

Jurisdictional Fair Play and Foreign Defendants: Asahi Metal Industry Co. v. Superior Court

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JURISDICTIONAL FAIR PLAY AND FOREIGN DEFENDANTS: ASAHI METAL INDUSTRY CO. v. SUPERIOR COURT

The Due Process Clause of the fourteenth amendment¹ limits state court jurisdiction over nonresident defendants.² The Supreme Court, in *International Shoe Co. v. Washington*,³ defined the boundaries of this limitation in a constitutional standard which embodies the minimum requirements of “the traditional notions of fair play and substantial justice.”⁴ Using *International Shoe* as a

¹ U.S. CONST. amend. XIV. The fourteenth amendment directs that “[n]o state shall . . . deprive any person of life, liberty or property, without due process of law . . .” *Id.* § 1.

² *Kulko v. Superior Court*, 436 U.S. 84, 91 (1978). See also 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1064-69 (1969); Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. ILL. L.F. 533, 533-35; see generally Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241. Discussing the underlying rationale for due process limits on state court jurisdiction, Professor Currie states:

[D]ue process embodies a test of fundamental fairness in all steps of the proceedings; that our sense of fairness is outraged by certain assertions of jurisdiction on the part of States unconnected with the parties or . . . controversy; and that this sense of unfairness stems partly from the inconvenience and expense involved, partly from the idea of unfair surprise, partly from anticipation of an improper choice of law, and partly from more general notions of the limits of a state’s rightful sovereignty.

Currie, *supra*, at 535.

³ 326 U.S. 310 (1945).

⁴ *Id.* at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). *International Shoe* marked the beginning of the expansion of personal jurisdiction and remains a landmark case in the development of modern jurisdictional analysis. The case and its progeny have been the focus of extensive commentary. *E.g.*, Kurland, *The Supreme Court, the Due Process Clause, and the In Personam Jurisdiction of State Courts — from Pennoyer to Denckla: A Review*, 25 U. CHI. L. REV. 569 (1958); von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966); *Developments in the Law — State Court Jurisdiction*, 73 HARV. L. REV. 909, 916-48 (1960).

Various bases for the assertion of state court jurisdiction have been proposed and discarded during the past century. See R. CASAD, JURISDICTION IN CIVIL ACTIONS § 2.02(1) (1983). The principal basis for jurisdiction was the defendant’s physical presence within the territory. *Id.* In *Pennoyer v. Neff*, 95 U.S. 714 (1878), the Supreme Court held that “constructive service [by publication] upon a non-resident is ineffectual for any purpose,” thereby requiring actual presence in the state to sustain jurisdiction. *Id.* at 727.

Fifty years after *Pennoyer*, the Supreme Court began its transition away from presence as the only adequate basis for jurisdiction. See Kurland, *supra*, at 572-74. In *Hess v. Pawlowski*, 274 U.S. 352 (1927), the Court found jurisdiction through the legal fiction of defendant’s “implied consent.” *Id.* at 356-57. The *Hess* Court found that a state’s power to exclude

matrix by which jurisdictional questions were to be addressed, state courts since then have extended their jurisdiction to include a foreign corporate defendant "that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State."⁵ The "stream of commerce" theory, introduced in dictum in *World-Wide Volkswagen Corp. v. Woodson*,⁶ has been adopted by a majority of the federal courts.⁷ Recently, however, in *Asahi Metal Industry Co. v.*

nonresidents from its highways resulted in the implied consent of nonresident motorists to jurisdiction. See *id.* at 355-57. Later, domicile within the state was held by the Court to be "sufficient to bring an absent defendant within the reach of [a] state's jurisdiction . . ." Milliken v. Meyer, 311 U.S. 457, 462 (1940). Finally, in *International Shoe*, the Supreme Court rejected mechanical tests of presence and consent, opting instead for a more flexible standard of fairness and reasonableness. See Kurland, *supra*, at 573-77. The minimum contacts standard enunciated in *International Shoe* is now recognized as the prevailing test for *in personam* jurisdiction. See R. CASAD, *supra*, § 2.05. Moreover, this standard also applies to *in rem* and *quasi in rem* jurisdictional cases. See Rush v. Savchuk, 444 U.S. 320, 328 (1980); Shaffer v. Heitner, 433 U.S. 186, 212 (1977).

⁵ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98 (1980). The *World-Wide Volkswagen* Court cited *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961), to illustrate the stream of commerce theory. See *World-Wide Volkswagen*, 444 U.S. at 298. In *Gray*, the Illinois Supreme Court upheld state court jurisdiction over a nonresident corporation whose only contact with the forum State was placement of its product in the stream of commerce. *Gray*, 22 Ill. 2d at 432, 176 N.E.2d at 766. The suit was brought by an Illinois plaintiff against the foreign manufacturer of a water heater which had exploded and injured the plaintiff. *Id.* at ___, 176 N.E.2d at 762. The foreign corporation, Titan Valve Manufacturing Co., manufactured a safety valve in Ohio which was later incorporated into a hot water heater in Pennsylvania and subsequently sold to a consumer in Illinois. *Id.* The Illinois court affirmed jurisdiction over the Ohio component part manufacturer and found that the defendant's business transactions resulted "in substantial use and consumption in [the] State." *Id.* at ___, 176 N.E.2d at 766. The *Gray* court added that if a corporation chooses "to sell its products for ultimate use in another [s]tate, it is not unjust to hold it answerable there for any damage caused by defects in those products." *Id.*

