THIS AIN'T THE TEXAS TWO STEP FOLKS: DISHARMONY, CONFUSION, AND THE UNFAIR NATURE OF PERSONAL JURISDICTION ANALYSIS IN THE FIFTH CIRCUIT

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I. INTRODUCTION

The state of the "stream of commerce" test is in flux. The Supreme Court's last pronouncement on the subject, *Asahi Metal Industry Co. v. Superior Court of California, Solano County*,[1] muddied the water in cases involving products that travel "through" interstate commerce to reach a distant forum state.[2] The Court has yet to resolve its division on the proper analysis for stream-of-commerce cases, and federal circuit courts and state courts are equally divided on the issue.[3] As evidenced by a recent Fifth

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[1] 480 U.S. 102 (1987). While the Court agreed on the result, that Asahi, a third-party defendant, was not subject to jurisdiction in California, the Court split badly on the rationale. O'Connor, plus three, stated that there were no "minimum contacts" and therefore no personal jurisdiction because the due process clause required more than mere placement in commerce of a product for establishment of minimum contacts. *Id.* at 112–13. She wrote that foreseeability, plus some other evidence of "purposeful direction" was required to establish minimum contacts. *Id.* at 111–12. Brennan plus three other Justices disagreed. They found "minimum contacts" sufficient to satisfy the Due Process Clause, based on the mere foreseeability of a product placed in the stream of commerce reaching the forum state. *Id.* at 116–17 (Brennan, J., concurring). Justice Stevens articulated yet a third approach. He believed foreseeability should be based on an analysis of the volume, value, and hazardous nature of the product placed into the stream of commerce. *Id.* at 122 (Stevens, J., concurring).

[2] For thorough and interesting discussions of the legacy of the *Asahi* split, see Robert J. Condlin, *"Defendant Veto" or "Totality of the Circumstances"? It's Time for the Supreme Court to Straighten Out the Personal Jurisdiction Standard Once Again*, 54 CATH. U. L. REV. 53 (2004); Russell J. Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531 (1995).

[3] *See* discussion *infra* notes 94–97.

Circuit decision, *Luv N' Care, Ltd. v. Insta-Mix, Inc.*,[4] none of the theories of minimum contacts have been fully accepted. This case in particular, through its vigorous concurring opinion and powerful majority opinion, demonstrates that the unresolved issues of how to determine minimum contacts still impact important decisions in cases daily.[5] Additionally, the Fifth Circuit, as well as other circuits, have complicated the issue by combining their particular reading of the minimum contacts test with a burden-shifting test, often shifting the burden on the defendant to articulate "compelling reasons" why after a finding of purposeful contact, jurisdiction should not lie in the forum.[6]

This division in the circuits and the states causes not only uncertainty in the law, but also undesirable forum shopping.[7] Personal jurisdiction

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[4] 438 F.3d 465 (5th Cir. 2006). For a good discussion of this case, see Alison Myhra, *Fifth Circuit Survey June 2005–May 2006: Civil Procedure*, 39 TEX. TECH L. REV. 689, 707–12 (2007).

[5] *Luv N' Care*, 438 F.3d at 474 (DeMoss, J., concurring); *id.* at 469–70 (majority opinion).

[6] *Id.* at 473 (citing Nuovo Pignone, SpA v. Storman Asia M/V, 310 F.3d 374, 382 (5th Cir. 2002)).

[7] *See* Semtek Intern. Inc. v. Lockheed Martin Corp., 531 U.S. 497, 498 (2001) ("Any other rule would produce the sort of forum shopping and inequitable administration of the laws that *Erie* seeks to avoid."); Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627, 651 n.3 (1999) ("In its Report on the Federal Courts Improvement Act of 1982, the House stated, 'Patent litigation long has been identified as a problem area, characterized by undue forum-shopping and unsettling inconsistency in adjudications.'"); G. Marcus Cole, *Protecting Consumers From Consumer Protection:* Watters v. Wachovia Bank, CATO SUP. CT. REV. 251, 275 (2007) ("Forum shopping is bad when it occurs *ex post*, when parties to a transaction seek a favorable outcome by seeking a biased arbiter. On the contrary, *ex ante* forum shopping is what federalism is all about. Parties should exercise their constitutional right to interstate travel, for example, and 'vote with their feet' when encountering an inhospitable legal or regulatory climate.") (citations omitted); Emil Petrossian, II, *In Pursuit of the Perfect Forum: Transnational Forum Shopping*, 40 LOY. L.A. L. REV. 1257, 1264, 1265 (2007) ("But despite these differences in conceptualization, the aversion toward and regulation of procedural forum shopping appears to stem from the same root: the well-established legal principle that disputes should be resolved on their merits and not on procedural technicalities. This principle is offended whenever a party obtains a favorable outcome simply by bringing or removing an action to a particular forum, because the party does so irrespective of the relative strength or weakness of that party's legal position."); Daniel Tan, *Damages for Breach of Forum Selection Clauses,*

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analysis now varies depending on which circuit a litigant files in. If a plaintiff is savvy enough to pick a circuit embracing Brennan's foreseeability view, minimum contacts will likely be found.[8] This is particularly true where that same jurisdiction, after finding "purposeful conduct" then transfers the burden to the defendant to demonstrate "unfairness."[9] Conversely, if a plaintiff files in the First, Fourth, Sixth, or Eleventh Circuits, a finding of personal jurisdiction may be less likely, given the same facts, because those circuits employ the O'Connor test requiring a much more specialized showing to reach "purposeful conduct."[10]

This division in the circuits creates uncertainty for businesses and fails to give companies sufficient notice to structure their business to minimize risks, a common theme and concern in the Court's prior minimum contacts jurisprudence.[11] The impact of the Courts' disagreement may make

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Principled Remedies, and Control of International Civil Litigation, 40 TEX. INT'L L.J. 623, 638–39 (2005) ("Classically speaking, forum shopping is bad. Principles of fairness demand that the plaintiff not be allowed an unfettered right to arbitrarily commence proceedings in any forum he wishes. 'At the heart of the classical view [against forum shopping] lies a desire for fairness to the defendant. Forum-shopping is seen as subjecting the defendant to unanticipated and perhaps unforeseeable risks.' The courts are especially reluctant to allow proceedings in 'unnatural' courts—courts that have only a remote connection with the dispute itself—unless there are good reasons for this. The forum shopper is often seen as 'one who manipulates loopholes in the system to thwart [the] ideals of neutrality to hurt the defendant.'") (citations omitted).

[8] *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 116–17 (1987) (Brennan, J., concurring).

[9] *See Luv N' Care*, 438 F.3d at 473 (citing *Nuovo Pignone*, 310 F.3d at 382).

[10] For a collection of cases, see *infra* note 129.

[11] *See, e.g.*, Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474–76 (1985); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297–98 (1980); Int'l Shoe Co. v. Washington, 326 U.S. 310, 316–19 (1945); *see also* Daniel Wanat, *Copyright Infringement Litigation and the Exercise of Personal Jurisdiction Within Due Process Limits: Judicial Application of Purposeful Availment, Purposeful Direction, or Purposeful Effects Requirements to Finding that a Plaintiff Has Established a Defendant's Minimum Contacts Within the Forum State*, 59 MERCER L. REV. 553, 564, 589–93 (2008) (discussing the impact of *Asahi* on copyright cases); Randall B. Weill, *The Internet and Personal Jurisdiction in the United States*, *in* INTERNATIONAL JUDICIAL ASSISTANCE IN CIVIL MATTERS 209, 213 (Suzanne Rodriguez & Bertrand Prell eds., 1999) ("The determination of whether minimum contacts exist 'is one in which few answers will be written 'in black

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companies defer on the worst-case-scenario: increased insurance, additional set-asides for anticipation of litigation in foreign jurisdictions, or basically increasing the overall cost of doing business. The divide impacts not only product liability actions, but also copyright and trademark infringement actions, as courts have been more willing to extend the analysis in these areas.[12] Additionally, this article will explore the most absurd results of this divide, forum shopping within a jurisdiction, with cases where the federal courts and state courts within a circuit disagree on how to establish minimum contacts.

This article explores the deep divide in federal and state courts over the proper application of the minimum contacts test, as well as the arguments in favor of each test. As a case study, this article will use the Fifth Circuit Court of Appeals as a model of how personal jurisdiction analysis is playing out in the federal circuit courts. It will explore how this Circuit Court has resolved the foreseeability issue, and in particular, it will explore the additional burdens placed on parties by that Circuit's reading of *Burger King v. Rudzewicz*,[13] which transfers the burden of proof of the fundamental fairness factors to the defendant, once the plaintiff has shown purposeful contact with the forum.[14] Further, this article will explore the various developments of the due process test, exploring circuit courts that use burden shifting in their analysis and even some courts that do not require a court to perform a "fairness" analysis.[15] Lastly, this article will hopefully serve as a catalyst for the Fifth Circuit to reconsider the fairness of its current jurisprudence and add to the continuing plea from courts and commentators for the Supreme Court to answer this question and to once and for all align the courts on the proper "minimum contacts test."[16]

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and white. The grays are dominant and even among them the shades are innumerable.'") (quotations omitted) (discussing the impact of *Asahi* on internet commerce).

[12] *See, e.g.*, *Burger King Corp.*, 471 U.S. 462; *Luv N' Care*, 438 F.3d 465.

[13] 471 U.S. 462.

[14] *Luv N' Care*, 438 F.3d at 473.

[15] When I refer to "fairness analysis" or "fundamental fairness factors," I am referring to the balancing test first articulated by the Supreme Court in *International Shoe*, such that the exercise of jurisdiction does not offend "traditional notions of fair play and substantial justice." *Int'l Shoe*, 326 U.S. at 316. This test was turned into a five-factor analysis in the Court's *World-Wide Volkswagen* opinion. *World-Wide Volkswagen*, 444 U.S. at 297–98.

[16] Circuit splits are a classic reason for the Court to grant certiorari. *See* SUP. CT. R. 10 (providing that one reason for granting certiorari is to correct a split among circuit courts);

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II. DISHARMONY IN THE CIRCUITS

A. The Foundation: Supreme Court Precedent

1. Early Precedent: Federal Constitutional Limitations on State Courts' Authority to Exercise Personal Jurisdiction

Personal jurisdiction is power: the power to force persons to answer grievances within a particular judicial system.[17] Traditional jurisdictional analysis at its simplest level assumes that a state has legal control over matters within its jurisdictional limits.[18] It follows that the state therefore has legislative jurisdiction to prescribe rules within its territory and judicial jurisdiction to adjudicate disputes arising within its territory.[19]

The power to make individuals answer in a particular state's courts was initially thought to be limited to a state's territorial boundaries.[20] The authority of a state to control activity within its borders is not specifically mentioned in the Constitution (other than a general reference in the Tenth Amendment).[21] However, the idea that a state inherently has the authority to adjudicate controversies arising within its borders is based on three considerations: first, "the historical fact that the states existed as independent political units before adoption of the Constitution; [second,] the legal circumstance that the states commissioned the delegates to the Constitutional Convention and ratified the Constitution itself; and [finally,] [an analogy of] the states to independent nations."[22]

As the United States expanded in territory, the economic reality was that people and products increasingly began to travel across state lines.

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see also Stephen B. Burbank, *Judicial Accountability to the Past, Present and Future: Precedent, Politics and Power*, 28 U. ARK. LITTLE ROCK L. REV. 19 (2005).

[17] FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., CIVIL PROCEDURE 71–72 (3d ed. 1985).

[18] Pennoyer v. Neff, 95 U.S. 714, 722 (1878). For an interesting discussion of the development of the territorial rules of personal jurisdiction, see LARRY L. TEPLEY & RALPH U. WHITTEN, CIVIL PROCEDURE 178–91 (3d ed. 2004).

[19] *Pennoyer*, 95 U.S. at 722.

[20] *Id.*

[21] *See* JAMES & HAZARD, *supra* note 17, at 72. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

[22] JAMES & HAZARD, *supra* note 17, at 72.

Questions invariably arose as to how far a state could exert this inherent power of adjudication; in particular, those activities concerning persons[23] and products outside the state. Accordingly, the Fourteenth Amendment Due Process Clause is the principle Constitutional limitation on a state court's exercise of jurisdiction.[24] The Supreme Court first injected this Constitutional limitation in *Pennoyer v. Neff*.[25] *Pennoyer* involved a collateral attack in federal court on a state court judgment.[26] Neff sought reversal of a state court default judgment on the theory that the state court lacked the power to adjudicate this dispute because the state court had no personal jurisdiction over him.[27]

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[23] It is well settled that corporations are persons within the meaning of the Fourteenth Amendment. Santa Clara County v. S. Pac. R.R. Co., 118 U.S. 394, 396 (1886); *see also* Covington & Lexington Tpk. Rd. Co. v. Sanford, 164 U.S. 578, 592 (1896).

[24] *Pennoyer*, 95 U.S. at 733.

[25] 95 U.S. 714. For an interesting discussion of the *Pennoyer* case and how the Fourteenth Amendment was first utilized, see Wendy Collins Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and* Pennoyer *Reconsidered*, 62 WASH. L. REV. 479, 499–500 (1987). Collins opined:

> Field's final and most startling step was to introduce the [D]ue [P]rocess [C]lause of the [F]ourteenth [A]mendment into his jurisdictional analysis. This step was unnecessary and surprising for several reasons. First, that clause had not been raised or argued by either party or by the court below. Second, Field had already concluded that the federal courts were not required to (and hence would not) enforce the prior Oregon judgment. Third, the due process discussion was dictum for the additional reason that the [F]ourteenth [A]mendment did not exist at the relevant time.

