.

### 3. Defendant Distributor Versus Manufacturer

In addition to the distinction concerning forum sales, another major factual difference between *Asahi* and *World-Wide Volkswagen* is that the defendants challenging jurisdiction in *World-Wide Volkswagen* were retail and wholesale distributors while the third-party defendant in *Asahi* was a manufacturer.<sup>160</sup> However, the *World-Wide Volkswagen* stream of commerce dictum recognized the possibility of personal jurisdiction premised upon "the efforts of [a] manufacturer or distributor to serve, directly or indirectly, the market for its products in other States."<sup>161</sup> Moreover, lower court decisions subsequent to *World-Wide Volkswagen* upheld the assertion of personal jurisdiction over distributors under the stream of commerce doctrine.<sup>162</sup>

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158. As Professor Jay has noted, "[T]he modern large-scale commercial enterprise hardly considers state lines relevant. Profits are made *because* products cross boundaries to reach a large number of consumers; regardless of whether the dealer makes direct contact with a distant state, the business benefits from the broad dispersal which occurs." Jay, *supra* note 33, at 446.

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

160. Although both the manufacturer and national importer of the allegedly defective automobile were defendants in *World-Wide Volkswagen*, neither of them challenged personal jurisdiction in the Oklahoma or United States Supreme Courts. *Id.* at 288 n.3.

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

162. *E.g.*, *Giotis v. Apollo of the Ozarks, Inc.*, 800 F.2d 660 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 1303 (1987); *Nelson ex rel. Carson v. Park Indus., Inc.*, 717 F.2d 1120 (7th Cir. 1983), *cert. denied*, 465 U.S. 1024 (1984); *Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distrib. Pty. Ltd.*, 647 F.2d 200 (D.C. Cir. 1981).



While there may be some superficial appeal to distinguishing between jurisdictional assertions involving manufacturers and distributors, there is no principled basis upon which to make such a distinction. To the extent that a distributor "serve[s], directly or indirectly, the market for its products in other States,"<sup>163</sup> it, too, should be subject to personal jurisdiction in those states.

This is not to say, however, that all, or any, distributors in a particular distribution chain will be subject to suit in all fora. As one federal appellate court has recognized, "[A] manufacturer or primary distributor may be subject to a particular forum's jurisdiction when a secondary distributor and retailer are not, because the manufacturer and primary distributor have intended to serve a broader market and they derive direct benefits from serving that market."<sup>164</sup> Moreover, due to the nature of products liability actions, it may be more difficult, as a matter of substantive tort law, to successfully assert such claims against distributors than against manufacturers.<sup>165</sup>

Nevertheless, in situations in which minimum contacts exist between a distributor and the forum, that distributor should be subject to the personal jurisdiction of the forum. As with attempts to distinguish between sale and use of a product in the forum, no per se rule mechanically excluding distributors from suit under the stream of commerce doctrine should be adopted.

#### 4. Component Parts Manufacturers

Just as distributors should be subject to stream of commerce jurisdiction in appropriate circumstances, component parts manufacturers also should be held subject to suit when they have minimum contacts with the forum. Thus, even Justice O'Connor's *Asahi* opinion did not rely upon *Asahi's* status as a component parts manufacturer as support for the conclusion that stream of commerce personal jurisdiction could not be asserted.<sup>166</sup> Indeed, the seminal state stream of commerce decision, *Gray v. American Radiator & Standard San-*

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

164. *Nelson*, 717 F.2d at 1125-26.

165. For example, although the plaintiffs' claim in *World-Wide Volkswagen* concerned the allegedly defective design and placement of their car's gas tank and fuel system, this claim was asserted against the car's manufacturer, importer, wholesale distributor, and retail dealer. *World-Wide Volkswagen*, 444 U.S. at 288. In addition, Professor Brilmayer has proposed that, for the purposes of specific jurisdiction, the only contacts with a forum that should be considered constitutionally significant are those related to the underlying substantive claim. Brilmayer, *supra* note 20, at 82. Thus, "[i]n *World-Wide Volkswagen*, the defendant's affiliation with other dealers doing business in Oklahoma was not a related contact since there was no reason to allege that fact other than to manufacture a jurisdictional contention." *Id.* at 88.

166. *Asahi*, 107 S. Ct. at 1031-33.

*itary Corp.*,<sup>167</sup> involved a claim brought against a component parts manufacturer. In addition, both state and federal decisions subsequent to *World-Wide Volkswagen* upheld personal jurisdiction over foreign and foreign country component parts manufacturers.<sup>168</sup>

Not all courts, however, have sustained the extension of long arm jurisdiction over component parts manufacturers.<sup>169</sup> Both courts and commentators have argued that

[a]lthough the states may have a legitimate interest in protecting . . . residents from defective product injuries, that interest is adequately protected by allowing actions against the immediate seller or manufacturer-assembler. . . . Tort law has sufficiently advanced such that the state's interests in protecting its residents from defective products is fully served without the need for drawing into the litigation all of the remote parts manufacturers from around the world.<sup>170</sup>

However, to the extent that there is any perceived unfairness in subjecting a component parts manufacturer to suit, the unfairness is inherent in the substantive law of tort.<sup>171</sup> Any efforts to protect component parts manufacturers from suit should focus on substantive tort law, rather than attempt to indirectly undercut the policies advanced by such law through special jurisdictional rules and exceptions.

In *Calder v. Jones*,<sup>172</sup> the Supreme Court implicitly rejected the argument that claims against remote defendants should not be entertained if other, solvent defendants who can satisfy plaintiff's claims are amenable to suit. The trial court in that case had quashed service of process directed to the reporter and editor of an allegedly libelous article, noting, *inter alia*, that plaintiff's rights could be "fully satisfied" by her claim against the defendant publisher.<sup>173</sup> The Su-

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167. 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

168. *E.g.*, *Bean Dredging Corp. v. Dredge Tech. Corp.*, 744 F.2d 1081 (5th Cir. 1984); *Rockwell Int'l Corp. v. Costruzioni Aeronautiche Giovanni Agusta*, 553 F. Supp. 328 (E.D. Pa. 1982); *State ex rel. Hydraulic Servocontrols Corp. v. Dale*, 294 Or. 381, 657 P.2d 211 (1982); *Volkswagenwerk, A.G. v. Klippan, GMBH*, 611 P.2d 498 (Alaska), *cert. denied*, 449 U.S. 974 (1980).

169. *E.g.*, *Shaw v. American Cyanamid Co.*, 534 F. Supp. 527 (D. Conn. 1982); *Phoenix Trimming, Inc. v. Mowday*, 431 So. 2d 198 (Fla. Dist. Ct. App.), *petition denied*, 440 So. 2d 352 (Fla. 1983); *Martinez v. American Standard*, 91 A.D. 652, 457 N.Y.S.2d 97 (1982), *aff'd*, 60 N.Y.2d 873, 458 N.E.2d 826, 470 N.Y.S.2d 367 (1983).

170. *Kennedy*, *supra* note 99, at 338. *See* *Hutson v. Fehr Bros.*, 584 F.2d 833, 837 n.1 (8th Cir), *cert. denied*, 439 U.S. 983 (1978); *Samuels v. BMW of N. America, Inc.*, 554 F. Supp. 1191, 1195 (E.D. Tex. 1983).

171. Component parts manufacturers can be subject to tort claims in either negligence or strict liability. *PROSSER & KEETON*, *supra* note 148, at § 100.

172. 465 U.S. 783 (1984).

173. *Calder*, 465 U.S. at 786.

preme Court, however, ultimately upheld the constitutionality of service upon the employees, because they were "primary participants in an alleged wrongdoing intentionally directed at a [forum] resident."<sup>174</sup>

Similarly, component parts manufacturers should not be insulated from suit merely because they have not directly dealt with the forum. While a component parts manufacturer may not be able to take direct advantage of a marketplace, the commercial usefulness and value of component parts are premised upon the incorporation of those components into finished products that then will be distributed in the marketplace.

