

Liberty vs. Reciprocal  
Fairness

By Daniel R. Correa

**W**hen our clients' due process rights are at stake, we cannot allow a court to throw its hands in the air and say, "no standards exist in product liability cases."

# A Principled Approach to Personal Jurisdiction

The United States Supreme Court has struggled to articulate a clear standard to assess personal jurisdiction in product liability cases. In both major "stream-of-commerce" cases—*Asahi Metal Indus. Co. v. Superior*

*Court of Cal.*, 480 U.S. 102 (1986) and *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011)—the Court could not garner consensus on a single test. Given that due process rights are at stake, the Court's inability to articulate a clear rule is particularly troublesome.

Recently, the Supreme Court issued two opinions in which it reached near unanimous consensus on two personal jurisdiction principles. The Justices agreed (8–1) that the territoriality rule and its guiding principles articulated in *Pennoyer v. Neff*, 95 U.S. 714 (1877), inform general (all-purpose) jurisdiction analyses. See *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014). We can call this the comity principle. Following *Daimler*, the Justices unanimously reaffirmed that individual liberty guides personal jurisdiction inquiries, because due process protects a non-resident defendant's right to be subject only to lawful power. See *Walden v. Fiore*, 134 S. Ct. 1115 (2014). We can call this the liberty principle.

Why the disjunction between principles and rules in product liability cases? The Court historically had no problem conforming liberty and comity principles to jurisdictional rules in other cases. See, e.g., *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) (breach of contract); *Calder v. Jones*, 465 U.S. 783 (1984) (libel). The Court found consensus the first time it visited personal jurisdiction in the product liability context. See *World-Wide Volkswagen Corporation v. Woodson*, 444 U.S. 286 (1980).

This article proceeds in three parts. The first explicates *Daimler A.G.* and *Walden*. The second traces personal jurisdiction principles from the territoriality rule to liberty. The third offers a way to articulate personal jurisdiction principles in product liability cases consistent with the Court's precedent.

## State Sovereignty and Liberty: Personal Jurisdiction Bedrocks

For many practitioners, the rules are all that matter, because rules are "law." Principles are often relegated to the rule-of-thumb realm. When the issue concerns personal jurisdiction, however, we cannot divorce rules from principles without doing violence to due process.



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### **Daimler AG v. Bauman: A Synopsis**

In *Daimler AG*, plaintiffs filed suit in the United States District Court for the Northern District of California to seek redress for alleged human rights violations. The complaint alleged that Mercedes-Benz Argentina collaborated with Argentinian security forces to “kidnap, detain, torture, and kill plaintiffs and their relatives....” 134 S. Ct. at 751. These alleged events occurred during Argentina’s “dirty war.” *Id.* The plaintiffs named one defendant, Daimler Aktiengesellschaft (AG), asserting vicarious liability as their theory. All plaintiffs held residences and citizenships outside the United States.

The plaintiffs asserted that California could exercise personal jurisdiction over Daimler (A German Corporation) due to business conducted by its subsidiary—Mercedes-Benz USA, LLC (MBUSA)—in the state. In other words, the plaintiffs asserted that the State could impute MBUSA’s California business contacts to Daimler. *Id.* at 751–52.

Daimler moved to dismiss for lack of personal jurisdiction. The district court granted Daimler’s motion. The Ninth Circuit, on rehearing following earlier affirmation, reversed the district court’s holding. The appellate court held general jurisdiction appropriate on the plaintiffs’ agency theory. MBUSA’s services were important to Daimler, according to the appellate court, such that Daimler would perform those services absent MBUSA. *Id.* at 759–60. The appellate court gave scant weight to the fact that Daimler and MBUSA’s agreement expressly disclaimed any agency relationship. *Id.* at 760 n.15

The Supreme Court reversed the Ninth Circuit’s opinion. Personal jurisdiction focuses on the defendant’s contacts with the forum. When a defendant’s conduct or contact in the state does not give rise or relate to the litigation, a State may exercise all-purpose jurisdiction over the defendant if the forum is one in which the defendant is “fairly regarded as at home.” *Id.* at 760 (quoting *Goodyear Dunlop Tires Operation, S.A. v. Brown*, 131 S. Ct. 2846, 2854 (2011)). Only in rare occasions is a defendant likely to be regarded as at home outside its place of incorporation or principal place of business. *Daimler AG*, 134 S. Ct. at 760.