Id. at 499–500 (citations omitted).

[26] Perdue, *supra* note 25, at 480. This is called a "collateral attack" because normal procedure would be to appeal the state court's decision to a higher state court.

[27] *Pennoyer's* facts are well-known to first-year law students. This case involved a collateral attack on a state court judgment. *Pennoyer*, 95 U.S. at 721–22. Neff claimed a tract of land in Oregon under a "land patent" issued to him by the federal government in 1866, but apparently had not paid his attorney. *Id.* at 719. The attorney, Mitchell, sued Neff in Oregon state court for lack of payment and won a default judgment when Neff failed to appear. *Id.* at 719–20. He then attached Neff's land and it was forcibly sold pursuant to the judgment. *Id.* at 720. The state court claimed authority to resolve the

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The United States Supreme Court, after reviewing the federal court's reversal of the state court default judgment, held the state judgment void because Neff had not been physically served with process while present in Oregon, and the property had not been seized prior to judgment.[28] Because the state court lacked jurisdiction, no other state or federal court could give effect to the judgment.[29] As a result, the Court limited a state's ability to exercise jurisdiction over non-residents.[30] While not specifically relying on the Fourteenth Amendment,[31] the Court indicated that to allow a state to exercise jurisdiction outside its territorial boundaries would violate due process:[32]

> To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance.[33]

The Court equated personal jurisdiction—judicial power over the defendant—with territorial limits.[34] A person or piece of property found within a state's borders was constitutionally susceptible to personal jurisdiction in that state.[35] The Court held that the Constitution required in-

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dispute on the theory that the State had inherent authority over property within the state's territorial limits. *Id.*

Pennoyer bought the land in a sheriff's sale and then later, Neff sued Pennoyer in federal court in Oregon to recover possession of the land. *Id.* at 719. Neff attacked the state court judgment collaterally. *Id.* at 721–22. He asserted that in the original contest action the state court lacked jurisdiction and therefore, the federal court lacked the power (under the Article IV Full Faith and Credit Clause) to enforce the judgment. *Id.*

[27] *Id.* at 720–21.

[28] *Id.* at 727.

[29] *Id.* at 732.

[30] *Id.* at 733.

[31] *See* Perdue, *supra* note 25, at 499–500.

[32] *Pennoyer*, 95 U.S. at 733.

[33] *Id.* at 733.

[34] *Id.* at 722.

[35] *Id.*

state service of process or waiver by the defendant.[36] In addition, the Court intimated that an out-of-state defendant could be permissibly haled into court by first attaching any of that person's land in the forum state.[37] The permissibility of "pre-judgment attachment" was premised on the idea that land located within the state's borders was always within a state's jurisdiction, and further, that a land-owner was always deemed in control (i.e., to know the legal status) of his land.[38]

With the Fourteenth Amendment securely interposed into jurisdiction analysis,[39] in later cases the Court began to explore alternatives to a defendant's physical presence within the forum state. Service of process within the state assured jurisdiction, regardless of whether or not that presence was transient.[40] Post-*Pennoyer*, a state court had the authority to enter judgments against a person who was located within the state and served with process, against property located in the state,[41] or against a person who consented to jurisdiction.[42]

a. Legal Fictions: Presence Premised on "Consent"

Much of the law of personal jurisdiction after *Pennoyer* developed in cases in which corporations were defendants.[43] By the late nineteenth century, corporations were spreading their business throughout the country and dominating the economy.[44] Accordingly, "A corporation, like an individual, could consent to suit in a forum . . . [but] [i]n the absence of *actual* consent, the traditional rule was that corporations could not be sued outside [their] state [of incorporation]."[45] However, the reality of

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[36] *Id.* at 721–22.

[37] *Id.* at 723.

[38] *Id.* at 727.

[39] *But see* Perdue, *supra* note 25, at 499–500.

[40] *See* Burnham v. Superior Court, 495 U.S. 604 (1990) (*Burnham* revived the physical presence test as a valid basis for acquiring jurisdiction over non-resident defendants); DAN B. DOBBS, THE LAW OF REMEDIES 127–29 (2d ed. 1993).

[41] For a discussion of the affirmative principles of in rem jurisdiction after *Pennoyer*, see TEPLEY & WHITTEN, *supra* note 18, at 196–204.

[42] *Id.* at 196.

[43] *Id.* at 214.

[44] JAMES & HAZARD, *supra* note 17, at 69.

[45] TEPLEY & WHITTEN, *supra* note 18, at 214 (citation omitted).

corporations is that they conduct business and effect persons within a state even though they are never physically present in that state.[46]

As claims against out-of-state corporations multiplied, questions arose: would it violate the Due Process Clause to subject a large national or multi-state corporation to jurisdiction wherever it conducted its business? Courts turned to legal fictions, adopting the theories of presence and consent to actions against corporate and individual defendants, pushing the parameters of the traditional notions of personal jurisdiction almost to absurdity.[47]

States solved this problem in several ways. First, most states would not recognize the legal existence of an out-of-state corporation unless the corporation appointed an agent for service in the forum.[48] States still commonly provide that if no agent is appointed, then a state official shall be deemed the corporation's agent for service of process.[49] In addition, particularly with foreign corporations and those corporations which did not perform local business activities, "presence" was premised on the presence of employees, bank accounts, or service of process on employees.[50]

For individuals, courts began relying on the idea of "implied consent" for the exercise of personal jurisdiction when a person committed certain acts within that state. For example, in *Hess v. Pawlowski*,[51] the United States Supreme Court decided that a Massachusetts statute requiring a non-resident to answer for his conduct by impliedly consenting to service of process by virtue of the use of its highways was constitutional.[52] The statute required a non-resident to answer for his conduct in the state where the cause of action originated, and provided a convenient forum for the claimant to sue.[53] The Court relied on "[t]he state's power to regulate the use of its highways . . ." and found that this power extended not only to residents of the state but also to non-residents.[54] The Court's reliance on

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[46] *Id.* at 214–15.

[47] JAMES & HAZARD, *supra* note 17, at 70–71.

[48] *Id.* at 70; *see, e.g.*, Chatters v. Louisville & N.R. Co., 17 F.2d 305, 307 (E.D. La. 1926); Tex. & Pac. Ry. Co. v. Gay, 26 S.W. 599, 609 (Tex. 1894).

[49] JAMES & HAZARD, *supra* note 17, at 70.

[50] *Id.*

[51] 274 U.S. 352 (1927).

[52] *Id.* at 356–57.

[53] *Id.* at 356.

[54] *Id.*

such a dubious distinction as implied consent forecasted a significant change in the personal jurisdiction analysis.

b. The Rise of Minimum Contacts

All modern constitutional analysis of personal jurisdiction stems from *International Shoe Co. v. Washington*.[55] International Shoe was a Delaware Corporation, with its principle place of business in St. Louis, Missouri.[56] The corporation manufactured and sold shoes and other footwear.[57]

The litigation arose out of International Shoe's failure to contribute to Washington's unemployment compensation fund.[58] The company was notified of administrative proceedings initiated by service on its employees in Washington.[59] International Shoe maintained that since it was not physically present and conducted no business within the state, it violated the Constitution to hold them to judgment.[60]

In rejecting *International Shoe's* lack of physical presence argument, the Court created a new test for personal jurisdiction. To satisfy the demands of the Due Process Clause, the defendant must have such "contacts" with the forum state "as make it reasonable, in the context of our federal system of government, to require the corporation to defend the

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[55] 326 U.S. 310 (1945). For several interesting discussions on *International Shoe*, see Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From* Pennoyer *to* Burnham *and Back Again*, 24 U.C. DAVIS L. REV. 19 (1990); Philip B. Kurland, *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); Logan Everett Sawyer III, *Jurisdiction, Jurisprudence, and Legal Change: Sociological Jurisprudence and the Road to* International Shoe, 10 GEO. MASON L. REV. 59 (2001).

[56] *Int'l Shoe*, 326 U.S. at 313.

[57] *Id.* International Shoe structured its business to avoid having a jurisdictional "presence" in Washington State. International Shoe had no stores in Washington and no inventory other than shoe samples. *Id.* It employed salesmen who worked and resided in the state, but orders were transmitted to the home office in St. Louis, and all orders were sent "FOB." *Id.* at 313–14. FOB means "Free On Board," which allows a purchaser to take title at the point of sale. BLACK'S LAW DICTIONARY 671, 690 (8th ed. 2004).

[58] *Int'l Shoe*, 326 U.S. at 314–15.

[59] *Id.* at 312.

[60] *Id.* at 311–12.

particular suit which is brought there."[61] These "minimum contacts" would be satisfied when the "quality and nature of the activity" of the defendants within the forum was sufficient "in relation to the fair and orderly administration of the laws which it was the purpose of the [D]ue [P]rocess [C]lause to insure."[62] In contrast, the protections of due process would be violated if the individual or corporation had "no contacts, ties, or relations."[63] In applying the test, "[a]n 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business" was also required.[64]

Moreover, "*International Shoe* can be seen as a New Deal or Progressive decision" allowing Washington State to enforce its unemployment compensation statute.[65] In addition, the decision expanded the ability of a state to exercise jurisdiction over an out-of-state defendant, and also enhanced governmental power to deal with societal needs, enforce innovations across state lines, and arguably nationalize New Deal reforms.[66] The Court stressed that flexibility to states and federal governments in attempts to pass New Deal reforms and hold out-of-state companies to these requirements would be valued over formality with regard to jurisdictional issues.[67]

2. Modern Times: Defining the Outer Limits of Minimum Contacts

After establishing the minimum contacts analysis as its touchstone, the Court spent a good amount of time refining the parameters of that test in its subsequent cases.[68] "Minimum contacts with a forum state may arise

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[61] *Id.* at 317.

[62] *Id.* at 319.

[63] *Id.*

[64] *Id.* at 317 (quoting Hutchinson v. Chase & Gilbert, 45 F.2d 139, 141 (2d Cir. 1930)).

[65] JAMES & HAZARD, *supra* note 17, at 73.

[66] *Id.*

[67] *Id.*

[68] *See* Hanson v. Denckla, 357 U.S. 235 (1958). *Hanson* involved a trust created by a Pennsylvania resident, Dora Donner, with a Delaware Trust Company appointed as trustee. *Id.* at 238. Mrs. Donner moved to Florida and continued to receive income from the trust until her death. *Id.* at 239. After her death, two of her daughters, whose children were not provided for in the trust, filed suit in Florida State Court challenging the disposition of the trust. *Id.* at 240. The Florida court exercised jurisdiction over the Delaware trustee and invalidated the trust. *Id.* at 242–43. When the daughters sought enforcement of the

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incident to a federal court's 'general' or 'specific' jurisdiction over a non-resident defendant."[69] General jurisdiction is personal jurisdiction based on a defendant's contacts with the forum that are unrelated to the controversy.[70] Conversely, "specific jurisdiction" is personal jurisdiction based on contacts with the forum that are related to the particular controversy.[71] Modern jurisprudence requires that in order to exercise specific personal jurisdiction, the court must examine the relationship among the defendant, the forum, and the litigation to determine whether the maintenance of the suit would offend traditional notions of fair play and substantial justice. [72]

The Court repeatedly noted positive reasons for extending personal jurisdiction over non-residents: (1) necessity—increased flow of commerce between states, and (2) burden—progress in communications and transportation making defense of a lawsuit in a foreign jurisdiction less burdensome.[73] But even with the lessening burden and increased necessity, the Court noted that territorial limitations mean "something"—"a defendant may not be called upon to [answer a complaint] unless he has had 'minimum contacts' with the state."[74]

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judgment in Delaware, the court in Delaware ruled that the judgment was not entitled to full faith and credit because Florida had neither in rem jurisdiction over the trust assets, nor in personam jurisdiction over the trust company. *Id.* at 254–55.

The Supreme Court agreed with the Delaware Court, emphasizing that although the reach of personal jurisdiction could cross state lines, there were still important limitations to a state exercising jurisdiction over a non-resident defendant. *Id.* at 255–56.

[69] Bullion v. Gillespie, 895 F.2d 213, 216 (5th Cir. 1990).

[70] *See* Helicoptieros Nacionales de Colombia v. Hall, 466 U.S. 408, 414 (1984); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 438 (1952).

[71] *Helicoptieros*, 466 U.S. at 414 n.8; *see also Bullion*, 895 F.2d at 216.

[72] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980).

[73] McGee v. Int'l Life Ins. Co., 355 U.S. 220, 222–35 (1957).

[74] Hanson v. Denckla, 235 U.S. 235, 251 (1958). In contrasting the facts of *Hanson* with its prior decision in *McGee*, the Court noted that the transaction at issue, the creation of the trust, did not occur within Florida. *Id.*; *McGee*, 355 U.S. 220. The Court emphasized that "[t]he unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State." *Hanson*, 235 U.S. at 253.

In *McGee*, the non-resident corporate defendant solicited a reinsurance agreement with a resident of California. *See McGee*, 355 U.S. at 221. The offer was accepted in that

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Repeatedly in these early cases, the Court emphasized that it would focus on the "nature and quality"[75] of the defendant's contact with the forum, finding it 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."[76] Conversely, the Court continued to remain steadfast in its adherence to the power of physical presence within the forum.[77] This remains true even as the Court made personal jurisdiction, not only a question of state sovereignty, but also of individual liberty.[78] The Court began to emphasize an individual liberty rationale rather than state sovereignty for limits on personal jurisdiction.[79]

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state, and the insurance premiums were mailed from there until the insured's death. *Id*. at 221–22. The Texas insurance company claimed that jurisdiction would not lie in California in a claim for life insurance benefits. *See id.* at 221. The Supreme Court said that the act of soliciting and the agreement itself provided a sufficient basis for exercise of personal jurisdiction over the Texas corporation. *See id.* at 223.

