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CONSTITUTIONAL LAW-PERSONAL JURISDICTION-A STATE'S ABILITY TO EXERCISE JURISDICTION OVER A FOREIGN MANUFACTURER

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CONSTITUTIONAL LAW—PERSONAL JURISDICTION—A STATE'S ABILITY TO EXERCISE JURISDICTION OVER A FOREIGN MANUFACTURER

State v. NV Sumatra Tobacco Trading Co., 403 S.W.3d 726 (Tenn. 2013).

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I. INTRODUCTION

In 1999 a Florida-based entrepreneur, Basil Battah, founded FTS Distributors ("FTS") and began importing cigarettes.[1] FTS purchased NV Sumatra Tobacco Trading Company's United brand "American Blend" cigarettes from a company located in California.[2] NV Sumatra Tobacco Trading Company, the defendant, is an Indonesian-based manufacturer.[3] Prior to FTS acquiring the cigarettes, the defendant had obtained United States trademarks for the United brand.[4] After successfully advertising and selling all of his inventory, Mr. Battah wanted to purchase more cigarettes from

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1. State v. NV Sumatra Tobacco Trading Co., 403 S.W.3d 726, 732 (Tenn. 2013). Mr. Battah founded American Automotive Security, a car alarm company, in 1998 and changed its business model to FTS's in 1999. *Id.*

2. *Id.*

3. *Id.*

4. *Id.*

the defendant and secure the exclusive United States sales and distribution rights.[5] The defendant, however, had existing exclusive distribution agreements for its United brand cigarettes with other international distributors and directed Mr. Battah to contact the proper agent from the distributors.[6] After purchasing more inventory from the independent distributors, Mr. Battah began taking the necessary steps to comply with the regulations of the tobacco industry and continued to advertise the product.[7]

Although the defendant had already acquired United States trademarks for its brand, Mr. Battah and his attorney were responsible for ensuring compliance with the Federal Trade Commission ("FTC") and filing the required information regarding the cigarettes' ingredients with the Department of Health and Human Services.[8] Mr. Battah's attorney also sent him a letter reminding him to comply with all state and local laws, including any state tobacco escrow laws that might be in force under the Master Settlement Agreement ("MSA") entered into by certain states and tobacco companies after the nationwide settlement of litigation with the companies in the late 1990s.[9] This litigation concerned the responsibility of tobacco companies for the costs associated with tobacco-related health conditions in the United States.[10]

The MSA had separated the tobacco companies into three categories: the Original Participating Manufacturers ("OPAs"), the Subsequent Participating Manufacturers ("SPMs"), and the Non-Participating Manufacturers ("NPMs").[11] The states agreed to

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5. *Id.*

6. *Id.* The defendant had an existing exclusive distribution agreement with Unico Trading Pte., Ltd., a distribution company based in Singapore. *Id.* This company, in turn, had an exclusive agreement with a tobacco distribution company, Silmar Trading, Ltd., based in the British Virgin Islands. *Id.*

7. *Id.* In attempts to successfully sell the cigarettes, Mr. Battah "created magazine ads, assembled a booth with an illuminated United brand logo, and obtained some point-of-sale posters" from the defendant. *Id.* He also attended annual tobacco distributor trade shows where he marketed to smaller regional distributors; three of the distributors that purchased his product sold cigarettes in Tennessee. *Id.* at 733.

8. *Id.* at 732.

9. *Id.* at 730–32.

10. *Id.* at 729. The four largest domestic tobacco companies and a team of eight state attorneys general entered into the MSA. *Id.* at 730. These companies controlled ninety-eight percent of the cigarette market in the United States. *Id.* The MSA concerned forty-six of the states, the District of Columbia, and the five territories of the United States. *Id.* The tobacco companies settled with the four remaining states prior to the MSA. *Id.*

11. *Id.* The OPAs are the original tobacco companies who joined the MSA; the

dismiss their pending suits, releasing all past and future claims against the OPAs and SPMs in exchange for regulatory concessions and substantial monetary payments.[12] The NPMs, however, did not have any financial obligations under the MSA and could enter the cigarette market, undercutting participating members' prices without any ramifications under the MSA.[13] The MSA allowed the participating members to reduce their annual financial obligation if they lost any market share to the NPMs.[14] The MSA also provided for states to establish qualifying statutes to mitigate the impact of NPMs on the payments received from the participating members.[15] Tennessee was one of the states to approve the MSA and established the "Tennessee Tobacco Manufacturers' Escrow Fund Act of 1999" to mitigate any monetary losses due to the NPMs.[16] This act required any tobacco product manufacturer selling cigarettes to consumers in Tennessee after May 16, 1999, to either become a participating manufacturer by joining the MSA or begin making payments to a "qualified escrow fund."[17]

In July 2001, one of the distributor's agents forwarded a facsimile from the defendant to Mr. Battah acknowledging that because United cigarettes were being sold in multiple states subject to the Escrow Fund Act (including Tennessee), FTS needed to have its attorney investigate if escrow funds needed to be opened in these

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SPMs are the tobacco companies who joined the MSA but are not OPAs; the NPMs are the tobacco companies not in the MSA. *Id.* The SPMs represent the tobacco companies who control most of the remaining two percent of the cigarette market. *Id.*

12. *Id.* at 731.

13. *Id.* (quoting Gregory W. Traylor, *Big Tobacco, Medicad-Covered Smokers, and the Substance of the Master Settlement Agreement*, 63 VAND. L. REV. 1081, 1105 (2010)).

14. *Id.* The section of the MSA that allows for the OPAs to reduce payments is the Non-Participating Manufacturer Market Share Adjustment. *Id.* The annual payment amount to the fund is based on the number of cigarettes sold by the NPM that year. *Id.* (quoting *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1164 (10th Cir. 2012)). All funds that remain in escrow are restored to the NPM twenty-five years later. *Id.* (quoting *Grand River Enter v. Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 63 (2d Cir. 2007)).

15. *Id.*

16. *Id.* at 731–32; *see also* TENN. CODE ANN. § 47-31-103(a). The statute allowed by the MSA can be in the form of either requiring the NPMs to join the MSA or to establish an escrow account to "secure damage awards for any successful cigarette-related claim the state might obtain from the NPM." *NV Sumatra Tobacco Trading Co.*, 403 S.W.3d at 731.

17. *NV Sumatra Tobacco Trading Co.*, 403 S.W.3d at 732 (quoting TENN. CODE ANN. § 47-31-103(a)).

states.[18] Previously, the United States Custom Service had also notified FTS that the United brand packing needed to be changed.[19]

Mr. Battah requested a meeting with the defendant and its distributors to address the issues of the packaging and the escrow funds, hoping to resolve the issues quickly because he was nearly out of inventory.[20] During the meeting, which was held in China, Mr. Battah presented both of the issues and concluded that the best course of action would be to change the packaging and open an escrow fund in each of the states.[21] In early 2002, an agent of the defendant called Mr. Battah and informed him it would not be changing its packaging nor opening any state escrow funds because it had decided to no longer serve the United States market. Shortly after the call, Mr. Battah sold the rest of his inventory and founded his own cigarette manufacturing company.[22]

On June 5, 2003, the State of Tennessee filed suit against the defendant for not depositing funds in a required escrow account for sales between 2000 and 2002.[23] The total sales were estimated at 11,592,800 cigarettes.[24] Based upon these estimates, the State alleged that the defendant owed $168,316.83 into escrow and was thus subject to penalties up to three hundred percent of unpaid escrow amounts as well as the State's costs and attorney's fees.[25]

In October 2004, the defendant moved to dismiss for lack of personal jurisdiction.[26] The trial court denied the motion and

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18. *Id.* at 734. Because the cigarettes were imported into Miami, which is not subject to the Escrow Fund Act, and then indirectly distributed to the states that are subjected to the Act, the defendant recognized that these states could initiate civil action to compel compliance and wanted FTS's attorney to determine how to proceed with the subjected states. *Id.*

19. *Id.* at 733. The packing was considered to be confusing, thus leading customers to infer the cigarettes were manufactured in the United States (and not Indonesia) because of the name and images on the packing. *Id.* Mr. Battah's attorney convinced the Custom Service to grant a waiver for the cigarettes that were already packaged, but it refused to allow any new packaged cigarettes to enter the country unless they were in compliance with the order. *Id.*

20. *Id.* at 734.

