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Personal Jurisdiction and the Due Process Clause: An Evaluation of the Fairness Factors

While the concept of “minimum contacts” is still hailed as “the constitutional touchstone” for determining whether an exercise of personal jurisdiction comports with the due process clause,¹ recent United States Supreme Court decisions reflect a dispute among the justices over the role of the minimum contacts test vis-a-vis the fairness factors.² The decision of the Supreme Court in *Asahi Metal v. Superior Court*³ outlines the two divergent positions in this dispute.⁴ In *Asahi*, the Court held that an exercise of jurisdiction would be unreasonable and unconstitutional based on the fairness factors, but the justices were equally divided on the issue of whether the defendant had established minimum contacts.⁵ According to Justice O'Connor, minimum contacts is the threshold determination of what is essentially a two part balancing test.⁶ First, a court must

1. See *Asahi Metal Indus. Co., v. Superior Court*, 107 S. Ct. 1026, 1031 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985); U.S. CONST. amend. XIV, § 1 “No state shall . . . deprive any person of life, liberty, or property without due process of law.”

2. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 300 (1980) (Brennan, J., dissenting) (Justice Brennan argues that the Court should not mechanically conduct a minimum contacts test but should focus on the overall reasonableness of jurisdiction); *Asahi*, 107 S. Ct. at 1031, 1035 (Justices O'Connor, Powell, Rehnquist and Scalia consider the minimum contacts test the threshold of the personal jurisdiction analysis; Justices Brennan, Stevens, White, Blackmun and Marshall consider contacts to be one of several factors in determining the reasonableness of asserting jurisdiction over the defendant).

3. 107 S. Ct. 1026 (1987).

4. *Id.* at 1031, 1034. See *infra* text at notes 104-37 (discussion of the *Asahi* case).

5. 107 S. Ct. at 1031-33, 1035-38. See *infra* note 110 and accompanying text.

6. *Asahi*, 107 S. Ct. at 1031, 1034. Under this approach, if the defendant has sufficient minimum contacts, the two part test becomes a balancing test and the court must consider

determine whether the defendant has sufficient minimum contacts with the state.⁷ If there are insufficient minimum contacts with the forum state, then an assertion of jurisdiction would not meet due process requirements.⁸ Under this approach, an examination of other factors cannot establish the validity of an assertion of jurisdiction; the fairness factors may be considered only to affirm or defeat jurisdiction.⁹ If the court finds sufficient minimum contacts, however, jurisdiction is generally valid unless an examination of the fairness factors indicates that an exercise of jurisdiction would be clearly unreasonable.¹⁰

In contrast, Justices Brennan, Stevens, White, Blackmun and Marshall consider this defendant-oriented due process approach outdated and suggest that minimum contacts is just one factor in determining the overall reasonableness of personal jurisdiction.¹¹ The "Brennan position" advocates a multifactor approach in which the court considers the following factors to determine whether an assertion of jurisdiction would be fair and reasonable to the defendant: (1) The defendant's contacts with the forum state; (2) the inconvenience to the defendant in conducting the suit in that state; (3) the state's interest in the litigation; (4) the plaintiff's interests in conducting the suit in the forum state; and (5) the interest of the interstate judicial system in achieving the most efficient resolution of controversies.¹² Since this analysis emphasizes the reasonableness of an assertion of jurisdiction, none of these requirements

the fairness factors to determine whether jurisdiction would be unreasonable. *Id.* at 1033-34. "When minimum contacts have been established, often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the alien defendant." *Id.* at 1034. However, if the court does not find minimum contacts, an examination of the fairness factors is generally unnecessary since an assertion of jurisdiction would not meet due process requirements. See *World-Wide Volkswagen v. Woodson*, 444 U.S. 294, 287-299 (1980). Although Justice O'Connor's plurality opinion examined the fairness factors in Part IIB, O'Connor, Rehnquist, Powell and Scalia stated in Part III that their decision that an assertion of jurisdiction would be unconstitutional was based on the lack of minimum contacts. *Id.* at 1035.

7. *Id.* at 1031.

8. *Id.* at 1035.

9. *Id.* at 1031. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477-78 (1985). The other factors are: (1) The burden on the defendant; (2) the interest of the forum state in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the shared interest of the several states in furthering fundamental substantive social policies. *Id.* at 477.

10. *Burger King*, 471 U.S. at 477.

11. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 300-01 (1980) (Brennan, J., dissenting).

12. *Burger King*, 471 U.S. at 476-77; See *World-Wide Volkswagen*, 444 U.S. at 300-05.

are absolute.¹³ If a court finds that jurisdiction over the defendant is reasonable based on these factors, jurisdiction is also constitutional and satisfies the due process requirements of the fourteenth amendment.¹⁴ Accordingly, this position rejects the notion that a certain quantum of contacts is needed.¹⁵ Instead, less significant contacts by the defendant may suffice when other factors make personal jurisdiction reasonable and consistent with "traditional notions of fair play and substantial justice."¹⁶

In order to establish which approach is more consistent with the due process considerations underlying the restrictions on personal jurisdiction, this comment examines the original due process restrictions on personal jurisdiction, the development of the minimum contacts test and the evolution of personal jurisdiction analysis through *Asahi*.¹⁷ Next, this comment reviews and evaluates the factors which courts currently consider in personal jurisdiction analysis.¹⁸ Finally, this comment suggests that the minimum contacts test, without consideration of the fairness factors, is sufficient to ensure that personal jurisdiction over a defendant is reasonable and consistent with the due process requirements of the fourteenth amendment.¹⁹

I. DUE PROCESS RESTRICTIONS ON PERSONAL JURISDICTION

A. *The Origin of Due Process Restrictions on Personal Jurisdiction*

Since *Pennoyer v. Neff*²⁰ was decided in 1877, assertions of personal jurisdiction by state courts are governed by the due process

13. *Burger King*, 471 U.S. at 486 (Brennan, J.) "We reject any talismanic jurisdictional formulas, "the facts of each case must [always] be weighed" in determining whether personal jurisdiction would comport with fair play and substantial justice. This approach, does of course, preclude clear-cut jurisdictional rules. But any inquiry into "fair and substantial justice" necessarily requires determinations "in which few answers will be written in black and white. The greys are dominant and even among them the shades are innumerable." *Id.* at 486 n.29.

14. *See World-Wide Volkswagen*, 444 U.S. at 300-301 (Brennan, J., dissenting).

15. *See id.*; *Burger King*, 471 U.S. at 478 (Justice Brennan, in his majority opinion, rejects the notion that personal jurisdiction might turn on "mechanical tests" (citing *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945))).

16. *World-Wide Volkswagen*, 444 U.S. at 300; *Burger King*, 471 U.S. at 477-78.

17. *See infra* notes 20-137 and accompanying text.

18. *See infra* notes 138-96 and accompanying text.

19. *See infra* text at notes 197-99.

20. 95 U.S. 714 (1877).

clause.²¹ In *Pennoyer*, the Court stated that the ability of a state court to render a valid in personam judgment over a foreign defendant depends on the "presence" of the defendant within the state.²² The "presence requirement" reflected two restrictions embodied in the due process clause.²³ The first restriction is that a state's authority to render a judgment over persons or property is limited by territorial boundaries.²⁴ *Pennoyer* also established that since states are independent and equal sovereigns, an assertion of jurisdiction by a state court outside the boundaries of the state could interfere with the independence of another state.²⁵

Subsequent case law expanded state court jurisdiction through the "consent" and the "doing business" doctrines.²⁶ Under the "consent" doctrine, a court may assert jurisdiction over a defendant on any cause of action arising out of activities which the state has a right to regulate under the state police power.²⁷ Since the state may regulate these activities, the state may also impose conditions on the conduct of these activities.²⁸ Thus, by engaging in certain

21. *Pennoyer*, 95 U.S. at 733. The Court states:

Since the adoption of the Fourteenth Amendment . . . the validity of . . . judgments rendered against nonresidents without personal service of process upon them, or their voluntary appearance, may be directly questioned, and their enforcement in the State resisted on the ground that proceedings in a court of justice to determine the personal rights . . . of parties over whom the court has no jurisdiction do not constitute due process of law.