[75] *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).

[76] *Hanson*, 357 U.S. at 253 (citing *Int'l Shoe Co.*, 326 U.S. at 319 (1945)). The *Hanson* decision also contrasted with the Court's decision in *Perkins v. Benquet Consolidated Mining Co.*, 342 U.S. 437 (1952), where the Court held that an Ohio state court could properly exercise jurisdiction over a Philippine corporation stockholder's claim even though the claim did not arise from anything the defendant did in Ohio. *Id.* at 438. The corporation had temporarily relocated its president to Ohio, after ceasing operations during the Japanese military occupation of the Philippine Islands. *Id.* at 447. The Court analyzed the nature and quality of the President's contacts with Ohio—drawing salary checks, maintenance of a bank account, holding director's meetings—as "continuous and systematic" and "substantial." *Id.* at 448.

[77] *See* Burnham v. Superior Court, 495 U.S. 604 (1990); *see also* TEPLEY & WHITTEN, *supra* note 18, at 226–31 (discussing *Burnham* and the Court's transient presence jurisdiction jurisprudence).

[78] Ins. Corp. of Ir., Ltd. v. Campagnie de Bauxites de Guinee, 456 U.S. 694, 702 (1982).

[79] The Court wrote:

> The restriction on state sovereign power described in *World-Wide Volkswagen Corp.*, however, must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns. Furthermore, if the federalism concept operated as an independent

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What unifies the Court's jurisprudence in this era is the willingness to explore not only the nature and quality of the defendant's activities in the forum, but also the purpose and intent of the defendant in seeking contact with the forum. This focus on "intent" continues into the Court's personal jurisdiction jurisprudence through the mid-twentieth century. No case demonstrates this better than *World-Wide Volkswagen Corp. v. Woodson*.[80]

3. World-Wide Volkswagen *and the Focus on Unilateral Acts of a Third Party*

World-Wide Volkswagen tested the Court's pronouncement in *Hanson* concerning unilateral actions by third parties and traveling commodities.[81] At issue was the inherent transitory nature of an automobile and a plaintiff's ability to choose his forum contrasted with smaller local companies' needs for predictability and cost control with regard to product liability.[82]

In its decision overturning the Oklahoma court's exercise of personal jurisdiction, the Court again explored the nature and quality of the defendants' contacts with the forum state.[83] But here, unlike *Hanson*, the

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> restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement: Individual actions cannot change the powers of sovereignty, although the individual can subject himself to powers from which he may otherwise be protected.

Id. at 703 n.10.

[80] 444 U.S. 286 (1980). In *World-Wide Volkswagen*, the Plaintiffs were involved in a car accident in Oklahoma. *Id.* at 288. Plaintiffs sued on a theory of design defect naming the national manufacturer (Audi) and importer (Volkswagen), as well as the car's regional distributor (World-Wide Volkswagen Corp.) and its retail dealer (Seaway). *Id.* Seaway and World-Wide Volkswagen Corp. attacked Oklahoma's exercise of jurisdiction arguing that extension of jurisdiction to them would violate the Due Process Clause of the Fourteenth Amendment. *Id.*

[81] *Id.* at 298–99.

[82] *See* Borchers, *supra* note 55, at 66–68 (discussing *World-Wide Volkswagen*).

[83] Both World-Wide Volkswagen and Seaway were incorporated in New York and had their primary places of business in New York. *World-Wide Volkswagen*, 444 U.S. at 288–89. Plaintiff could adduce no evidence that World-Wide Volkswagen or Seaway did any business in Oklahoma—they did not ship, nor sell, any products in Oklahoma, had no agent to receive process there, or advertise in any media circulated in Oklahoma. *Id.* at 289. (*continued*)

Court had to deal with an inherently mobile chattel, noting that this presented a unique problem when it came to analyzing "intent" to have contact with the forum.[84] The Court focused on "foreseeability"—would it be reasonable from the facts presented to infer that a defendant could predict that plaintiff's car would cause injury in the forum state; or whether it was only through the unpredictable acts of a third-party that brought the product to a distant forum.

The Court, in reviewing its prior jurisprudence noted that the dual purpose of the minimum contacts test was to "protect[] the defendant against the burdens of litigating in a distant or inconvenient forum," and "to ensure that the States . . . do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system."[85] In addition to requiring sufficient minimum contacts, the Court expanded on its pronouncement in *International Shoe* that any exercise of jurisdiction must be measured against "[a]n 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principle place of business."[86]

This "reasonableness" inquiry required investigation into whether the "maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[87] The factors relevant to the reasonableness or fairness inquiry were:

> [1] the burden on the defendant . . . ; [2] forum state's interest in adjudicating the dispute; [3] the plaintiff's interest in obtaining convenient and effective relief, at least when that interest is not adequately protected by the plaintiff's power to choose the forum; [4] the interstate judicial system's interest in obtaining the most efficient resolution of controversies; [5] and the shared interest of

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Further, there was no evidence that any vehicle sold by World-Wide Volkswagen or Seaway ever made its way to Oklahoma. *Id*.

[84] *Id.* at 296 n.11.

[85] *Id.* at 292.

[86] Int'l Shoe Co. v. Washington, 326 U.S. 310, 317 (1945) (quoting Hutchinson v. Chase & Gilbert Inc., 45 F.2d 139, 141 (2d Cir. 1930)).

[87] *World-Wide Volkswagen*, 444 U.S. at 292 (quoting *Int'l Shoe*, 326 U.S at 316).

> the several states in furthering fundamental substantive social policies.[88]

The most interesting aspect of the Court's analysis concerns the divide in the role "foreseeability" should play in the court's minimum contacts analysis.[89] Here is where we begin to see a central divide emerge within the Court. The majority said "'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause,"[90]—particularly where, as in this case, it was the actions of a third

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[88] *World-Wide Volkswagen*, 444 U.S at 292 (citing Kulko v. Superior Court, 436 U.S. 84, 92, 98 (1978); Shaffer v. Heitner, 433 U.S. 186, 211 n.37 (1977); McGee, v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957)). I refer to these factors as the "fundamental fairness" factors throughout the article. In analyzing the facts specific to *World-Wide Volkswagen*, the Court, relying on these factors, concluded that World-Wide Volkswagen and Seaway did not have sufficient contacts when weighed against the "fundamental fairness" factors. *Id.* at 299. The majority focused on the isolated nature of this accident, "the fortuitous circumstances that a single Audi automobile, sold in New York to New York residents, happened to suffer an accident while passing through Oklahoma." *Id.* at 295.

[89] Another important aspect of *World-Wide Volkswagen* lies in the Court's discussion regarding the two other defendants in the lawsuit, the international manufacturer and the national importer of the defective car. Asking whether these defendants had purposely availed themselves of the privilege of conducting activities within Oklahoma, i.e., whether they had directly or indirectly served the Oklahoma market, the Court responded in the affirmative. *Id.* at 297–98. The Court found that the international manufacturer and national importer had purposefully served the Oklahoma market because they served the national market and distributed their automobiles throughout the United States. *Id.* Unlike the local retailer and regional distributor, whose product reached the distant state of Oklahoma only because a consumer took it there, the product of the international manufacturer and national importer reached the distant state through established chains of distribution. *Id.* at 297. As the Court explained, "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." *Id.* at 297–98.

The international manufacturer, Audi, never challenged personal jurisdiction, and the national importer, Volkswagen of America, dropped its personal jurisdiction objection before the appeal to the Supreme Court. *See id.* at 288 n.3. Accordingly, the Supreme Court's discussion with respect to these two defendants is dictum.

[90] *Id.* at 295. The majority went on to paint worst-case scenarios, concluding that if foreseeability were the only criteria, then "[e]very seller of chattels would in effect appoint the chattel his agent for service of process. His amenability to suit would travel with the

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party that carried the product to the distant forum state.[91] Justice Brennan opined that foreseeability that a product placed into the stream of commerce will end up in the forum state is sufficient to establish minimum contacts.[92] Moreover, "[B]y 'deliver[ing] its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State,'" a defendant purposely avails himself to that jurisdiction.[93]

4. Increased Reliance on Defendant's "Purposeful Availment"

In a rare showing of unity the Court showed a willingness to extend minimum contacts and the foreseeability analysis when it came to contractual relationships.[94] *Burger King* is significant because it seems to

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chattel." *Id.* at 296. However, Brennan's dissent stated that foreseeability should be enough to demonstrate purposeful intention to conduct business within the forum, and therefore sufficient to establish minimum contacts. *Id*. at 306 (Brennan, J., dissenting).

[91] *See id.* at 288 (majority opinion).

[92] *Id*. at 306–07 (Brennan, J., dissenting).

[93] *Id.* at 306 (quoting *id*. at 297–98 (majority opinion)). What we will see is that Justice Brennan's pronouncement here is not so alarming, given the "fundamental fairness" analysis he will espouse in *Asahi*. While establishing minimum contacts may be simpler given a pure stream of commerce analysis, Brennan will demonstrate that other factors may trump these contacts. While rejecting Brennan's stream of commerce analysis, the majority maintained that foreseeability was still a relevant factor in determining the Constitutionality of a specific exercise of jurisdiction against a non-resident defendant. *Id.* at 297 (majority opinion). However, the majority characterized the proper analysis as not "the mere likelihood that a product will find its way in to 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." *Id.* (citing *Kulko*, 436 U.S. at 97–98; *Shaffer*, 433 U.S. at 216.)

[94] *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); John R. Leathers, *Supreme Court Voting Patterns Related to Jurisdictional Issues*, 62 WASH. L. REV. 631, 643 (1987) (discussing the significance of the Court's voting patterns on key personal jurisdiction cases and *Burger King's* impact). *Burger King* involved a franchise relationship between Rudzewicz and the parent company, Burger King Corporation. *Burger King*, 471 U.S. at 467. Rudzewicz, with his partner, entered into a contractual relationship with Burger King Corporation, based in Miami, Florida, which obligated him personally to payments exceeding one million dollars over a twenty-year period. *Id.* Burger King commenced suit after Rudzewicz refused to stop using trademarks and service marks after the termination of their franchise. *Id.* at 468–69. Rudzewicz filed a special

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relax the standard laid out in *World-Wide Volkswagen* and because it signals the Court's shift in non-reliance of sovereign power as a reason for jurisdiction.[95] The Court focused on the defendant's acitivity purposely directed at the forum.[96] Most interesting is the majority's shift of burden to the defendant to refute the presumption of personal jurisdiction once "purposeful availment" is demonstrated by the plaintiff.[97] Analogizing the business relationship with Burger King to the "deliberate" and "purposeful" conduct in its intentional tort (defamation, libel and slander) cases,[98] the Court focused on the creation of "continuing obligations"

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appearance contesting jurisdiction, contending that Burger King's claim did not "arise" within the district in Florida. *Id.* at 469. The Supreme Court affirmed the Florida court's decisions allowing jurisdiction, focusing on the defendant's "purposeful" contact with Florida. *Id.* at 469–71.

[95] Relying on the individual liberty interest found in the Due Process Clause, the Court focused on the fairness of the exercise of jurisdiction based on the foreseeability as evidenced in the contractual relationship entered into by the parties. *Id.* at 477–78.

[96] *Id.* at 477.

[97] *See id.* at 475; Leathers, *supra* note 94, at 642.

[98] The Court extended its foreseeability analysis to international torts, libel and slander. *See* Calder v. Jones, 465 U.S. 783, 788–90 (1984). In *Calder*, Shirley Jones brought suit in California State Court against the National Enquirer, Inc., its local distributing company, and Mr. Calder and Mr. South. *Id.* at 784–85. The Enquirer and its distributing company answered the complaint and did not contest jurisdiction. *Id.* at 785. The central issue in this case involved Calder and South, employees of the national magazine. *Id.* at 784–86. Both were Florida residents as the time of the printing, and the Court focused on the quality and nature of each defendant's contact with California—travel, phone calls, testimony at an unrelated trial, and reliance on California sources among others. *Id.* at 785–86. The Court went further and discussed the foreseeability of the effects of the defendants Florida contact in California:

> The allegedly libelous story concerned the California activities of a California resident. It impugned the professionalism of an entertainer whose television career was centered in California. The article was drawn from California sources, and the brunt of the harm, in terms both of [Jones'] emotional distress and the injury to her professional reputation, was suffered in California. In sum, California is the focal point both of the story and of the harm suffered.

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between the defendant and the forum was deemed sufficient to allow jurisdiction.[99] Again, the Court focused on the "purposeful direction" of the activity by the defendant.[100] The defendant here derived benefits from his relationship created in the forum, and therefore could not assert that it was not foreseeable or unfair to have to answer for issues relating to this contractual relationship.[101]

Id. at 788–89 (footnote omitted). Knowing the brunt of the effects or injury of the article would be felt by Jones in California provided sufficient minimum contacts to satisfy Constitutional scrutiny. *Id.* at 788–90.

Another example of the Court's willingness to expand personal jurisdiction in defamation actions appears in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), decided on the same day as *Calder*. A New York resident, alleging defamation, brought suit in Ohio, the magazine's corporate home. *Id.* at 772. When the plaintiff discovered the state's statute of limitations had run, she filed in New Hampshire, which had a longer statute of limitations. *Id.* at 773. The Court held that Hustler's sale of thousands of copies of magazines each month in New Hampshire constituted sufficient purposeful contact with the forum to withstand constitutional scrutiny. *Id.* at 774.