When minimum contacts, direct or indirect, exist with the forum and personal jurisdiction would not be unfair or unreasonable, component parts manufacturers, too, should be subject to suit. As with the distinctions between forum sales and use, distributors and manufacturers, and direct and indirect forum contact, no per se rules should be adopted immunizing certain classes of defendants from suit. Instead, the constitutional sufficiency of a defendant's forum contacts should be tested by a general test such as the one discussed in the next section of this article.<sup>175</sup>

#### *B. Justice Stevens' Concurrence as a Test for Minimum Contacts*

Because of the four/four/one split within the Supreme Court concerning the stream of commerce doctrine, Justice Stevens' short

174. *Id.* at 790.

175. A possible criticism of a minimum contacts test that does not employ per se rules is that such a test does not provide either state and lower federal courts or private actors with any certainty as to what conduct constitutes constitutionally sufficient minimum contacts. As Justice White asserted in arguing that the Supreme Court should accept a personal jurisdiction case involving contractual dealings between corporate parties, "The disarray among federal and state courts . . . may well have a disruptive effect on commercial relations in which certainty of result is a prime objective." *Lakeside Bridge & Steel Co. v. Mountain State Constr. Co.*, 445 U.S. 907, 911 (1980) (White, J., dissenting from denial of certiorari).

Similarly, an Advisor to the Restatement (Second) of Conflict of Laws also recently has suggested that "[t]he underlying reason for the continuing uncertainty as to personal jurisdiction seems to be the inability of the courts to effect any special rules; the only guidance is the indefinite concept of minimum contacts." Packer, *Congressional Power to Reduce Personal Jurisdiction Litigation*, 59 *TEMPLE L.Q.* 919, 919-20 (1986). See also Comment, *Constitutional Limitations on State Long Arm Jurisdiction*, 49 *U. CHI. L. REV.* 156 (1982).

However, the Supreme Court has answered the criticism that its test for personal jurisdiction is too indefinite:

This approach does, of course, preclude clear-cut jurisdictional rules. But any inquiry into "fair play and substantial justice" necessarily requires determinations "in which few answers will be written in 'black and white.

The greys are dominant and even among them the shades are innumerable.'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 486 n.29 (1985) (quoting *Kulko v. Superior Court*, 436 U.S. 84, 92 (1978) (quoting *Estin v. Estin*, 334 U.S. 541, 545 (1948))).

concurrence in *Asahi* may represent the limits to which the present Court is prepared to go in accepting stream of commerce jurisdiction. Moreover, Justice Stevens' opinion was joined by Justices White and Blackmun, and therefore may be the type of analysis that the Court will employ in the future to test assertions of stream of commerce jurisdiction. For these reasons, this opinion now will be analyzed.

Without explicitly adopting Justice O'Connor's "purposeful availment" test, Justice Stevens asserted that such a test had been misapplied in *Asahi*.<sup>176</sup> Although not describing in detail the test that he would apply, Justice Stevens argued that "purposeful availment" (and, thus, minimum contacts) "requires a constitutional determination that is affected by the volume, the value, and the hazardous character of the components [placed into the stream of commerce]."<sup>177</sup> Justice Stevens, therefore, apparently has suggested that while "mere awareness" by a manufacturer that its products will enter the forum state is not sufficient to establish minimum contacts in all cases, in cases such as *Asahi* the minimum contacts test may be satisfied.<sup>178</sup>

Indeed, rather than becoming entangled in distinctions between "mere awareness" and "purposeful availment," Justice Stevens suggests that the Court instead focus on the goods that actually have reached the forum in the stream of commerce.

Justice Stevens' focus on "the volume, the value, and the hazardous character of the components"<sup>179</sup> also is quite consistent with the consideration in *International Shoe* of "the quality and nature of [defendant's] activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure."<sup>180</sup> Accordingly, Justice Stevens' suggestion not to focus directly on the purposeful nature of defendant's conduct, but to instead determine the actual degree to which a defendant has "serve[d] . . . the market,"<sup>181</sup> is both a reasonable and workable method by which to determine minimum contacts.

Not only the general approach suggested by Justice Stevens, but two of the three factors he has included in his proposed test, are quite properly considered in analyzing minimum forum contacts. The extent to which a defendant has "serve[d] . . . the [forum] market,"<sup>182</sup>

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176. 107 S. Ct. at 1038 (Stevens, J., concurring, in part, and concurring in the judgment).

177. *Id.*

178. *Id.* It is important to remember that Justice Stevens' proposed test is merely to determine the existence of minimum contacts. Even if this test were satisfied and minimum contacts found to exist, personal jurisdiction would be unconstitutional if found to be "unreasonable and unfair." *Id.*

179. *Id.*

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

181. *World-Wide Volkswagen*, 444 U.S. at 297, quoted in *Asahi*, 107 S. Ct. at 1038 (Stevens, J., concurring, in part, and concurring in the judgment).

182. *Id.*

and thus obtained the benefits and protections of the forum, can best be determined by the value and volume of that defendant's products distributed within the forum. Moreover, by focusing on the actual commercial relationship between the defendant and the forum, a forum sale that is merely "an isolated occurrence" will not subject foreign manufacturers and distributors to the jurisdiction of the forum.<sup>183</sup>

Although not explicitly stated by Justice Stevens, the volume and value of products within the forum must be considered together in determining constitutionally sufficient minimum contacts. Thus, while it may take millions of inexpensive cigarette lighters<sup>184</sup> or thousands of steel castings<sup>185</sup> to establish minimum forum contacts, the sale of even a single product within the forum may satisfy minimum contacts if the product is sufficiently valuable.<sup>186</sup> Or, to take an example from *Asahi*, the sale of thousands of motorcycle tire tubes in California may provide sufficient contacts to assert personal jurisdiction over the tube manufacturer Cheng Shin, but not over Asahi, the manufacturer of the less expensive valve subassembly.

Although Justice Stevens' focus on the volume and value of products within the forum provides a helpful test for minimum contacts, his suggestion that "the hazardous character of the components" also be considered is problematic.<sup>187</sup> In fact, consideration of the hazardous character of the component part for jurisdictional purposes creates the very type of "double counting" disapproved by the Supreme Court in the first amendment context.<sup>188</sup>

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

184. *Oswalt v. Scripto, Inc.*, 616 F.2d 191 (5th Cir. 1980).

185. *Bean Dredging Corp. v. Dredge Tech. Corp.*, 744 F.2d 1081 (5th Cir. 1984).

186. *See Gorso v. Bell Equip. Corp.*, 376 F. Supp. 1027 (W.D. Pa. 1974). *See also Benn v. Linden Crane Co.*, 370 F. Supp. 1269 (E.D. Pa. 1973). *Cf. Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) ("So long as it creates a 'substantial connection' with the forum, even a single act can support jurisdiction.").

187. Justice Stevens' consideration of the hazardous character of the component part is similar to the dissenters' suggestion in *World-Wide Volkswagen* that "a critical factor in the disposition of the litigation is the nature of the instrumentality under consideration." 444 U.S. at 318 (Blackmun, J., dissenting). *See also id.* at 306 (Brennan, J., dissenting); *id.* at 314, 316 (Marshall, J., dissenting). While these justices' concern was with the mobility of the allegedly defective automobile, at least one federal appellate court has relied upon the hazardous character of an allegedly defective product in upholding jurisdiction. *Poyner v. Erma Werke, GMBH*, 618 F.2d 1186, 1192 (6th Cir.), *cert. denied*, 449 U.S. 841 (1980) (personal jurisdiction upheld over German firearms manufacturer).