21. *Id.* Mr. Battah still desired an exclusive distribution contract with the defendant, but the defendant continued to reiterate he needed to go through the distributors it already had. *Id.* at 733.

22. *Id.* at 735.

23. *Id.* at 736. Tennessee originally filed suit claiming damages for the sales between 2000 and 2001, but then amended to include sales in 2002. *Id.*

24. *Id.* This number was computed using Tennessee's licensed tobacco distributor reports and jointly stipulated by the parties. *Id.*

25. *Id.*

26. *Id.* The defendant moved to dismiss under Tenn. R. Civ. P. 12.02(2).

commenced discovery.[27] On cross-motions for summary judgment, the trial court ruled in favor of the defendant, finding no basis for person jurisdiction because the defendant had done nothing to purposefully direct its products to Tennessee; instead, it had merely placed them into the stream of commerce.[28] The Tennessee Court of Appeals reversed, holding that the desire to target all fifty states for distribution supported a finding of minimum contacts and that the stream of commerce theory authorized jurisdiction over foreign manufacturers who derive benefits from the distribution and sale of products throughout the United States.[29] On appeal to the Tennessee Supreme Court, *held*, reversed.[30] A foreign manufacturer cannot have reasonable expectations of being brought to court in a state where it did not purposefully avail itself of that state.[31] The necessary minimum contacts are not established by simply placing a product into the stream of commerce, nor are they established by the manufacturer's distributors targeting only the United States market as a whole (rather than targeting specific states).[32] *State v. NV Sumatra Tobacco Trading Co.*, 403 S.W.3d 726 (Tenn. 2013).

II. ISSUE PRESENTED TO THE COURT

Personal jurisdiction has gradually developed through landmark United States Supreme Court cases beginning with the decisive modern case of *International Shoe Co. v. Washington* in 1945, which established that in order to subject a non-resident defendant to judgment in personam, the defendant needs to "have certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[33] In analyzing minimum contacts requirements, the State of Tennessee generally follows the principles established by the United States Supreme Court.[34]

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27. *NV Sumatra Tobacco Trading Co.*, 403 S.W.3d at 736.

28. *Id.* at 737.

29. *Id.* at 737–38.

30. *Id.* at 765.

31. *Id.*

32. *Id.*

33. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

34. *NV Sumatra Tobacco Trading Co.*, 403 S.W.3d at 751. The Court also declines to follow any change in the traditional interpretation of personal jurisdiction requirements from the United States Supreme Court that does not command a majority. *Id.* at 765.

In 1980, the Supreme Court introduced the "stream of commerce" analysis to its cases involving non-resident defendants in *World-Wide Volkswagen Corp. v. Woodson*.[35] In this case, the Court established there is no due process violation if the defendant enters a product into the stream of commerce with the expectation that it would enter the forum state.[36] The purpose of this rationale is to lend a degree of predictability to for non-resident defendants so they may structure their conduct with some assurance as to where their conduct will and will not subject them to suit.[37]

While the Court continued to define the requirements to establish jurisdiction over non-resident defendants, the law became somewhat unclear in 1987,[38] when the Court heard *Asahi Metal Industry Co. v. Superior Court of California*, a products-liability case involving an international manufacturer and divided over the exact "amount of contact required in the stream of commerce analysis for a defendant to establish a purposeful contact in the forum state."[39] The Court split on the issue of whether personal jurisdiction may be established solely on the basis that the manufacturer was aware that the final product was marketed to the forum state after it entered into the stream of commerce or whether additional contacts were required.[40]

During the twenty-four years that the Court was silent on the issue of minimum contacts requirements, both circuit courts and states had no real sense of direction over the specific amount of contact needed for a state to establish jurisdiction over non-resident defendant.[41] When the Court granted certiorari to *J. McIntyre Machinery, Ltd. v. Nicastro*, many hoped this would clear up the confusion created by *Asahi*.[42] The Court, however, was once again split: the plurality argued that the controlling question of minimum contacts should be based on whether the defendant manifested

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35. Kristin R. Baker, *Product Liability Suits and the Stream of Commerce After* Asahi*:* World-Wide Volkswagen *is Still the Answer*, 35 TULSA L.J. 705, 705 (2000).

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

37. *Id.* at 297.

38. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 478 (1985); Baker, *supra* note 35, at 705.

39. Baker, *supra* note 35, at 705.

40. Asahi Metal Indus. Co. v. Super. Ct. of Cal., 480 U.S. 102, 112–17 (1987).

41. Baker, *supra* note 35, at 712.

42. *See* J. McIntyre Mach., Ltd. v. Nicastro, 131 S.Ct. 2780 (2011); Patrick J. Borchers, J. McIntyre, Goodyear, *and the Incoherence of the Minimum Contacts Test*, 44 CREIGHTON L. REV. 1245, 1245–46 (2011); Allan Ides, *Forward: A Critical Appraisal of the Supreme Court's Decision in* J. McIntyre Machinery, Ltd. v. Nicastro, 45 LOY. L.A. L. REV. 341, 345 (2010).

intent to submit to the power of the sovereign state, which can only be demonstrated only in a stream of commerce case if the defendant targeted the forum state.[43] The concurrence rejected this analysis, contending this was not an appropriate case to adopt a new principle and the outcome should be based solely on controlling precedent.[44] With another case which produced no controlling majority, states and circuit courts again clashed over how to analyze minimum contacts.[45]

In *NV Sumatra*, the Tennessee Supreme Court allowed the defendant's appeal in order to provide guidance on which analysis should be applied in establishing sufficient minimum contacts, and thus determine whether Tennessee could properly exercise jurisdiction over the defendant.[46]

III. THE DEVELOPMENT OF THE EXERCISE OF PERSONAL JURISDICTION OVER FOREIGN MANUFACTURERS

A. Federal Development of the Minimum Contacts Test and the Stream of Commerce Analysis

Following the development of an expanding and increasingly mobile economy, the United States Supreme Court has rejected its old holding that a non-resident, non-willing defendant must be served within the boundaries of the state where the suit is located.[47] *International Shoe*, the Court's seminal modern personal jurisdiction case, expanded a court's jurisdictional reach to outside its borders for non-resident defendants.[48] The Court thus established the standard

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43. *J. McIntyre Mach., Ltd.*, 131 S.Ct. at 2789–92.

44. *Id.* Since the court was "fragmented . . . and no single rationale explaining the result enjoy[ed] the assent of the five Justices, the '[holding] . . . may be viewed as the position taken by those Members who concurred . . . on the narrowest grounds.'" State v. NV Sumatra Tobacco Trading Co., 403 S.W.3d 726, 756 (Tenn. 2013) (quoting Marks v. United States, 430 U.S. 180, 193 (1977)). It is, however, not required that the narrowest concurrence be taken as the Court's position and, once again, no majority opinion controlled. *See* Borchers, *supra* note 42, at 1245–46.

45. *See* Ides, *supra* note 42, at 345.