Under the Ninth Circuit’s agency theory, the Supreme Court reasoned, a court

could exercise general jurisdiction over any company whenever it operated in the state through a subsidiary. *Id.* at 759–60. “Anything a corporation does through an independent contractor, subsidiary, or distributor is presumably something that the corporation would do ‘by other means’ if the independent contractor, subsidiary, or distributor did not exist.” *Id.*

Even assuming MBUSA’s California contacts imputed to Daimler, and assuming MBUSA was at home in California, the Supreme Court held Daimler’s contacts with California controlled the analysis. *Id.* at 760. The only Daimler contacts in California came from MBUSA’s business in the state. Neither Daimler nor MBUSA were incorporated in California or had principal places of business in California. *Id.* at 761–62. General jurisdiction, the Supreme Court held, in this case would reach too far, subjecting Daimler to general jurisdiction in any state in which MBUSA has substantial sales. *Id.*

The Court next emphasized the importance comity plays in the personal jurisdiction due process inquiry when the issue is general jurisdiction. The Ninth Circuit’s decision envisioned an expansive role for personal jurisdiction that other nations do not share. *Id.* at 763. If the Court were to sustain such an expansive view, it could “impede[] negotiations of international agreements on the reciprocal recognition and enforcement of judgments.” *Id.* Rapport between countries, the Court explained, plays a role in the due process inquiry. *Id.*

By a parity of reason, interstate comity must play a role in the due process inquiry. The Court’s opinion suggests as much. The Court made clear that specific jurisdiction inquiries have been cut loose from the State sovereignty-centered focus in *Pennoyer*. However, the Court has consistently “declined to stretch general jurisdiction beyond limits traditionally recognized” in *Pennoyer*. *Daimler AG*, 134 S. Ct. at 757–58. Interstate comity played a central role in the Court’s reasoning in *Pennoyer*.

We can extrapolate from *Daimler AG* that State sovereignty plays an important role in the personal jurisdiction due process inquiry. The bridge between general and specific jurisdiction is a matter of relatedness: is jurisdiction predicated on the defendant’s conduct in the state and does that conduct give rise or relate to the litigation?

The comity principle must inform the personal jurisdiction analysis all the way down. In the specific jurisdiction context, the comity principle may take a back seat to the liberty principle (described below), but comity nevertheless remains integral to the total inquiry. The comity principle dictates that each State possesses the right as a co-equal sovereign to develop its own laws

## **Personal jurisdiction**

focuses on the defendant’s contacts with the forum.

and to protect its residents and their property within its jurisdiction. Each State must afford non-resident defendants due process in accord with the Fourteenth Amendment to exercise personal jurisdiction over them in part to foster rapport amongst the States.

Equally important to the Court’s opinion was its adamant objection to Justice Sotomayor’s belief that “reciprocal fairness” guides the personal jurisdiction inquiry. *See id.* at 758 n.10, 768. For Justice Sotomayor, personal jurisdiction principles are generally applicable, whether the issue involves general or specific jurisdiction. To her credit, she is right about generally applicable principles. And, as will be discussed below, the Court did articulate what can fairly be called a “reciprocal fairness” principle. So the question becomes, what does it mean that a strong majority rejected “reciprocal fairness” in the general jurisdiction analysis?

### **Walden v. Fiore: A Synopsis**

In *Walden*, the defendant was a deputized Drug Enforcement Administration (DEA) agent. Acting on a tip from DEA agents in Puerto Rico, he searched the plaintiffs at an Atlanta airport and seized \$97,000 in their possession. These funds, the plaintiffs declared, came from the plaintiffs’ gambling profession.