[99] *Burger King*, 471 U.S. at 475–76. In *Burger King*, it was the purposeful activities of the parties and their relative sophistication which led the Court to its conclusion that Rudzewicz had "availed himself of the privilege of conducting business there, and because his activities are shielded by the 'benefits and protections' of the forum's laws it is presumptively not unreasonable to require [Rudzewicz] to submit to the burdens of litigation in that forum as well." *Id.* at 476. It was not important to the court that the business relationship was conducted predominately through mail and telephone, without the physical presence of the defendant in the forum. *Id.*

[100] *Id.* Applying this principle, the Court has held that the Due Process Clause forbids the exercise of personal jurisdiction: (1) over an out-of-state automobile distributor whose only tie to the forum resulted from a customer's decision to drive there, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 298–99 (1980); (2) over a divorced husband sued for child-support payments whose primary affiliation with the forum was created by his former spouse's decision to settle there, Kulko v. Superior Court, 436 U.S. 84, 94 (1978); and (3) over a trustee whose only connection with the forum resulted from the settlor's decision to exercise her power of appointment there, Hanson v. Denckla, 357 U.S. 235, 252–54 (1958). In such instances, the defendant has had no "clear notice that it is subject to suit" in the forum and thus no opportunity to "alleviate the risk of burdensome litigation" there. *World-Wide Volkswagen*, 444 U.S. at 297.

[101] *Burger King*, 471 U.S at 479–80. So long as it creates a "substantial connection" with the forum, even a single act can support jurisdiction. McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957). The Court has noted, however, that "some single or occasional acts"

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5. The State of Confusion: Asahi

The Supreme Court's most recent pronouncement on the issue of the exercise of personal jurisdiction over non-residents came in the form of a highly divided plurality opinion, *Asahi Metal Industry Co. v. Superior Court of California, Solano County*.[102] This case involved a motorcycle accident in Solano, California in 1978.[103] Plaintiff Gary Furcher filed a product liability action in state court against Cheng Shin Rubber Industrial Co., Ltd. ("Cheng Shin"), a Taiwanese manufacturer of tire tubes.[104] Cheng Shin filed a third-party impleader against Asahi Metal Industry Co., Ltd. ("Asahi"), "the manufacturer of the tube's valve assembly."[105] The "claims against Cheng Shin and the other defendants were eventually settled," and the only issue remaining in California Supreme Court was the indemnificaion action against Asahi.[106]

Asahi asserted that jurisdiction was improper in California because it did not have sufficient contacts with the forum state.[107] In deciding whether the exercise of jurisdiction would violate the Due-Process-Clause protections, the Court focused again on the 'nature and quality' of Asahi's contacts with the forum.[108] The Court divided on whether Asahi's contacts with California were sufficient and on the issue of "minimum contacts" with regard to a product that has found its way to a distant forum state.[109]

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related to the forum may not be sufficient to establish jurisdiction if "their nature and quality and the circumstances of their commission" create only an "attenuated" connection with the forum state. Int'l Shoe Co. v. Washington, 326 U.S. 310, 318 (1945). This distinction derives from the belief that, with respect to this category of "isolated" acts, the reasonable foreseeability of litigation in the forum is substantially diminished. *See World-Wide Volkswagen*, 444 U.S. at 297.

[102] 480 U.S. 102 (1987). For a thorough discussion of *Asahi*, see Earl M. Maltz, *Unraveling the Conundrum of the Law of Personal Jurisdiction: A Comment on* Asahi Metal Industry Co. v. Superior Court of California, 1987 DUKE L.J. 669 (1987).

[103] *Asahi*, 480 U.S. at 105.

[104] *Id.* at 105–06.

[105] *Id.* at 106.

[106] *Id.*

[107] *Id.*

[108] *Id.* at 108–09.

[109] *Id.* at 103–04. The Court focused on the international nature of the business transaction. *Id.* at 106–07. Asahi, a Japanese corporation manufactured its components in Japan. *Id.* at 106. Sales between it and Cheng Shin took place in Taiwan. *Id.* The case

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From *World-Wide Volkswagen*, it was clear that the Court would focus on those activities and results purposefully undertaken with the forum in mind and not on those activities of a "unilateral" nature.[110] In *Asahi*, the primary issue was whether the Court would treat a distributor's "unilateral" action the same as it had for a consumer's "unilateral" action.[111]

In his concurring opinion Justice Brennan did not recognize this distinction; instead, he focused on Asahi's "continuous activities" versus *World-Wide Volkswagen's* "one, isolated occurrence."[112] Justice Brennan, joined by Justices White, Marshall, and Blackmun, advocated a "mere foreseeability" test, opining that putting a product in the "stream of commerce" with the knowledge that "the final product is being marketed in the forum state," should be sufficient to sustain jurisdiction in the forum where that product causes injury.[113]

Brennan stated:

> The stream of commerce refers not to unpredictable currents or eddies, but to the 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 possiblity of a lawsuit there cannot come as a surprise. Nor will the litigation present a burden for which there is no corresponding benefit. A defendant who has placed goods in the stream of commerce 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. These benefits accrue regardless of whether that participant directly conducts business in the forum State, or engages additional conduct directed toward that State. Accordingly . . . jurisdiction

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states that the record didn't include a contract between Cheng Shin and Asahi. *Id.* at 107. The shipment of goods took place between Japan and Taiwan. *Id.* Further, there was scant evidence that higher management was aware that its components would be sold in the United States. *Id.*

[110] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297–98 (1980).

[111] *Asahi*, 480 U.S. at 109–12 (plurality opinion).

[112] *Id.* at 116–21 (Brennan, J., concurring).

[113] *Id.* at 117.

> premised on the placement of a product into the stream of commerce is consistent with the Due Process Clause, and . . . a showing of additional conduct [is not required].[114]

Justice O'Connor, joined by Rehnquist, Powell, and Scalia, proposed a different view of stream of commerce.[115] Justice O'Connor's "foreseeability plus" test would require additional purposeful actions directed at the forum besides simply putting a product in the stream of commerce with knowledge that the product would be sold in the forum state.[116] These additional contacts must be sufficient to "indicate an intent or purpose to serve the market in the forum State."[117] The types of activities that O'Connor found relevant to the inquiry included: "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."[118] However, mere "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."[119]

Dissatisfied with both Justice Brennan and O'Connor's "bright line" approaches, Justice Stevens presented a third, compromise approach to the stream of commerce analysis.[120] He believed that the most relevant factors for consideration are: "the volume, value, and hazardous characteristic of the components [placed in the stream of commerce]."[121] Justice Stevens observed, even while describing his view of minimum contacts, that the Court's disagreement over the minimum contacts analysis was superfluous since the reversal in this case was based on concerns about "fair play and substantial justice." [122] A majority of the Court agreed that regardless of

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[114] *Id.*
[115] *Id.* at 112 (plurality opinion).
[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.* at 121–22 (Stevens, J. concurring).
[121] *Id.* at 122.
[122] *Id.* at 121.

whether there were minimum contacts in this case, the fundamental fairness factors dictated that jurisdiction should not lie in California.[123]

B. Evidence of Deep Divides Among the Circuits

The federal appellate courts, as well as state courts, are in complete disagreement on how to apply the minimum contacts test articulated in *International Shoe* in *Asahi*-type situations where a product finds its way to a distant forum state.[124] In addition to the lack of consensus on what constitutes minimum contacts, the circuits have also split on which party bears the ultimate burden of proving that the exercise of jurisdiction comports with due process protections.[125] Justice Brennan expressly states in *Burger King* that once a plaintiff establishes purposeful minimum contacts with the forum by the defendant, then the burden shifts to the defendant to show "compelling" reasons why jurisdiction should not lie in that forum.[126] Further, complicating the matter, is the split between the federal circuit courts' choice of minimum contacts test, with the state courts contained within that circuit.[127] This article uses the Court of Appeals for the Fifth Circuit as an example of a circuit that uses the Brennan "mere foreseeability" minimum contacts test, and that shifts the ulitmate burden to demonstrate unfairness to the defendant, and splits within the states within its circuit on the appropriate minimum contacts test.[128]

1. Split on the Minimum Contacts Test Used in the Federal Circuits and the States

With no guidance from the United States Supreme Court since its split decision in *Asahi*, the federal circuit courts and state courts have split on

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[123] *Id.*

[124] Even before *Asahi*, the lower courts, in interpreting *World-Wide Volkswagen*, had developed the two approaches promoted by Justice O'Connor and Justice Brennan respectively. *See id.* at 110–12 (plurality opinion) (cataloging cases); *see also* Ruston Gas Turbines Inc. v. Donaldson Co., 9 F.3d 415, 420 (5th Cir. 1993) ("[T]he Fifth Circuit has continued to follow the original 'stream of commerce' theory established in the majority opinion of *World-Wide Volkswagen* . . . .").

[125] *See infra* text accompanying notes 148–55.

[126] Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985).

[127] *See* chart *infra* note 229, app A.

[128] *See infra* Section II.C.

which "effects" test is applicable. The First, Fourth, Sixth, Ninth, and Eleventh Circuits employ the O'Connor "foreseeability plus" test.[129] The Fifth, Seventh, and Eighth Circuits employ the Brennan "mere foreseeability" test.[130] Other federal circuit courts have declined to decide the issue and instead use both tests when deciding whether a defendant has sufficient contacts with a state to justify jurisdiction.[131] State courts are also significantly divided on the issue.[132] One federal district court has advocated Justice Stevens's approach to determining minimum contacts.[133]

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[129] *See, e.g.*, Bridgeport Music, Inc. v. Still N The Water Publ'g, 327 F.3d 472, 479–80 (6th Cir. 2003) (following Justice O'Connor's stream of commerce plus test); Lesnick v. Hollingsworth & Vose Co., 35 F.3d 939, 945–46 (4th Cir. 1994) (same); Boit v. Gar-Tec Prods., Inc., 967 F.2d 671, 683 (1st Cir. 1992) (same); Madara v. Hall, 916 F.2d 1510, 1519 (11th Cir. 1990) (same).

[130] *See, e.g.*, Barone v. Rich Bros. Interstate Display Fireworks Co., 25 F.3d 610, 613–15 (8th Cir. 1994) (following Justice Brennan's stream of commerce test); Ruston Gas Turbines, Inc. v. Donaldson Co., 9 F.3d 415, 420 (5th Cir. 1993) (same); Dehmlow v. Austin Fireworks, 963 F.2d 941, 947 (7th Cir. 1992) (same).

[131] *See, e.g.*, Kernan v. Kurz-Hastings, Inc., 175 F.3d 236, 244 (2d Cir. 1999); Akro Corp. v. Luker, 45 F.3d 1541, 1545 (Fed. Cir. 1995) (following *Int'l Shoe* purposeful availment test for patent infringement cases).

[132] *Compare* Modern Trailer Sales, Inc. v. Traweek, 561 P.2d 1192, 1196 (Alaska 1977) (Preceding *Asahi*, "It is sufficient that, as here, the defendant purposefully sets his product or his designs into the stream of commerce, knowing or having reason to know that they will reach the forum state and that they create a potential risk of injury." (quoting Jones Enterprises, Inc. v. Atlas Serv. Corp., 442 F.2d 1136 (9th Cir. 1971))); Cont'l Research Corp. v. Reeves, 419 S.E.2d 48, 53 (Ga. Ct. App. 1992) (following Justice Brennan's stream of commerce test); Kailieha v. Hayes, 536 P.2d 568, 572 (Haw. 1975) (Preceding *Asahi*, "injuries were caused by products introduced into the stream of commerce by defendants whose primary interest was to benefit economically from their use in other states. Correspondingly, the forum states had an overriding interest in the protection of their citizens from injuries resulting from the use of these products."); Svendsen v. Quester Corp., 304 N.W. 2d 428, 431 (Iowa 1981) (precedes *Asahi* and follows Brennan's approach); Juelich v. Yamazaki Mazak Optonics Corp., 682 N.W.2d 565, 571–72 (Minn. 2004) (same); Pohlmann v. Bil-Jax, Inc. 954 S.W.2d 371, 373 (Mo. Ct. App. 1997) ("The placement of a product into the stream of commerce without more is not an action of defendant purposefully directed toward the forum state."); Cox v. Hozelock, Ltd., 411 S.E.2d 640, 644 (N.C. Ct. App. 1992) (same); Winston Idus., Inc. v. Dist. Court of Seventh Judicial Dist., 560 P.2d 572, 574 (Okla. 1977) ("We conclude that under the Oklahoma long-arm statutes Oklahoma may acquire jurisdiction over a foreign manufacturer of a