46. *NV Sumatra Tobacco Trading Co.*, 403 S.W.3d at 759.

47. Douglas D. McFarland, *Drop the* Shoe*: A Law of Personal Jurisdiction*, 68 MO. L. REV. 753, 753 (2003).

48. *Id.* The development of personal jurisdiction over defendants developed into two categories: general jurisdiction and specific jurisdiction. *NV Sumatra Tobacco Trading Co.*, 403 S.W.3d at 744. Specific jurisdiction occurs when a defendant has minimum contacts with the forum state and the cause of action arises from these contacts. *Id.* General jurisdiction, on the other hand, arises when the cause of action does not arise from the contacts but jurisdiction can still be proper. *Id.* Jurisdiction is

that due process is not offended if a non-resident defendant has "certain minimum contacts with [the forum State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[49] As the Court explained:

> [T]o the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protections of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.[50]

Since its inception and throughout its progeny, the Court's minimum contacts test has been intensively fact-specific.[51]

In 1958, the Court first recognized that the technological progress of the country had increased the flow of commerce between states; therefore, a corresponding need arose to increase jurisdictional reach over non-resident defendants.[52] The Court, however, emphasized that the prerequisite requirement of minimum contacts must be satisfied regardless of whether the defendant's burden to defend in the forum was minimal.[53] The Court then introduced the "purposeful availment requirement," a criteria which would later divide the Justices.[54] The Court declared 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."[55] This requirement thus demonstrated the Court's trend of broadening the circumstances under which a state may exercise personal jurisdiction over non-resident defendants.[56]

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proper if the defendant is "essentially at home" in the state. *Id.* (quoting Goodyear Dunlap Tires Operations, S.A. v. Brown, 131 S.Ct. 2846, 2851 (2011)). There is no dispute that the matter in *NV Sumatra* implicates specific jurisdiction. *Id.*

49. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940).

50. *Id.* at 319.

51. Johnjerica Hodge, *Minimum Contacts in the Global Economy: A Critical Guide to* J. McIntyre Machinery v. Nicastro, 64 ALA. L. REV. 417, 421 (2012).

52. Hanson v. Denckla, 357 U.S. 235, 250–51 (1958).

53. *Id.* at 251.

54. Hodge, *supra* note 51, at 421.

55. *Hanson*, 357 U.S. at 253 (emphasis added).

56. Austin W. Scott, *Hanson v. Denckla*, 72 HARV. L. REV. 695, 702 (1959).

The concept of "purposeful availment" was further refined by the Court in 1980 under *World-Wide Volkswagen*.[57] The Court explained that "'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause," and while foreseeability is not "wholly irrelevant . . . 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."[58] Furthermore, the Court noted that the reasonableness of bringing suit in a specific state was not sufficient to satisfy the minimum contacts test.[59] The Court reiterated that even if the defendant would suffer minimally or not at all, "the Due Process Clause 'does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations.'"[60]

Additionally, *World-Wide Volkswagen* introduced the foundation for the stream of commerce theory implemented by the Court.[61] This theory is based on the concept that if the sale of a product is not an isolated incident but rather "arises from . . . efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has . . . been the source of injury."[62] This analysis suggests that the minimum contacts test would have been satisfied if the defendant either "directly or indirectly" attempted to serve the forum state.[63] Basing suit upon the "unilateral activity of another party or a third person"[64] or upon "customers' behaviors" would

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57. Hodge, *supra* note 51, at 421.

58. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295–97 (1980).

59. Hodge, *supra* note 51, at 422.

60. *World-Wide Volkswagen Corp.*, 444 U.S. at 294 (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)).

61. Hodge, *supra* note 51, at 422.

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

63. Hodge, *supra* note 51, at 422. *World-Wide Volkswagen* involved a products liability action where a family purchased an Audi in New York and was later injured in a car accident in Oklahoma. Baker, *supra* note 35, at 707–08. The plaintiffs alleged that their injuries resulted from a defective design in the fuel system. *Id.* No evidence was presented that the defendants had contacts with Oklahoma outside of this single incident. *Id.* The Court refused to allow jurisdiction based on one isolated incident because, despite the foreseeability of a car accident in a state other than where the car was purchased, jurisdiction must be based on the foreseeability of defendant's conduct and connection to the state where it would be brought into court. *Id.*

64. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985) (quoting Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 417 (1984)).

therefore be inappropriate because it would deprive the corporation of the power to decide which markets into which it wished to purposefully avail itself.[65]

The Court specifically held that "[t]he forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State."[66] This expectation arises when a corporation purposefully avails itself by conducting activities in the forum state because "it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State."[67] The purpose of the minimum contacts test is thus twofold: not only does it protect the defendant against burdens of litigating in a distant or inconvenient forum, but it also acts to ensure that States do not reach beyond their sovereign limits.[68]

The Court emphasized that once it is proven that a defendant has purposefully established sufficient minimum contacts, they may be considered "in light of other relevant factors, including the forum State's interest in adjudicating the dispute" to ensure maintenance of the suit "does not offend 'traditional notions of fair play and substantial justice.'"[69] In 1985, the Court in *Burger King Corp. v. Rudzewicz* further elaborated on this necessity of ensuring that the suit does not offend "traditional notions of fair play and justice."[70] The Court thus asserted that the "minimum requirements inherent in the concept of 'fair play and substantial justice' may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities."[71] Consequently, the two issues

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65. *See* Hodge, *supra* note 51, at 423 (quoting *World-Wide Volkswagen, Corp.*, 444 U.S. at 297–98).

66. *World-Wide Volkswagen Corp.*, 444 U.S. at 297–98.

67. *Id.* at 297.

68. *Id.* at 291–92.

69. *Id.* at 292 (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940))). Factors courts may look at are "'the burden on the defendant,' 'the forum State's interest in adjudicating the dispute,' 'the plaintiff's interest in obtaining convenient and effective relief,' 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies,' and the 'shared interest of the several States in furthering fundamental substantive social policies.'" *Burger King Corp.*, 471 U.S. at 477 (quoting *World-Wide Volkswagen Corp.*, 444 U.S. at 292).

70. *Int'l Shoe Co.*, 326 U.S. at 316 (quoting *Milliken*, 311 U.S. at 463); *see also Burger King Corp.*, 471 U.S. at 477.

71. *Burger King Corp.*, 471 U.S. at 477–78 (quoting *World-Wide Volkswagen*

required for any jurisdictional challenge under the stream of commerce theory are minimum contacts and the "traditional notions of fair play and substantial justice" of bringing the suit in the forum state.[72]

Two years later in *Asahi*, the Court was presented with a products-liability case involving a foreign manufacturer.[73] The Court unanimously decided to consider the issue of minimum contacts and the reasonableness of the suit separately.[74] While the Justices agreed that trying the case would not comport with "traditional notions of fair play and substantial justice," the Justices were drastically split over whether the defendant had purposefully availed itself on the forum State, thus satisfying the minimum contacts test.[75] Justice O'Connor was joined by three other Justices in her minimum contacts analysis.[76] She emphasized that Court precedent established "[t]he 'substantial connection' between the defendant and the forum State necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully directed toward the forum State*."[77] She asserted:

> The placement of a product into the stream of commerce, *without more*, is not an act of the defendant purposefully directed toward the forum State . . . 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

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Corp., 444 U.S. at 292).