⁶ *World-Wide Volkswagen*, 444 U.S. at 297-98. In *World-Wide Volkswagen*, the Supreme Court rejected Oklahoma's assertion of personal jurisdiction over a nonresident defendant. *Id.* In dictum, however, the Court stated that the forum state does not violate the Due Process Clause "if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." *Id.*

⁷ See, e.g., *Bean Dredging Corp. v. Dredge Technology Corp.*, 744 F.2d 1081, 1085 (5th Cir. 1984) (foreign component part manufacturer aware its product might be incorporated into finished product which would find its way to forum state through commerce stream); *Nelson ex rel. Carson v. Park Indus., Inc.*, 717 F.2d 1120, 1127 (7th Cir. 1983), *cert. denied*, 465 U.S. 1024 (1984) (foreign manufacturer and wholesaler aware of retailer's distribution scheme and derived economic benefit from products they placed in commerce stream and therefore subject to jurisdiction); *Hedrick v. Daiko Shoji Co., Ltd.*, 715 F.2d 1355, 1358 (9th Cir. 1983) (manufacturer or supplier of defective product knows or should know such product would enter stream of foreign commerce).

Superior Court,⁸ the Supreme Court questioned the validity of the stream of commerce theory and held California's exercise of long-arm jurisdiction over a Japanese component part manufacturer to be unfair, unreasonable, and inconsistent with the dictates of due process.⁹

In *Asahi Metal Industry*, a products liability action was brought against Cheng Shin Rubber Industrial Co. ("Cheng Shin") and others for injuries resulting from a motorcycle accident.¹⁰ The complaint alleged defects in a tire manufactured by Cheng Shin, a Taiwanese corporation.¹¹ Cheng Shin cross claimed against Asahi Metal Industry Co. ("Asahi"), seeking indemnification from the Japanese component part manufacturer.¹² Although the underlying products liability action was eventually settled, the Superior Court of California refused to quash service of the summons, rejecting Asahi's claim that California lacked personal jurisdiction in the matter.¹³ The California Supreme Court reversed an intermediate appellate order that the summons be quashed,¹⁴ and found the facts sufficient to support jurisdiction under the Due Process Clause.¹⁵ On certiorari, a unanimous United States Supreme Court

⁸ 480 U.S. ____, 107 S. Ct. 1026 (1987).

⁹ *Id.* at ____, ____, 107 S. Ct. at 1033, 1035.

¹⁰ See *Asahi Metal Indus. Co. v. Superior Court*, 39 Cal. 3d 35, 41, 702 P.2d 543, 544, 216 Cal. Rptr. 385, 387 (1985), *rev'd*, 480 U.S. ____, 107 S. Ct. 1026 (1987). The plaintiff, Gary Zurcher, was severely injured, and his passenger wife, Ruth Moreno, was killed when Zurcher lost control of his Honda motorcycle and collided with a tractor. See *id.*

¹¹ *Id.* The complaint alleged defects in the motorcycle tire, tube and sealant. *Id.* The California retailer of the tube, Sterling May Co., also was named in the complaint. *Id.*

¹² See *Asahi*, 480 U.S. at ____, 107 S. Ct. at 1029-30. Asahi manufactured tire valve assemblies, which were sold to Cheng Shin and several other tire manufacturers, to be used in finished tire tubes. See *id.* at ____, 107 S. Ct. at 1030.

¹³ See *id.* After finding that Asahi's sales to Cheng Shin amounted to sufficient minimum contacts for assertion of jurisdiction, the trial court denied Asahi's motion to quash service of summons. *Asahi*, 39 Cal. 3d at 41, 702 P.2d at 545, 216 Cal. Rptr. at 387. The record in the court below indicated that Asahi had conducted business with Cheng Shin for the past ten years. See *id.* From 1978 to 1982, Asahi sold 1,350,000 tire valve assemblies to Cheng Shin. *Id.* Sales to Cheng Shin accounted for 1.24 percent of Asahi's gross income in 1981 and .44 percent of its gross income in 1982. *Id.*

¹⁴ See *Asahi*, 39 Cal. 3d at 54, 702 P.2d at 553, 216 Cal. Rptr. at 396. Asahi sought a peremptory writ of mandate to command the trial court to quash service of summons. *Id.* at 41, 702 P.2d at 545, 216 Cal. Rptr. at 387. The court of appeals granted the writ, *id.*, finding it unreasonable to subject Asahi to California jurisdiction. See *Asahi*, 480 U.S. at ____, 107 S. Ct. at 1030.