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product which it reasonably may expect to enter interstate commerce, which does enter interstate commerce, and because of the alleged defect causes damage to the plaintiff in Oklahoma."); State *ex rel.* Circus Circus Reno, Inc. v. Pope, 854 P.2d 461, 159 (Or. 1993) ("Thus, [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 and those products subsequently injure forum customers."); Grange Ins. Ass'n v. State, 757 P.2d 933, 938 (Wash. 1988) ("This court has decided that purposeful minimum contacts are established when an out-of-state manufacturer places its products in the stream of interstate commerce, because under those circumstances it is fair to charge the manufacturer with knowledge that its conduct might have consequences in another state."); Smith v. York Food Mach. Co., 504 P.2d 782, 785–86 (Wash. 1972) (and cases cited therein)); Hill v. Showa Denko, K.K., 425 S.E.2d 609, 616 (W. Va. 1992) (same); Kopke v. A. Hartrodt S.R.L., 629 N.W.2d 662, 674 (Wis. 2001) (same); *with* New Organics Co. v. Bloomfield Bakers, Inc., No. CV020815943, 2007 WL 1675741, at *2 (Conn. Super. Ct. May 23, 2007) ("However, the holding in *Asahi* . . . is controlling and states: '[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 . . . [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.'"); State v. Quill Corp., 470 N.W.2d 203, 212 (N.D. 1991) ("Thus '[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' and those products subsequently injure forum consumers. . . . "), *rev'd on other grounds*, 504 U.S. 298 (1992); *and Ex parte* Alloy Wheels Int'l Ltd., 882 So. 2d 819, 827 (Ala. 2003) (following Justice O'Connor's stream of commerce plus test); Rollin v. William V. Frankel & Co., 996 P.2d 1254, 1257–58 (Ariz. Ct. App. 2000) (same); Kilcrease v. Butler, 739 S.W.2d 139 (Ark. 1987) (requiring more than mere foreseeability); Roberts v. Bendos, 102 Ark. App. 358, 358–59 (Ct. App. 2008) (summary of Arkansas law concerning minimum contacts for personal jurisdiction); Carretti v. Italpast, 125 Cal. Rptr. 2d 126, 135 (Ct. App. 2002) (same); Union Pac. R.R. Co. v. Equitas Ltd., 987 P.2d 954, 957 (Colo. Ct. App. 1999) (same); Holder v. Haarmann & Reimer Corp., 779 A.2d 264, 273 (D.C. 2001) (same); Boone v. Oy Partek Ab, 724 A.2d 1150, 1159 (Del. Super. Ct. 1997 ("Instead, there must be some act on the part of the defendant 'purposefully directed to the forum State' which indicates an 'intent or purpose to serve the market in the forum State' . . . some evidence of 'additional conduct' on the part of the defendant is required."); Kin Yong Lung Indus. Co. v. Temple, 816 So. 2d 663, 666 (Fla. Dist. Ct. App. 2002) (same); St. Paul Surplus Lines Ins. Co. v. Int'l Playtex, Inc., 777 P.2d 1259, 1266 (Kan. 1989) ("The United States Supreme Court found that the mere act of placing a product into the stream of commerce was not sufficient to support a

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finding that *Asahi* had purposefully directed its actions toward the State of California."); Halderman v. Sanderson Forklifts Co., 818 S.W.2d 270, 274 (Ky. Ct. App. 1991) (same); Witbeck v. Bill Cody's Ranch Inn, 411 N.W.2d 439, 448 (Mich. 1987) (same); Sorrells v. R & R Custom Coach Works, Inc., 636 So. 2d 668, 674 (Miss. 1994) (same); Wagner v. Unicord Corp., 526 N.W.2d 74, 78–79 (Neb. 1995) ("The placement of a product into the stream of commerce, without more, generally is not proof of purposefully directed conduct toward the forum state."); Nicastro v. McIntyre Machinery Am., Ltd., 945 A.2d 92, 102–03 (N.J. Super. Ct. App. Div. 2008) ("Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, 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."); Schultz v. Hyman, 607 N.Y.S.2d 824, 824 (N.Y. App. Div. 1994) (same); Sherry v. Geissler U. Pehr GmbH, 651 N.E.2d 1383, 1388 (Ohio Ct. App. 1995) (same); Graham v. Mach. Distrib., Inc., 599 A.2d 984, 987 (Pa. Super. Ct. 1991) (same); Frankenfeld v. Crompton Corp., 697 N.W.2d 378, 384–85 (S.D. 2005) (following O'Connor's "stream of commerce plus" test); Dall v. Kaylor, 658 A.2d 78, 80 (Vt. 1995) (same); Sutherland v. Robby Thruston Carpentry, Inc., 68 Va. Cir. 43 (Va. Cir. Ct. 2005) (same); Arguello v. Industrial Indus. Woodworking Mach. Co., 838 P.2d 1120, 1124 (Utah 1992) ("[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 [or she] should reasonably anticipate being haled into court there."); Olmstead v. American Granby Co., 565 P.2d 108, 115 (Wyo. 1977) ("This kind of a distribution plan should give rise to a knowledge upon the part of these appellees that their products could reasonably be expected to reach Wyoming and be utilized here, especially when wholesalers in this state or region are a part of the distribution process. . . . The fact that the orders for appellees' products are unsolicited does not serve to diminish the nature and focus of appellees' activities."). Other states apply different "minimum contacts" analysis on a case-by-case basis, have not expressly adopted a test, or use a hybrid approach. *See, e.g.*, Doggett v. Elecs. Corp. of Am., 454 P.2d 63, 68–69 (Idaho 1969) (pre-*Asahi* but embodying factors articulated by Justice Stevens, "In placing their goods in the flow of interstate commerce, the respondents must have had the reasonable expectation that such items would be shipped indiscriminately throughout the United States. If dangerously defective goods are placed in the interstate flow of commerce, those whose negligence created the defect should be prepared to defend themselves wherever injury should occur."); Hollingsworth & Vose Co. v. Connor, 764 A.2d 318, 330–31 (Md. Ct. Spec. App. 2000); Bunch v. Lancair Intern., Inc., No. DV-05-674, 2006 WL 2423267, at *7 (Mont. Dist. 2006) (This case is factually similar to *World-Wide Volkswagen* in that a plane crashed due to a defect in Montana and all parties were residents of Oregon. The court found no jurisdiction for largely the same reasons as in *World-Wide Volkswagen*, but the court does not

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The Brennan "mere foreseeability" and the O'Connor "forseeability plus" approaches have their critics and supporters. Brennan's "mere foreseeablity" approach is arguably too expansive. Its application would confirm the fears articulated in *World-Wide Volkswagen*, that unilateral acts of a third-party or one-time trips would allow jurisdiction in a foreign state.[134] This approach could potentially burden businesses, particularly smaller manufacturers and retailers, who may be unable to anticipate and

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specifically endorse Brennan or O'Connor.); Emeterio v. Clint Hurt & Assocs., Inc., 967 P.2d 432, 436 (Nev. 1998) (no cases discussing the split); Visarraga v. Gates Rubber Co., 717 P.2d 596, 602 (N.M. Ct. App. 1986) (This case uses *World-Wide Volkswagen* and the California Supreme Court *Asahi* decision to follow a Stevens approach with an emphasis on the "substantial number of products." The court states, "Adopting the *World-Wide Volkswagen* distinction, the court in *Asahi* found that 'the minimum contacts requirement is satisfied where, as here, the manufacturer is aware that a substantial number of its products will be sold in the forum state.'"); State v. NV Sumatra Tobacco Trading, Co., 666 S.E.2d 218, 225 n.5 (S.C. 2008) (The court noted: "We, therefore, decline to embrace the 'stream of commerce plus theory.'" However, it also does not expressly follow Brennan, Stevens, or the hybrid theory. The facts in this case would likely satisfy any of the tests.).

[133] Abuan v. Gen. Elec. Co., 735 F. Supp. 1479, 1486 (D. Guam 1990) ("Thus, Justice Stevens frames a test which satisfies the concerns of the entire Court.").

[134] The majority in *World-Wide Volkswagen* articulated the following "doomsday" scenarios:

> If foreseeability were the criterion, a local California tire retailer could be forced to defend in Pennsylvania when a blowout occurs there, a Wisconsin seller of a defective automobile jack could be haled before a distant court for damage caused in New Jersey or a Florida soft-drink concessionaire could be summoned to Alaska to account for injuries happening there. Every seller of chattels would in effect appoint the chattel his agent for service of process. His amenability to suit would travel with the holder of the chattel. We recently abandoned the outworn rule of *Harris v. Balk*, 198 U.S. 215 (1905), that the interest of a creditor in a debt could be extinguished or otherwise affected by any state having transitory jurisdiction over the debtor.

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 296 (1980) (citations omitted). For a critique of the "mere foreseeability" approach, see Diane S. Kaplan, *Paddling Up the Wrong Stream: Why the Stream of Commerce Theory Is Not a Part of the Minimum Contacts Doctrine*, 55 BAYLOR L. REV. 503, 588–600 (2003).

structure business so as to limit liability.[135] This is a growing concern with increased use and impact of the internet.[136]

O'Connor's "foreseeability plus" test arguably requires too much additional conduct on the part of a defendant given the risks inherent in a product liability lawsuit.[137] This theory does not adequately balance the interests of the potential customers with those of a manufacturer.[138] For instance, when a small manufacturer chooses a large distributor like Walmart, the small manufacturer is essentially making a choice to reach (or attempt to reach) as many consumers as possible. As in the *Luv N' Care* case, where the manufacturer relied on the Walmart brand name and nation-wide appeal to widen the impact and sales of its product, the defendant may argue that it has not directed its product to a foreign jurisdiction because the automatic nature of the distributing system

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[135] Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 110 (1987) (plurality opinion) (quoting *World-Wide Volkswagen*, 444 U.S. at 297) ("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 connections with the State.").

[136] For a discussion of internet jurisdiction, see generally Danielle K. Citron, *Minimum Contacts in a Borderless World: Voice Over Internet Protocol and the Coming Implosion of Personal Jurisdiction Theory*, 39 U.C. DAVIS L. REV. 1481 (2006); Kyle D. Johnson, *Measuring Minimum Contacts Over the Internet: How Courts Analyze Interstate Commerce to Acquire Personal Jurisdiction Over the Out-of-State Person*, 46 U. LOUISVILLE L. REV. 313 (2007) (analyzing different internet minimum contact rules and potential outcomes).

[137] *See Asahi*, 480 U.S. at 116–17 (Brennan, J. concurring). A number of state courts have also rejected O'Connor's view. *See* Showa Denko K.K. v. Pangle, 414 S.E.2d 658, 662 (Ga. Ct. App. 1991); Cox v. Hozelock, Ltd., 411 S.E.2d 640, 644 (N.C. Ct. App. 1992); Hill v. Showa Denko K.K., 425 S.E.2d 609, 613 (W. Va. 1992).

[138] *See* Matthew Oetker, *Personal Jurisdiction and the Internet*, 47 DRAKE L. REV. 613 (1999); Russell J. Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531, 555 (1995) ("A defendant that releases a product for sale should be subject to jurisdiction in any state where the product causes harm if the product comes there either in the normal course of commercial distribution or is brought into the state by someone using the product as it is intended to be used. Otherwise we turn the clock back to the days before modern long-arm statutes when a manufacturer, to avoid being haled into court where a user is injured, need only Pilate-like wash its hands of a product by having independent distributors market it.").

rendered them ignorant to the final destination of the product.[139] As a result, a plaintiff in such a lawsuit may have difficulty proving foreseeability despite the defendant placing its product into the stream of commerce on a national scale.

2. Split on Burden Shifting

One aspect of personal jurisdiction that has received little attention is that of which party bears the burden of proving whether or not the exercise of jurisdiction comports with the traditional notions of fair play and substantial justice. These "fundamental fairness" factors were elevated in status in the Court's decision in *Asahi*.[140] The majority of the Court agreed that whether or not the third-party plaintiff could demonstrate sufficient minimum contacts or not, an exercise of jurisdiction in this case would be fundamentally unfair.[141] These fairness factors became an essential part of any due process analysis.[142]

In a typical 12(b)(2) motion, after the defendant files its motion, the plaintiff is then required to present only a prima facie case, although the burden would rise to preponderance of evidence at trial.[143] In deciding whether the plaintiff had established a prima facie case, the district court would be required to take uncontroverted allegations in the plaintiff's complaint as being true and to resolve all conflicts contained in that party's

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[139] *See infra* discussion Section II.C; *see also* Luv N' Care Ltd. v. Insta-Mix, Inc., 438 F.3d 465, 469 (5th Cir. 2006).

[140] *See* Bruce Posnak, *The Court Doesn't Know Its* Asahi *from Its* Wortman*: A Critical View of the Constitutional Constraints of Jurisdiction and Choice of Law*, 41 SYRACUSE L. REV. 875, 894–95 (1990).

[141] *Asahi*, 480 U.S. at 116.

[142] There is some criticism that the fundamental fairness factors consume too much of the court's attention and inquiry into them "consumes more time and resources than the trial on the merits." Posnak, *supra* note 140, at 896. Only one circuit has shown an unwillingness to find that these factors are mandatory in a personal jurisdiction analysis. *See* Penzoil Prods. Co. v. Colelli & Assocs., Inc., 149 F.3d 197, 201 (3d Cir. 1998) ("[A]ssuming minimum contacts have been established, a court *may* inquire whether 'the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'' Although the latter standard need only be applied at a court's discretion, we have generally chosen to engage in this second tier of analysis in determining questions of personal jurisdiction.") (emphasis added, citations omitted).

[143] *See* Felch v. Transportes Lar-Mex SA DE CV, 92 F.3d 320, 326 (5th Cir. 1996).

favor.[144] The assumption underlying this analysis is that the plaintiff will bear the burden on all aspects of the personal jurisdiction analysis, and in the case of specific jurisdiction, this analysis would have three parts: "(1) whether the defendant . . . purposely directed its activities toward the forum state or purposely availed itself of the privilege of conducting activities there; (2) whether the plaintiff's cause of action arises out of or results from defendant's forum-related contacts; and (3) whether the exercise of personal jurisdiction is fair and reasonable."[145] This analysis is typically performed by a district court without an evidentiary hearing.[146]

Depending on the jurisdiction, it will be determined whether an evidentiary hearing on the motion to dismiss or on summary judgment will trigger a shift of the prima facie proof requirements to the defendant.[147] A plaintiff is typically required to make a "threshhold" showing of minimum contacts through affidavits and other evidence; this often requires a showing that the defendant's contacts were purposefully directed at the forum.[148] This threshold is met differently depending on the circuit. The First Circuit requires the plaintiff go beyond the pleadings and make affirmative proof, and not merely rely on its pleadings.[149] The Seventh and Fourth Circuits, for example, appear to hold that allegations in a complaint, unsupported by any evidence in the record before the court, are sufficient to make a prima facie showing of personal jurisdiction so long as the defendant does not present evidence to contradict the allegations.[150]

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[144] *Id.* at 327.