72. McFarland, *supra* note 47, at 774.

73. Baker, *supra* note 35, at 709. The plaintiff was a California citizen who sued a Taiwanese manufacturer of a motorcycle tire tube. *Id.* The Taiwanese manufacturer then filed a cross-complaint seeking indemnification against Asahi Metal Industry Co., the Japanese manufacturer of the tube's valve assembly. *Id.*

74. McFarland, *supra* note 47, at 775.

75. Baker, *supra* note 35, at 710. By the time this case reached the Supreme Court, the plaintiff had settled with the Taiwanese manufacturer, thus leaving only the indemnification issue between the two foreign parties. *Id.* at 709. The Court gave significant weight to the fact that the defendants were international parties and also "considered the procedural and substantive policies of Japan and Taiwan [that] would be affected by the state of California's assertion of jurisdiction over the alien defendant." *Id.* at 710.

76. Asahi Metal Indus. Co. v. Super. Ct. of Cal., 480 U.S. 102, 105 (1987). Chief Justice Rehnquist, Justice Powell, and Justice Scalia joined Justice O'Connor's opinion. *Id.*

77. *Id.* at 112 (quoting *Burger King Corp.*, 471 U.S. at 475–76) (emphasis added).

> the product into the stream into an act purposefully directed toward the forum State.[78]

According to Justice O'Conner, examples of what "more" is required under this test include: "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."[79] In this particular case, she concluded that the minimum contacts test was not met because the defendant did not demonstrate any activities purposefully directed towards the forum state; rather, it simply placed the product into the stream of commerce.[80]

Justice Brennan authored the concurrence and was also joined by three others Justices in disagreeing with both Justice O'Connor's analysis and overall conclusion regarding minimum contacts.[81] He dismissed the need for any additional conduct, arguing that "[t]he stream of commerce refers . . . to the *regular and anticipated flow of products* from manufacture to distribution to retail sale. As long as a participant . . . is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise."[82] He thus contended that a manufacturer who places goods into 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."[83] Justice Brennan argued that "[t]hese benefits accrue regardless of whether that participant directly conducts business in the forum State, or engages in additional conduct directed toward that State."[84] He concluded that although the suit would not conform with "fair play and substantial justice," there were sufficient minimum contacts because the defendant was aware of the distribution process and knew it would economically derive benefits from sales in California.[85]

Justice Stevens wrote separately, emphasizing the diversity of opinions.[86] Prior to criticizing Justice O'Connor's interpretation of

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78. *Id.* (emphasis added).
79. *Id.*
80. Baker, *supra* note 35, at 711.
81. *Id.*
82. *Asahi Metal Indus. Co.*, 480 U.S. at 117 (emphasis added).
83. *Id.*
84. *Id.*
85. *See id.* at 121; Baker, *supra* note 35, at 711.
86. Baker, *supra* note 35, at 711.

the requirements for minimum contacts, he challenged the necessity of analyzing the minimum contacts because the Court had already established the case would be unreasonable to adjudicate.[87] He stressed that "[a]n examination of minimum contacts is not always necessary to determine whether a state court's assertion of personal jurisdiction is constitutional" and the finding that trying the suit would be unreasonable alone is enough to require reversal.[88] Justice Stevens concluded there was "no reason in this case for the plurality to articulate 'purposeful direction' or any other test as the nexus between an act of a defendant and the forum State that is necessary to establish minimum contacts."[89] He further criticized the plurality for assuming "that an unwavering line can be drawn between 'mere awareness' that a component will find its way into the forum State and 'purposeful availment' of the forum's market."[90]

Asahi contained no majority opinion explaining how to determine whether an out-of-state defendant possessed sufficient minimum contacts for the forum state to exercise jurisdiction over it.[91] In the twenty-four years until the Court handed down its next opinion on the issue, the circuit courts and states were thus left directionless in determining which opinion established the proper analysis for the minimum contacts test.[92]

After more than two decades of confusion, the Court finally granted certiorari to another products-liability case involving a foreign manufacturer.[93] Although the defendant in *McIntyre* had limited contacts with the forum state, it had targeted the United states market as a whole by attending numerous annual conventions for scrap recycling.[94] Basing its opinion on Justice Brennan's interpretation of the stream of commerce theory, the New Jersey Supreme Court found jurisdiction to be proper.[95] In its decision, the

87. *See id.*

88. *Asahi Metal Indus. Co.*, 480 U.S. at 121. The highest court in California had found that the suit against the defendant was reasonable and that it had sufficient contacts with the state to confer jurisdiction. *Id.* at 108.

89. *Id.* at 122.

90. *Id.* at 122.

91. Baker, *supra* note 35, at 711–12.

92. *See id.* at 712; Ides, *supra* note 42, at 341.

93. Hodge, *supra* note 51, at 425. The New Jersey plaintiff brought suit after losing four fingers in a metal shearing machine manufactured by the defendant, a manufacturer based in England (the machine had been shipped to New Jersey through an American distributor based in Ohio). *Id.*

94. *See id.* The forum state, New Jersey, was known to possess the highest level of scrap recycling business. J. McIntyre Mach., Ltd. v. Nicastro, 131 S.Ct. 2780, 2782–83 (2011).

95. *See* Borchers, *supra* note 42, at 1250.

United States Supreme Court once again handed down a fractured ruling in the form of a 4-2-3 decision.[96]

Justice Kennedy authored the plurality opinion and began by declaring that the New Jersey Supreme Court erred in applying the stream of commerce theory, possibly because of the confusion left by *Asahi*.[97] He thus announced that "this case present[ed] the opportunity to provide greater clarity."[98] Justice Kennedy analyzed the requirement that the suit would not offend "traditional notions of fair play and justice"[99] and declared "[i]n products-liability cases like this one, it is the defendant's purposeful availment that makes jurisdiction consistent with 'traditional notions of fair play and substantial justice.'"[100] The plurality contended that it is the "submission through contact with and activity directed at a sovereign state [that] may justify specific jurisdiction 'in a suit arising out of or related to the defendant's contacts with the forum.'"[101] It further argued that confusion over *Asahi* had stemmed from its prior statements regarding the relationship between jurisdiction and the stream of commerce, and stated that while it is a good analogy, "steam of commerce" simply refers to when a defendant may appropriately be subject to jurisdiction without entering the forum State when manufacturers or distributors seek to serve the forum's market.[102] The plurality found this theory to be applicable only when the defendant targeted the forum state; stating that it is improper when the facts only suggest that the defendant "might have predicted" that its goods would reach the forum state.[103] The plurality concluded that "the stream-of-commerce metaphor cannot supersede either the mandate of the Due Process Clause or the limits on judicial authority that Clause ensures."[104]

While implicitly endorsing Justice O'Connor's analysis of the minimum contacts test, the plurality explicitly criticized Justice Brennan's concurrence, claiming that it "advocat[ed] a rule based on general notions of fairness and foreseeability, [and] is [thus]

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96. Hodge, *supra* note 51, at 419.

97. *J. McIntyre Mach., Ltd.*, 131 S. Ct. at 2785.

98. *Id.* at 2786.

99. *Id.* at 2787 (quoting International Shoe Co. v. State of Wash., 326 U.S. 310, 316 (1945)).

100. *Id.*

101. *Id.* at 2788 (quoting Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 414 (1984)).