The defendant advised the plaintiffs that the DEA would return their funds once the plaintiffs proved they acquired these funds through a legitimate source. The defendant helped draft an affidavit to show probable cause to forfeit the funds and for-

warded the affidavit to a U. S. Attorney's Office in Georgia. The plaintiffs' attorney in Nevada provided the defendant documentation to show the plaintiffs legitimately acquired the funds. Sometime later, the DEA returned the plaintiffs' funds.

The plaintiffs filed suit in the United States District Court for the District of Nevada. They asserted claims for damages on

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grounds the defendant violated their Fourth Amendment rights. The defendant moved to dismiss for lack of personal jurisdiction. The trial court granted the defendant's motion.

The Ninth Circuit reversed the district court's ruling. The appellate court focused on the plaintiffs' claim that the defendant falsified his affidavit to show probable cause to support the forfeiture. Invoking the *Calder's* effects test, see *Calder v. Jones*, 465 U.S. 783 (1984), the appellate court held personal jurisdiction proper because the defendant aimed his allegedly false affidavit at Nevada when he submitted the affidavit, knowing it would affect the plaintiffs who have a substantial connection to Nevada. *Walden*, 134 S. Ct. at 1120.

The Supreme Court reversed the Ninth Circuit's holding. The Court placed great weight on the fundamental principles that underlie the Fourteenth Amendment Due Process Clause when the issue is personal jurisdiction. "The Due Process Clause of the Fourteenth Amendment constrains a State's authority to bind a nonresident defendant to a judgment of its courts." *Id.* at 1121.

The minimum contacts test to establish specific jurisdiction "focuses on 'the relationship among the defendant, the forum, and the litigation.'" *Id.* at 1121-22 (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 775 (1984)). The focus is not on any contacts the defendant makes with peo-

ple who reside in or have affiliations with the forum state. *Walden*, 134 S. Ct. 1122. "Due process requires that a defendant be haled into court in a forum State based on his own affiliation with the State, not based on the 'random, fortuitous, or attenuated' contacts he makes by interacting with other persons affiliated with the State." *Id.* (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)). The Due Process Clause in this context "principally protects" the non-resident defendant's liberty, "not the interests of the plaintiff." *Id.* at 1121-22, 1125 n.9.

According to the Supreme Court, the Ninth Circuit erred when it focused on the defendant's contacts with and conduct toward the plaintiffs. *Calder* recognized that the defendant's libelous article focused on and was directed at an actress in California. *Walden*, 134 S. Ct. at 1122. But the *Walden* Court reasoned that the significance of the *Calder* defendant's conduct was that the tort occurred in California.

A libel action required the actress to show loss of reputation. *Id.* A person's reputation is measured by the value her neighbors and associates place on her character. *Id.* The actress' neighbors and associates lived in California. *Id.* Her injury would not have occurred but for the allegedly libelous article's publication in California. *Id.* She felt the brunt of her injury in California as a result. *Id.* The journalist's conduct forged a connection to California by the article's effects—"injury to the plaintiff's reputation in the estimation of the California public." *Id.*

By focusing on the defendant's conduct toward the plaintiffs and his knowledge that the plaintiffs had "strong forum connections," the Ninth Circuit erred. *Id.* A plaintiff's connection to the forum cannot decisively determine personal jurisdiction over a non-resident defendant. *Id.* A defendant must have minimum contacts with the state—not with the plaintiff—that relate to the litigation to satisfy a nonresident defendant's right to due process before a foreign tribunal exercises personal jurisdiction over him. The *Walden* defendant engaged in no conduct bearing on Nevada itself.

### Personal Jurisdiction Jurisprudence in Time

Personal jurisdiction traditionally spoke to the public law principle that a nation's

sovereignty did not extend past its borders. *D'Arcy v. Ketchum*, 52 U.S. 165, 176 (1850); *Pennoyer v. Neff*, 95 U.S. 714, 722-23 (1877). This principle (the territoriality rule) applied, likewise, to the separate sovereign States in the United States. North Carolina could not exercise power over a New York citizen unless that citizen voluntarily consented to New York's jurisdiction. North Carolina, however, could exercise jurisdiction over its own citizens no matter where they were by directly serving them.