Id. See *McGee v. International Life Insurance Co.*, 355 U.S. 220, 222 (1957). The fourteenth amendment of the United States Constitution provides that "No state shall . . . deprive any person of life, liberty, or property without due process of law." U.S. CONST. amend. XIV, § 1.

22. *Pennoyer*, 95 U.S. at 722, 733 (unless a defendant was served process within the state or voluntarily appeared to defend a suit, a court has no power to render a valid in personam judgment against the defendant).

23. See generally 2 J. MOORE, J. LUCAS, H. FINK & C. THOMPSON, *MOORE'S FEDERAL PRACTICE* § 4.41-1[3] (2d. ed. 1987) [hereinafter MOORE] (discussing *Pennoyer* and the resulting due process restrictions on personal jurisdiction).

24. *Pennoyer*, 95 U.S. at 722. See Lilly, *Jurisdiction Over Domestic and Alien Defendants*, 69 VA. L. REV. 85, 87-88 (1983) (examines the traditional basis of the territorial view of jurisdiction).

25. *Pennoyer*, 95 U.S. at 722. See generally, Lewis, *The Three Deaths of "State Sovereignty" and the Curse of Abstraction in the Jurisprudence of Personal Jurisdiction*, 58 NOTRE DAME L. REV. 699, 702-9 (1983) (reviews the historic origins of sovereignty limitations on personal jurisdiction).

26. See, e.g., *Kane v. New Jersey*, 242 U.S. 160, 165, 167 (1916) (state can exact express consent from an individual as a condition to engaging in certain types of activity with the state); *Adam v. Saenger*, 303 U.S. 59, 67-68 (1938) (consent to personal jurisdiction by bringing suit in the state); *Hess v. Pawloski*, 274 U.S. 352, 356-57 (1927) (use of highways by nonresidents constitutes implied consent to appointment of agent for service of process on use related causes of action).

27. See *Hess*, 274 U.S. at 356.

28. *Id.* at 356.

activities within the state, the defendant has either expressly or impliedly "consented" to an assertion of personal jurisdiction on causes of action arising out of these activities.²⁹ In contrast, the "doing business" doctrine is a modification of the "presence" requirement articulated in *Pennoyer*. The "doing business doctrine" deems a corporation "present" in a state for personal jurisdiction purposes, if the corporation is doing business within that state.³⁰

B. Minimum Contacts as a Basis for Personal Jurisdiction

In the landmark case *International Shoe Co. v. Washington*,³¹ the Supreme Court held that due process requires that a defendant have minimum contacts with a state such that an assertion of personal jurisdiction over that defendant by a state court does not offend "traditional notions of fair play and substantial justice."³² The *International Shoe* Court thus rejected the notion that the fortuitous presence of the defendant in the forum state is adequate grounds upon which to exercise personal jurisdiction.³³ The claim in *International Shoe* was based on a state statute that allowed the state commissioner to issue a notice of assessment of delinquent contributions to the state unemployment fund upon either personal notice to the employer or by registered mail to the last known address.³⁴ The defendant corporation, claimed that it was not "doing business" within the state and had no agents within the state upon whom service could be made.³⁵ The corporation argued that service on the corporation's sales solicitor pursuant to state statute was unconstitutional.³⁶ The Court, however, noted that the defendant employed several salesmen who resided in Washington to exhibit

29. See, e.g., *Kane*, 242 U.S. at 165, 167; *Adam*, 303 U.S. at 67-68; *Hess*, 274 U.S. at 356-57. The "consent" doctrine is still a viable doctrine. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.14 (1985).

30. See *Hutchinson v. Chase & Gilbert, Inc.*, 45 F.2d 139, 141-42 (2d. Cir. 1930) (enumerates the factors of the "doing business" test). See also 2 MOORE *supra* note 23, § 4.41-1[1] (discussing the "presence" and "doing business" theories).

31. 326 U.S. 310 (1957).

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

33. *Id.*

34. *Id.* at 312. See generally, Note, *Jurisdiction over Foreign Corporations - An Analysis of Due Process*, 104 U. PA. L. REV. 381, at 385, 388 (1955) (reviews the facts in *International Shoe* and analyzes some of its requirements).

35. *International Shoe*, 326 U.S. at 315-16.

36. *Id.*

samples and solicit orders from buyers within the state.³⁷ These activities resulted in a substantial volume of merchandise shipped by the defendant to purchasers within Washington.³⁸ The Court indicated that since the defendant received the benefit of state laws in conducting these business activities, the defendant also incurred obligations that the laws imposed on these activities.³⁹ Furthermore, the Supreme Court declared that the demands of due process may be met by contacts of the defendant with the forum state which, "in the context of our federal system of government," make it reasonable to require the defendant to answer to the consequences of a suit.⁴⁰ The Court explained that the inconvenience to the defendant in conducting a suit in the forum state is a relevant consideration.⁴¹ The Court held that since the defendant had engaged in continuous and systematic forum activities which were related to the cause of action, an assertion of personal jurisdiction by the state court would meet the requirements of due process.⁴²

C. *The Development of Personal Jurisdiction Analysis*

The due process analysis in *International Shoe* is based on three considerations that underlie the fairness of asserting jurisdiction over a defendant based on minimum contacts: (1) Exchange rationale;⁴³ (2) federalism;⁴⁴ and (3) inconvenience to the defendant.⁴⁵

1. *The Exchange Rationale*

An assertion of jurisdiction over a defendant who exercises the privilege of conducting activities within a state is fair because the defendant receives the benefits of state law and can therefore be expected to bear the burdens associated with state law.⁴⁶ This

37. *Id.* at 313-14.

38. *Id.* at 314-15.

39. *Id.* at 319.

40. *Id.* at 317.

41. *Id.*

42. *Id.* at 320.

43. *Id.* at 319.

44. *Id.* at 317.

45. *Id.* at 317. See Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 698-705 (1987). Professor Stein suggests that the jurisdictional justifications for minimum contacts are regulatory need, exchange of burdens for benefits, and convenience. *Id.*

46. *International Shoe*, 326 U.S. at 319. See Stein, *supra* note 45, at 700.

exchange rationale also underlies the basic framework of the minimum contacts test. First, a court must decide whether a defendant's forum activities have been continuous and systematic or merely single and isolated.⁴⁷ Then the court must determine whether the cause of action is related to the defendant's forum activities.⁴⁸ In cases where the defendant has engaged in continuous and systematic forum activities which are related to the cause of action, jurisdiction is valid under the holding in *International Shoe*.⁴⁹ If the defendant has a large number of forum contacts, an assertion of jurisdiction may be reasonable even if the contacts are unrelated, in light of the benefits the defendant incurred from conducting a large number of activities within the forum state.⁵⁰ The justification for this theory is that a defendant who conducts a large number of activities is similar to a "resident" who may always be sued in the state of domicile.⁵¹ When a defendant's forum contacts are only single and isolated, however, a state court may exercise jurisdiction over the defendant so long as the suit arises out of the activities of the defendant within the state.⁵²

2. Federalism Concerns

The Supreme Court in *International Shoe* also indicated that federalism concerns underlie the due process requirement of mini-

47. See *International Shoe*, 326 U.S. at 317-18.

48. *Id.* See, e.g., *Allegheny Ludlum Steel Corp. v. Pacific Gas & Elec. Co.*, 607 F. Supp. 35, 37 (W.D. Pa. 1984) (one of the initial determinations of personal jurisdiction analysis is whether the cause of action arises from defendant's forum related activities).

49. See *International Shoe*, 326 U.S. at 320 (the Court determined that defendant's contacts were continuous and systematic and that the cause of action arose out of these activities; personal jurisdiction over the defendant was held to be valid); 4 C. WRIGHT & MILLER, *FEDERAL PRACTICE & PROCEDURE*, § 1067(1) (1987) [hereinafter WRIGHT & MILLER] (continuous and systematic contacts by the defendant has been a valid basis for an assertion of jurisdiction).