[145] Luv N' Care, Ltd. v. Insta-Mix, Inc., 438 F.3d 465, 469 (5th Cir. 2006) (quoting Nuovo Pignone, SpA v. Storman Asia M/V, 310 F.3d 374, 378 (5th Cir. 2002)).

[146] *Felch*, 92 F.3d at 326.

[147] *See, e.g.*, Wien Air Alaska, Inc. v. Brandt, 195 F.3d 208, 215 (5th Cir.1999) ("Once a plaintiff has established minimum contacts, the burden shifts to the defendant to show that the assertion of jurisdiction is unfair.") (citation omitted).

[148] *See, e.g.*, Putkowski v. Warwick Valley Cent. Sch. Dist., 363 F. Supp. 2d 649, 652 (S.D.N.Y. 2005) ("It is a plaintiff's burden to establish the propriety of a court's exercise of personal jurisdiction over parties to the suit.").

[149] Boit v. Gar-Tec Prods., Inc., 967 F.2d 671, 675 (1st Cir. 1992) (citing Serras v. First Tenn. Bank Nat'l Ass'n, 875 F.2d 1212, 1214 (6th Cir. 1989) (noting that plaintiff may not rest on their pleadings to make the prima facie showing)).

[150] Turnock v. Cope, 816 F.2d 332, 333 (7th Cir. 1987); Dowless v. Warren-Rupp Houdailles, Inc., 800 F.2d 1305, 1307 (4th Cir. 1986).

Additionally, once that threshold has been met, some courts then shift the burden of showing that personal jurisdiction is otherwise unreasonable to the defendant.[151] Defendants must present compelling facts in support of the claim that personal jurisdiction is unreasonable.[152] Circuits requiring this shift in burden cite *Burger King* for this proposition: once a plaintiff has made a threshold showing of minimum contacts and satisfaction of due process requirements to support the exercise of jurisdiction, the burden shifts to defendant to present compelling facts showing that personal jurisdiction is otherwise unreasonable.[153]

Only one circuit expressly refuses to transfer the burden of prooving the fundamental fairness factors to the defending party.[154] Other circuits do not use language to suggest that there is a shift in burden to the defendant, instead only stating that the court needs to decide the issue without specifically allocating the burden.[155] These circuits seem to present a hybrid approach. Still in other circuits, in particular the Eleventh

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[151] *See, e.g.*, Future Tech. Today, Inc. v. OSF Healthcare Sys., 218 F.3d 1247, 1249 (11th Cir. 2000); Metro. Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 568 (2d Cir. 1996); WBS Connect, LLC v. One Step Consulting, Inc., No. 07-cv-00514-WDM-CBS, 2007 WL 4268971, at *5 (D. Colo. Nov. 30, 2007) (citing OMI Holdings, Inc. v. Royal Ins. Co. of Can., 149 F.3d 1086, 1091 (10th Cir. 1998)) (although it appears that this court would require a prima facie case consisting of both minimum contacts and fundamental fairness factors and then the burden would shift to the defendant to present a compelling case for denial of jurisdiction); Umbach v. Mercator Mementum Fund, L.P., No. 07-22219-CIV, 2007 WL 2915910, at *3 (S.D. Fla. Oct. 5, 2007).

[152] *See, e.g.*, *Metro. Life Ins. Co.*, 84 F.3d at 568; Rano v. Sipa Press, Inc., 987 F.2d 580, 588 (9th Cir. 1993); Carteret Sav. Bank, FA v. Shushan, 954 F.2d 141, 150 (3d Cir. 1992); O'Donnell v. Animals Matter, Inc., No. 3:07-CV-00241-FDW, 2007 WL 2781218, at *1 (W.D.N.C. Sept. 21, 2007) (citing Inamed Corp. v. Kuzmak, 249 F.3d 1356, 1363 (Fed Cir. 2001)); *Putowski*, 363 F. Supp. 2d at 653.

[153] Burger King Corp. v. Rudzewicz, 471 U.S 462, 477 (1984).

[154] Richards v. Aramark Servs., Inc., 108 F.3d 925, 928 (8th Cir. 1997) ("The burden of proof is on the party seeking to establish the court's in personam jurisdiction and the burden does not shift to the party challenging jurisdiction." (citing Gould v. P.T. Krakatau Steel, 957 F.2d 573, 575 (8th Cir. 1992))).

[155] *See, e.g.*, *OMI Holdings, Inc.*, 149 F.3d at 1091; Boit v. Gar-Tec Prods, Inc., 967 F.2d 671, 676 (1st Cir 1992); *WBS Connect, LLC*, 2007 WL 4268971, at *3 (It appears that the Court would require a prima facie case consisting of both minimum contacts and fundamental fairness factors and then the burden would shift to the defendant to present a compelling case for denial of jurisdiction.).

Circuit, the plaintiff is required to plead sufficient material facts to form a basis for personal jurisdiction, and after this showing the burden will shift to the defendant to challenge these allegations by affidavits or other pleadings.[156] After the defendant meets this burden, the plaintiff must substantiate the jurisdictional allegations with affidavits or other competent proof and cannot rely on mere allegations.[157]

World-Wide Volkswagen and *Asahi* do not contain this burden-shifting language.[158] These cases instead leave the inquiry ambiguous "[i]n determining the fairness and reasonableness of a forum's exercise of jurisdiction, a court must consider, among other things, 'the burden on the defendant, the interests of the forum . . . and the plaintiff's interest in obtaining relief.'"[159]

3. Impact of Differing Approaches

The impact of these differing approaches is clear: disharmony and unpredictability. The threshold question of personal jurisdiction is one of the most litigated issues in federal and state courts.[160] Unfortunately, as the chart in Appendix A illustrates, circuits and state courts are split on what amount of contact will suffice to establish minimum contacts.[161] The chart also illustrates that the federal circuit courts are split on whether or not to shift the burden to the defendant to articulate the fundamental fairness factors.[162]

While neither Brennan's nor O'Connor's approach guarantees any particular result, forum shopping based on jurisdictional test becomes increasing likely.[163] This problem is most apparent in the jurisdictions

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[156] *Future Tech. Today, Inc.*, 218 F.3d 1247 at 1249; *Umbach*, 2007 WL 2915910, at *3.

[157] *Future Tech. Today, Inc.*, 218 F.3d at 1249.

[158] *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113 (1987) (plurality opinion); World-Wide Volkswagen Corp., v. Woodson, 444 U.S. 286, 291–94 (1980).

[159] Vermeulen v. Renault, U.S.A., Inc., 985 F.2d 1534, 1551 (11th Cir. 1993) (quoting *Asahi*, 480 U.S. at 113 (plurality opinion)).

[160] *See* Weintraub, *supra* note 138, at 531. Professor Weintraub found in his internet search over 2,000 cases from 1990 to 1995 discussing personal jurisdiction and minimum contacts. *Id.* at 531–32 n.5.

[161] *See* chart *infra* note 229, app A.

[162] *See* chart *infra* note 229, app A.

[163] Of course just because a plaintiff only need demonstrate "mere foreseeability" does not mean personal jurisdiction is always proper against a foreign defendant. *See, e.g.*, Lee

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where a state court differs from its federal circuit on which foreseeability test applies to the personal jurisdiction analysis.[164] Removal decisions by a defendant must now take into account the likelihood of a finding of personal jurisdiction in either the federal or state court, and even within the same circuit these courts may disagree on the proper test.[165] When the two courts differ in their approaches, it may benefit the plaintiff to have a federal court with a more lax personal jurisdiction rule. Further, it may force defendants to stay in state court more often.

In addition, the burden shift presents another forum-shopping problem. Defendants could face a double dilemna when a court allows the threshold showing by the plaintiff to be so low, and then the court shifts the burden to the defendant to come up with affirmative evidence. Two of the factors that contribute to making a forum unfair to a defendant are choice-of-law rules and inconveniences to the defendant.[166] Defendants at risk are those smaller operations that do not engage in interstate transactions and would include distance of travel, difficulties of proof in a foreign jurisdiction, or physical handicap.[167] This shift of burden might make sense in a jurisdiction that applies a high threshold for demonstrating contact with the forum; but the Fifth Circuit is the only circuit that expressly employs Brennan's "mere foreseeability" test and shifts the burden to the defendant.[168] In most situtaions this latter approach will lead to forum shopping and inequal administration of justice.

Fairness and predictability have been the cornerstones of the Court's personal jurisdiction analysis.[169] "The Due Process Clause, by ensuring the 'orderly administration of the laws,' . . . gives a degree of predictability to the legal system that allows potential defendants to structure their primary

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v. Allen, 32 F.3d 566, 1994 WL 442487, at *4 (5th Cir. Aug. 2, 1995) (finding no minimum contacts); Wilson v. Berlin, 20 F.3d 644, 650–51 (5th Cir. 1994) (defamation action).

[164] *See* chart *infra* note 229, app A.

[165] *See* chart *infra* note 229, app A.

[166] For a good discussion of these potential burdens, see Weintraub, *supra* note 138, at 546.

[167] *Id.* at 547.

[168] *See, e.g.*, Luv N' Care, Ltd., v. Insta-Mix, Inc., 438 F.3d 465, 470 (5th Cir. 2006); *cf.*, Barone v. Rich Bros. Interstate Display Fireworks Co., 25 F.3d 610, 613–15 (8th Cir. 1994) (following Justice Brennan's stream of commerce test and does not shift the burden onto the defendant to demonstrate fairness factors).

[169] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."[170] "[T]wo factors most likely to make suit in an interested forum unfair to the defendant are the forum's choice-of-law rule and the consideration of inconveniences to the defendant."[171] These inconveniences play out most likely for smaller businesses, that do not transact business on a national scale.[172] These inconveniences could include distant travel, proof difficulties, and including procuring witnesses.[173]

C. The Fifth Circuit as an Example of How the Brennan Test and the Burden Shift Play Out

1. Precedent

The Fifth Circuit has consolidated the personal jurisdiction analysis into a convenient three-step process:

> (1) Whether the defendant . . . purposely directed its activities toward the forum state or purposely availed itself of the privilege of doing conducting activities there; (2) whether the plaintiff's cause of action arises out of or results from defendant's forum-related contacts; and (3) whether the exercise of personal jurisdiction is fair and reasonable.[174]

In light of the Supreme Court's split in *Asahi*, the Court of Appeals for the Fifth Circuit has noted its intention to follow Brennan's "mere foreseeability" theory as articulated in *World-Wide Volkswagen*.[175] The court, in analyzing the unclear precendent of *Asahi*, has reasoned that a "faithful" interpretation of *World-Wide Volkswagen* required a finding of jurisdiction only where it was foreseeable that a product would make its way to the forum. "[A] state does not offend due process by exercising

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[170] *Id.* (citations omitted).

[171] Weintraub, *supra* note 138, at 546.

[172] *Id.*

[173] *Id.*

[174] Nuovo Pignone, SpA v. Storman Asia M/V, 310 F.3d 374, 378 (5th Cir. 2002) (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985)).

[175] *See* Ruston Gas Turbines, Inc. v. Donaldson Co., 9 F.3d 415, 420 (5th Cir. 1993); Irving v. Owens-Corning Fiberglass Corp., 864 F.2d 383, 386 (5th Cir. 1989).

jurisdiction over an entity that 'delivers its product into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.'"[176] The foreseeability that is critical to the court in its due process analysis is the "defendant's conduct and connection with the forum State . . . such that he should reasonably anticipate being haled into court there."[177] The court has also been willing to find jurisdiction where the case involved "nonresident defendants that were links in the continuous chain of brokers, manufacturers, and distributors that permitteed the introduction of a product into the stream of commerce."[178]

While the Fifth Circuit has stayed true to its application of the pre-*Asahi* precedent, its anlaysis of personal jurisdiction varies with the nature of the underlying litigation.[179] The Fifth Circuit consistently holds that "mere foreseeability or awareness [is] a constitutionally sufficient [basis] for personal jurisdiction if the defendant's product made its way into the forum state while still in the stream of commerce."[180] Yet, its application

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[176] Luv N' Care, Ltd. v. Insta-Mix, Inc., 438 F.3d 465, 470 (5th Cir. 2006) (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 298 (1980)); *see also Ruston Gas*, 9 F.3d at 420 (finding specific jurisdiction in Texas against a Minnesota shipper destined for Texas); *Irving*, 864 F.2d at 387 (finding specific jurisdiction in Texas against a Yugoslavian licensed trading company that sold raw asbestos to an American broker who then sold the asbestos to a Texas asphalt company).

[177] Wilson v. Berlin, 20 F.3d 644, 649 (5th Cir. 1994) (quoting *World-Wide Volkswagen*, 444 U.S. at 295).

[178] Doan v. Consumer Testing Labs. (Far East) Ltd., No. 96-30744, 1996 WL 762865, at *4 (5th Cir. Dec. 17, 1996); *see also Ruston Gas*, 9 F.3d at 420 (finding specific jurisdiction in Texas against a Minnesota shipper destined for Texas); *Irving*, 864 F.2d at 387 (finding specific jurisdiction in Texas against a Yugoslavian licensed trading company that sold raw asbestos to an American broker who then sold the asbestos to a Texas asphalt company); Bean Dredging Corp. v. Dredge Tech. Corp., 744 F.2d 1081, 1085 (5th Cir. 1984) (finding specific personal jurisdiction in Louisiana against a Washington manufacturer of steel casings that sold the castings to a California cylinder maker, which cylinders were used ultimately as parts of a dredge constructed by a Louisiana shipper).