188. In *Calder v. Jones* the Court addressed this issue as follows:

We . . . reject the suggestion that First Amendment concerns enter into the jurisdictional analysis. . . . [T]he potential chill on protected First Amendment activity stemming from libel and defamation actions is already taken into account in the constitutional limitations on the substantive law governing such suits. To reintroduce those concerns at the jurisdictional

A similar form of "double counting" would exist were the hazardous nature of a component part to form the predicate for both the assertion of personal jurisdiction and the imposition of a heightened standard of liability under substantive tort law. Under the substantive law of torts, the potentially hazardous character of manufactured components has been held to subject the manufacturer not only to liability for negligence, but, in many situations, to strict liability.<sup>189</sup> Moreover, the determination of whether a product is hazardous or dangerously defective may pose difficult issues under modern tort law,<sup>190</sup> and there is little reason to further complicate personal jurisdiction analysis by importing tort rules into that analysis. For just such reasons, the Court in *World-Wide Volkswagen* refused to craft separate jurisdictional rules based upon the hazardous nature of the automobile: "The 'dangerous instrumentality' concept apparently was never used to support personal jurisdiction; and to the extent it has relevance today it bears not on jurisdiction but on the possible desirability of imposing substantive principles of tort law such as strict liability."<sup>191</sup>

While the hazardous character of a product thus should not be considered in the stream of commerce analysis, product value and volume provide a workable test for minimum contacts. These two factors should be more objectively ascertainable than are the intentions or subjective purposes of a defendant. In addition, the test is one that can be applied to the different persons (manufacturers and distributors), activities (sale and use), and products (component parts and finished products) within the distribution stream. Accordingly, when a person is not only aware that his products have entered the forum, but the value and volume of those products are such that the person has "serve[d] . . . the [forum] market,"<sup>192</sup> the minimum contacts test should be considered satisfied.

#### IV. THE STREAM OF COMMERCE DOCTRINE APPLIED TO FOREIGN COUNTRY DEFENDANTS

While the previous section of this article considered the stream of commerce doctrine in a domestic setting, this section considers

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stage would be a form of double counting.

*Calder v. Jones*, 465 U.S. 783, 790 (1984) (citations omitted). See also *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 780 n.12 (1984); *Army Times Publishing Co. v. Watts*, 730 F.2d 1398, 1400-1401 (11th Cir. 1984).

189. RESTATEMENT (SECOND) OF TORTS § 394 ("Chattel Known to be Dangerous"); § 395 ("Negligent Manufacture of Chattel Dangerous Unless Carefully Made"); § 402A ("Special Liability to Seller of Product for Physical Harm to User or Consumer") (1965). See also Bieman, *Strict Products Liability: An Overview of State Law*, 10 J. PROD. LIAB. 111 (1987).

190. PROSSER & KEETON, *supra* note 148, at § 99 ("Meaning of Dangerously Defective or Unsafe Products").

191. *World-Wide Volkswagen*, 444 U.S. at 297 n.11.

192. *Id.* at 297.

whether there should be any separate standard for applying that doctrine to adjudicate claims brought against foreign country defendants.<sup>193</sup> There are substantial policy arguments for the requirement of either greater, or lesser, forum contacts when the defendant is from a foreign country.<sup>194</sup> The conclusion reached, however, is that the international character of litigation should not necessitate any different showing of minimum contacts, but should be considered as one of several factors in the determination of whether the exercise of personal jurisdiction would offend "traditional notions of fair play and substantial justice."<sup>195</sup>

The *Asahi* Court was sensitive to the foreign country status of Asahi and the international implications of the assertion of personal jurisdiction by the California courts:

In every case . . . [the interests of other nations], as well as the Federal interest in its foreign relations policies, will be best served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum State. "Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field."<sup>196</sup>

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193. Although "[t]here are significant differences between interstate and international cases," "[b]y and large, American courts and writers have not distinguished between international and interstate conflicts for choice-of-law purposes." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 10, comment d and reporter's note, at 39 (1971). See also Note, *The Outer Limits of In Personam Jurisdiction Over Alien Corporations: The National Contacts Theory*, 16 GEO. WASH. J. INT'L L. & ECON. 637 (1982); von Mehren & Trautman, *supra* note 6, at 1122. But see Du Bois, *The Significance in Conflict Laws of the Distinction Between Interstate and International Transactions*, 17 MINN. L. REV. 361 (1933); Ehrenzweig, *Interstate and International Conflicts Law: A Plea for Segregation*, 41 MINN. L. REV. 717 (1957).

194. See notes 196-222 *infra* and accompanying text.

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

196. *Asahi*, 107 S. Ct. at 1035 (quoting *United States v. First Nat'l City Bank*, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting)). As one commentator has noted, "[T]he difficulty of enforcing a judgment obtained against an alien defendant, the fear of retaliation by courts abroad against American citizens, and the constraints of international law all counsel restraint in claiming jurisdiction over aliens." Note, *Alien Corporations and Aggregate Contacts: A Genuinely Federal Jurisdictional Standard*, 95 HARV. L. REV. 470, 483 (1981) (footnotes omitted).

Indeed, concern by foreign manufacturers was evidenced by the amicus curiae briefs filed in the Supreme Court on behalf of Asahi. Such briefs were filed by the American Chamber of Commerce in the United Kingdom and the Confederation of British Industry, Alcan Alumínio do Brasil, S. A. (a Brazilian aluminum manufacturer subject to suit in United States courts concerning allegedly malfunctioning cookers), and Cassiar Mining Corporation (a Canadian company that mines raw asbestos fiber and which has been sued in the United States for injuries allegedly stemming from construction materials fabricated from the fibers).

Not only must "great care" be taken in asserting jurisdiction to insure a proper respect for foreign sovereignties, but interests of the United States, too, can be undermined by overly expansive jurisdictional assertions. The Supreme Court was sensitive to this fact in upholding a forum-selection clause requiring the litigation of a commercial dispute in London, rather than in the United States, in *The Bremen v. Zapata Off-Shore Co.*:

The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our law and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.<sup>197</sup>

Moreover, even once a plaintiff has obtained a judgment in a United States court, he or she often will be required to seek enforcement of that judgment in a foreign jurisdiction.<sup>198</sup> "The jurisdictional tests that are acceptable to United States courts may be viewed as exorbitant in an international context. . . . When jurisdiction has been based on principles that are considered exorbitant by other nations, the likelihood of recognition, enforcement, and recovery is limited."<sup>199</sup> Thus, if a foreign country does not recognize the validity of a United States judgment, having obtained jurisdiction over the

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197. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972). See also *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 517 n.11 (1974) ("To determine that 'American standards of fairness' . . . must [automatically] govern the controversy demeans the standards of justice elsewhere in the world and unnecessarily exalts the primacy of United States law over the laws of other countries.").

As was noted over twenty years ago:

[I]n establishing bases for jurisdiction in the international sense, a legal system cannot confine its analysis solely to its own ideas of what is just, appropriate, and convenient. To a degree it must take into account the views of other communities concerned. Conduct that is overly self-regarding with respect to the taking and exercise of jurisdiction can disturb the international order and produce political, legal, and economic reprisals.

von Mehren & Trautman, *supra* note 6, at 1127. See also Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT'L & COMP. L. 1 (1987).

198. Professors James and Hazard have explained:

There are at least two critical aspects of enforcement of a judgment. The first is establishing authority to pronounce judgment, in particular establishing authority that will be recognized elsewhere if the judgment cannot be enforced within the jurisdiction where it was rendered. This is the problem of recognition of judgments. The second critical aspect of enforcement is being able to exercise effective coercion to get compliance with the judgment if the judgment loser refuses to comply voluntarily with the judgment.