¹⁵ See *Asahi*, 39 Cal. 3d at 53-54, 702 P.2d at 553, 216 Cal. Rptr. at 396. Writing for the court, Chief Judge Bird noted that California's long arm statute, CAL. CIV. PROC. CODE § 410.10 (West 1973), conferred jurisdiction to the extent that the minimum contacts test of *International Shoe* had been met. See *Asahi*, 39 Cal. 3d at 42, 702 P.2d at 545, 216 Cal.

reversed,¹⁶ holding that the state court's exercise of personal jurisdiction over Asahi was unreasonable, unfair and in violation of due process requirements.¹⁷

Writing for the Court, Justice O'Connor noted that the exercise of personal jurisdiction must not "offend 'traditional notions of fair play and substantial justice.'"¹⁸ The Court identified factors to be evaluated by a court before asserting jurisdiction over a non-resident defendant.¹⁹ Justice O'Connor then balanced the interest of the forum state in exercising its jurisdiction against the burden imposed upon the nonresident defendant,²⁰ and found the heavy

Rptr. at 387. The court's analysis tracked the expansion of personal jurisdiction in the forty years since *International Shoe*, and focused on the Supreme Court's decision in *World-Wide Volkswagen*. See *id.* at 42-47, 702 P.2d at 545-49, 216 Cal. Rptr. at 387-91. The California court based its decision primarily on the "stream of commerce" wording in *World-Wide Volkswagen*, see *id.* at 45-47, 702 P.2d at 547-49, 216 Cal. Rptr. at 390-91, as applied to component part manufacturers. *Id.* The court stated that "jurisdiction over a nonresident defendant is constitutional where the defendant 'delivers its products into the stream of commerce with the expectation that they will be purchased in the forum State.'" *Id.* at 46-47, 702 P.2d at 548, 216 Cal. Rptr. at 391 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298 (1980)). The California Supreme Court acknowledged that Asahi's contacts with the forum state did not include any *direct* attempt to service the California market, but nonetheless concluded that Asahi's knowledge that its valve assemblies would be incorporated into finished products sold in the state thereby constituted sufficient basis for jurisdiction. See *id.* at 50-51, 702 P.2d at 551-52, 216 Cal. Rptr. at 393-94.

¹⁶ *Asahi*, 480 U.S. at ____, 107 S. Ct. at 1031. The Court was unanimous in only one aspect of the decision — that the facts of the case required reversal of the California Supreme Court decision. See *id.* at ____, 107 S. Ct. at 1029.

¹⁷ Eight Justices agreed that the requirements of the Due Process Clause as enunciated in *International Shoe* had not been satisfied in this instance. *Id.* at ____, 107 S. Ct. at 1033-35.

¹⁸ *Id.* at ____, 107 S. Ct. at 1033 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

¹⁹ See *id.* at ____, 107 S. Ct. at 1033-34. The Court noted that these factors, previously set forth in *World-Wide Volkswagen*, included:

the burden on the defendant, the interests of the forum state, and the plaintiff's interest in obtaining relief. It must also weigh in its determination "the interstate judicial system's interest in obtaining the most efficient resolution of the controversies; and the shared interest of the several States in furthering fundamental substantive social policies."

Id. at ____, 107 S. Ct. at 1034 (quoting *World-Wide Volkswagen*, 444 U.S. at 292 (citations omitted)).

²⁰ *Id.* at ____, 107 S. Ct. at 1034-35. The Court was influenced by the settlement and dismissal of the underlying products liability action. See *id.* at ____, 107 S. Ct. at 1034. Interest of the forum state waned considerably after the dismissal and all that remained for California to adjudicate was an indemnity claim between two foreign corporations. *Id.* The Court rejected the California Supreme Court's argument that adjudication in California would heighten consumer protection "by ensuring that foreign manufacturers comply with the state's safety standards." *Id.* (quoting *Asahi*, 39 Cal. 3d. at 53, 702 P.2d at 553, 216 Cal. Rptr. at 395). Moreover, consumer safety could adequately be protected by subjecting the

burdens on Asahi to outweigh the state's interest in the case.²¹

The Court, however, was deeply divided²² over the adequacy of the stream of commerce theory as a basis for personal jurisdiction.²³ Writing for a plurality of four,²⁴ Justice O'Connor rejected the interpretation of *World-Wide Volkswagen* which finds that mere foreseeability that a product would enter the forum state was a sufficient basis to establish jurisdiction over a nonresident defendant.²⁵ Rather, the *Asahi* plurality noted that the defendant must purposefully direct its activities towards the forum state,²⁶

manufacturer of the finished product to state jurisdiction. *See id.* at ____, 107 S. Ct. at 1034.

²¹ *See id.* at ____, 107 S. Ct. at 1034-35. Noting that Asahi would have to submit the dispute to a foreign tribunal and travel to the United States to defend the suit, the Court found the imposition of such burdens to be severe. *Id.* In assessing the weight of the burdens on the alien defendant, the Court stated 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." *Id.* at ____, 107 S. Ct. at 1034.

²² Three separate opinions were filed in the case notwithstanding the unanimous reversal of the California court's decision. *Id.* at ____, 107 S. Ct. at 1026.