[179] Dalton v. R & W Marine, Inc., 897 F.2d 1359, 1361 (5th Cir. 1990).

[180] *Luv N' Care*, 438 F.3d at 470 (citing *Ruston Gas*, 9 F.3d 415). It is also interesting to note that while the Fifth Circuit relies on Brennan's "mere foreseeability" approach, it has often used the factors articulated in Justice Stevens' approach to justify the exercise of jurisdiction. *See, e.g.*, *id.* at 470–71; Seiferth v. Helicoptieros Atuneros, Inc., 472 F.3d 266, 273–74 (5th Cir. 2006); Nuovo Pignone, SpA v. Storman Asia M/V, 310 F.3d 374, 381 n.8 (5th Cir. 2002) ("This court has taken a relatively expansive view of the stream-of-

(*continued*)

of that standard has been fairly consistent in product liability cases.[181] The application for the "mere foreseeability" test does not in itself guarantee a plaintiff unfettered discretion in choosing a district court within the Fifth Circuit as her forum.[182]

The Fifth Circuit, although expressing a reluctance in extending the Brennan "mere foreseeability" anlaysis to other areas besides product liability, has done so on a number of occassions.[183] In *Nuevo Pignone, SpA v. Storman Asia M/V*,[184] the Fifth Circuit, in extending the Brennan "mere foreseeability" analysis to a breach of contract case, stated "[a]s a voluntary member of the economic chain that brought the [product] to [the forum, defendant] purposefully has availed itself of the privilege of conducting business in that state."[185] The Fifth Circuit has also extended the "mere foreseeability" analysis to copyright infringement cases.[186]

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commerce principle by requiring only 'mere foreseeability' that a defendant might be haled into court because it has purposely availed itself of the privileges of conducting business in the home forum; we have not required that a defendant 'purposely direct' its activities toward the forum." (citing *Ruston Gas*, 9 F.3d at 419)).

[181] *See, e.g.*, Doan v. Consumer Testing Labs. (Far East) Ltd., No. 96-30744, 1996 WL 762865, at *4 (5th Cir. Dec. 17, 1996); *see also Ruston Gas*, 9 F.3d at 420; *Irving*, 864 F.2d at 387; *Bean Dredging Corp.*, 744 F.2d at 1085 (finding specific personal jurisdiction in Louisiana against a Washington manufacturer of steel casings that sold the castings to a California cylinder maker, which cylinders were used ultimately as parts of a dredge constructed by a Louisiana shipper).

[182] *See, e.g.*, Felch v. Transportes Lar-Mex SA DE CV, 92 F.3d 320, 323 (5th Cir. 1996) (The "fact that some merchandise which [the company transports] is ultimately destined for the United States is also insufficient [to find minimum contacts].").

[183] *See Nuovo Pignone*, 310 F.3d at 381; *Ruston Gas*, 9 F.3d at 418; *cf.*, Alpine View Co. v. Atlas Copco AB, 205 F.3d 208, 217 (5th Cir. 2000) (declining to apply stream-of-commerce principle because the plaintiffs had "failed to make a prima facie showing that the 'litigation results from alleged injuries that arise out of or relate to" defendants contacts with the forum (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985))); Ham v. La Cienega Music Co., 4 F.3d 413, 416 (5th Cir. 1993) (finding that defendant's activities, though connecting them to Texas within the meaning of the stream-of-commerce principle, were insufficient to support jurisdiction given the "highly attenuated" relationship between the litigation and those activities).

[184] 310 F.3d 374.

[185] *Nuovo Pignone* involved a contract to ship a reactor from Italy to New Orleans, negotiated by two Italian corporations. *Id.* at 377. The contract required the defendant to provide a "satisfactory vessel" and an "onboard shipping crane" to move the reactor. *Id.*

(*continued*)

The application of the burden shift has been less consistent. The Fifth Circuit seems clear that when the case involves a contract dipute and the plaintiff demonstrates "purposeful contact" with the forum, the burden will always shift to the defendant to demonstrate unfairness.[187] In assesing that burden on the defendant the court has consistently stated that "[i]t is rare to say the assertion is unfair after minimum contacts have been shown."[188] The court suggests that a showing of minimum contacts justifiably allows the burden suffered by the defendant to be significant and yet comport with constitutional protections.[189] It has also seemed willing to extend the burden-shifting to other areas such as intentional torts,[190] and trademark infringement and patents,[191] copyright infringement,[192] and even product

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The defendant was not required to unload the reactor, only to provide the crane. *Id.* Allegations in the complaint suggested that the defective crane was the cause of the accident. *Id.* The lower court did not conduct an evidentiary hearing, finding that based on the allegations in the Plaintiff's complaint, it had demonstrated minimum contacts between the defendant and the forum. *Id.* at 378. The Fifth Circuit affirmed this decision, holding that although the defendant was not required to perform its obligations under the contract in Louisiana, it nonetheless made itself amenable to jurisdiction in Louisiana. *Id.* at 382.

[186] See the lower court's application in *Isabell v. DM Records, Inc.*, No. Civ.A.3:02-CV-1408-G, 2004 WL 1243153, at *8–9 (N.D. Tex. June 4, 2004) (citing *Ruston Gas*, 9 F.3d at 418).

[187] *See Nuovo Pignone*, 310 F.3d at 381 n.8 (Defendant "does not present any reason why "subjecting it to suit in Louisiana would be overly burdensome."); Wien Air Alaska, Inc. v. Brandt, 195 F.3d 208, 211 (5th Cir. 1999) (fraud and tortious acts toward a Texas corporation); Marathon Oil Co. v. A.G. Ruhrgas, 182 F.3d 291, 293 (5th Cir. 1999) (fraud and intentional interference with a business relationship); *cf.* Tel. Elecs. Corp. v. S. Pac. Telecomms. Co., 98 F.3d 1339 (5th Cir. 1998) (no indication that the court shifted the burden); Command-Aire Corp. v. Ontario Mech. Sales & Serv. Inc., 963 F.2d 90, 95 (5th Cir. 1992).

[188] *Wien Air Alaska, Inc.*, 195 F.3d at 215 (citing Akro Corp. v. Luker, 45 F.3d 1541, 1549 (Fed. Cir. 1995)).

[189] *Id.* (fraudulent inducement, breach of contract and breach of fiduciary duties case).

[190] *See Wien Air Alaska*, 195 F.3d at 215 (fraudulent inducement, breach of contract and breach of fiduciary duties case); Guidry v. U.S. Tobacco Co., 188 F.3d 619, 630 (5th Cir. 1999) (tobacco litigation alleging intentional and non-intentional torts); *Marathon Oil Co.*, 182 F.3d 291 (fraud and intentional interference with a business relationship).

[191] *See* Luv N' Care, Ltd. v. Insta-Mix, Inc., 438 F.3d 465, 473 (5th Cir. 2006) (citing *Nuovo Pignone*, 310 F.3d. at 382). Lower courts within the circuit have consistently applied the burden shift to patent infringement cases citing precedent from the Federal

(*continued*)

liability.[193] However, the application of burden shifting to the defendant has been inconsistent depending on the underlying cause of action and the individual panel of judges.[194]

2. All the Factors Come Together: Luv N' Care

In a recent pronouncement on personal jurisdiction analysis, a Fifth Circuit panel once again affirmed its adherence to the Brennan "mere foreseeability" theory and overturned a lower court's dismissal of personal

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Circuit. *See, e.g.*, Advanced Biological Labs., SA v. Ameripath, Inc., No. 2:07 CV 31, 2008 WL 1757819, at *2 (E.D. Tex. April 14, 2008) (citing Akro Corp. v. Luker, 45 F.3d 1541, 1546 (Fed. Cir. 1995)); Moore v. Harney Hardware, Inc., No. H-05-4054, 2006 WL 1342820, at *2 (S.D. Tex. May 15, 2006); Jacobs Chuck Mfg. v. Shandong Weida Mach. Co., No. Civ.A. 2:05-CV-185, 2005 WL 3299718, at *8 (E.D. Tex. Dec. 5, 2005).

[192] Ham v. La Cienega Music Co., 4 F.3d 413, 415 (5th Cir. 1993); Isbell v. DM Records, Inc., No. Civ.A.3:02-CV-1408-G, 2004 WL 1243153, at *12 (N.D. Tex. June 4, 2004).

[193] Polythane Sys., Inc. v. Marina Ventures Int'l, Ltd., 993 F.2d 1201, 1206 (5th Cir. 1993). This case presents an interesting twist on the typical products liability action. Here, the product's manufacturer, a Texas corporation, preempted a lawsuit by filing a declaratory judgment action against the users of the product, two Maryland corporations. *Id*. at 1204. The court noted in its analysis that the defendants in the lower court "failed to persuade us that the proceedings in Texas were offensive to the notions of fair play and substantial justice." *Id.* at 1206.

[194] Court shifts burden: *see, e.g.*, *Nuovo Pignone*, 310 F.3d. at 382 (breach of contract and tort, cites *Burger King* for factors); *Wien Air Alaska*, 195 F.3d at 215 (fraud, fraudulent inducement, breach of contract and fiduciary duties, cites *Burger King* for factors).

Court does not shift the burden: *see, e.g.*, Stroman Realty, Inc. v. Wercinski, 513 F.3d 476, 484, 487 (5th Cir. 2008) (section 1983 civil rights action); DP Solutions, Inc. v. Rollins, Inc., No. 01-40727, 2002 WL 494672, at *7–8 (5th Cir. Mar. 14, 2002) (restrictive covenants and tortuous interference with a contract); Tel. Elecs. Corp. v. S. Pac. Telecomms. Co., No. 95-31037, 1996 WL 556856, at *4 (5th Cir. Sept. 10, 1996) (contract dispute); Felch v. Transportes Lar-Mex SA DE CV, 92 F.3d 320, 323 (5th Cir. 1996) (cites *Asahi* for factors, wrongful death survival action); Doan v. Consumer Testing Labs. (Far East) Ltd., No. 96-30744, 1996 WL 762865, at *2 (5th Cir. Dec. 17, 1996) (product liability); Command–Aire Corp. v. Ontario Mech. Sales & Serv. Inc., 963 F.2d 90, 95 (5th Cir. 1992) (contract dispute, panel cites *Asahi* for fundamental fairness factors); Dalton v. R. & W. Marine, Inc., 897 F.2d 1359, 1363 (5th Cir. 1990) (holding that the court must consider the *Asahi* fairness factors).

jurisdiction.[195] The District Court for the Western District of Louisiana previously held that "mere foreseeability" or awareness that a product may enter a jurisdiction while traveling through the stream of commerce was not constitutionally sufficient contact to warrant personal jurisdiction.[196]

The Fifth Circuit panel, in rejecting this lower court's analysis, instead focused on the knowing benefits the defendant had accrued through the availability of Louisiana's market.[197] Even while acknowledging that a defendant could structure its business dealings so as to avoid lawsuits in a foreign jurisdiction, the Fifth Circuit still found jurisdiction proper in Louisiana.[198] While Insta-Mix argued that it was Wal-Mart's actions, and not theirs, that took the product to a distant forum, the court focused on those shipments Insta-Mix sent to Wal-Mart's distribution center in Louisiana.[199]

The court specifically discounted Insta-Mix's argument concerning the use of electronic processing of its purchase orders.[200] Although this process is automatic and initiated by Wal-Mart, the court found that the company could not claim "ignorance of the contents of those orders once their products inevitably reach the intended market."[201] The court further rejected Insta-Mix's argument that businesses should be allowed to structure their vendor agreements to avoid foreign jurisdictions.[202] To promote predictabiilty in the legal system and to allow potential defendants

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[195] *Luv N' Care*, 438 F.3d at 470.

[196] *Id.*

[197] *Id.*

[198] *Id.* (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)).

[199] *Id.* at 471. The amount of revenue generated from the shipments to the Louisiana distribution center made up about 4.5 percent of Insta-Mix's total distribution. *Id.*

[200] *Id.*

> Insta-Mix received and filled purchase orders from Wal-Mart via an "Electronic Data Interchange" ("EDI") system, which contains information regarding the price, quantity, and destination of each shipment. Once an order is filled, the EDI system automatically sends to Wal-Mart an electronic invoice that contains the letterhead of an Insta-Mix-related entity and the destination address.

Id. at 468.

[201] *Id.* at 471.