F. JAMES & G. HAZARD, *CIVIL PROCEDURE* § 2.32, at 110 (3d ed. 1985).

199. Note, *supra* note 137, at 587, 589. See also Weintraub, *Jurisdiction Over the Foreign Non-Sovereign Defendant*, 19 SAN DIEGO L. REV. 431, 436 (1982).



foreign country defendant may be of little practical significance.<sup>200</sup>

Despite the above reasons cautioning "great care and reserve"<sup>201</sup> in the exercise of jurisdiction over foreign country defendants, the nationality of the defendant should not be given determinative weight in the personal jurisdiction calculus.<sup>202</sup> It should not be assumed that plaintiffs routinely or frivolously will attempt to obtain jurisdiction over foreign country defendants. Indeed, in the *Asahi* litigation not only Cheng Shin, but another co-defendant, filed a claim against Asahi. However, service of process was never perfected by Cheng Shin's co-defendant because of the \$5000.00 cost for translation and other expenses associated with service of a Japanese defendant under applicable procedural requirements.<sup>203</sup> The burdens and complexities

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200. One commentator has argued that the absence of an international equivalent to the full faith and credit clause is a reason to require more substantial forum contacts when asserting personal jurisdiction over a foreign country defendant.

When international parties are involved, "Full Faith and Credit" is inapplicable for enforcement and the plaintiff must rely on principles of international comity. Consequently, it is arguable that when international defendants are involved, courts should return to the traditional doctrines of jurisdiction between independent sovereigns and find jurisdiction only where the forum has a more traditional "power" to support jurisdiction over the defendant.

Note, *International Products Liability and Long-Arm Jurisdiction: Hutson v. Fehr Bros.*, 5 N.C. J. INT'L L. & COM. REG. 319, 322 (1980).

However, another legal scholar recently has asserted that "[i]t is unclear how frequently foreign recognition of judgments is necessary, even in international cases" and that "[a] United States plaintiff's decision that he will not need to enforce a United States judgment against a foreign defendant, or if so, that he will be successful in doing so, would probably be fairly accurate in many cases." Born, *supra* note 197, at 23 & n.101.

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

202. Indeed, both commentators and courts have suggested that, at least when there is no alternative domestic forum available, United States courts should be more ready to assert personal jurisdiction over foreign country defendants than over domestic defendants. *Bach v. McDonnell Douglas, Inc.*, 468 F. Supp. 521, 527 (D. Ariz. 1979); *Centronics Data Computer Corp. v. Mannesmann, A.G.*, 432 F. Supp. 659, 664 (D.N.H. 1977); *LeManufacture Francaise Des Pneumatiques Michelin v. District Court*, 620 P.2d 1040, 1048 (Colo. 1980); Toran, *Federalism, Personal Jurisdiction, and Aliens*, 58 TUL. L. REV. 758 (1984); Weinberg, *The Helicopter Case and the Jurisprudence of Jurisdiction*, 58 S. CAL. L. REV. 913 (1985).

In *Shaffer v. Heitner*, the Supreme Court raised, without deciding, the question of whether a more expansive personal jurisdiction may be exercised where there is no alternative forum available. 433 U.S. 186, 211 n.37 (1977). Subsequently the Court refused to adopt a doctrine of "jurisdiction by necessity" in *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 419 n.13 (1984). In *Helicopteros* the Court struck down the assertion of personal jurisdiction over a foreign country defendant by a Texas state court, even though the potential alternative forum was in Colombia or Peru rather than in the United States. *Id.*

203. Stewart, *Shortening California's Long Arm*, 73 A.B.A. J. 45, 46 (April

of such international service of process should not be underestimated:

Lawyers in the United States accustomed to the relative ease of service of process in federal court litigation frequently are surprised to find that compliance with the technical requirements of service outside the United States can involve costs, delays and technical pitfalls grossly disproportionate to the basic function of service of process, that of notifying the defendant of the pending action.<sup>204</sup>

In concluding that the California courts could not constitutionally exercise jurisdiction over *Asahi*, the Supreme Court relied, in part, upon the "unique burdens placed upon one who must defend oneself in a foreign legal system."<sup>205</sup> However, comparable burdens are placed upon a United States plaintiff who initiates suit in a foreign jurisdiction.<sup>206</sup> Among the burdens and expenses of litigating in a foreign country are the cost of a foreign country filing fee,<sup>207</sup> and the need to employ foreign, as well as United States, counsel.<sup>208</sup> In

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1, 1987). See generally FED. R. CIV. P. 4(i), for alternative means of service upon parties in foreign countries, and the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Convention), Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 162. The specific requirements for service of process on a Japanese defendant are set forth in Peterson, *Jurisdiction and the Japanese Defendant*, 25 SANTA CLARA L. REV. 555 (1985). See also Horlick, *A Practical Guide to Service of United States Process Abroad*, 14 INT'L LAW. 637 (1980).

204. Horlick, *supra* note 203, at 637. See also FED. R. CIV. P. 4(i), advisory committee's note (1963) ("Service of process beyond the territorial limits of the United States may involve difficulties not encountered in the case of domestic service.").

205. *Asahi*, 107 S. Ct. at 1034.

206. Not only do the costs and burdens associated with foreign suit make a domestic forum attractive to United States plaintiffs, but they also may induce foreign country plaintiffs (such as Cheng Shin in the *Asahi* case) to bring suit in the United States.

As the Supreme Court has noted, "American courts . . . are . . . extremely attractive to foreign plaintiffs." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 252 (1981). Among the reasons for the attractiveness of United States courts to foreign country defendants are this country's acceptance of strict liability in tort, the potential ability to choose among fifty different state jurisdictions in which to file suit, and the availability of jury trials, contingent attorneys' fees, and broad discovery. *Id.* at 252 n.18. However, because "a foreign plaintiff's choice [of forum] deserves less deference" than that of a domestic plaintiff, *id.* at 256, claims brought by foreign country plaintiffs may be particularly suitable for *forum non conveniens* dismissals. See notes 234-43 *infra* and accompanying text. For a recent example of a *forum non conveniens* dismissal of actions brought by foreign country plaintiffs in the United States, see *In re Union Carbide Corp. Gas Plant Disaster*, 809 F.2d 195 (2d Cir.), *cert. denied*, 108 S. Ct. 199 (1987).

207. Japanese filing fees are based on a percentage of the plaintiff's claim, and "the filing fee for a \$1,000,000 claim would probably exceed \$5000." Peterson, *supra* note 203, at 582-83.

208. See, e.g., Finn, *Foreign Lawyers: Regulation of Foreign Lawyers in*

addition, case backlogs and judicial delays may well be encountered in foreign, as well as in United States, courts.<sup>209</sup>

Perhaps even more significantly, it is difficult to justify an across-the-board rule under which a foreign country defendant, such as a major, multi-national corporation, would only be subject to suit if it had significantly greater contacts with the forum than the minimum contacts required to entertain a claim against a domestic corporation. For instance, it should be less burdensome for a Canadian corporation in Windsor, Ontario to appear in a Detroit court than for a Hawaiian manufacturer to respond to an action in the civil code courts of Louisiana.<sup>210</sup>

Indeed, to the extent that amenability to suit has a substantial substantive effect upon a foreign country corporate defendant, a similar effect upon a domestic corporation should be presumed.<sup>211</sup> Thus, one section of Cheng Shin's brief in the Supreme Court was

*Japan*, 28 HARV. INT'L L. J. 123 (1987) (describing the limited opportunities for foreign lawyers in Japan, which prohibits non-Japanese lawyers from appearing in, or preparing documents for, Japanese courts or administrative agencies). However, a domestic defendant sued in a state other than its own also may need to retain local counsel. *Leis v. Flynt*, 439 U.S. 438 (1979) (per curiam). See also *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 283-84 n.16 (1985).