50. See *International Shoe*, 326 U.S. at 318. The Court cites the following cases as examples: *Tauza v. Susquehanna Coal Co.*, 220 N. Y. 259, 115 N.E. 915 (1917) (substantial activity by corporation in the state). See also *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (defendant's forum activities unrelated to the cause of action were substantial; personal jurisdiction was held proper).

51. *Milliken v. Meyer*, 311 U.S. 457, 462-63 (1914). "Domicile in the state is alone sufficient to bring an absent defendant within the reach of the state's jurisdiction The state which accords him privileges and affords protection to him and his property by virtue of his domicile may also exact reciprocal duties." *Id.*

52. See *International Shoe*, 326 U.S. at 318. See, e.g., *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957) (a single insurance contract solicited by defendant from the forum was sufficient to create the necessary minimum contacts since the cause of action arose out of the contract).

minimum contacts.⁵³ Since *International Shoe* was decided, the concept of minimum contacts has developed to include certain activities by defendants outside state borders which cause harm within the state.⁵⁴ Because of this development, determining whether a certain activity constitutes minimum contacts with the state has become increasingly more difficult because the Supreme Court has resorted to ambiguous phrases as guidelines for jurisdictional analysis.⁵⁵ Although the original determination that a certain activity is a forum contact may be more difficult under current analysis, the greater significance accorded to contacts which relate to the cause of action remains the same.⁵⁶

If a cause of action arises out of forum activity, an exercise of jurisdiction by the state court over the defendant does not interfere with the territorial rights of another state.⁵⁷ When a state justifies

53. See *International Shoe*, 326 U.S. at 312. See also Redish, *Due Process, Federalism and Personal Jurisdiction: A Theoretical Evaluation*, 75 Nw. U. L. Rev. 1112, 1118 (1981). Professor Redish argues that the Court's requirement that contacts be reasonable "in our federal system of government, makes clear the Court's continued emphasis on federalism concerns in formulating a due process analysis of state judicial jurisdiction." *Id.*

54. See, e.g., *Gray v. American Radiator & Sanitary Corp.*, 22 Ill. 2d 432, 435-37, 176 N.E.2d 761, 764-66 (1961) (foreign manufacturer of valve for waterheater, which was sold in forum state, was subject to personal jurisdiction of forum state court in cause of action arising out of explosion of water heater in forum state; defendant's contact with the state was the connection that its products had with the state of purchase). See also *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) (Court notes that the substantial amount of business transacted solely by mail and wire across state lines as a part of modern commercial life, obviates the need for defendant's physical presence within a state in which business is conducted in order to be subject to personal jurisdiction).

55. The Supreme Court has been unable to formulate precise guidelines for the terms "substantial connection" and "purposeful delivery into the stream of commerce." See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98 (1980) (a state may constitutionally assert jurisdiction over a defendant that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state). A conflict has arisen, however, based on when a delivery of a product into the stream of commerce amounts to a purposeful delivery and resulting minimum contacts. See *infra* notes 132-39 and accompanying text. See also *Burger King*, 471 U.S. at 474.

56. See *Helicopteros Nacionales de Colombia, S. A. v. Hall*, 466 U.S. 408, 414 n.8 (1984) (defines specific jurisdiction as jurisdiction which is based on a cause of action that "arises out of or relates to" forum state activity). See also *Burger King*, 471 U.S. at 473 n.15. "Specific" jurisdiction differs from 'general' jurisdiction, through which a state exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum." *Id.* See Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 Sup. Ct. Rev. 77, 82 "(R)elated contacts are weighed more heavily in favor of jurisdiction than unrelated contacts. Unrelated contacts must be continuous or substantial but even a single contact may support jurisdiction if related to the litigation." *Id.* Professor Brilmayer suggests that substantive relevance to the cause of action should provide the test for whether a contact is related. *Id.*

57. *Brilmayer*, *supra* note 56, at 88 (a state may legitimately seek to regulate activities within its own territory). Professor Brilmayer also observes that the distinction between related and unrelated contacts is rooted in the concept of state sovereignty. *Id.* at 84-85. See also *Humphreys v. Pierce*, 512 F. Supp. 1321, 1325 (W. D. Va. 1981) (when a tort is committed within the geographical boundaries of the forum state no principle of state sovereignty is implicated by the assertion of jurisdiction).

the assertion of personal jurisdiction over a defendant based on continuous and systematic activity that did not give rise to the cause of action, jurisdiction by the court could interfere with the jurisdiction of the state court where the cause of action arose. As the Supreme Court explained in *Insurance Corp. of Ireland v. Compagnie de Bauxites*,⁵⁸ however, the federalism concerns of the due process clause actually protect the individual liberty interest of the defendant instead of the territorial rights of the states.⁵⁹ Since sovereignty notions are not an independent requirement, but underlie the requirement of minimum contacts, the defendant can be subject to general personal jurisdiction on forum contacts unrelated to the cause of action.⁶⁰

3. Inconvenience to the Defendant

The final due process consideration enunciated in *International Shoe* is the inconvenience to the defendant of making a defense in the forum state.⁶¹ Personal jurisdiction must comport with "traditional notions of fair play and substantial justice."⁶² Therefore, in addition to examining the extent of the defendant's activities in the forum state, a court must consider the inconvenience to the defendant of conducting a law suit in the forum state.⁶³

II. THE INTRODUCTION OF OTHER FACTORS INTO PERSONAL JURISDICTION ANALYSIS

A. From *International Shoe* to *Hanson*

Twelve years after *International Shoe*, the Supreme Court decided another landmark case, *McGee v. International Life Insurance*.⁶⁴

58. 456 U.S. 694 (1982).

59. *Ireland*, 456 U.S. at 702-03 n.10. In *Ireland*, the Supreme Court faced the question whether the discovery sanction under Federal Rule of Civil Procedure 37(b)(2) of taking the personal jurisdiction facts as established may be applied to a defendant who failed to comply with discovery requests with respect to documents establishing personal jurisdiction. *Id.* at 695. The Court held that the application of the legal presumption to the issue of jurisdiction does not in itself violate the Due Process Clause. *Id.* at 709.

60. *Id.* at 702 n.10.

61. *International Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945).

62. *Id.* at 316; *Hutchinson v. Chase & Gilbert Inc.*, 45 F.2d 139, 141 (2d. Cir. 1930).

63. *International Shoe*, 326 U.S. at 317; *Hutchinson*, 45 F.2d at 141.

64. 355 U.S. 220 (1957). Most of the fairness factors had their origin in the California

McGee marked the beginning of the Supreme Court's focus on factors in addition to minimum contacts in determining whether an assertion of jurisdiction is constitutional under the due process clause.⁶⁵ In *McGee*, the beneficiary of a life insurance policy purchased by a California resident from an Arizona corporation, sued the Texas corporation that had assumed the obligation from the original insurer.⁶⁶ International Life Insurance Co., the Texas corporation, sent a reinsurance certificate to the insured in California which the insured accepted.⁶⁷ When the insured died and the beneficiary requested payment on the policy, International Life Insurance Co. refused to pay the claim.⁶⁸ Consequently, the beneficiary instituted an action in California, the defendant was served with process by registered mail, and the beneficiary recovered a judgment against the defendant.⁶⁹

A California statute allowed the court to assert personal jurisdiction over foreign corporations on insurance contract claims by California residents if the corporation could not be served with process within the border.⁷⁰ The United States Supreme Court held that due process was satisfied because the suit was based upon a contract which had a "substantial connection" with the state. This connection existed because the defendant had solicited the contract from a California resident.⁷¹ Furthermore, the state had a significant interest in exercising jurisdiction over insurance contracts involving state residents which was reflected in the statutory scheme governing insurance.⁷² The Court further indicated that the nationalization of

Supreme Court decision of *Fisher Governor Co. v. Superior Court*, 53 Cal.2d 222, 347 P.2d 1, 1 Cal. Rptr. 1 (1959). Justice Traynor enunciated factors that may be considered in determining whether personal jurisdiction over a defendant would be reasonable. *Id.* at 225-26, 347 P.2d at 3-4, 1 Cal. Rptr. at 3-4. The factors include: (1) The state's interest in providing a forum for residents or in regulating the business involved; (2) the relative availability of evidence and the burden of defense and prosecution in one place rather than another; (3) the ease of access to an alternative forum; (4) the avoidance of multiplicity of suits and conflicting adjudications; and (5) the extent to which the cause of action arose out of defendant's local activities. *Id.*

65. *McGee*, 355 U.S. at 222-24. The state court in *McGee*, considered the state's "manifest interest in providing effective means of redress for its residents when their insurer refuses to pay claims" and "the inconvenience to the defendant in being held amenable to suit in the forum state." *Id.* at 223-24.