102. *Id.*

103. Hodge, *supra* note 51, at 426 (quoting *J. McIntyre Mach., Ltd.*, 131 S.Ct. at 2788).

104. *Id.* at 426–27 (quoting *J. McIntyre Mach., Ltd.*, 131 S.Ct. at 2791).

inconsistent with the premises of lawful judicial power."[105] The plurality claimed Justice Brennan's premise created foreseeability as the "touchstone of jurisdiction. . . .[106] Rejecting the concurrence, the plurality declared:

> Two principles are implicit in the foregoing. First, personal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis. The question is whether a defendant has followed a course of conduct directed at the society or economy existing within the jurisdiction of a given sovereign, so that the sovereign has the power to subject the defendant to judgment concerning that conduct. . . . [W]hether a judicial judgment is lawful depends on whether the sovereign has authority to render it. The second principle is [that] . . . [b]ecause the United States is a distinct sovereign, a defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular state.[107]

The plurality initially adopted Justice O'Connor's "something more" requirement and then offered an even more restrictive view.[108] Determining that the defendant had not meet these standards, the plurality held that jurisdiction was improper.[109]

Justice Breyer concurred only in judgment.[110] Initially acknowledging and agreeing with the New Jersey Supreme Court that the American economy is a changing landscape, he did not find this case to be an example that called for changes in personal jurisdiction jurisprudence.[111] Therefore, Justice Brennan felt that the case should be controlled by the Court's earlier precedents.[112] Emphasizing that only one machine was purchased in New Jersey, Justice Brennan noted that "[n]one of our precedents finds that a single isolated sale, even if accompanied by the kind of sales effort indicated here, is sufficient."[113] Considering only the limited facts offered by the New Jersey Supreme Court, the concurrence offered

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105. Borchers, *supra* note 42, at 1255 (quoting *J. McIntyre Mach., Ltd.*, 131 S.Ct at 2783–84).

106. *J. McIntyre Mach., Ltd.*, 131 S.Ct. at 2788.

107. *Id.* at 2789.

108. Borchers, *supra* note 42, at 1255.

109. *Id.*

110. *See J. McIntyre Mach., Ltd.*, 131 S.Ct. at 2791 (Breyer, J., concurring).

111. Hodge, *supra* note 51, at 427.

112. Borchers, *supra* note 42, at 1257.

113. *J. McIntyre Mach., Ltd.*, 131 S.Ct. at 2792; *see also* Borchers, *supra* note 42, at 1257.

the following as the basis for its reasoning: the distributor's sales, the fact that the manufacturer wanted its distributor to sell machines across the United States, and the fact that the manufacturer had representatives attend trade shows in the United States.[114] Applying both tests proposed by *Asahi*, Justice Brennan thus found the jurisdiction claim lacking,[115] as the facts of the case demonstrated no "regular . . . flow" or "regular course" of sales in New Jersey. Moreover, he found that there was not "something more" on behalf of the defendant, such as special state-related design, advertising, advice, marketing, or anything else.[116] The concurrence concluded by finding that the defendant did not have the requisite contacts needed to confer jurisdiction.[117]

The concurrence then admonished the plurality for adopting such a strict policy in light of the changes in the American economy and foresaw dire consequences if states were limited to exercising jurisdiction over only the defendants who subjected themselves to a state's sovereign power.[118] The concurrence questioned what the consequence will be for a company which targets the world by selling products through its website, or for a company who consigns its products through an intermediary, such as Amazon.com, and then receives and fulfills its own orders.[119] The concurrence noted these concerns were absent from the plurality's opinion.[120]

The dissent, authored by Justice Ginsburg, further attacked the plurality for allowing the defendant to market and profit off of the United States economy while simultaneously avoiding liability by hiding behind its distributors.[121] In Justice Ginsburg's view, the "splintered majority . . . 'turn[ed] 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

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114. *J. McIntyre Mach., Ltd.*, 131 S.Ct. at 2791 (quoting Nicastro v. McIntyre Mach. Am., Ltd., 987 A.2d 575, 578–79 (N.J. 2010)).

115. Borchers, *supra* note 42, at 1257.

116. *J. McIntyre Mach., Ltd.*, 131 S.Ct. at 2792; *see* Borchers, *supra* note 42, at 1257. The concurrence acknowledges that there could be other facts the plaintiff could have used to establish jurisdiction, but because the plaintiff bears the burden to establish jurisdiction, the concurrence only uses those facts stated by the New Jersey Supreme Court. *J. McIntyre Mach., Ltd.*, 131 S.Ct. at 2792.

117. *J. McIntyre Mach., Ltd.*, 131 S.Ct. at 2794.

118. Hodge, *supra* note 51, at 428.

119. *J. McIntyre Mach., Ltd.*, 131 S.Ct. at 2793.

120. *Id.*

121. *See* Borchers, *supra* note 42, at 1258; Hodge, *supra* note 51, at 429 (quoting Russell J. Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. Davis L. Rev. 531, 555 (1995).

its hand of a product by having independent distributors market it.'"[122] The dissent emphasized that there was simply no reason *not* to find jurisdiction over a company with full knowledge that its products were used throughout the nation and that actively attempted to serve the entire United States market.[123] Moreover, the dissent highlighted the fact that the defendant did not attempt to exclude any states in its marketing,[124] attended numerous conventions to target states with high scrap recycling industries, and worked closely with its independent distributor to ensure as many United States sales as possible.[125] Because New Jersey was the fourth largest scrap recycling state, it was a de facto target of any manufacturer of the type of machine like the one that injured the plaintiff.[126]

The dissent denounced the plurality's interpretation that limiting personal jurisdiction embodies principles of sovereignty; rather, the dissent found the Court's precedents characterize the limitations as protecting interests of liberty.[127] The dissent stressed that "the constitutional limits on a state court's adjudicatory

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122. Hodge, *supra* note 51, at 429 (quoting *J. McIntyre Machinery, Ltd.*, 131 S.Ct. at 2795). In particular, Tennessee's long-arm statute's language allows for the exercise of jurisdiction over non-resident defendants:

> The "based on conduct within Tennessee" section of the 1997 long arm statutes provides that Tennessee courts may exercise personal jurisdiction over a person who acts directly or indirectly, as to a claim for relief arising from the person's (1) transacting any business in this state; (2) contracting to supply services or things in this state; (3) causing tortious injury by an act or omission in this state; (4) causing tortious injury in this state of the person who regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state; (5) having an interest in, using, or possessing real property in this state; (6) contracting to insure any person, property, or risk located within this state at the time of contracting; or (7) conducts as a director or officer of a domestic `corporation or the conduct of a domestic corporation while the person held office as a director or officer. This section provides that when jurisdiction over a person is based upon this section, only a claim for relief arising from acts enumerated in this section may be asserted against this person.

LAWRENCE A. PIVNICK, 1 TENNESSEE CIRCUIT COURT PRACTICE § 4:3 (2011) (footnote omitted).

123. Hodge, *supra* note 51, at 429.

124. *Id.*

125. Borchers, *supra* note 42, at 1258.

126. *Id.*

127. Hodge, *supra* note 51, at 429.

authority derive from considerations of due process, not state sovereignty. . . . 'The restriction on state sovereign power . . . must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause.'"[128] Embracing the concept that the fundamental fairness of suit to the litigants is at the heart of the Due Process inquiry, the dissent reasoned:

> The modern approach to jurisdiction over corporations . . . ushered in by *International Shoe*, gave prime place to reason and fairness. . . . On what measure of reason and fairness can it be considered undue to require McIntyre UK to defend in New Jersey as an incident of its efforts to develop a market for its industrial machines anywhere and everywhere in the United States?[129]

The dissent concluded the defendant cared little about which state was the forum, hoping rather to avoid any United States court and all litigation entirely.[130]

Applying the dueling *Asahi* opinions, the dissent noted that *McIntyre* was more appropriate for the stream of commerce theory because of the "defendant's attendance at trade shows and its employ of a U.S. distributor—facts completely absent in the case of the Asahi valve manufacturer."[131] The control over the distributor in *McIntyre* was also far more substantial than the minimal control possessed by the defendant in *Asahi*.[132] In sum, the dissent rejected the plurality's overall analysis and conclusion and found that the New Jersey court should have been allowed to exercise jurisdiction over the defendant.[133]

Although many hoped *McIntyre* would produce a controlling majority to define the proper analysis for determining sufficient minimum contacts, the Court's fractured opinion never provided the "greater clarity" promised by Justice Kennedy and once again left

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128. *J. McIntyre Mach., Ltd.*, 131 S.Ct. at 2798 (quoting Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 n.10 (1982). *See also* Shaffer v. Heitner, 433 U.S. 186, 204 (1977) (recognizing that "the mutually exclusive sovereignty of the States . . . [is not] the central concern of the inquiry into personal jurisdiction.").