209. *Falt, Congestion and Delay in Asia's Courts*, 4 U.C.L.A. PAC. BASIN L. J. 90, 145 (1985) ("Studies thus far conducted substantiate the assertions of those most directly involved in the administration of justice that most Asian court systems are unable to keep pace with an ever increasing volume of litigation.").

210. *Compare Olsen ex rel. Sheldon v. Mexico*, 729 F.2d 641 (9th Cir.), cert. denied, 469 U.S. 917 (1984) (California court can constitutionally exercise personal jurisdiction over Mexico in action concerning airplane crash near United States/Mexican border) with *Larson v. Association of Apartment Owners*, 606 F. Supp. 579 (D. Minn. 1985) (Minnesota court could not exercise personal jurisdiction over Hawaiian defendants in suit concerning an injury sustained at defendants' Hawaiian condominium). See also *The Supreme Court, 1986 Term—Leading Cases*, 101 HARV. L. REV. 119, 269, n.62 (1987) ("Distance and unfamiliarity with the American legal system are not necessarily related.").

211. Perhaps in recognition of this fact, Justice O'Connor noted in her opinion in *Asahi*:

We have no occasion here to determine whether Congress could, consistent with the Due Process Clause of the Fifth Amendment, authorize federal court personal jurisdiction over alien defendants based on the aggregate of national contacts, rather than on the contacts between the defendant and the State in which the federal court sits.

*Asahi Metal Indus. Co. v. Superior Court*, 107 S. Ct., 1026, 1033 (1987). See also *Omni Capital Int'l v. Rudolf Woolf & Co.*, 108 S. Ct. 404, 409 n.5 (1987).

For discussions of the "national contacts" theory of personal jurisdiction, see Born, *supra* note 197, at 36-42; Lilly, *supra* note 5, at 127-49; Fullerton, *Constitutional Limits on Nationwide Personal Jurisdiction in the Federal Courts*, 79 NW. U.L. REV. 1 (1984); Note, *supra* note 193, at 637; Note, *National Contacts as a Basis for In Personam Jurisdiction Over Aliens in Federal Question Suits*, 70 CALIF. L. REV. 686 (1982); Note, *supra* note 196.

entitled "A Competitive Edge Must Not Be Given to Foreign Manufacturers."<sup>212</sup>

The Supreme Court recently evidenced a sensitivity to such concerns by refusing to interpret the Hague Evidence Convention to provide the exclusive means of obtaining discovery from a foreign country defendant, when to do so would place domestic businesses at a competitive disadvantage:

[A] rule of exclusivity would enable a company which is a citizen of another contracting State to compete with a domestic company on uneven terms, since the foreign company would be subject to less extensive discovery procedures in the event that both companies were sued in an American court. Petitioners made a voluntary decision to market their products in the United States. They are entitled to compete on equal terms with other companies operating in this market.<sup>213</sup>

Moreover, despite their constitutional powers in the areas of foreign relations and international trade,<sup>214</sup> neither Congress nor the Executive have acted to restrict judicial assertion of personal jurisdiction over foreign country defendants. This inaction is all the more significant because Congress has enacted legislation governing suits brought against foreign states and their agencies and instrumentalities. In the Foreign Sovereign Immunities Act of 1976,<sup>215</sup> Congress specifically provided for subject matter and personal jurisdiction, as well as world-wide service of process, in cases brought against such foreign defendants concerning, *inter alia*, certain torts and commercial activities.<sup>216</sup>

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212. Brief for Respondent, at 27, *Asahi Metal Indus. Co. v. Superior Court*, 107 S. Ct. 1026 (1987) (No. 85-693). Cheng Shin (ironically, a foreign country corporation, itself) argued:

American manufacturers must include in the cost of their goods the expenses associated with potential liability under products liability legislation and case law. Those domestic companies whose products are sold throughout the United States are subject to lawsuits in virtually every state. If foreign manufacturers of component parts are not subject to this same jurisdictional liability, a significant competitive advantage will be obtained over domestic manufacturers . . . .

*Id.*

213. *Societe Nationale Industrielle Aerospatiale v. United States District Court*, 107 S. Ct. 2542, 2553 n.25 (1987).

214. U.S. CONST. art. I, § 8, cl. 3; art. II, § 1, cl. 1; art. II, § 2, cl. 2; art. II, § 3. See generally L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* (1972).

215. Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified at 28 U.S.C. §§ 1330, 1602-1611 (1982)).

216. 28 U.S.C. §§ 1605(a)(2), (a)(5), 1608 (1982). Not only does the Act apply in both federal and state courts, 28 U.S.C. §§ 1602, 1604 (1982), but foreign states can remove actions brought against them from state to federal court. 28 U.S.C. § 1441(d) (1982). Thus "Congress [has] deliberately sought to channel cases against

Congress' specific recognition of broad jurisdiction and service of process in the Foreign Sovereign Immunities Act, "in the most internationally sensitive area—suits against a sovereign,"<sup>217</sup> should reassure domestic courts otherwise hesitant to assert a reasoned stream of commerce jurisdiction over foreign country defendants. Moreover, the courts of other major industrial nations exercise jurisdiction over foreign country defendants that have caused injury within the nation; for instance, French courts will entertain a suit brought by a French citizen against any defendant, anywhere in the world, regardless of contacts with France.<sup>218</sup>

Dean Peter Hay has observed:

There are good reasons why the American plaintiff should have a local forum available when the foreign defendant has brought about some contact with this country. These include the expense of litigating abroad, the forum's interest in affording a remedy leading to compensation, and the plaintiff's interest in the availability of American procedural law (e.g., jury trial, discovery). . . . But policy does not make for constitutionality.<sup>219</sup>

While Dean Hay certainly is correct that "policy does not make for constitutionality," the policies he cites tend to counterbalance policies generally counseling the courts against asserting jurisdiction over foreign country defendants.<sup>220</sup> In light of these countervailing policies, the courts should proceed, with care, to consider on a case by case basis assertions of jurisdiction over foreign country, as well as domestic, defendants.

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foreign sovereigns away from the state courts and into federal courts, thereby reducing the potential for a multiplicity of conflicting results among the courts of the 50 states." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 497 (1983).

The Act also provides that personal jurisdiction over a foreign state exists so long as that state is not entitled to immunity and has been served properly under the Act. 28 U.S.C. § 1330(b) (1982). However, the Act provides that foreign states are subject to suit with respect to acts done outside the United States only if "that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2) (1982). This statutory provision has been held to embody the *International Shoe* minimum contacts standard. *E.g.*, *Carey v. National Oil Corp.*, 592 F.2d 673, 676 (2d Cir. 1979) (per curiam); *Thos. P. Gonzalez Corp. v. Consejo Nacional de Produccion de Costa Rica*, 614 F.2d 1247, 1254-55 (9th Cir. 1980).

In addition to so providing in the Foreign Sovereign Immunities Act, 28 U.S.C. § 1608 (1982), Congress has provided in various other federal statutes for national and international service of process. *E.g.*, Clayton Anti-Trust Act, 15 U.S.C. § 22 (1982); Securities Exchange Act of 1934, 15 U.S.C. § 78aa (1982); Patent Act of 1952, 35 U.S.C. § 293 (1982). *See also* Packel, *supra* note 175 (suggesting that Congress should enact a federal statute generally governing assertion of personal jurisdiction over foreign country defendants).

217. Lilly, *supra* note 5, at 150.

218. Born, *supra* note 197, at 11-16; Note, *supra* note 211, at 705.

219. Hay, *supra* note 4, at 453 (footnotes omitted).

220. *See* notes 196-200 *supra* and accompanying text.