66. *Id.* at 222.

67. *Id.* at 221.

68. *Id.* at 222.

69. *Id.* at 221.

70. *Id.*

71. *Id.* at 223.

72. *Id.*

commerce has made it less burdensome for a party to defend in a foreign state court and that any inconvenience to the defendant in this case did not amount to a denial of due process.⁷³

In *Hanson v. Denckla*,⁷⁴ the Court considered whether the Florida district court had personal jurisdiction over a Delaware trust company because the testatrix executed her will in Delaware.⁷⁵ The Court declared that activity by the plaintiff in the forum state cannot establish minimum contacts by the defendant.⁷⁶ Rather, the Court emphasized that in order to exercise personal jurisdiction, a court must find 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 law.”⁷⁷ In a subsequent United States Supreme Court case, *World-Wide Volkswagen v. Woodson*,⁷⁸ the Court endorsed several of the fairness factors, but failed to clarify how these factors should be valued.⁷⁹

B. Recent Supreme Court Decisions

1. *World-Wide Volkswagen v. Woodson*

In *World Wide Volkswagen v. Woodson*,⁸⁰ purchasers of an automobile in New York sued the retailer and regional distributor for injuries incurred in an automobile accident in Oklahoma.⁸¹ The distributor did not distribute automobiles in Oklahoma, but did distribute automobiles in three other states.⁸² In analyzing whether the distributor had sufficient minimum contacts with Oklahoma to maintain an exercise of personal jurisdiction, the Court considered

73. *Id.* at 223.

74. 357 U.S. 235 (1958).

75. *Hanson*, 357 U.S. at 252-253.

76. *Id.* at 253.

77. *Id.*

78. 444 U.S. 286 (1980).

79. See *id.* at 293. The Court listed the following factors: (1) The burden on the defendant; (2) the forum state's interest in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenient and effective relief, 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; and (5) the shared interest of the several states in furthering fundamental substantive social policies. *Id.* at 294.

80. 444 U.S. 286 (1980).

81. *World-Wide Volkswagen*, 444 U.S. at 287.

82. *Id.* at 289.

whether the distributor had solicited products in Oklahoma.⁸³ The Court also examined whether the company had delivered products into the "stream of commerce" with the expectation that they would be purchased by consumers in the forum state.⁸⁴ The Court concluded that because the car could be used in Oklahoma does not indicate that the defendant could reasonably foresee being subject to suit there⁸⁵ and explained that only when a defendant conducts purposeful activity in a state does the defendant have notice that it may be subject to suit there.⁸⁶

Justice Brennan dissented in *World-Wide Volkswagen*, and criticized the majority for not giving enough consideration to the interest of the forum state.⁸⁷ Justice Brennan argued that the jurisdictional inquiry should focus on whether the particular exercise of jurisdiction over the defendant offends "traditional notions of fair play and substantial justice" and rejected any mechanical tests based on the quantum of contacts.⁸⁸ He further indicated that, if other considerations established that jurisdiction would be fair and reasonable, a lesser amount of contacts may suffice to support jurisdiction.⁸⁹ These considerations include the interests of the state and other parties in proceeding with the case in a particular forum, and the actual burden on the defendant in being subject to suit in that forum.⁹⁰ A similar approach was adopted in *Burger King Corp. v. Rudzewicz*,⁹¹ for which Justice Brennan wrote the majority opinion.

2. *Burger King Corp. v. Rudzewicz*

The suit in *Burger King* arose out of Rudzewicz's breach of a twenty year franchise agreement which he negotiated with the Burger King branch office in Michigan.⁹² The contract stated that all Burger

83. *Id.* at 296.

84. *Id.* at 297-98.

85. *Id.* at 298.

86. *Id.* at 297.

87. *Id.* at 299-300.

88. *Id.* at 300.

89. *Id.*

90. *Id.* at 300-01.

91. 471 U.S. 462 (1985).

92. *Burger King*, 471 U.S. at 466-67. See generally, Note, *Quest for a Bright Line Personal Jurisdiction Rule in Contract Disputes* — *Burger King Corp. v. Rudzewicz*, 61 WASH. L. REV. 703 (1980) (discussing the impact of *Burger King* on personal jurisdiction analysis in contract disputes); Stephens, *The Single Contract as Minimum Contacts: Justice Brennan Has It His Way*, 28 WM. & MARY L. REV. 89, 101-108 (discussing the facts, holding and implications of *Burger King*).

King operations are conducted and supervised from the Miami headquarters, that all relevant notices and payments must be sent there, that the agreements are made and enforced in Miami, and that all disputes are governed by Florida law.⁹³ Furthermore, throughout the contract disputes, the franchisees communicated with the Miami headquarters by mail and telephone.⁹⁴

In deciding whether the defendant had established minimum contacts with Florida, the *Burger King* Court enunciated a balancing approach for determining the constitutionality of an assertion of personal jurisdiction.⁹⁵ Although the Court maintained the minimum contacts test as the principal inquiry, the Court indicated that contacts may be considered in light of the following factors to determine the overall reasonableness of personal jurisdiction:⁹⁶ (1) The burden on the defendant; (2) the interest of the forum state in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the shared interest of the several states in furthering substantive social policies.⁹⁷ These considerations may establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts.⁹⁸ Finally, the Court considered whether the possibility of litigation was reasonably foreseeable by the defendant.⁹⁹ The Court emphasized that the contract involved prior negotiations and contemplated future consequences.¹⁰⁰ The franchisees were aware that all contract disputes would be governed by Florida law.¹⁰¹ Accordingly, the defendant could reasonably foresee the possibility of litigating contract disputes in Florida.¹⁰² Since nothing suggested that an assertion of personal jurisdiction by the state court would be unreasonable, the Court held that the Florida court's exercise of

93. *Burger King*, 471 U.S. at 480.

94. *Id.* at 481.

95. *See id.* at 476-77. *See* Sonenshein, *The Error to a Balancing Approach to the Due Process Determination of Jurisdiction Over the Person*, 59 TEMP. L.Q. 47, 48 (1986). Several appellate courts engaged in balancing in diversity cases prior to *Burger King*. *See, e.g.*, *Nova Biomedical Corp. v. Moller*, 629 F.2d 190 (1st Cir. 1980); *Pedi Bares, Inc. v. P & C Food Markets, Inc.*, 567 F.2d 933 (10th Cir. 1977); *Insurance Co. of N. Am. v. Marina Salina Cruz*, 649 F.2d 1266 (9th Cir. 1981).

96. *Burger King*, 471 U.S. at 476.

97. *Id.* at 477.

98. *Id.*

99. *Id.* at 474, 479-80.

100. *Id.* at 479.

101. *Id.* at 481.