²³ *See id.* at ____, 107 S. Ct. at 1031-33. Justice O'Connor outlined the divergent interpretations of *World-Wide Volkswagen*. One view holds that a defendant's act of placing a product into the stream of commerce, knowing that it may ultimately enter the forum state, is a sufficient basis for that state to exercise personal jurisdiction over the defendant. *See id.* at ____, 107 S. Ct. at 1032. This interpretation, used by the California Supreme Court in *Asahi*, has been adopted by many lower federal courts in addressing jurisdictional questions. *See supra* note 7 and accompanying text (cases of lower federal courts endorsing stream of commerce rationale). The opposite view, expressed by the state court of appeal in *Asahi*, is the view endorsed by the plurality of the Supreme Court in this case. *See Asahi*, 480 U.S. at ____, 107 S. Ct. at 1032-33. This position mandates additional conduct by the defendant directed towards the forum state before jurisdiction can be asserted. *See, e.g.*, *Banton Indus., Inc. v. Dimatic Die & Tool Co.*, 801 F.2d 1283, 1284 (11th Cir. 1986) (jurisdiction over foreign corporation found improper where corporation had no contacts with forum state other than sale of goods to state's resident); *Max Daetwyler Corp. v. R. Meyer*, 762 F.2d 290, 300 (3d Cir.) ("purposeful participation" by seller in "continuous distributive chain" alone cannot yield jurisdiction without evidence of purposeful affiliation with forum state), *cert. denied*, 474 U.S. 980 (1985); *Humble v. Toyota Motor Co., Ltd.*, 727 F.2d 709, 710 (8th Cir. 1984) (no jurisdiction over foreign component parts manufacturer where all distribution, marketing and sales decisions regarding completed product made without its involvement or participation).

²⁴ Justice O'Connor was joined by Chief Justice Rehnquist, Justices Powell and Scalia. *Asahi*, 480 U.S. at ____, 107 S. Ct. at 1026.

²⁵ *Id.* at ____, 107 S. Ct. at 1033. The principle that minimum contacts must be based upon acts 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" was first enunciated by the Supreme Court in *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). The Supreme Court recently reaffirmed this "purposeful availment" requirement in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985).

²⁶ *See Asahi*, 480 U.S. at ____, 107 S. Ct. at 1033.

the mere placement of a product into the stream of commerce, without more, does not satisfy the constitutional requirement of minimum contacts between the defendant and the forum state.²⁷

In a separate opinion,²⁸ Justice Brennan disagreed with the plurality's interpretation of the stream of commerce theory, labeling the plurality's position a "marked retreat" from the Court's due process analysis in *World-Wide Volkswagen*.²⁹ Justice Brennan argued that the defendant's awareness that its product would be marketed in the forum state should be sufficient to establish minimum contacts.³⁰

Justice Stevens, in a concurring opinion, asserted that since California's exercise of jurisdiction was unreasonable and unfair, the case should have been decided without considering whether the defendant had purposefully availed itself of the benefits of the forum.³¹ He further contended that the Court erred in finding that this defendant had not purposefully availed itself of the benefits of the forum state.³²

The Supreme Court in *Asahi* found it unfair and unreasonable for California to assert jurisdiction over this nonresident defend-

²⁷ See *id.* The plurality noted that certain activities of the defendant may indicate the requisite intent to serve the forum market. *Id.* "[D]esigning the product for the market 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" are examples of intent to serve the forum market. *Id.*

²⁸ Justice Brennan's opinion, concurring in part and in the judgment, was joined by Justices White, Marshall and Blackmun. *Id.* at ____, 107 S. Ct. at 1035-37 (Brennan, J., concurring in part and in the judgment).

²⁹ *Id.* at ____, 107 S. Ct. at 1036-37 (Brennan, J., concurring in part and in the judgment). Justice Brennan's conclusion that minimum contacts had been established was based largely on *Asahi's* awareness that its product, once incorporated in Cheng Shin's tires, would ultimately find its way into the forum state. *Id.* at ____, 107 S. Ct. at 1037 (Brennan, J., concurring in part and in the judgment). Accordingly, such knowledge indicated an intent by *Asahi* to benefit economically from Cheng Shin's sales in California. See *id.* (Brennan, J., concurring in part and in the judgment). Justice Brennan noted that the stream of commerce theory had been adopted by a majority of the federal courts and that the plurality's opinion was inconsistent with the Court's analysis in *World-Wide Volkswagen*. *Id.* at ____, 107 S. Ct. at 1036-37 (Brennan, J., concurring in part and in the judgment).

³⁰ *Id.* at ____, 107 S. Ct. at 1035 (Brennan, J., concurring in part and in the judgment).

³¹ *Id.* at ____, 107 S. Ct. at 1038 (Stevens, J., concurring in part and in the judgment). Justice Stevens was joined by Justices White and Blackmun. *Id.* (Stevens, J., concurring in part and in the judgment).

³² *Id.* (Stevens, J., concurring in part and in the judgment). Justice Stevens reasoned that, even though the product was distributed throughout the world, he would be inclined to find "purposeful availment" when the defendant had a regular course of dealing in the forum state. *Id.* (Stevens, J., concurring in part and in the judgment).

ant.³³ However, the disagreement among the Justices, as to what acts of a defendant will constitute "purposeful availment" sufficient for a finding of minimum contacts with the forum state, has injected uncertainty into jurisdictional analysis. It is submitted that the Court's division on the propriety of imposing a stream of commerce theory abandons prior Court analyses and undermines the liberty interests protected by the Due Process Clause. Moreover, the Court's prior jurisdictional decisions demand that a "purposeful availment" finding be made a prerequisite to a finding of minimum contacts. This Comment will examine the origins of the stream of commerce theory in *World-Wide Volkswagen* and its development and adoption by the lower federal courts. Additionally, this Comment will examine the lower courts' adoption of the stream of commerce theory based on foreseeability and will argue that assertion of jurisdiction based on foreseeability alone is inconsistent with the mandates of due process. Finally, this Comment will explore the international context in which jurisdiction is exercised and suggest that a strict application of the stream of commerce theory ignores the larger implications of requiring alien defendants to appear and defend actions in a foreign tribunal.