The *Asahi* Court quite properly did not modify the *International Shoe* minimum contacts standard for foreign country defendants.<sup>221</sup> Instead, the Court considered *Asahi's* national status as one of "several factors" to be analyzed in determining whether the exercise of personal jurisdiction would offend "traditional notions of fair play and substantial justice."<sup>222</sup> When other factors in the "fair play and substantial justice" balancing test point toward the exercise of jurisdiction, such as when the plaintiff is a resident of the domestic forum, personal jurisdiction over a foreign country defendant should be upheld. Thus, by the reasoned application of the "fair play and substantial justice" test, not only the interests of domestic plaintiffs and fora, but of foreign country defendants, can be protected.

#### V. NON-DUE PROCESS LIMITATIONS UPON THE EXERCISE OF STREAM OF COMMERCE PERSONAL JURISDICTION

In light of the possibly expansive nature of stream of commerce personal jurisdiction, judicial limitations in addition to those provided

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221. Professor Gary Born recently has suggested that, not only should the due process clause be interpreted to "require United States courts to use particular caution in asserting long-arm jurisdiction over foreigners," but "it should require closer connections between the forum and the defendant than are necessary in domestic cases." Born, *supra* note 197, at 34. However, while "particular caution" certainly is called for by such cases, any requirement of greater than minimum forum contacts is problematic.

First of all, Professor Born concedes that it would be "difficult, and perhaps unwise," to "specif[y] exactly how much closer a foreign defendant's connections with the forum" should be. *Id.* at 36. Secondly, whatever problems may exist with the minimum contacts test, that test has been applied for over forty years and the courts are very familiar with it. Moreover, many scholars have advocated movement away from the defendant bias inherent in the minimum contacts test, *see* note 136 *supra*, and it thus seems unwise to tilt that test even more strongly in favor of a class of defendants regardless of the other interests implicated by particular cases. Rather than attempting to modify the minimum contacts test, the interests of foreign country defendants best can be accommodated within the balancing process employed in all cases to determine whether personal jurisdiction would offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

222. *International Shoe*, 326 U.S. at 316. Subsequent to its reliance in *Asahi* on the general standard of "fair play and substantial justice," the Court addressed the proper interpretation of the Hague Evidence Convention in a suit brought against a foreign country defendant. *Societe Nationale Industrielle Aerospatiale v. United States District Court*, 107 S. Ct. 2542 (1987). In *Societe Nationale* the Supreme Court stressed that "American courts should . . . take care to demonstrate due respect for any special problem confronted by the foreign litigant," but would not "articulate specific rules to guide this delicate task of adjudication." *Id.* at 2557. In contrast to such a general standard, the United States Court of Appeals for the Ninth Circuit has developed a seven-part test to determine the reasonableness of assertion of personal jurisdiction over a foreign country defendant. *Hedrick v. Daiko Shoji Co.*, 715 F.2d 1355, 1358-59 (9th Cir. 1983), *modified, in part, on other grounds*, 733 F.2d 1335 (9th Cir. 1984); *Insurance Co. of N. America v. Marina Salina Cruz*, 649 F.2d 1266, 1270 (9th Cir. 1981). *See* note 69 *supra* (setting forth the Ninth Circuit's test).

by the due process clause may be appropriate in specific cases. This section of the article considers the possible use of such non-due process clause protections for either foreign or foreign country defendants. The conclusion is reached that, while the Constitution's commerce clause should not be considered separately in any stream of commerce calculus, the *forum non conveniens* doctrine and federal venue statute should be used to provide additional protections to foreign and foreign country defendants.<sup>223</sup>

A. *The Commerce Clause as a Limitation Upon the Exercise of Personal Jurisdiction*

One possible limitation upon the stream of commerce doctrine would be to apply a revitalized commerce clause as an additional constitutional restraint upon personal jurisdiction.<sup>224</sup> Prior to its decision in *International Shoe*, the Supreme Court invoked the interstate commerce clause, rather than the due process clause, to invalidate what the Court found to be overly expansive exercises of personal jurisdiction by state courts.<sup>225</sup> Both before and after *Inter-*

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223. In addition to the limitations on personal jurisdiction discussed in this section, states also can constrain their assertions of jurisdiction by enacting less expansive long arm statutes or interpreting their long arm statutes in a more restrictive manner. However, instead of taking such actions, states generally have moved in the opposite direction—enacting and interpreting long arm statutes as going to the limits of constitutional due process. *E.g.*, *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 290 (1980); *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 436, 176 N.E.2d 761, 763 (1961); CAL. CIV. PRO. CODE § 410.10 (West 1973).

As Professor Martin Louis has noted, "In close cases, state courts will naturally tend to resolve jurisdictional doubts in their own favor. And sooner or later one will announce a significant advance that the others will soon be pressed to follow." Louis, *The Grasp of Long Arm Jurisdiction Finally Exceeds Its Reach: A Comment on World-Wide Volkswagen Corp. v. Woodson and Rush v. Savchuk*, 58 N.C.L. REV. 407, 431-32 (1980). See also Comment, *supra* note 175, at 160; Currie, *supra* note 52, at 537. *But see* Jay, *supra* note 33, at 457-59.

Professor Abrams also has considered, but rejected, limitations on service of process as an additional means of protecting defendants from any unfairness stemming from an expansive assertion of personal jurisdiction. Abrams, *Power, Convenience, and the Elimination of Personal Jurisdiction in the Federal Courts*, 58 IND. L. REV. 1, 39-42 (1982).

224. The commerce clause of the United States Constitution provides that "[t]he Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States . . . ." U.S. CONST. art. I, § 8, cl. 3. Although the states are restricted in their attempts to regulate interstate, as well as foreign, commerce by the commerce clause, "[w]hen construing Congress' power to 'regulate Commerce with foreign Nations,' a more extensive constitutional inquiry is required." *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 446 (1979).

225. *Michigan Cent. Ry. v. Mix*, 278 U.S. 492, 494-95 (1929); *Atchison, T. & S.F. Ry. v. Wells*, 265 U.S. 101, 103 (1924); *Davis v. Farmers' Coop. Equity Co.*, 262 U.S. 312, 316 (1923). The development of this line of cases was traced by Judge Friendly in *Scanapico v. Richmond, F.& P. R.R.*, 439 F.2d 17, 25-27 (1st Cir. 1970) (rehearing en banc).

*national Shoe*, lower federal and state courts relied upon these Supreme Court precedents to strike down attempted exercises of personal jurisdiction as violative of both the interstate<sup>226</sup> and foreign<sup>227</sup> commerce clauses.

Several commentators have advocated that these commerce clause cases be relied upon to establish an additional limitation upon the exercise of personal jurisdiction over foreign and foreign country defendants.<sup>228</sup> In discussing the California Supreme Court's decision in *Asahi*, one author recently suggested that "[a] revival of the commerce clause limitation may . . . be essential, at least insofar as ensuring that the free flow of international trade is not [unduly] curtailed . . . ." <sup>229</sup>

However, in *Calder v. Jones* the Supreme Court refused to give any special consideration to the first amendment implications of long arm jurisdiction over a newspaper editor and reporter, rejecting the "suggestion that First Amendment concerns enter into the jurisdictional analysis."<sup>230</sup> As Professors James and Hazard have observed, the Court's analysis in *Calder* "would seem also to repudiate giving any special weight to the fact that a defendant's activity is governed by the Commerce Clause."<sup>231</sup> Just as in the case of the first amendment, "the infusion of [commerce clause] considerations would need-

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226. *Erlanger Mills v. Cohoes Fibre Mills*, 239 F.2d 502, 507 (4th Cir. 1956); *Bryson v. The Northlake Hilton*, 407 F. Supp. 73, 78 (M.D.N.C. 1976); *Panstwowe Zaklady Graviozne v. Automobile Ins. Co.*, 36 F.2d 504, 506 (S.D.N.Y. 1928); *White v. Southern Pac. Co.*, 386 S.W.2d 6, 9 (Mo. 1965) (per curiam). Judge Sobeloff suggested in *Erlanger Mills*, 239 F.2d at 507, that "[i]t is difficult to conceive of a more serious threat and deterrent to the free flow of commerce between the states [than that resulting from the imposition of personal jurisdiction upon a vendor in a forum distant from the place of sale]."