[202] *Id.*

to structure their conduct to avoid a potential lawsuit, the Court set forth a firm rule as to the term F.O.B.[203] The Court stated, "we conclude that a [Free On Board] term does not prevent a court from exercising personal jurisdiction over a non-resident defendant where other factors, such as the quantity and regulating of shipments, suggest that jurisdiction is proper."[204] While the Court noted its reluctance to extend this expansive view of stream of commerce to cases other than product liability, it noted that this case presented an appropriate opportunity to extend the doctrine.[205]

In a special concurrence, Judge DeMoss concurred in the majority opinion based on Fifth Circuit precedent and urged Insta-Mix to apply for a writ of certiorari so that the United States Supreme Court could resolve the split among the circuit courts regarding whether Justice Brennan's stream of commerce test or Justice O'Connor's stream of commerce plus test controls minimum contacts analysis.[206] According to Judge DeMoss, the minimum contacts principle is a court-created principle, and Justice O'Connor's stream of commerce plus test is more constitutionally defensible than Justice Brennan's stream of commerce test.[207] Judge DeMoss argued that to permit an exercise of personal jurisdiction simply because the defendant placed a product into the stream of commerce, the product reached the forum state, and it was foreseeable that the product would reach the forum state defies principles of federalism.[208] This is so, he explained, because the assertion of jurisdiction in such a case "destroys the notion of individual sovereignties inherent in our system of federalism."[209] Judge DeMoss reasoned that Insta-Mix should not be subject to suit in Louisiana because "[s]ubjecting Insta-Mix to suit in Louisiana create[d] a 'Wal-Mart exception,' rendering any small company that sells a product to Wal-Mart subject to suit in any state in the nation in which Wal-Mart resells the company's products."[210]

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[203] *Id.*
[204] *Id.* at 471–72 (footnote omitted).
[205] *Id.* at 472–73.
[206] *Id.* at 474, 476 (DeMoss, J., concurring).
[207] *Id.* at 474.
[208] *Id.* at 475.
[209] *Id.* (quoting Lesnick v. Hollingswoth & Vose Co., 35 F.3d 939, 945 (4th Cir. 1994)).
[210] *Id.*

Justice DeMoss criticized the majorities adoption of "mere foreseeability" as sufficient to pass constitutional scrutiny. He argued that this case presented the worst-case scenario for extension of personal jurisdiction.[211] The logical outcome of such a decision, would be "'[t]o permit a state to assert jurisdiction over any person in the country whose product is sold in the state simply because a person must expect that to happen [and would] destroy[] the notion of individual sovereignties inherent in our system of federalism.'"[212]

The majority reasoned that the non-resident defendant benefitted from Louisiana's market, as evidenced by the fact that the defendant filled approximately sixty-five purchase orders for items to a third-party confirming the same and derived substantial revenue from its sale of products bound for Louisiana.[213] Insta-Mix filed a petition for a writ of certiorari on March 22, 2006.[214] The Supreme Court, however, neither accepted Judge DeMoss's invitation nor granted Insta-Mix's petition.

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[211] *See id.*

[212] *Id.* (quoting *Lesnick*, 35 F.3d at 945). Justice DeMoss advocates adoption of Justice O'Connor's stream-of-commerce plus approach which would require more than "mere foreseeability" and instead require "[a]dditional conduct of the defendant . . . of the defendant . . . indicat[ing] an intent or purpose to serve the market in the forum State . . . ." *Id.* at 475 (quoting Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 112 (1987) (plurality opinion)). Justice DeMoss would focus his analysis on the lack of purposeful contact with Lousiana: doing no business in Lousiana; no agent for service of process in Louisiana; the terms of the contract were decided outside Louisiana; the F.O.B. language in the vendor agreement which effectively trasfers title to Wal-Mart at the point of sale; no advertising in Louisiana; no regular advice to customers in Louisiana; and no marketing of its products in Louisiana through a designated sales agent. *Id.* at 471, 475. These twin concerns were articulated by the majority in *World-Wide Volkswagen*:

> The concept of minimum contacts, in turn, 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 Corp. v. Woodson, 444 U.S. 286, 291–92 (1980).

[213] *Luv N' Care*, 438 F.3d at 471.

[214] Petition for Writ of Certiorari, Insta-Mix, Inc. v. Luv N' Care, Ltd., 548 U.S. 904 (2006) (No. 05-1232).

III. RECOMMENDATIONS

Truly the choice of a minimum contacts test comes down to how you define "nature and quality" of contacts, as that term was first defined in *International Shoe*.[215] In order to bring uniformity to the personal jurisdiction analysis, the proper focus when talking about products placed into interstate commerce should be quantity of the product (volume); the percentage of business this product represents (value); and the known hazards associated with the product (hazardous character).[216]

One court that has adopted the volume, value, and hazardousness test, first articulated by Justice Stevens in his concurrence in *Asahi*, has explained, "Justice Stevens frames a test which satisfies the concerns of the entire court."[217] Justice Stevens would require that any additional factor besides foreseeability that needs to be shown relate directly to the defendant's reasonable expectation of being subject to jurisdiction in the forum State.[218] This approach would require more than Brennan's "mere foreseeability" theory, but would also address the concerns of the majority in *Asahi* regarding the reasonableness factors.[219] Instead of mandating a rigid factor-based test, Justice Stevens's approach interjects common sense into the jurisdiction analysis.[220] A fundamentally fair test would focus on a manufacturer's attempts and success at reaching the forum, even though it uses a third-party distributor. Failing to focus on the volume and value of the product distributed, and instead focusing on advertising or specifications of the product, would allow companies who place a dangerous product into the stream of commerce, to escape from liability for defective products or trademark or copyright violations, while continuing to maintain a wide-spread distribution of their product. If a company creates its distribution market, even through a third party, it is

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[215] Int'l Shoe Co. v. Washington, 326 U.S. 310, 318 (1945).

[216] *Asahi*, 480 U.S. at 122 (Stevens, J. concurring). Even *International Shoe* relied in part on the volume of business the foreign corporation transacted in Washington state. *Int'l Shoe*, 326 U.S. at 314–15.

[217] Abuan v. Gen. Elec. Co., 735 F. Supp. 1479, 1486 (D. Guam 1990) (adopting Stevens' model).

[218] *Id.*

[219] *Id.*

[220] *Id.* (the focus should be on a manufacturer's attempts and success at reaching the forum).

reasonable and foreseeable that it should be amenable to suit where that product ends up as it flows through the stream of commerce. This approach follows more closely the Court's decision in *World-Wide Volkswagen*, "[t]he connection indeed 'arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its products in other States.'"[221]

Using Stevens' approach would solve two of the major problems associated with Brennan's approach: It would allow businesses to structure their dealings to minimize risk and liability in foreign jurisdictions; it would allow businesses to plan for the risks associated with mass distribution of a particular project; and it would focus the court's analysis on the contemplated business relationship and impact, emphasizing the purposeful nature of the contact. It would demonstrate to those who choose a nation-wide distributor that their product will make them amenable to jurisdiction in a foreign court. And warn them, if you do not want to be haled into court in a far-away jurisdiction, do not hire a national distributor. You cannot hide behind a contract and ignorance when you have tried to reach a greater number of potential customers, because you have chosen a designated distributor instead of individual marketing campaigns.

Stevens' approach would also solve problems inherent in Justice O'Connor's approach. Her approach, minimum contacts plus, has been criticized as too rigid, allowing companies too easily to structure themselves out of answering in a foreign jurisdictions for products they have put in the stream of commerce.[222] O'Connor's approach requires some other act, "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."[223]

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[221] *Id.* (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)).

[222] *See id.*; *see also* Sean K. Hornbeck, *Transnational Litigation and Personal Jurisdiction Over Foreign Defendants*, 59 ALB. L. REV. 1389, 1415 (1996).

[223] Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 112 (1987) (plurality opinion).

The *World-Wide Volkswagen* majority made a point to discuss how much money Volkswagen made on the sale of its products in Oklahoma.[224] The Court did not reject the exercise of jurisdiction because this factor was irrelevant; instead, it rejected the lower court's inference (without evidence) that because one vehicle ended up in Oklahoma, others might be used there also.[225]

Stevens's approach would allow a company like Luv N' Care, who uses a nation-wide distributor like Walmart, to structure its business in the most efficient way. Luv N' Care would not necessarily escape jurisdiction where their product arrived, not because Walmart agrees to serve as a distributor in a particular forum, but because of the volume of product directed towards the forum. When companies like Luv N' Care rely on the nationwide impact of their product and hope for a wider distribution through a company like Walmart, fairness would dictate that an injured party should not have to travel to the situs of the corporation to obtain relief.

One might suggest that the Supreme Court has not taken certiorari on the minimum contacts issue because most courts consider all factors when deciding minimum contacts.[226] Further, the arguably more important inquiry, according to *Asahi*, is the determination of fairness.[227]

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[224] *World-Wide Volkswagen*, 444 U.S. at 298.

[225] *Id.* "However, financial benefits accruing to the defendant from a collateral relation to the forum State will not support jurisdiction if they do not stem from a constitutionally cognizable contact with that State." *Id.* at 299.

[226] There is very little in terms of prior precedent to suggest how the addition of Justice Alito and Chief Justice Roberts would change the Supreme Court's analysis of minimum contacts. No cases were found in the D.C Circuit with Chief Justice Roberts participating. However, three cases from the Third Circuit Court of Appeals give some insight into Justice Alito's theory on the issue. In *In re Nazi Era Cases Against German Defendants Litigation*, the court decided an appeal from a district court's dismissal for lack of personal jurisdiction of plaintiff bringing suit against a company director, Lidgens, for alleged fraud in settling war claims after Nazi Germany forced the plaintiff's father to sell his shares of the company because he was Jewish. No. 04-2848, 2005 WL 2673498, at *1 (3rd Cir. Oct. 20 2005) (per curiam); *see also* Wellness Publ'g v. Barefoot, No. 03-3919, 2005 WL 852685 (3d Cir. Apr. 14, 2005) (per curiam); D.T.B. v. Advisory Comm. on Judicial Conduct to the Supreme Court of N.J., No. 03-2294, 2004 WL 2202278 (3d Cir. Sept. 14, 2004); Grand Entm't Group, Ltd. v. Star Media Sales, Inc., 988 F.2d 476, 483–84 (3d Cir. 1993) (Upholding the district court's exercise of personal jurisdiction over the defendants because they had

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The switching of the burden to the defendant, has not been discussed by the Court, outside of *Burger King*. And Courts that employ this burden shift have not discussed why it is fair to tax the defendant with the burden. It makes sense to transfer the burden to the defendant if the plaintiff has had to prove a higher standard as articulated by Justice O'Connor, a showing of foreseeability plus.[228] If the plaintiff has shown this much evidence, it should be up to the defendant to refute; particularly where the defendant would have access to information about its burdens in answering litigation in a foreign jurisdiction. The burden shift does not make sense, however, when the threshold inquiry is so low. Because we are not just about fairness but about state sovereignty and individual rights, it is important that the party asserting jurisdiction bear a sufficient burden.

IV. CONCLUSION

What is certain is that the Supreme Court needs to resolve the conflict in the circuits with regard to "stream of commerce" analysis. Leaving this question open has created conflict and inequality of the law.

Inconsistency in federal and state courts' application of "stream of commerce" has led to "flip-a-coin" jurisprudence. The current state of the law dictates that a plaintiff, by filing in state or federal court may dictate where personal jurisdiction will lie. This is both inequitable to plaintiffs and potential defendants. This inconsistency is not "due process" as contemplated in the Constitution and the Supreme Court's precedents. It does not allow business to structure to avoid lawsuits or contain liability costs or to "foresee" litigation liability. It is not clear how the Court will resolve this dispute should a case make its way to the Supreme Court, but a resolution is needed.

It is this author's opinion given the globalization of business, increasing use of the internet for commercial transactions, and increasing numbers of foreign products entering the market, that the Court should adopt a bright-line rule, in the vein of Justice Brennan's "stream of

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conducted business in Pennsylvania through an agent, and the court relied on *Asahi* for the proposition that "when minimum contacts have been established, the interest of the plaintiff often justify even the serious burdens placed on the alien defendant[s]." (citing *Asahi*, 480 U.S. at 114)).

[227] *See Asahi*, 480 U.S. at 113–14.

[228] *See id.* at 112 (plurality opinion).

commerce" and "mere foreseeability or awareness" standard. Businesses, both domestic and foreign, would be aware that if they place a product in the "stream of commerce" and it is foreseeable that it will end up in a particular forum, they will be amenable to jurisdiction in that forum.

APPENDIX A[229]

Circuit	Contacts Test Applied	Burden Shifts?
1st Cir.	O'Connor	Yes
NH	O'Connor	
MA	Undecided/Hybrid	
ME	Brennan	
RI	O'Connor	
2nd Cir.	Declined to Decide	Yes
CT	Brennan	
NY	O'Connor	
VT	O'Connor	
3d Cir.	Declined to Decide	Yes
DE	O'Connor	
NJ	O'Connor	
PA	O'Connor	
4th Cir.	O'Connor	Yes
MD	Undecided/Hybrid	
NC	Brennan	
SC	Undecided/Hybrid	
WVA	Brennan	
VA	O'Connor	
5th Cir.	Brennan	Yes
TX	O'Connor	
LA	O'Connor	
MS	O'Connor	
6th Cir.	O'Connor	Yes
MI	O'Connor	
OH	O'Connor	
KY	O'Connor	
TN	O'Connor	
7th Cir.	Brennan	Unknown
IL	Undecided/Hybrid	
IN	Undecided/Hybrid	
MI	O'Connor	
WI	Brennan	
8th Cir.	Brennan	No Shift
AR	O'Connor	
IA	Brennan	
MN	Brennan	
MO	O'Connor	
ND	Brennan	
NE	O'Connor	
SD	O'Connor	
9th Cir.	O'Connor	Yes
AK	Brennan	
AZ	O'Connor	
CA	O'Connor	

[229] Chart created by author.

HI ID MT NV OR WA	Brennan Hybrid Undecided/Hybrid Undecided/Hybrid Brennan Brennan	
10th Cir. AZ CO KS OK NM UT WY	Unknown O'Connor O'Connor O'Connor Brennan Undecided/Hybrid O'Connor Undecided/Hybrid	Yes
11th Cir. GA AL Fl	O'Connor Brennan O'Connor O'Connor	Yes
Federal Cir. DC	Declined to Decide O'Connor	Yes