World-Wide Volkswagen AND THE STREAM OF COMMERCE THEORY

The Supreme Court's decision in *World-Wide Volkswagen*³⁴ was initially viewed as a retreat from the expansion of state court

³³ See *id.* at _____, 107 S. Ct. at 1033.

³⁴ 444 U.S. 286, 291 (1980). In *World-Wide Volkswagen*, the plaintiffs brought a products liability action against an automobile retailer and its wholesale distributor, among others, claiming that defective design of an Audi gas tank and fuel system caused injuries in an accident in Oklahoma. *Id.* at 288-89. The plaintiffs were New York residents at the time the action was commenced, and the defendants were incorporated and had their principal place of business in New York. *Id.* The defendants claimed that Oklahoma's exercise of jurisdiction over them would violate the due process provision of the fourteenth amendment because of the absence of minimum contacts with the forum state. *Id.* at 288. The Supreme Court, in a 6-3 decision, rejected the Oklahoma Supreme Court's rationale that foreseeable use of the product, combined with the defendant's substantial revenue from the sale of automobiles, was sufficient to assert its long arm jurisdiction. *Id.* at 288-91. Writing for the Court, Justice White first applied the minimum contacts test as outlined in *International Shoe*, noting that this test serves two distinct functions. *Id.* at 291-92. First, a minimum contacts requirement protects defendants from the burdens of litigating in a distant or inconvenient forum. *Id.* Second, it establishes territorial limits on the exercise of state power, ensuring that each state retains sovereignty "within the context of our federal system of government." *Id.* at 293-94 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945)).

jurisdiction.³⁵ In denying the state court's power over a foreign defendant,³⁶ the Court outlined various considerations to be included in a jurisdictional determination of minimum contacts.³⁷ In now famous dictum, the Supreme Court stated that "[t]he forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State."³⁸ The *World-*

³⁵ *World-Wide Volkswagen*, 444 U.S. at 292. The Court stated that jurisdiction over a foreign defendant must be reasonable in light of the relationship between the defendant and the forum. *Id.* at 292. While the primary concern in assessing the reasonableness of jurisdiction is the burden on the defendant, the Court mandated that other factors be considered as well. *Id.* Those factors, derived from *International Shoe* and its progeny, included: "the forum State's interest in adjudicating the dispute; the plaintiff's interest in obtaining convenient and effective relief . . . ; the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies." *Id.* (citations omitted).

The *World-Wide Volkswagen* Court's reassertion of principles of federalism as a necessary element of analysis has been criticized as inconsistent with modern jurisdictional trends. See, e.g., Review, *The Supreme Court, 1979 Term*, 94 HARV. L. REV. 107, 116 (1980) (arguing that the *World-Wide Volkswagen* Court "has again confined state courts to a jurisdictional strait jacket"); Comment, *Minimum Contacts As Applied to Products Liability: World-Wide Volkswagen Corp. v. Woodson*, 29 DE PAUL L. REV. 1159, 1160 (1980) (criticizing *World-Wide Volkswagen* Court's focus on "discarded principles of jurisdiction") [hereinafter Comment, *Minimum Contacts*].

World-Wide Volkswagen was decided in the same term as *Rush v. Savchuk*, 444 U.S. 320 (1980), a leading case contracting the reach of *in rem* jurisdiction. Both decisions seemed to focus on federalism as the overriding concern in limiting state court jurisdiction. See Casenote, *Retracting the Long Arm: World-Wide Volkswagen Corp. v. Woodson and Rush v. Savchuk*, 22 B.C.L. REV. 385, 386-87 (1981) (arguing that Court's decisions focus on federalism rather than fairness); Comment, *Federalism, Due Process and Minimum Contacts: World-Wide Volkswagen Corp. v. Woodson*, 80 COLUM. L. REV. 1341, 1355 (1980) (Court's overriding concern was notion of territoriality as restraint on sovereign power). Some commentators, however, have assessed the decision in *World-Wide Volkswagen* as a possible source of expanded jurisdiction. See, e.g., Seidelson, *Recasting World-Wide Volkswagen as a Source of Longer Jurisdictional Reach*, 19 TULSA L.J. 1, 10 (1983) (*World-Wide Volkswagen* can expand state court jurisdiction); Weintraub, *Due Process Limitations on the Personal Jurisdiction of State Courts: Time for Change*, 63 OR. L. REV. 485, 503 (1984) (federalism concerns addressed in personal jurisdictional analysis no longer as important); see also *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.10 (1982) (Due Process Clause is only source of personal jurisdiction requirement).

³⁶ *World-Wide Volkswagen*, 444 U.S. at 298-99.

³⁷ *Id.* at 292; see also *supra* note 35.