227. *Overstreet v. Canadian Pac. Airlines*, 152 F. Supp. 838, 839 (S.D.N.Y. 1957); *Klepper v. Canadian Pac. Ry. Co.*, 271 A.D. 53, 56-58, 62 N.Y.S.2d 627, 629-30 (1946).

228. Comment, *supra* note 175, at 174-79 (in which the author argues that "[t]he constitutional interest in facilitating interstate commerce seems to require additional jurisdictional limitations beyond the minimum safeguards of causation, notice, and relevance provided by due process"); *Developments in the Law: State Court Jurisdiction*, 73 HARV. L. REV. 909, 983-87 (1960) (advocating a continued reliance upon the commerce clause as a limitation upon personal jurisdiction).

229. *Kennedy*, *supra* note 99, at 340-41. *Cf. Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979), in which the Supreme Court struck down a California tax on an instrumentality of foreign commerce as violative of the commerce clause, because, *inter alia*, "California's tax prevents this Nation from 'speaking with one voice' in regulating foreign trade . . . . California, by its unilateral act, cannot be permitted to place . . . impediments before this Nation's conduct of its foreign relations and its foreign trade." 441 U.S. at 452, 453.

230. *Calder v. Jones*, 465 U.S. 783, 790 (1984). *See also Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n.13 (1984).

231. F. JAMES & G. HAZARD, *supra* note 198, § 2.32 at 103.



lessly complicate an already imprecise [jurisdictional] inquiry."<sup>232</sup>

Accordingly, neither the interstate nor foreign commerce clause should be interjected into the personal jurisdiction inquiry. Instead, foreign and foreign country interests should be protected through the existing due process requirement that personal jurisdiction not offend "traditional notions of fair play and substantial justice."<sup>233</sup>

*B. The Doctrine of Forum Non Conveniens as a Limitation Upon The Exercise of Personal Jurisdiction*

In addition to the constitutional limitations on personal jurisdiction stemming from the due process clause, foreign and foreign country defendants, in appropriate cases, can invoke the protections of the doctrine of *forum non conveniens*. "The principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute."<sup>234</sup> This doctrine originated in Scotland and later was adopted by state courts in this country.<sup>235</sup> Subsequently the United States Supreme Court endorsed the use of the doctrine by the federal courts in its 1947 decision in *Gulf Oil Corp. v. Gilbert*.<sup>236</sup>

"Under *Gilbert*, dismissal ordinarily will be appropriate where trial in the plaintiff's chosen forum imposes a heavy burden on the defendant or the court, and plaintiff is unable to offer any specific reasons of convenience supporting his choice."<sup>237</sup> To guide the district courts in exercising their discretion under this doctrine, the *Gilbert* Court "provided a list of 'private interest factors' affecting the convenience of the litigants, and a list of 'public interest factors' affecting the convenience of the forum."<sup>238</sup>

232. *Calder*, 465 U.S. at 790. In rejecting any role for the first amendment in the jurisdictional analysis, the Court also relied upon the fact that "the potential chill on protected First Amendment activity stemming from libel and defamation actions is already taken into account in the constitutional limitations on the substantive law governing such suits." *Id.* For similar reasons, there is no basis for interjecting the commerce clause into the jurisdictional analysis because the foreign or foreign country status of the defendant already is considered in the minimum contacts test. *Asahi Metal Indus. Co. v. Superior Court*, 107 S. Ct. 1026, 1033-35 (1987). See also notes 221-222 *supra* and accompanying text.

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

234. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947). See also RESTATEMENT (SECOND) OF JUDGMENTS § 4 comment g (1982); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 84 (1971). For a recent critique of *forum non conveniens* and an analysis of its relationship to personal jurisdiction and choice of law, see Stewart, *Forum Non Conveniens: A Doctrine in Search of a Role*, 74 CAL. L. REV. 1259 (1986).

235. Bracher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908, 909-12 (1947).

236. 330 U.S. 501 (1947). See also *Koster v. Lumbermens Mut. Casualty Co.*, 330 U.S. 518 (1947).

237. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249 (1981).

238. *Id.* at 241.

The factors pertaining to the private interests of the litigants included the "relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive." The public factors bearing on the question included the administrative difficulties flowing from court congestion; the "local interest in having localized controversies decided at home"; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty.<sup>239</sup>

In its 1981 decision in *Piper Aircraft Co. v. Reyno*,<sup>240</sup> the Supreme Court upheld the dismissal of a wrongful death action brought on behalf of Scottish decedents. The action was brought against the United States corporations that had manufactured both an aircraft that had crashed in Scotland and the aircraft's propeller. The Court held that the district court had properly applied the *Gilbert* factors and that the mere fact that the Scottish decedents' claim would be subject to less favorable substantive tort law in Scotland did not preclude a *forum non conveniens* dismissal.<sup>241</sup>

Application of the doctrine of *forum non conveniens*, as thus interpreted and applied by the Supreme Court, should ameliorate at least some of the burdens that a foreign or foreign country defendant might be subject to under a stream of commerce doctrine of personal jurisdiction.<sup>242</sup>

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239. *Id.* at 241 n.6 (quoting *Gilbert*, 330 U.S. at 508-09) (citations omitted).

240. 454 U.S. 235 (1981).

241. *Id.* at 247-61. A prerequisite to any *forum non conveniens* dismissal is the existence of an alternative forum. *Id.* at 254 n.22 ("At the outset of any *forum non conveniens* inquiry, the court must determine whether there exists an alternative forum."); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 84 (1971); F. JAMES & G. HAZARD, *supra* note 198, at § 2.31.

242. An Advisor on the Restatement (Second) of Conflict of Laws has recommended that Congress, acting under its commerce clause powers, expand personal jurisdiction by conferring nationwide service of process on all state and federal courts with subject matter jurisdiction, subject only to the doctrine of *forum non conveniens*. Packel, *supra* note 175.

Moreover, "American defendants have turned with increasing frequency to the *forum non conveniens* doctrine because it has proven to be an effective means to avoid litigating an international dispute in federal court." Note, *Forum Non Conveniens and Foreign Plaintiffs in the Federal Courts*, 69 GEO. L. J. 1257, 1258 (1981). See also Recent Developments, *Jurisdiction: Foreign Plaintiffs, Forum Non Conveniens, and Litigation Against Multinational Corporations*, 28 HARV. INT'L L. J. 202, 209 (1987) (raising concern that *forum non conveniens* now may be used in complex international litigation "as a defensive strategy instead of a means for

The minimum contacts rule requires that either the defendant have some continuing relationship to the forum, such as residence, or the transaction sued on have some significant relationship to the forum. The *forum non conveniens* rule requires, more exactly, that the forum be not only minimally convenient, as required by the minimum contacts rule, but also that it be relatively convenient compared with other available forums.<sup>243</sup>

Accordingly, the doctrine of *forum non conveniens* can, and should, be used by United States courts to protect foreign and foreign country defendants from suit in unduly unfair and inconvenient fora. By so ameliorating potential hardships to defendants on a case by case basis, the stream of commerce doctrine of personal jurisdiction can be uniformly and consistently applied by both state and federal courts.