129. Borchers, *supra* note 42, at 1259 (quoting *J. McIntyre Mach., Ltd.*, 131 S.Ct. at 2800–01).

130. *Id.*

131. *Id.* at 1260.

132. Hodge, *supra* note 51, at 429.

133. *See J. McIntyre Machinery, Ltd.*, 131 S.Ct. at 2804.

states and lower courts scrambling in determining which analysis to apply.[134]

B. Tennessee's Development of the Minimum Contacts Test and Adoption of the Federal Precedent

Tennessee's long-arm statutes make it possible for the state to extend jurisdiction over non-resident defendants as long as jurisdiction comports with the Constitution's due process requirements.[135] In interpreting these types of cases, Tennessee has drawn guidance from the United States Supreme Court and adopted many of its principles.[136]

Applying the principles of *International Shoe* and its earliest progeny, the Tennessee Supreme Court held in 1981 "that the physical presence of the defendant or its agent in the forum state is 'not necessary' for the transaction of business to serve as a minimum contact" nor is it material which party solicited and initiated business.[137] The court held the "crucial factor is that the subsequent conduct of the defendant shows that it purposefully availed itself of the privilege of carrying on activities . . . within the forum."[138] Four years later, the Tennessee Supreme Court adopted more of the United States Supreme Court's principles.[139] Utilizing language from *Burger King*, the court held that "the absence of physical contacts will not defeat *in personam* jurisdiction where a commercial

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134. *See id.* at 2786; Hodge, *supra* note 51, at 431. While the *Marks* test does not command a majority of the Court, the stricter view is seen as the holding. Adam N. Steinman, *The Lay of the Land: Examining the Three Opinions in J. McIntyre Machinery, Ltd.*, 63 S.C. L. REV. 481, 514 (2012). The plurality's opinion cannot be said to be the narrowest, therefore, when the *Marks* test is applied, the concurring opinion may be viewed as controlling. *Id.*

135. *See* PIVNICK, *supra* note 122, at § 4.3; *see also* Gordon v. Greenview Hosp., Inc., 300 S.W.3d 635, 646 (Tenn. 2009). To establish jurisdiction, a plaintiff must first prove it is proper by a preponderance of the evidence. *See* 5B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1351 (3d ed. 2013); *Gordon*, 300 S.W.3d at 643. If, however, the defendant objects and attaches affidavits, the plaintiff then needs to make a prima facie showing of personal jurisdiction supplemented with its own affidavits or other written evidence. *Id.* at 644.

136. *Gordon*, 300 S.W.3d at 646.

137. Nicholstone Book Bindery, Inc. v. Chelsea House Publishers, 621 S.W.2d 560, 563 (Tenn. 1981). *Southern Machine Co. v. Mohasco Industries, Inc.* was the first case to fully analyze the Tennessee long-arm statutes and attempt to synthesize the rules from *International Shoe*, *McGee v. International Life Insurance Co.*, and *Hanson v. Denckla*. *Id.* at 562.

138. *Id.* at 563.

139. Masada Inv. Corp. v. Allen, 697 S.W.2d 332, 334 (Tenn. 1985).

actor purposefully directs his activities towards citizens of the forum State and litigation results from injuries arising out of or relating to those activities."[140] The court reasoned that in such a case, the defendant should reasonably anticipated being haled into court in the forum State based upon its conduct and activities with the forum.[141] Thus, the test established in *International Shoe* became the minimum contacts test in Tennessee: if the defendant has minimum contacts with the forum such that "the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[142] Initially Tennessee courts used five factors in determining whether the requisite minimum contacts existed: "the quantity of the contacts, their nature and quality, . . . the source and connection of the cause of action with those contacts[,] . . . the interest of the forum State[,] and convenience [of the forum to both parties]."[143]

After the United States Supreme Court handed down its splintered decision in *Asahi*, the Tennessee Court of Appeals had the opportunity to alter its traditional minimum contacts anaylsis.[144] The court, however, rejected the invitation and continued to apply the traditional minimum contacts test.[145] Instead of the previous five-step test used, the court decided the minimum contacts test only consisted of two steps: first, identifying "the contacts between the non-resident and the forum" and, second, determining whether "exercising personal jurisdiction based on these contacts is consistent with traditional notions of fair play and substantial justice."[146] These steps call for a methodical analysis of the facts with an emphasis on the defendant, the forum, and the nature of the litigation.[147] After reiterating the purposeful availment test, the court highlighted how the "four justices [in the *Asahi* decision] agreed that a non-resident defendant could be considered to have purposefully directed its business activities toward [the forum] if it 'market[ed] the product through a distributor who has agreed to

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140. *Id.*

141. *Id.* (quoting World-Wide Volkswagen, Corp. v. Woodson, 444 U.S. 268, 297 (1980)).

142. *Id.* (quoting Int'l Shoe Corp. v. Washington, 326 U.S. 310, 316 (1945)).

143. *Id.*; *see also* Shelby Mut. Ins. Co. v. Moore, 645 S.W.2d 242, 245 (Tenn. Ct. App. 1981).

144. Davis Kidd Booksellers, Inc. v. Day-Impex, Ltd., 832 S.W.2d 572, 574, 575 (Tenn. Ct. App. 1992).

145. *Id.* at 574.

146. *Id.* at 575 (citing Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 414 (1984)).

147. *Id.*

serve as . . . [its] agent in the forum state.'"[148] Although the court refused to change its use of the traditional minimum contacts test, it found that the analysis in Justice O'Connor's concurrence comported with the traditional test and used her examples as the basis to hold that a manufacturer who hires a distributor to target the entire United States market, without ever specifically targeting Tennessee, does not meet the purposeful availment standard.[149]

In a later case against a foreign corporation, the Tennessee Court of Appeals upheld usage of the the traditional two-part minimum contacts test.[150] After analyzing the defendant's contacts, the court again found personal jurisdiction lacking, and highlighted the fact that the defendant had no knowledge of the locations in the United States where their product was sold.[151] The court used examples from Justice O'Connor's *Asahi* opinion of what could create the necessary additional conduct to demonstrate that the defendant had done nothing to meet the established purposeful availment criteria.[152] In 2004, the Tennessee Court of Appeals then rejected the idea that simply placing an item into the stream of commerce was sufficient to warrant jurisdiction, reasoning that "presumed knowledge that the products would be sold in Tennessee" was an insufficient basis for personal jurisdiction.[153] The court stated that this decision was consistent with *World-Wide Volkswagen*'s rejection

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148. *Id.* (quoting Asahi Metal Indus.Co. v. Superior Court, 480 U.S. 102, 112 (1987)).