³⁸ *Id.* at 297-98. The *World-Wide Volkswagen* Court's words were framed in terms of the role of foreseeability in due process analysis. *Id.* at 297. Critical to the interpretation of the stream of commerce dictum are the Court's pronouncements immediately preceding the stream of commerce language. The Court, citing *Hanson v. Denckla*, 357 U.S. 235, 253 (1958), reaffirmed the principle that a corporation must "purposefully avail[] itself of the privilege of conducting activities within the forum State" before jurisdiction may be as-

Wide Volkswagen Court noted that concerns over the inconvenience of litigation to the defendant had been "substantially relaxed" over the years.³⁹ Expansion of state court jurisdiction was attributed to developments in commerce and transportation, making it less burdensome for a defendant to litigate in a foreign forum.⁴⁰ The Court, however, insisted that jurisdictional expansion was not without limits, and warned that it was "a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts."⁴¹

The Court in *World-Wide Volkswagen* reiterated the requirement that the defendant must "*purposefully* avail[] itself of the privilege of conducting activities within the forum State" before jurisdiction can be sustained.⁴² Further, the Court held that this requirement is not fulfilled by the unilateral activity of a third party; it must be evidenced by the activities of the defendant itself.⁴³ Provided that the "purposeful availment" test was satisfied,

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

³⁹ See *id.* at 297-98. The Court, quoting from an earlier case expanding jurisdiction, stated:

Today, many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.

Id. at 293 (quoting *McGee v. International Life Ins. Co.*, 355 U.S. 220, 222-23 (1957)).

⁴⁰ *Id.* at 293.

⁴¹ *Id.* at 294 (quoting *Hanson v. Denckla*, 357 U.S. 235, 251 (1958)).

⁴² See *id.* at 297 (quoting *Hanson*, 357 U.S. at 253 (emphasis added)). The purposeful availment requirement ensures that the defendant "has clear notice that it is subject to suit" in the forum state. *Id.* at 297. Such notice enables the defendant to avoid or lessen the risks associated with foreign litigation "by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State." *Id.* Due process requirements "allow[] 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." *Id.*

The *World-Wide Volkswagen* Court found that since the defendants had not purposefully directed activity in the forum state, the stream of commerce theory could not afford a basis for Oklahoma jurisdiction. See *id.* at 298.

⁴³ *Id.* The Court in *World-Wide Volkswagen* acknowledged that it was foreseeable that some of the defendant's automobiles would be driven by purchasers into Oklahoma. *Id.* However, "the mere 'unilateral activity' of a third party cannot 'satisfy the requirement of contact with the forum State.'" *Id.* at 298 (quoting *Hanson*, 357 U.S. at 251). It is the defendant's activities, not a third party's, which establish the necessary minimum contacts. See, e.g., *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 (1985). In *Burger King*, the plaintiff corporation sued a nonresident franchisee in Florida for breach of their franchise agreement. *Id.* at 464. The Supreme Court held that the Due Process Clause was not vio-

courts were then free to assert jurisdiction over a nonresident defendant based on the stream of commerce theory.⁴⁴ The "purposeful availment" test is a critical component of jurisdictional analysis, one continuously reaffirmed by the Court since its decision in *Hanson v. Denckla*.⁴⁵ In keeping with this analysis, the Supreme Court plurality in *Asahi* refused to find purposeful availment where the defendant's only connection with the forum state was the placement of its product into the stream of commerce.⁴⁶ It is submitted that, in *Asahi*, Justice Brennan's proposed interpretation of the stream of commerce theory⁴⁷ violates the express limita-

lated by requiring the franchisee to defend the suit in Florida because the defendant's minimum contacts with the forum state had been established. *See id.* at 487. These minimum contacts ensure "fair warning [to the defendant] that a particular activity may subject [him] to the jurisdiction of a foreign sovereign." *Id.* at 472 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977) (Stevens, J., concurring)). "[T]his 'fair warning' requirement is satisfied if the defendant has 'purposefully directed' his activities at residents of the forum." *Id.* (citing *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984)). *See also* *Calder v. Jones*, 465 U.S. 783 (1984). In sustaining California jurisdiction over a Florida newspaper and its editor in a libel action, the Supreme Court in *Calder* noted that the defendant's "intentional, and allegedly tortious, actions were expressly aimed" at the forum State. *Calder*, 465 U.S. at 789. The Supreme Court since *World-Wide Volkswagen* has also reaffirmed the principle that the unilateral activity of one other than the defendant will not constitute sufficient minimum contacts. *See Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 417 (1984) ("Such unilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction.").

⁴⁴ *World-Wide Volkswagen*, 444 U.S. at 297-98.

⁴⁵ 357 U.S. 235 (1985). *See* *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984); *World-Wide Volkswagen*, 444 U.S. at 297-98.

⁴⁶ *Asahi Metal Indus. Co.*, 480 U.S. at ____, 107 S. Ct. at 1033. Justice O'Connor acknowledged the division among the federal courts as to the proper application of the stream of commerce theory. *Id.* at ____, 107 S. Ct. at 1032-33. Justice O'Connor further noted that the California Supreme Court's decision in *Asahi* illustrates the view that *World-Wide Volkswagen* permits jurisdiction "to be based on no more than the defendant's act of placing the product in the stream of commerce." *Id.* at ____, 107 S. Ct. at 1032. The plurality commented that this view holds that "mere foreseeability or awareness [is] a constitutionally sufficient basis for personal jurisdiction" as long as "the defendant's product [makes] its way into the forum State while still in the stream of commerce." *Id.* at ____, 107 S. Ct. at 1032. In rejecting the mere foreseeability test of the California Supreme Court in this case, the plurality stated that "[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State." *Id.* at ____, 107 S. Ct. at 1033.