102. *Id.* at 482.

personal jurisdiction over the defendant did not offend due process.¹⁰³

3. *Asahi Metal Indus. Co. v. Superior Court*

The original suit in *Asahi Metal Indus. Co. v. Superior Court*,¹⁰⁴ was a product liability action against a Taiwanese tire manufacturer, Cheng Shin, and a Japanese component part manufacturer, Asahi.¹⁰⁵ Cheng Shin cross claimed against Asahi for indemnification.¹⁰⁶ After the plaintiff settled with Cheng Shin and dismissed his claim, Asahi moved to quash Cheng Shin's service of summons and have the indemnity claim dismissed for lack of personal jurisdiction.¹⁰⁷ The United States Supreme Court held that the exercise of personal jurisdiction by the California court over Asahi was unreasonable based on a consideration of the fairness factors developed in *World-Wide Volkswagen*.¹⁰⁸ The Court came to this conclusion by focusing on the great burden on the foreign defendant in having to conduct a lawsuit in the forum and the lack of forum state interest in the litigation.¹⁰⁹ The Court was divided, however, on whether the defendant had established minimum contacts based on the "stream of commerce" test developed in *World-Wide Volkswagen*.¹¹⁰ Furthermore, the Court failed to address the relationship of the fairness factors to minimum contacts or the exact weight to be given to these factors.¹¹¹

In Part IIA of the plurality opinion, Justice O'Connor considered whether the mere act of placing a product in the stream of commerce

103. *Id.* at 487.

104. 107 S. Ct. 1026 (1987).

105. *Asahi*, 107 S. Ct. at 1029. The plaintiff claimed that a defective tire had caused the motorcycle accident which killed his wife and caused his own injuries. *Id.*

106. *Id.* at 1029-30.

107. *Id.* at 1030.

108. *Id.* at 1034. See *World-Wide Volkswagen v. Woodson*, 444 U.S. 290, 292 (1980) (list of the fairness factors).

109. *Asahi*, 107 S. Ct. at 1034-35.

110. *Id.* at 1029, 1032-33 (Justice O'Connor, discussing the dispute among the lower courts and within the Supreme Court as to what constitutes a purposeful delivery of a product into the stream of commerce). See also *id.* at 1035-38 (Justice Brennan concurring in part but disagreeing with Justice O'Connor on whether the mere placement of a product in the stream of commerce is sufficient to establish minimum contacts).

111. See *infra* notes 117-120 and accompanying text. See also *Stein*, *supra* note 45, at 762 (indicating that *Asahi* highlights the Court's inability to evaluate the jurisdictional significance of contacts).

would suffice to allow an exercise of personal jurisdiction.¹¹² O'Connor construed the due process clause as requiring some "additional conduct" besides the defendant's awareness of product entry into the forum state through the stream of commerce.¹¹³ Justice O'Connor listed the following activities as examples of conduct that could indicate a defendant's intent to serve the market in the forum state: (1) Designing the product for the market in the forum state; (2) advertising in the forum state; (3) establishing channels for providing regular advice to customers in the forum state; or (4) marketing the product through a distributor who has agreed to serve as the sales agent in the forum state.¹¹⁴ Justice O'Connor examined whether the defendant engaged in any of these activities and concluded that Asahi did not purposefully avail itself of the California market.¹¹⁵ Thus, the defendant did not have minimum contacts with California.¹¹⁶

Justices Brennan and Stevens disagreed with Justice O'Connor's conclusion that the defendant did not have the requisite minimum contacts with California.¹¹⁷ Specifically, Justice Brennan argued that Justice O'Connor's requirement of "additional conduct" as part of the stream of commerce test is not a meaningful differentiation between the various manufacturers who place goods into the stream of commerce.¹¹⁸ Justice Brennan contended that the economic benefits derived from the sale of a product in the forum state and the benefit of the protection of state law accrue to a manufacturer whenever goods are placed in the stream of commerce.¹¹⁹

Although Justice Stevens also disagreed with Justice O'Connor's conclusion that Asahi did not have minimum contacts with California, he stated that this was one of those rare cases in which a consideration of minimum contacts is not necessary since an assertion of personal jurisdiction would be clearly unreasonable based on a consideration of the fairness factors.¹²⁰ This pronouncement indicates Justice Stevens' view that the existence of minimum contacts is not necessarily the threshold determination of personal

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

113. *Id.* at 1032-33.

114. *Id.* at 1033.

115. *Id.*

116. *Id.* at 1035.

117. *Id.* at 1035 (Brennan, J., concurring in part), 1038 (Stevens, J., concurring in part).

118. *Id.* at 1035.

119. *Id.*

120. *Id.* at 1038 (Stevens, J., concurring in part).

jurisdiction analysis in each case. Instead, a consideration of minimum contacts is unnecessary if jurisdiction is clearly unreasonable.¹²¹ Although Justice Stevens has historically been aligned with Justice Brennan in close personal jurisdiction decisions, Justice Stevens' theoretical approach differs from Justice Brennan, as Stevens' *Asahi* concurrence indicates.¹²² Justice Stevens' concurrence implies that he sees personal jurisdiction as a two part analysis rather than the pure multifactor approach, which includes a minimum contacts determination, advocated by Justice Brennan. Thus Justice Stevens' concurrence suggests that if either minimum contacts or reasonableness do not exist, jurisdiction is unconstitutional.¹²³ This approach is more similar to Justice O'Connor's approach than Justice Brennan's approach. As suggested in a previous section, Justice O'Connor's personal jurisdiction analysis is a two part test consisting of minimum contacts and reasonableness which becomes a balancing test once minimum contacts are found to exist.¹²⁴ Thus in close personal jurisdiction decisions, the result may hinge on whether Justice Stevens remains more closely aligned with Justice Brennan or whether he can be shifted towards Justice O'Connor's viewpoint.

III. THE APPROPRIATE BALANCE BETWEEN MINIMUM CONTACTS AND THE FAIRNESS FACTORS - CURRENT PERSONAL JURISDICTION ANALYSIS

A. *Minimum Contacts*

All personal jurisdiction decisions must commence with an evaluation of whether the activities of a defendant within the forum may be characterized as continuous and systematic or single and isolated, and whether the cause of action is related to these activities.¹²⁵ A court may assert "general" jurisdiction over an unrelated cause of action only if the defendant has conducted substantial

121. *Asahi*, 107 S. Ct. at 1038.

122. *Asahi*, 107 S. Ct. at 1038.

123. *See id.*

124. *See supra* note 6 and accompanying text.

125. *See International Shoe Co. v. Washington*, 326 U.S. 310, 317-320 (1945).

continuous and systematic activities within the state.¹²⁶ If a cause of action is related, a single act by the defendant may be sufficient to establish specific personal jurisdiction.¹²⁷ In making these characterizations, the court must examine the facts to determine whether the defendant has purposefully availed himself of the privilege of conducting activities within the forum state.¹²⁸ The determination of this issue proceeds along different lines depending on whether the case involves a contract, manufacturer product liability or a single tort dispute.¹²⁹

In contract cases, "purposeful availment" means that the defendant has a "substantial connection" with the forum state arising from the contract.¹³⁰ In *Burger King*, the prototype contract case in a personal jurisdiction context, the defendant had a substantial connection with the forum state because his contract created continuing obligations between himself and residents of the forum state.¹³¹ In manufacturer product liability actions "purposeful availment" also depends on the expectation of the defendant of deriving benefits from activities in the forum state.¹³² In such cases, the test enunciated in *World-Wide Volkswagen* is applicable. Under this test, the court must determine whether the defendant purposefully delivered products into the "stream of commerce" with the expectation that they would be purchased by consumers in the forum state.¹³³ In *Asahi*, the Supreme Court was divided on the issue of the requirements of the stream of commerce test.¹³⁴ Justice O'Connor's opinion listed several activities which would indicate to a court that the defendant purposefully placed products into the "stream of commerce" and directed the products at forum state consumers.¹³⁵ The *Asahi* concurrences, on the other hand, did not require that a defendant engage in "additional conduct" to indicate pur-

126. See *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 447 (1952).

127. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 n.18 (1985). See *International Shoe*, 326 U.S. at 318. See, e.g., *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957) (a single insurance contract solicited by defendant from the forum state was sufficient to create minimum contacts since the cause of action arose out of the contract).