149. *Id.* at 576. The Tennessee Court of Appeals later adopted the attitude of the United States Supreme Court that the "fair warning" requirement in the Due Process Clause serves to protect an individual's interest in liberty. *See* Attea v. Eristoff, No. M2005-02834-COA-R3-CV, 2007 WL 1462206, at *2 (Tenn. Ct. App. May 18, 2007). This requirement is met when the defendant "purposefully directs" its activities towards the forum state and the injuries the litigation is based upon stem from these activities. *Id.*

150. The court emphasized that it should consider "the burden on the defendant, the interests of the forum state, the plaintiff's interest in obtaining relief, the judicial system's interest in obtaining the most efficient resolution of controversies, and the state's shared interest in furthering fundamental, substantive social policies" when analyzing the reasonableness of the suit. Mullins v. Harley-Davidson Yamaha BMW of Memphis, Inc., 924 S.W.2d 907, 910 (Tenn. Ct. App. 1996) (quoting *Davis Kidd Booksellers, Inc.*, 832 S.W.2d. at 575); *see also* World-Wide Volkswagen, Corp. v. Woodson, 444 U.S. 286, 292 (1980).

151. *Mullins*, 924 S.W.2d at 909, 912.

152. *See id.* at 910–11 (giving examples of the intention or purpose to serve the forum state).

153. Eubanks v. Procraft, Inc., No. E2003-02602-COA-R9-CV, 2004 WL 1732315, at *3 (Tenn. Ct. App. Aug. 3, 2004).

of foreseeability as the basis for jurisdiction.[154] Finally, in *Gordon v. Greenview Hosp.*, the Tennessee Supreme Court affirmed use of the traditional two part minimum contacts test established in *International Shoe* rather than adopting the broader analysis proffered in *Asahi*.[155]

IV. CONSEQUENCES OF *STATE V. NV SUMATRA TOBACCO TRADING CO.*

The decision in *NV Sumatra* upholds utilizing the traditional minimum contacts test analysis by refusing to alter the analysis without a commanded majority from the United States Supreme Court.[156] The majority's rationale, authored by Justice Koch, analyzed relevant federal court precedent to establish how to evaluate the minimum contacts test.[157] The majority found that Tennessee appellate courts have closely followed federal precedent and they have appropriately refused to diverge from traditional analyses without a controlling majority from the United States Supreme Court signaling that change.[158] The majority acknowledged that the appellate courts' analyses have been consistent with Justice O'Connor's opinion in *Asahi*, considering it to be based upon the more traditional minimum contacts test.[159] *NV Sumatra*, however, presented the first opportunity for Tennessee Supreme Court to address this type of personal jurisdiction challenge since *McIntyre*.[160] The majority found that this latest case did not act as a change in the law, and refused to find Justice Breyer's concurrence as the controlling holding from the Supreme Court.[161]

The majority endorsed the appellate courts' use of the traditional minimum contacts test and analyzed the case's facts under it, reasoning that the "ultimate purpose is to determine whether the

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154. *Id.* at *4.

155. Gordon v. Greenview, Hosp., Inc., 300 S.W.3d 635, 647 (Tenn. 2009).

156. State v. NV Sumatra Tobacco Trading Co., 403 S.W.3d 726, 752 (Tenn. 2013).

157. *Id.* at 740. Justice Koch acknowledged Tennessee long-arm statutes derive their content from the Constitution. *Id.*

158. *Id.* at 751–52.

159. *Id.* at 754–55; *see, e.g.*, Davis Kidd Booksellers, Inc. v. Day-Impex Ltd., 832 S.W.2d. 572, 575 (Tenn. Ct. App. 1992) (applying Justice O'Connor's example of how a "non-resident defendant could be considered to have purposefully directed its business activities toward a state if it 'market[ed] the product through a distributor who has agreed to serve as a sales agent in the forum state'") (quoting Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 112 (1987)).

160. *NV Sumatra Tobacco Trading Co.*, 403 S.W.3d at 740.

161. *Id.* at 758.

contacts demonstrate that NV Sumatra has purposefully availed itself of Tennessee's laws, such that it should reasonably anticipate being haled into court [in Tennessee]."[162] The majority conceded that the defendant was aware at some point that cigarettes were being sold in Tennessee, but reiterated federal precedent and emphasized that "awareness alone is insufficient for establishing minimum contacts."[163] While it also acknowledged that the defendant had interactions with the United States at the federal level—such as filing a trademark application—it asserted that "national contacts *alone* cannot justify jurisdiction in an individual state jurisdiction."[164] Finding the defendant had no aggressive national campaign—coupled with the fact that the defendant withdrew from the entire United States market after discovering the legal implications of selling in Tennessee—[165] the majority concluded that the issue centered on the cigarettes sold in Tennessee.[166] Although the majority recognized that the amount of cigarettes sold in Tennessee was substantial and "nothing to sneeze at," it stressed the minimum contacts analysis has always been based on the defendant, the forum State, and the connection between them—not an analysis simply hinging on the amount of product sold.[167]

The majority found Mr. Battah and his distribution company to be the "*proximate* cause" of the cigarettes being sold in Tennessee and emphasized it was his "unilateral activity" that resulted in the cigarettes being sold there, rather than any deliberate engagement in "significant activities" on behalf of the defendant.[168] In other words, these actions cannot be attributed to the defendant.[169] The court further argued that this fact demonstrates *World-Wide Volkswagen*'s foreseeability principle, noting that the defendant made "no 'effort' to 'serve directly or indirectly' the Tennessee market . . . [and it therefore] had no effort-based 'expectation' that its product would arrive here and subject the company to legal

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162. *Id.* at 760.

163. *Id.*

164. *Id.* at 760–61.

165. The legal situation refers to the defendant becoming aware it could be sued in states, such as Tennessee, that had adopted the Tobacco Manufacturer's Escrow Fund Act. *Id.* at 764.

166. *Id.* at 762.

167. *Id.* at 762–63.

168. *Id.* at 764 (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475–76 (1985)).

169. *See Burger King Corp.*, 471 U.S. at 475–76 (stating that a defendant will not be haled into court for the unilateral action of a third party).

liability."[170] This is particularly important, as notice of the susceptibility of suit is one of the key underlying principles of the minimum contacts test for foreign corporations.[171] The court found this to be a clear example of a corporation choosing *not* to avail itself of Tennessee: because the defendant withdrew from the United States market after becoming aware that Tennessee and other states were members of the Escrow Fund Act, it did not want to be subject to this law and thus demonstrated this by fully withdrawing from the United States market.[172] Because the defendant did not purposefully avail itself of Tennessee, exercising jurisdiction under the Due Process Clause is automatically unfair and there is no need to evaluate the reasonableness of the suit.[173]

The dissent, authored by Chief Justice Wade, based its opinion on finding Justice Breyer's concurrence in *J. McIntyre* as the controlling opinion of United States Supreme Court.[174] The dissent analyzed the facts under the three categories which Justice Breyer used in his analysis: "[q]uantity of sales, . . . [r]elationship with distributors, . . . and [c]ontacts with the national market."[175] It found the quantity of sales to be overwhelmingly higher than in *McIntyre*, and viewed such sales as evidence of "'regular . . . flow' or 'regular course' of sales" in Tennessee, thus authorizing a finding of minimum contacts.[176] The dissent interpreted the facts to show that the defendant knew the destination of the product to be Miami,[177] acknowledged existence of the Tennessee tobacco escrow fund law and its requirements over a year before announcing it would no longer serve the United States market, complied with federal laws directly and through its distributors, and sent promotional materials to Mr. Battah—who then used them at trade shows and aggressively advertised on the defendant's behalf.[178] The dissent used this

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170. *NV Sumatra Tobacco Trading Co.*, 403 S.W.3d at 764 (quoting World-Wide Volkswagen, Corp. v. Woodson, 444 U.S. 286, 297–98 (1980)).

171. *Id.*

172. *Id.*

173. *Id.* at 759.