Prior to the States ratifying the Fourteenth Amendment, the Supreme Court relied on public law principles to hold that a judgment by a court without jurisdiction over a non-resident defendant was not entitled to recognition in the defendant's home state under the Full Faith and Credit Clause. *D'Arcy*, 52 U.S. 165. The Court made clear that the territoriality rule existed when the Constitution was ratified. *Id.* Neither the Constitution nor any congressional act, the Court held, intended to "displace that principle of natural justice." *Id.* The issue arose again in *Pennoyer v. Neff* after the Fourteenth Amendment had been ratified.

### Territoriality's Jurisdictional Beginning and End

The Court in *Pennoyer* articulated the public law principles that governed personal jurisdiction. Individual States enjoyed independent sovereignty and two public law principles applied to them. The first is that "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory." *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877). The second follows from the first: "that no State can exercise direct jurisdiction and authority over persons or property without its territory." *Id.* The "rule of territoriality" governed the case, not the Due Process Clause.

In *dictum*, the Court reasoned that the Fourteenth Amendment Due Process Clause would invalidate judgments entered without personal jurisdiction over a non-resident defendant. Mitchell's action against Neff was adjudicated before the Fourteenth Amendment was ratified, so Neff could not rely on the Fourteenth Amendment as a basis to void the State court judgment. Nevertheless, the *Pennoyer* Court reasoned:

Whatever difficulty may be experienced in giving [due process of law] a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt of their meaning when applied to judicial proceedings. They mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights.

*Id.* at 733.

Here, the Court incorporated public law principles into the Fourteenth Amendment Due Process Clause. The Court has since struggled to answer how principles that speak to State sovereignty could comfortably comport with due process principles that concern individual rights owed persons by the State.

### **International Shoe: Fun with Fictions**

*Pennoyer* tied personal jurisdiction to sovereign power over persons and things within a state's territory. A defendant served with process within a sovereign's jurisdictional borders, even if the defendant's presence was only fleeting, empowered the forum to assert personal jurisdiction over him. See *Burnham v. Superior Court*, 495 U.S. 604, 611–612 (1990). Obviously, this “presence” rule stretched the territorial rule to its limits. For, it is one thing to assert sovereign power over citizens and residents within a state's territory, and another thing to assert sovereign power over a person just passing through.

Nevertheless, long-standing practice among the States adhered to the principle that a citizen resides wherever she is found. See *id.* Once process is served on a person within the jurisdiction, the sovereign exerts power over that person and that is sufficient to vest the forum with personal jurisdiction over her. Early courts located the foundation of jurisdiction in “physical power.” *McDonald v. Mabee*, 243 U.S. 90, 91 (1917).

Notice to a defendant served two purposes: provide notice to and provide a basis for the sovereign to exercise power over the defendant. Notice had to be by personal service in the jurisdiction if the non-resident defendant did not consent to jurisdiction. A State could not exercise personal jurisdiction over a non-resident defendant by simply publishing notice in

a newspaper. Justice Holmes considered notice by publication to be too fictitious an analogy to physical power. *Id.* So two important questions arose: when can an out-of-state corporation be deemed “present” in a state and how can a plaintiff physically serve an out-of state corporation?

*International Shoe Company v. Washington*, 326 U.S. 310 (1945), answered these two questions by making due process principles, rather than territoriality, the primary personal jurisdiction concern. The Court noted that service of process personally on the person in the state no longer determined personal jurisdiction. *Id.* at 316. A State could always effect service by other means, such as through mail or upon an agent. *Id.* Due process required that the non-resident defendant “have certain minimum contacts with [the State] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” *Id.*

The Court designed the minimum contacts test to obviate the need to repair to fictions to justify exerting personal jurisdiction over non-resident corporations. Earlier courts tried to adhere to *Pennoyer's* territoriality rule by conflating a corporation's employees' actions in the forum state to the corporation's actual “presence” in the state or consent to the State's jurisdiction. See *id.* at 316–18; *Hutchinson v. Chase & Gilbert, Inc.*, 45 F.2d 139, 141 (2d Cir. 1930). The *International Shoe* Court reasoned that courts should focus on the non-resident defendant's activities in the state, which are the real concern.