128. *Asahi*, 107 S. Ct. 1026, 1031; *Burger King*, 471 U.S. at 475; *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298 (1980) (citing *Hanson*); *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

129. See *infra* notes 130-37 and accompanying text.

130. *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957).

131. *Burger King*, 471 U.S. at 480.

132. See *World-Wide Volkswagen*, 444 U.S. at 296-98.

133. *Id.* at 298.

134. See *infra* notes 136-37 and accompanying text.

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

poseful delivery of products into the "stream of commerce."¹³⁶ Thus, whether certain activity amounts to minimum contacts under a stream of commerce analysis remains subject to different interpretations.¹³⁷

B. The Reasonableness of An Assertion of Personal Jurisdiction

1. Current Due Process Considerations

Under current personal jurisdiction analysis, the minimum contacts test is construed as imposing a dual limitation on an assertion of jurisdiction.¹³⁸ First, federalism concerns underlying the minimum contacts requirement are viewed as a due process limitation on personal jurisdiction over a defendant.¹³⁹ Second, courts believe that the minimum contacts test protects defendants from burdensome and inconvenient litigation.¹⁴⁰ In *Hanson v. Denckla*,¹⁴¹ for example, the Supreme Court declared that personal jurisdiction restrictions are a consequence of territorial limitations on the power of the respective states and a protection of the defendant from inconvenient litigation.¹⁴² The Supreme Court further explained the due process restrictions in *World-Wide Volkswagen Corp. v. Woodson*.¹⁴³ The Court stated that:

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

136. *Asahi*, 107 S. Ct. at 1035 (Brennan, J., concurring in part).

137. *Felix v. Bomoro Kommanditgesellschaft*, 196 Cal. App. 3d 106, 114, 241 Cal. Rptr. 670, 674 (1987).

138. See *Empire Abrasive Equip. Corp. v. H. H. Watson Inc.*, 567 F.2d 554, 557 (3d Cir. 1977) (the twin limitations of the due process clause over state judicial power are federalism concerns and fairness to the defendant); *Allegheny Ludlum Steel Corp. v. Pacific Gas & Elec. Co.*, 607 F. Supp. 35, 37 (W.D. Pa. 1984) (the twin limitations of the due process clause on personal jurisdiction are federalism concerns and fairness to the defendant). See also, *infra* text accompanying note 144.

139. See *Insurance Corp. of Ireland v. Compagnie de Bauxites*, 456 U.S. 694, 702 n.10 (1982).

140. *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 292-93 (1980).

141. 357 U.S. 235 (1958).

142. *Hanson*, 357 U.S. at 251.

143. 444 U.S. 286 (1980).

reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.¹⁴⁴

Some commentators have construed the Court's assertion that the minimum contacts test protects an individual liberty interest, in *Insurance Corp. of Ireland v. Compagnie de Bauxites*,¹⁴⁵ as a retreat from the theory that federalism concerns underlie the due process restrictions on personal jurisdiction.¹⁴⁶ The context of the statement, however, indicates that the Court simply intended to explain the proper role of federalism concerns rather than abandon those concerns altogether.¹⁴⁷ In a footnote to *Ireland*, the Court explicitly recognized that due process restrictions on personal jurisdiction reflect an element of interstate federalism and cited the section in *World-Wide Volkswagen v. Woodson* quoted above.¹⁴⁸ The Court explained, however, that due process limitations on personal jurisdiction primarily protect an individual liberty interest.¹⁴⁹

Lower federal court decisions after *Ireland*, have continued to construe the dual function of the minimum contacts test as a protection of both the defendant and the federalism interest.¹⁵⁰ Consequently, the assertion of the Supreme Court that the due process clause protects the individual's liberty interest, can be construed to mean that there is no independent sovereignty restriction on the ability of a court to assert personal jurisdiction over the defendant. However, one of the functions of the minimum contacts test is to protect the state's sovereignty interest.¹⁵¹

144. *World-Wide Volkswagen*, 444 U.S. at 291-92. Furthermore, the Court declared that although the burden on the defendant is a primary concern in determining the reasonableness of jurisdiction, the burden may be considered in light of other factors including the plaintiff and forum state's interest in conducting the litigation in that particular state. *Id.* at 292.

145. 456 U.S. 694 (1982).

146. See Note, Bauxites's "Individual Liberty Interest" and the Right to Control Amenability to Suit in Personal Jurisdiction Analysis, 51 *FORDHAM L. REV.* 1278, 1289 (interprets the Supreme Court's statement in *Ireland* as removing sovereignty concepts from jurisdiction analysis); Redish, *supra* note 53, at 1113-15 (asserting that federalism is irrelevant to due process limits on personal jurisdiction).

147. Stein, *supra* note 45, at 711-12.

148. *Ireland*, 456 U.S. at 702-03 n.10.

149. *Id.*

150. See *Horne v. Adolph Coors Co.*, 684 F.2d 255 (3d Cir. 1982) (fifth amendment due process case which relies on the fourteenth amendment due process analysis in *Paolino v. Channel Home Centers*, 668 F.2d 721 (3d Cir. 1981), decided prior to *Ireland*, which discussed both federalism concerns and fairness to the defendant); *Allegheny Ludlum Steel Corp. v. Pacific Gas & Elec. Co.*, 607 F. Supp. 35 (W.D. Pa. 1984) (recognizes federalism concerns as one of the limitations inherent in the due process clause restriction on personal jurisdiction).

151. See *Ireland*, 456 U.S. at 702 n.10. See also WRIGHT & MILLER, *supra* note 48, 1067.

The Supreme Court is also divided over the appropriate weight of the fairness factors in relation to minimum contacts and the reasonableness of an assertion of personal jurisdiction.¹⁵² The plurality opinions in *Asahi*, suggesting the proper analyses of minimum contacts and the fairness factors, reveal the two divergent positions on this issue. In order to evaluate the constitutional soundness of these positions, it is useful to compare the results the court would be likely to reach in three hypothetical fact patterns. The first hypothetical scenario is one in which the court has found that there are sufficient minimum contacts. In this case the Justice O'Connor group would consider jurisdiction unreasonable only in rare cases when the burden on the defendant is very great and the interest of the plaintiff and the forum state are slight.¹⁵³ The group of justices represented by Justices Brennan and Stevens, would also give considerable weight to minimum contacts but would emphasize that jurisdiction must be reasonable considering all the factors.¹⁵⁴ Nevertheless, both positions would most likely arrive at the same result since even the Brennan group imposes a heavy burden on the defendant to prove that jurisdiction is unreasonable once minimum contacts have been established.¹⁵⁵

A second possible fact situation is one in which the defendant had no contacts with the forum state. This fact situation is similar to *Hanson v. Denckla*,¹⁵⁶ in which a unanimous Court declared that

Sonenshein, *supra* note 95, at 59. Federalism concerns only underlie the due process limitations on personal jurisdiction of state courts and federal courts hearing diversity cases. See *Handley v. Indiana & Michigan Elec. Co.*, 732 F.2d 1265, 1271 (6th Cir. 1984).

152. See *Asahi Metal Indus. Co. v. Superior Court*, 107 S. Ct. 1026 (1987) (4-4 split among the justices on whether there are minimum contacts based on delivery of products into the stream of commerce, and on the appropriate significance of these contacts in light of the fairness factors). See also Sonenshein, *supra* note 95, at 56.

153. *Asahi*, 107 S. Ct. at 1034. Justice O'Connor stated that "When minimum contacts have been established, often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the defendant." *Id.* Justice O'Connor, however, conceded that in *Asahi* these factors reveal the "unreasonableness of the assertion of jurisdiction over Asahi, even apart from the question of the placement of goods in the stream of commerce." *Id.*

154. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 300 (1980) (Brennan, J., dissenting) (Justice Brennan argues that the Court should not mechanically conduct a minimum contacts test but should focus on the overall reasonableness of jurisdiction).

155. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477-78 (1985). Justice Brennan, the author of the opinion, states that a defendant who has purposefully directed his activities at the forum state "must present a compelling case that the presence of some other consideration would render jurisdiction unreasonable." *Id.* at 487. Justices Stevens, Blackmun and White may never reach the issue of minimum contacts if jurisdiction would be unreasonable. See *Asahi*, 107 S. Ct. at 1038 (Stevens, J., concurring in part). See also *supra* notes 120-124 and accompanying text for a discussion of Justice Stevens' concurrence.

156. 357 U.S. 235 (1958).

in order to be subject to personal jurisdiction, a defendant must have purposefully availed himself of the privilege of conducting activities within the state.¹⁵⁷ Even Justice Brennan has never suggested that jurisdiction could be created with reasonableness factors alone, absent the requisite minimum contacts.¹⁵⁸ Thus, both positions in this case would agree that an assertion of jurisdiction would be unconstitutional.

Only in the final hypothetical situation would the difference in approaches create two different results. This third situation could arise when, although the defendant arguably has some contacts, the court is unable to determine whether they are sufficient contacts upon which to exercise personal jurisdiction. For example, in a contracts case, a court might have difficulty in determining whether a contract has substantial connection with the forum state; or, in a product liability case, a court might have difficulty in deciding whether the defendant purposefully directed products into the stream of commerce with the expectation that they would be purchased by forum state consumers. Under this hypothetical scenario, the approaches would differ in two respects. First, the Brennan group would be more likely to find minimum contacts since they do not believe in a mechanical requirement of contacts.¹⁵⁹ Next, assuming that jurisdiction in the forum state would be reasonable, the Brennan group would hold that less significant contacts may be sufficient to create jurisdiction if the fairness factors would make an assertion of personal jurisdiction reasonable.¹⁶⁰ An imposition of jurisdiction under this situation would generally require that the burden on the defendant of litigating in the forum state be negligible and that the interests of both the plaintiff and the forum state be significant.

157. *Id.* at 253. *See also* *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (the due process clause will not permit jurisdiction by a state court in a state with which the defendant has no contacts).

158. Justice Stevens, joined by Justices Blackmun and White, however, stated that "An examination of minimum contacts is not always necessary to determine whether a state court's assertion of personal jurisdiction is constitutional." *Asahi*, 107 S. Ct. at 1035 (Stevens, J., concurring in part). Stevens' cite to *Burger King* indicates that a court may not have to determine minimum contacts in cases where jurisdiction would be extremely unreasonable. *See id.* (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-78 (1985)). *See also supra* notes 120-24.

159. *See* *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 301 (Brennan, J., dissenting).

160. *See* *Burger King Corp. v. Rudzewicz*, 477 U.S. 462, 477 (1985). Justice Brennan, in dictum, states that "these considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of contacts than would otherwise be required." *Id.*

The O'Connor position, on the other hand, would be unlikely to find personal jurisdiction over the defendant in this case.¹⁶¹ Once minimum contacts have been established, the O'Connor position would allow consideration of the fairness factors to affirm or defeat jurisdiction. However, this group would not allow the threshold level of the defendant's minimum contacts with the forum state to be established through an examination of the interests of the other participants in the litigation.¹⁶² In order to determine which of these two approaches is more viable, each of the fairness factors will be examined in light of relevant due process considerations.¹⁶³

IV. THE FAIRNESS FACTORS

A. *The Burden on the Defendant*

Both the Brennan and the O'Connor approaches view the burden or inconvenience on the defendant as a primary factor for jurisdictional analysis.¹⁶⁴ In *Asahi*, Justice O'Connor's opinion on the unreasonableness of an assertion of jurisdiction examined this factor by focusing on the distance between the home of the defendant and the forum state and the fact that the defendant would be subject to a foreign nation's judicial system.¹⁶⁵ Justice Brennan suggested that the burden of litigation on the defendant should be determined in light of the benefits the defendant has received through conducting activities in the forum, and whether litigation in the forum would cause undue surprise to the defendant.¹⁶⁶ In the area of choice-of-law, the Due Process Clause of the Fourteenth Amendment has been interpreted to assure the defendant fundamental

161. See *Asahi*, 107 S. Ct. at 1031 (minimum contacts must be based on an act by the defendant).

162. *Id.*

163. See generally, Redish, *supra* note 53 (discussing the proper role of federalism concerns in personal jurisdiction analysis and concluding that a due process test should primarily focus on convenience factors and the burden of litigating in a particular forum); Drobak, *The Federalism Theme in Personal Jurisdiction*, 68 IOWA L. REV. 1015 (1983) (arguing that federalism concerns exist as a byproduct of a defendant's right to be free from the judicial authority of states lacking minimum contacts).

164. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) (majority opinion); *id.* at 300-01 (Brennan, J., dissenting).

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

166. *Id.* at 1035 (Brennan, J., concurring in part).

fairness.¹⁶⁷ Furthermore, the Supreme Court has recognized that, although an examination of contacts for choice-of-law and personal jurisdiction may result in different conclusions, both inquiries are closely related and depend on similar considerations.¹⁶⁸ In *Burger King*, both the majority and the dissent recognized that due process would be offended if an assertion of jurisdiction would be fundamentally unfair.¹⁶⁹ This "burden factor" was also one of the original due process considerations in *International Shoe*.¹⁷⁰ Therefore, this factor has constitutional significance, apart from minimum contacts, in personal jurisdiction analysis in considering fundamental fairness to the defendant.¹⁷¹ Since the due process clause protects defendants from overly burdensome litigation, a consideration of the "burden factor" is essential in order to preserve defendants' due process rights.¹⁷²

B. The Plaintiff's Interest in Obtaining Convenient and Effective Relief

This factor inquires into the plaintiff's interest in litigating in a particular forum. Since the due process clause protects the liberty and property interest of the defendant, it is difficult to understand why this consideration should rise to the level of constitutional significance.¹⁷³ Furthermore, even if a state court cannot assert personal jurisdiction over a particular defendant, the plaintiff is generally not without a remedy since a suit can be brought in the defendant's home state or nation.¹⁷⁴ In some cases, the additional expense involved in foreign litigation might prevent the plaintiff from suing. Even if the plaintiff does not have an alternative

167. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 317 n.23 (1981).

168. *Shaffer v. Heitner*, 433 U.S. 186, 224-25 (1977).

169. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 489 (Stevens, J., dissenting) (Justice Stevens joined by Justice White indicated that they would have found jurisdiction fundamentally unfair).

170. *International Shoe Co. v. Washington*, 326 U.S. 310, 317. See *supra* notes 45, 61-63 and accompanying text.

171. See *International Shoe*, 326 U.S. at 317; *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298 (1980).

172. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretive Reexamination of the Full Faith and Credit and Due Process Clauses (part 2)*, 14 CREIGHTON L. REV. 735, 842-46 (1981) (the actual burden on the defendant in defending in the forum state is a relevant issue to the due process right to be heard).

173. See *Sonenshein*, *supra* note 95, at 58.

174. *Id.*

American forum, however, the Supreme Court has not accepted a "jurisdiction by necessity" argument as a constitutional jurisdiction doctrine.¹⁷⁵

C. *The Interest of the Forum State in Adjudicating the Dispute*

Since the Supreme Court has been unable to clarify the proper significance of this factor, there is considerable confusion over the extent to which federalism concerns are important in explaining the constitutional restrictions on personal jurisdiction.¹⁷⁶ Recently, in *Insurance Corp. of Ireland v. Compagnie de Bauxites*,¹⁷⁷ eight justices agreed on two considerations that underlie personal jurisdiction analysis: (1) The personal jurisdiction requirements imposed by the due process clause recognize and protect an individual liberty interest; (2) the minimum contacts test reflects an element of federalism.¹⁷⁸ The Court explained that the federalism theory described in *World Wide Volkswagen*, must ultimately be considered a function of the individual liberty interest preserved by the due process clause.¹⁷⁹ The holding in *Ireland* is consistent with *International Shoe* since both cases recognized that the due process clause primarily serves to protect defendants from unreasonable assertions of jurisdiction rather than to explicitly protect the sovereignty of the states.¹⁸⁰

Justice Brennan's approach in *World-Wide Volkswagen*, *Burger King* and *Asahi* requires the balancing of various factors along with the amount of contacts to determine the reasonableness of jurisdiction. However, this approach may result in inconsistencies in the determination of the constitutionality of jurisdiction. For example, a defendant with the same level of contacts with two states may be sued on the same cause of action unrelated to these contacts in

175. Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 622, 647 (1988). See *Helicopteros Nacionales de Colombia, S. A. v. Hall*, 466 U.S. 408, 419 n.13 (1984) (the Court refused to consider the plaintiff's jurisdiction by necessity argument).