### C. *Change of Venue as a Limitation Upon the Exercise of Personal Jurisdiction*

Potential hardship or unfairness to defendants in actions filed in the federal courts also may be lessened in appropriate cases by a change of venue. As the Supreme Court recognized in *Burger King Corp. v. Rudzewicz*, “[T]o the extent that it is inconvenient for a party who has minimum contacts with a forum to litigate there, such considerations most frequently can be accommodated through a change of venue.”<sup>244</sup>

Under section 1404(a) of Title 28 of the United States Code, “[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.”<sup>245</sup> Because

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maximizing the convenience of the parties”). *But see Piper Aircraft*, 454 U.S. at 256 (claim of a foreign plaintiff “deserves less deference” than that of a domestic plaintiff in *forum non conveniens* determination).

243. F. JAMES & G. HAZARD, *supra* note 198, § 2.32 at 108. *See also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 84 comment a (1971).

244. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 483-84 (1985).

245. 28 U.S.C. § 1404(a) (1982). Section 1404(a) has been described as “embod[ying] in an expanded version the common-law doctrine of *forum non conveniens*, under which a court in appropriate circumstances may decline to exercise its jurisdiction in the interest of the ‘easy, expeditious and inexpensive’ resolution of a controversy in another forum.” *Burger King*, 471 U.S. at 477 n.20. *See also* *Norwood v. Kirkpatrick*, 349 U.S. 29, 32 (1955) (“Congress [in § 1404(a)] . . . intended to permit courts to grant transfers upon a lesser showing of inconvenience [than is necessary under *forum non conveniens* doctrine].”); *Felicia, Ltd. v. Gulf Am. Barge, Ltd.*, 555 F. Supp. 801, 807 (N.D. Ill. 1983).

In addition to § 1404, 28 U.S.C. § 1406(a) (1982) provides for transfer of federal actions “to any district or division in which it could have been brought.” However, § 1406 only applies to actions “laying venue in the wrong division or district.” 28 U.S.C. § 1406(a) (1982).

federal venue generally is proper in either the judicial district in which "all defendants reside, or in which the claim arose,"<sup>246</sup> federal defendants may be able to transfer actions to a more convenient district within the federal system. Moreover, even with respect to an action filed in state court, a defendant may be able to remove the action to federal court and then move for a change of venue under 28 U.S.C. section 1404.<sup>247</sup>

Despite the possible utility of the federal venue provisions to defendants sued in inconvenient federal districts, there remain serious problems with exclusive reliance upon them to alleviate potential defendant hardship and unfairness. For instance, situations will arise in which there is no more convenient alternative district in which an action "might have been brought" and to which transfer therefore would be appropriate.<sup>248</sup> Of even greater significance to a foreign country defendant is the fact that the federal venue statutes only provide for change of venue within the United States.<sup>249</sup>

Nevertheless, because a federal court enjoys broader discretion to order a change of venue than to dismiss a case due to *forum non conveniens*,<sup>250</sup> a defendant may be able to obtain a change of venue

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246. 28 U.S.C. § 1391(a) (1982) (diversity cases); 28 U.S.C. § 1391(b) (1982) (cases "wherein jurisdiction is not founded solely on diversity of citizenship"). In addition to the general venue provisions of § 1391, various federal statutes contain special venue provisions pertaining to the particular federal statute in question. *E.g.*, 15 U.S.C. § 78aa (1982) (Securities Exchange Act of 1934); 29 U.S.C. § 185(a) (1982) (Labor Management Relations Act of 1947). Moreover, a special venue provision covering foreign country defendants provides that "[a]n alien may be sued in any district." 28 U.S.C. § 1391(d) (1982).

247. See 28 U.S.C. § 1441 (1982) (providing for removal by defendants of civil actions over which the federal courts have original jurisdiction). Just such a removal and change of venue were employed by the defendants in *Piper Aircraft*, 454 U.S. at 240-41.

While under 28 U.S.C. § 1441 a defendant generally can remove a federal question case without regard to the citizenship of the parties, a diversity case can be removed only "if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." 28 U.S.C. § 1441(b) (1982).

248. Presumably, it will be most convenient for a party to defend an action in the state of his or her own residence. However, 28 U.S.C. § 1391(a), (b) only provide for venue in a defendant's district of residence if that district is where "all defendants reside." Thus to the extent multiple defendants from different states are sued in the same action, they may not be able to obtain a transfer to a more convenient forum than that originally chosen by the plaintiff. *Liaw Su Teng v. Skaarup Shipping Corp.*, 743 F.2d 1140, 1148 (5th Cir. 1984); *Gallery House, Inc. v. Yi*, 587 F. Supp. 1036, 1039-40 (N.D. Ill. 1984).

249. Foreign country defendants, however, can seek the dismissal of actions under the doctrine of *forum non conveniens*. See notes 234-43 *supra* and accompanying text. Moreover, because an alien "may be sued in any district," 28 U.S.C. § 1391(d) (1982), the possibilities for transfer within the United States may be great.

250. See note 245 *supra*.

in a case in which the hardship necessary for a *forum non conveniens* dismissal could not be shown.<sup>251</sup> Although not providing protections as expansive as the *forum non conveniens* doctrine, the federal venue statutes can provide valuable supplemental protection to foreign and foreign country defendants sued in an inconvenient federal forum. The availability of both change of venue and *forum non conveniens* dismissal should permit the federal courts to apply a more consistent and predictable stream of commerce doctrine of personal jurisdiction with respect to foreign and foreign country defendants.

## VI. CONCLUSION

It has been twenty-six years since the Illinois Supreme Court, acting "in . . . light of the facts of economic life as it is lived today," applied the stream of commerce doctrine to uphold personal jurisdiction over a component parts manufacturer from another state.<sup>252</sup> Today's courts similarly should reflect contemporary economic realities and, in appropriate cases, employ the stream of commerce doctrine to uphold personal jurisdiction over foreign and foreign country manufacturers and distributors.

With respect to foreign defendants, the courts should exercise personal jurisdiction if a defendant was both aware that its products would reach the forum and actually served the forum market. Service of the market, in turn, should be determined by a consideration of the volume and value of a defendant's products reaching the forum.

Personal jurisdiction over foreign country defendants should be determined by this same minimum contacts test. However, the foreign country status of a defendant should be considered by the court in its determination whether, despite the existence of minimum forum contacts, the exercise of personal jurisdiction would be fair and reasonable. Having determined that personal jurisdiction constitutionally can be asserted over a foreign or foreign country defendant, a court still may grant a change of venue or *forum non conveniens*

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251. The possibility of a change of venue also may affect the manner in which a federal court interprets and applies the minimum contacts test for personal jurisdiction. Thus in *Donald Manter Co. v. Davis*, the First Circuit refused to uphold the dismissal, on personal jurisdiction grounds, of an action against a defendant who was personally served while temporarily within the forum state because "[a]ny legitimate showing a defendant may make as to fairness . . . is fully cognizable under the change of venue statute, 28 U.S.C. § 1404(a), without impinging on an established principle of jurisdiction. Dismissing the action altogether is overkill." 543 F.2d 419, 420 (1st Cir. 1976). For an attempt to synthesize personal jurisdiction and venue theory, see Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts*, 66 CORNELL L. REV. 411 (1981).

252. *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 443, 176 N.E.2d 761, 766 (1961).

dismissal to protect a defendant from litigation in an unfair or unreasonable forum.

In the quarter century since the Illinois Supreme Court's decision in *Gray v. American Radiator & Standard Sanitary Corp.*,<sup>253</sup> the courts have refined the stream of commerce doctrine of personal jurisdiction in a domestic setting. The jurisdiction exercised in *Gray*, by an Illinois court over an Ohio manufacturer, is no longer considered novel or unique. During the final decade of this century, the courts of this nation increasingly will be faced with efforts to assert jurisdiction over defendants from other nations. By applying the jurisdictional doctrines discussed in this article, the interests of all parties and states, foreign and domestic, can best be protected.

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253. 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