⁴⁷ *Id.* at ____, 107 S. Ct. at 1035 (Brennan, J., concurring in part and in the judgment). Justice Brennan views the plurality's interpretation of the stream of commerce theory as unnecessarily requiring "additional conduct" by the defendant before minimum contacts could be established. *Id.* at ____, 107 S. Ct. at 1035 (Brennan, J., concurring in part and in the judgment). Justice Brennan stated:

The stream of commerce refers not to unpredictable currents or eddies, but to the

tions on personal jurisdiction established by previous Supreme Court decisions.

FORESEEABILITY ALONE IS NOT ENOUGH

Justice Brennan's opinion and the California Supreme Court's decision in *Asahi* illustrate the majority view of the lower federal courts concerning the application of the stream of commerce theory.⁴⁸ This interpretation equates foreseeability — the defendant's awareness that its product will enter the forum market — with affirmative action by the defendant to serve the forum market.⁴⁹ While foreseeability is relevant to due process analysis, it must be evaluated in light of the defendant's *conduct* — conduct that would lead the defendant to expect that it would be subject to jurisdiction in the forum state.⁵⁰ Foreseeability alone is not sufficient contact with or activity within the forum state of the kind necessary to support personal jurisdiction.⁵¹ The defendant's awareness

regular and anticipated flow of products from manufacture to distribution to retail sale. As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise.

Id. at ____, 107 S. Ct. at 1035 (Brennan, J., concurring in part and in the judgment). It is submitted that Justice Brennan's opinion transforms the purposeful availment requirement from a critical element of due process analysis into a superfluous finding — one not required so long as the defendant's awareness of the product's final destination has been established. It is suggested that such an interpretation largely ignores the dictates of both *World-Wide Volkswagen* and subsequent jurisdictional analyses of the Court.

⁴⁸ See *id.* at ____, 107 S. Ct. at 1035-36 n.1; see, e.g., *Bean Dredging Corp. v. Dredge Technology Corp.*, 744 F.2d 1081 (5th Cir. 1984). In *Bean Dredging*, the Fifth Circuit held that a nonresident component part manufacturer was subject to the personal jurisdiction of a Louisiana state court because the product ultimately found its way into the forum state. *Bean Dredging*, 744 F.2d at 1082. Though the parts were manufactured and sold in other states, the court found constitutional jurisdiction could be based on the stream of commerce theory since the defendant was aware that its product might be incorporated into a finished product for use in the forum state. See *id.* at 1082-83.

⁴⁹ See *supra* note 48.

⁵⁰ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). The Court in *World-Wide Volkswagen* rejected foreseeability as a sufficient criterion for minimum contacts. *Id.* at 295-96. The Court, however, stated that "[t]his is not to say, of course, that foreseeability is wholly irrelevant. But the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State." *Id.* at 297.

⁵¹ *Id.* See also *Kulko v. Superior Court*, 436 U.S. 84, 97-98 (1978) (no purposeful act by defendant to warrant exercise of personal jurisdiction by California); *Shaffer v. Heitner*, 433 U.S. 186, 216 (1977) (*in rem* proceedings governed by *International Shoe* standard and require affirmative acts by defendant to establish minimum contacts). For an outline of the reasoning behind an absolute requirement of minimum contacts as established by activity of

of the final destination of its product must be coupled with some purposeful attempt to benefit, directly or indirectly, from the forum market.⁵² Activity of the defendant which shows an implicit attempt to serve the market might include: designing the product for marketing in the forum state;⁵³ advertising in the forum state;⁵⁴ or marketing the product through an exclusive distributor in the forum state.⁵⁵

the defendant, see *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

⁵² See *World-Wide Volkswagen*, 444 U.S. at 297; *Rockwell Int'l Corp. v. Costruzioni Aeronautiche Giovanni Agusta*, 553 F. Supp. 328, 332 (E.D. Pa. 1982); see also *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) (defendant must purposefully avail itself of forum state's privileges, thereby invoking benefits and protection of its laws).

In Justice Brennan's concurring opinion in *Asahi*, he argued that the "purposeful availment" test is satisfied when the defendant "benefits economically from the retail sale of the final product in the forum State, and indirectly benefits from the State's laws that regulate and facilitate commercial activity." *Asahi*, 480 U.S. ____, 107 S. Ct. at 1035 (Brennan, J., concurring in part and in the judgment). The plurality, however, pointed out that the arrival of defendant's product in the forum state was the result, not of the defendant's actions, but of the movement of the stream of commerce itself. *Id.* at ____, 107 S. Ct. at 1032. Justice O'Connor stated that "the stream eventually swept defendant's product into the forum State, but the defendant did nothing else to purposefully avail itself of the market in the forum state." *Id.* See also *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) (defendant's purposefully directed effort toward forum state is necessary for minimum contacts finding).