176. See Lewis, *supra* note 25 at 699, 727-39, 742 (1983) (reviewing the Supreme Court's vacillating pronouncements on sovereignty considerations inherent in the area of personal jurisdiction and urging that personal jurisdiction should maintain an individual rights focus).

177. 456 U.S. 694 (1982).

178. *Ireland*, 456 U.S. at 702 n.10.

179. *Id.*

180. Sonenshein, *supra* note 95, at 58. See also Redish, *supra* note 53, at 1137 (the only due process concern of jurisdictional analysis should be the avoidance of inconvenience to the defendant).

both State A and State B. If State A has a weak interest in regulating the activity which created the cause of action, an assertion of jurisdiction in light of the moderate amount of contacts will be characterized as unreasonable. However, if State B has a strong regulatory scheme governing the activity which creates the cause of action, the court will probably find that less significant contacts suffice where other relevant factors make an assertion of jurisdiction reasonable. Thus, the defendant could be deprived of his property in one state but not in the other state. The due process clause as interpreted in *International Shoe* is supposed to ensure that a defendant bears only the burden of having to defend a suit in a forum where he had the privilege of conducting activities and where he benefitted from the protection of the state's laws.¹⁸¹ In this case, however, the assertion of jurisdiction over the defendant in forum B would depend on the interests of the state rather than on the extent of activities by the defendant. "Traditional notions of fair play and substantial justice" could not contemplate such an unfair result.

Although the Court has seemingly rejected federalism concerns as an independent limitation on personal jurisdiction,¹⁸² the interest of the forum state in litigating the case remains one of the factors which the court considers in determining the reasonableness of allowing an exercise of personal jurisdiction.¹⁸³ A forum state has two interests in the litigation of a cause of action.¹⁸⁴ First, every state has an interest in providing an available forum for state residents to adjudicate their causes of action.¹⁸⁵ However, the home state of the defendant has an equally strong interest in providing the defendant with the protection of the state courts, and an interest in preventing overreaching by other states. Given these conflicting interests, this factor should not affect personal jurisdiction by a state court over the defendant.

181. *International Shoe Co. v. Washington*, 326 U.S. 310, 316-320 (1945).

182. See *supra* note 151 and accompanying text.

183. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980) (considered forum state's interest in adjudicating the dispute a relevant factor); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985) (considered forum state's interest in adjudicating the dispute a relevant factor).

184. See *Brilmayer*, *supra* note 56, at 106-07.

185. *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (forum state has a manifest interest in providing effective means of redress for its residents). See *Asahi Metal Indus. Co. v. Superior Court*, 107 S. Ct. 1026, 1034 (1987) (since plaintiff was not a forum state resident, forum state's interest in the dispute was significantly diminished). See also *Brilmayer supra* note 56, at 107; *Sonenshein*, *supra* note 95, at 58.

The second interest is the interest of the state in regulating activities that occur within its borders.¹⁸⁶ This interest, however, is already protected in two appropriate ways.¹⁸⁷ First, the minimum contacts test itself distinguishes between causes of action which arise out of, or relate to, activities by the defendant in the forum state and causes of action which do not arise out of the activities of the defendant within the forum.¹⁸⁸ Generally, a state court has a legitimate interest in applying its laws to activities occurring within the state.¹⁸⁹ This interest is adequately protected by allowing the court personal jurisdiction over causes of action which arise out of forum activities.¹⁹⁰ Since the substantive law of the state defines the elements of a cause of action, the interest of a state in regulating intrastate activities is adequately protected by this requirement.¹⁹¹ Second, choice-of-law regulations adequately protect the interest of the state in applying state law to causes of action arising within the state,¹⁹² although the Supreme Court has recognized that an examination of the defendant's contacts with the state may result in different conclusions for personal jurisdiction and choice-of-law issues.¹⁹³

D. The Interest of the Interstate Judicial System in Adjudicating the Dispute and the Shared Interest of the Several States in Furthering Fundamental Substantive Policies

Finally, consideration of the interstate judicial system's interest in adjudicating the dispute and the shared interest of the several states in furthering fundamental substantive policies, give little guidance in deciding why a defendant should be subject to the personal jurisdiction of a particular state court. These considerations may possibly be more meaningful when the court decides whether

186. See Brilmayer, *supra* note 56, at 106.

187. *Id.*

188. See *supra* notes 125-27 and accompanying text.

189. See Redish, *supra* note 53 at 1139. "A state's legitimate interest in a particular dispute-other than the provision of a convenient forum for its citizens - is limited primarily to having its body of substantive law control the outcome, for it is primarily through its substantive law that a state's policy goals are attained." *Id.*

190. Brilmayer, *supra* note 56, at 106.

191. *Id.*

192. Sonenshein, *supra* note 95, at 58 (the author states that choice-of-law provisions govern a claim irrespective of jurisdiction).

193. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 317 n.23 (1981).

a state court should have personal jurisdiction over an alien defendant.¹⁹⁴ As the Supreme Court recognized in *Asahi*, a consideration of this factor as applied to an alien defendant would require a court examination of the procedural and substantive policies of other nations.¹⁹⁵ The Supreme Court has warned that this inquiry requires great care and reserve by the court.¹⁹⁶

V. CONCLUSION

The due process considerations established in *International Shoe* are adequately protected by the minimum contacts test. The due process protections afforded defendants by the Constitution should not be diluted by the Supreme Court by requiring a consideration of the fairness factors.¹⁹⁷ Since the Supreme Court has not specified the weight to be given to the fairness factors, consideration of these factors makes an assertion of jurisdiction both arbitrary and unpredictable.¹⁹⁸ Furthermore, the interests supposedly protected by consideration of these factors are in fact either inappropriate due process concerns or are already protected in other ways. Therefore, due process merely requires minimum contacts based on a defendant's substantial or related forum activity for valid exercise of in personam jurisdiction by a court. Once minimum contacts have been established, the court should dismiss the case only where the burden on the defendant is so great that it amounts to a denial of fundamental fairness.¹⁹⁹ If the defendant lacks sufficient minimum

194. See *Asahi Metal Indus. Co. v. Superior Court*, 107 S. Ct. 1026, 1034-35 (consideration by the Court of the procedural and substantive policies of other nations requires great care and reserve and a careful inquiry into the reasonableness of the assertion of jurisdiction and an unwillingness to find the serious burdens on the alien defendant outweighed by minimal plaintiff and forum state interest).

195. *Id.*

196. *Id.* See *United States v. First Nat. City Bank*, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting).

197. Lewis, *supra* note 25, at 739 (arguing that due process protects purely personal rights and that the Court should repudiate not just the sovereignty but also the governmental interest factors).

198. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980). The Court asserted that the due process restrictions ensure "the fair and orderly administration of the laws" and give a greater degree of predictability to the legal system. However, since the Supreme Court has given an ambiguous analysis of the due process requirements in the most recent cases, the goal of predictability cannot be realized. *Id.*

199. *Asahi* may have been such a case. See *supra* note 109 and accompanying text. See also Redish, *supra* note 53, at 1141-42. (If the burden caused by the assertion of jurisdiction would be so oppressive as to threaten the defendant's ability to obtain a fair trial, the state court should not be allowed to assert jurisdiction under any circumstance); *supra* notes 167-71 and accompanying text.

contacts, however, the inquiry should cease and the court should dismiss the case.

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