174. *Id.* at 770 (Wade, C.J., dissenting). Chief Justice Wade agreed with the observation that under the *Marks* test, Justice Breyer's concurrence is the controlling opinion because it is the "position taken by those Members who concurred in the judgment on the narrowest grounds." *Id.* (quoting Marks v. United States, 430 U.S. 188, 193 (1977)).

175. *Id.* at 771.

176. *Id.* at 773 (quoting Willemsen v. Invacare Corp., 282 P.3d 867, 874 (Or. 2012)).

177. The products were shipped to the Miami Free Zone, which is the foreign trade zone in Miami, Florida. *Id.* at 774.

178. *Id.* at 774–79.

interpretation of facts to justify finding that the defendant was aware of the sales of its cigarettes in Tennessee and that it had purposefully availed itself of Tennessee through its independent distributors.[179]

Finally, the dissent characterized the defendant's contact with the national market as justifying jurisdiction in Tennessee through the defendant's own actions and through the actions of its distributors.[180] The dissent argued that exercising jurisdiction was proper because the defendant had a trademark, explicitly consented to the sale of its cigarettes in the United States, and worked with FTS to abide by federal regulations.[181] The dissent contended that the defendant worked directly and through its distributors to help FTS distribute and market the cigarettes, emphasizing that it had sent promotional posters to Mr. Battah who had attended tradeshow on the defendant's behalf.[182] These facts, viewed together as a whole, demonstrate the additional conduct required by Justice Breyer where there is no regular course of sales.[183] After finding the defendant had sufficient minimum contacts, the dissent argued that exercising jurisdiction is reasonable because of Tennessee's financial interest in collecting the unpaid escrow funds.[184] Finding the defendant had sufficient minimum contacts and that suit would be reasonable, the dissent concluded that Tennessee should be allowed to exercise jurisdiction.[185]

Because the two most recent United States Supreme Court rulings regarding minimum contacts analysis have produced no controlling majority, it was especially important for the Tennessee Supreme Court to issue guidance to the lower courts regarding the proper analysis to employ. The majority itself limited the holding by defining the case by two narrow issues: first, if a manufacturer whose products arrive through independent intermediaries should be subject to suit in a particular state, and, second, if a manufacturer who targets the United States market as a whole should be able to be sued in a state when there is no evidence that it

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179. *Id.* at 777–78. The State only was only required to make a prima facie showing of personal jurisdiction through sworn statements viewed in light most favorable to the plaintiff. *Id.*

180. *Id.* at 778.

181. *Id.* at 779.

182. *Id.* It was at one of these tradeshows that Mr. Battah sold cigarettes to Tennessee distributors. *Id.*

183. *Id.*; *see* J. McIntyre Mach., Ltd. v. Nicastro, 131 S.Ct. 2780, 2792 (2001) (Breyer, J., concurring).

184. *NV Sumatra Tobacco Trading Co.*, 403 S.W.3d at 780.

185. *Id.* at 781.

purposefully directed its activities toward that state.[186] The holding is also limited by the majority's refusal to alter the traditional minimum contacts test without a controlling opinion by the United States Supreme Court.[187] By upholding the traditional minimum contacts test,[188] the court seemed to endorse prior Tennessee appellate courts' alignment with Justice O'Connor's additional conduct requirements in *Asahi*.[189]

Relying upon *World-Wide Volkswagen*, the court further reasoned that Tennessee cannot exercise jurisdiction over the manufacturer without making an effort to directly or indirectly serve the citizens of Tennessee—*regardless* of whether the manufacturer targeted the national market.[190] Had the defendant decided to continue to serve the United States and Tennessee markets—rather than fully pull out of all the United States markets after the meeting regarding the escrow funds issue—it seems that the court would have analyzed the defendant's activities differently and possibly found that it intended to serve Tennessee.[191] The court also seems to suggest that if the defendant had solicited sales reports from Mr. Battah, regularly sent him promotional materials to help with sales, or controlled the distribution system, the arguments to suggest that the defendant directed its activities towards Tennessee would have been much stronger.[192] The court's emphasis that national contacts alone are insufficient to confer jurisdiction to an individual state[193] seems to imply a desire to protect the liberty interest of not being subject to a state court without substantial ties to that state.[194] It also seems to imply an endorsement of Justice Kennedy's contention that a manufacturer can target the national market without targeting a state market.[195] Moreover, the court's refusal to allow

186. *Id.* at 740 (majority opinion).

187. *See id.* at 758.

188. *See id.* at 759 (declining to broaden the minimum contacts test).

189. In its explanation of how the defendant did not purposefully avail itself of the state, the majority used the examples presented by Justice O'Connor in *Asahi*. *Id.* at 764; *see also* Asahi Metal Indus Co. v. Superior Court, 480 U.S. 102. 112 (1987) (listing examples).

190. *NV Sumatra Tobacco Trading Co.*, 403 S.W.3d at 764 (emphasis added).

191. *See id.* ("Because NV Sumatra made no 'effort' to 'serve directly or indirectly' the Tennessee market, the company had no effort-based 'expectation' that its products would arrive here and subject the company to legal liability.").

192. *See id.* (noting that most of the "sales effort" was done by Mr. Battah.).

193. *Id.* at 761.

194. *See id.* at 755 (stating that to protect liberty, it must be fair to expect a defendant to defend a case in Tennessee).

195. *See* J. McIntyre Machinery, Ltd. v. Nicastro, 131 S.Ct. 2780, 2789 (2011) ("[A] defendant may . . . be subject to the jurisdiction of the courts of the United

independent, third-party activity to confer jurisdiction over a manufacturer with no control over that third-party[196] implies an unwillingness to hold a party legally responsible for actions it did not, in fact, control. Thus, the Tennessee Supreme Court seems committed to follow the established federal precedent's refusal to allow foreseeability as a basis for establishing personal jurisdiction.[197] Additionally, the seemingly implicit endorsement of Justice O'Connor's *Asahi* analysis actually encourages the use of the traditional minimum contacts test because it requires evidence that the defendant purposefully availed itself of the forum state.[198]

Despite the confusing federal precedents, the Tennessee Supreme Court in *NV Sumatra* clearly affirms the use of the traditional minimum contacts test, which requires a manufacturer to purposefully direct its activities towards the forum state to establish sufficient minimum contacts.[199]

V. CONCLUSION

To clarify ambiguous federal precedent regarding interpretation of the minimum contacts test, the Tennessee Supreme Court granted its appeal in *NV Sumatra* in order to give guidance on Tennessee's standards.[200] After analyzing the history of both federal and state development of the minimum contacts, it is clear that Tennessee generally follows the federal courts.[201] The Tennessee Supreme Court, however, refused to adopt any augmentation to the traditional test without a controlling majority opinion from the United States Supreme Court.[202] Using the analyses established by federal precedent, the court thus declined to establish Tennessee jurisdiction over the defendant when the facts failed to demonstrate the defendant purposefully directed activities toward Tennessee, and thus failed to establish sufficient minimum contacts or any

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States buy not of any particular state.").

196. *NV Sumatra Tobacco Trading Co.*, 403 S.W.3d at 764 (noting that Mr. Battah's activities were the cause of the contacts with Tennessee).

197. *See id.* at 743 (quoting World-Wide Volkswagen, Corp. v. Woodson, 444 U.S. 286, 295 (1980)).

198. *See supra*, note 189 and accompanying text.

199. *See NV Sumatra Tobacco Trading Co.*, 403 S.W.3d at 765.

200. *Id.* at 751.

201. *See id.* at 22 ("Personal jurisdiction cases in Tennessee have generally hewn closely to the United States Supreme Court's precedents.").

202. *Id.* at 758.

reasonable basis to anticipate being brought to court in Tennessee.[203]

203. *Id.* at 765.