⁵³ See *Volkswagenwerk, A.G. v. Klippan*, 611 P.2d 498 (Alaska), *cert. denied*, 449 U.S. 974 (1980). In *Volkswagenwerk*, a German seatbelt manufacturer was subject to jurisdiction in Alaska as a component part manufacturer of a defective Volkswagen produced in Germany. *Id.* at 500. The court found that the defendant had designed its product to meet the safety standards of the American Society of Automotive Engineers. See *id.* at 500-01. Additionally, the seatbelts contained labels supplied by the defendant which noted that the seatbelts were "approved for sale in all states," *id.* at 501, thereby showing the necessary attempt to serve the forum market. See *id.*

⁵⁴ See *Rockwell Int'l Corp. v. Costruzioni Aeronautiche Giovanni Agusta*, 553 F. Supp. 328, 328 (E.D. Pa. 1982). In *Rockwell*, a federal court sustained Pennsylvania jurisdiction over a French component part manufacturer. *Id.* at 334. The court found several factors indicating attempts by the defendant to serve the forum market. *Id.* at 330. Principally, the defendant manufactured its product specifically for inclusion in products designed for use by executives in the United States and Europe. See *id.* Additionally, the defendant advertised its product in a publication it knew would be circulated in the United States, Canada, and Europe. *Id.* Finally, the court found that the defendant had an exclusive agreement with a California corporation for the promotion and sale of its product. See *id.*

⁵⁵ See *Oswalt v. Scripto, Inc.*, 616 F.2d 191, 198 (5th Cir. 1980). In *Oswalt*, a Japanese manufacturer of cigarette lighters was held to be subject to Texas jurisdiction based on the stream of commerce theory. See *id.* at 200. The defendant, however, sold millions of lighters through an exclusive United States distributor who serviced "national retail outlets." *Id.* at 199.

FAIR PLAY AND FOREIGN DEFENDANTS

The Supreme Court has stated that "minimum requirements inherent in the concept of 'fair play and substantial justice' may defeat the reasonableness of jurisdiction *even if* the defendant has purposefully engaged in forum activities."⁵⁶ In this context, a court faced with a jurisdictional question must consider the obvious burdens on an alien defendant of litigating in a foreign tribunal and the international implications of asserting jurisdiction.⁵⁷ Neither faction in the *Asahi* Court squarely confronted the broader issue of a state's "right to make a binding determination . . . of an alien defendant's conduct abroad."⁵⁸ The real question presented in the *Asahi* case remains unanswered, that is, "[t]o what extent will foreign sovereigns accept and enforce the determination by a State that it can regulate persons outside its territory?"⁵⁹ This question must be considered within the dictates of *International Shoe* that "traditional notions of fair play and substantial justice" not be offended by the exercise of state court jurisdiction.⁶⁰

⁵⁶ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477-78 (1985) (emphasis added) (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)). Justice Stevens in *Asahi* argued in a separate opinion that this rule alone would defeat California's assertion of jurisdiction on these facts. See *Asahi*, 480 U.S. —, 107 S. Ct. at 1038 (Stevens, J., concurring in part and in the judgment). Justice Stevens did not agree that the Court should have addressed the question of minimum contacts and saw "no reason in this case . . . to articulate 'purposeful direction' or any other test" to establish minimum contacts. *Id.* (Stevens, J., concurring in part and in the judgment).

⁵⁷ See Born, *Reflections on Judicial Jurisdiction In International Cases*, 17 GA. J. INT'L & COMP. L. 1 (1987). Professor Born outlines factors which require a stricter due process analysis in international cases, including the need for federal control over foreign relations and commerce. *Id.* at 27-34. The author also argues for an aggregation of the defendant's national contacts rather than its contacts solely with the forum state in determining jurisdiction. *Id.* at 37-42. While noting that the general principles of due process, as enunciated in *International Shoe* and its progeny, are flexible enough to adapt to cases involving alien defendants, Professor Born suggests that these principles be applied with stricter scrutiny in the international context. *Id.* at 34-36.

⁵⁸ Brief for Petitioner (LEXIS, Genfed library, Briefs file), *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. —, 107 S. Ct. 1026 (1987) (No. 85-693).

⁵⁹ *Id.*

⁶⁰ See *Asahi*, 480 U.S. at —, 107 S. Ct. at 1033. Justice O'Connor, writing for the plurality, noted that *World-Wide Volkswagen* cautioned courts to take the interests of the several states into consideration when addressing jurisdictional questions. See *id.* at —, 107 S. Ct. at 1034. On the facts of this case, Justice O'Connor stated that "this advice calls for a court to consider the procedural and substantive policies of other nations whose interests are affected by the assertion of jurisdiction . . ." *Id.* at —, 107 S. Ct. at 1034 (emphasis in original). The plurality noted that the interest of another nation will vary with each case, but stated that "those interests, as well as the Federal interest in its foreign relations policies, will be best served by a careful inquiry into the reasonableness of the

CONCLUSION

The deep division of the Supreme Court regarding the stream of commerce theory is an unfortunate by-product of the complexity of jurisdictional cases. The Court has advocated that jurisdiction be determined on a case-by-case basis, balancing many competing factors. Such an approach, while retaining flexibility to determine what constitutes fairness, undermines the predictability and notice that is critical to due process. The Court in *Asahi* takes the first step towards developing fixed rules and principles to determine the propriety of state court jurisdiction over alien defendants. This application of the stream of commerce theory will assist state courts and lower federal courts by ensuring that the strictures of due process will be followed in future jurisdictional cases.

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