So, “[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.” *International Shoe*, 326 U.S. at 319. A cursory glance at this passage reveals what Justice Sotomayor called “reciprocal fairness.”

The “minimum contacts” test flips territoriality on its head. Rather than focus on the State's actions, the Court shifted its focus to the defendant's actions. Reasonable-

ness and fairness replaced territoriality. A State could now extraterritorially extend its power into another state by serving binding notice on non-resident defendants in their home state. To the extent the forum court considered it reasonable for the non-resident corporation to defend itself in the jurisdiction based on its activities in the state, a non-resident corporation could not complain that the court's exercise of jurisdiction was unfair. The territoriality rule appeared to lose meaning and content in the due process personal jurisdiction analysis.

State sovereignty had not changed. But the Court recognized that technological advances revolutionized the national economy. *McGee v. International Life Ins. Co.*, 355 U.S. 220, 222–223 (1957). Commercial transactions were conducted through mail or other transportation methods that involved parties “separated by the full continent.” *Id.* Modern transportation also made it “much less burdensome for a party sued to defend himself in a State where he engages in economic activity.” *Id.* The Court had embarked on a seeming irreversible trend “toward expanding the permissible scope of State jurisdictions over foreign corporations and other nonresidents.” *Id.*

One pressing question remained: how could the court justify its personal jurisdiction expansion to individual (natural) persons? The Court never explicitly answers this question. In *Shaffer v. Hietner*, 433 U.S. 186 (1977), however, the Court applied *International Shoe's* minimum contacts test to natural persons. Quoting *International Shoe* to support that due process does not sanction asserting personal jurisdiction over “an individual or corporate defendant with which the State has no contacts, ties, or relations,” *Shaffer* reasoned (in a footnote):

As the language quoted indicates, the *International Shoe* Court believed that the standard it was setting forth governed actions against natural persons as well as corporations, and we see no reason to disagree.

*Shaffer* 433 U.S. at 204 & n.19. In passing the Court also noted:

The differences between individuals and corporations may, of course, lead to the conclusion that a given set of circumstances establishes state jurisdiction over one type of defendant but not the other.

*Id.*

The Court did not state why the difference between natural persons and corporations may lead to different personal jurisdiction conclusions, despite both enjoying the same Fourteenth Amendment rights. Its concession is especially perplexing given that the Court later holds that due process in the personal jurisdiction context

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protects a defendant's "liberty." If liberty guides the inquiry, why should outcomes turn on the defendant's nature, unless we admit that one or the other is entitled to greater liberty? But if we admit this, then why adhere to the fiction that liberty is the overall due process principle? Why not admit that jurisdiction turns on the distinction between natural persons and artificial, State-created entities and that different principles guide the due process analysis depending on the defendants' nature?

#### **Stream of Confusion: From *World-Wide Volkswagen* to *Nicastro***

The stream of commerce metaphor was initially utilized to inform the minimum contacts test, but slowly threatened—and continues to threaten—to swallow the minimum contacts test altogether. The Court first entered the stream-of-commerce waters in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), and has since been unable to calm the storm it created.

#### **World-Wide Volkswagen: A Return to State Sovereignty**

The Supreme Court in *Woodson* rejected the notion that foreseeability alone establishes personal jurisdiction. Foreseeability

as a benchmark would render companies amenable to suit wherever their product traveled. "Every seller of chattels would in effect appoint the chattel his agent for service of process." *Id.* at 296. The minimum contacts test ties jurisdiction to the defendant's willful acts directed at the state; that is, a corporation must "purposefully avail[] itself of the privileges of conducting activities within the forum State." *Id.* at 297. A State may exercise personal jurisdiction over a non-resident "corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state." *Id.* at 298.

Surprisingly, the majority opinion centered its personal jurisdiction inquiry on State sovereignty: "we have never accepted the proposition that State lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism in the Constitution." *Id.* at 293. Viewed this way, the minimum contacts test works both to protect a non-resident defendant from inconvenient litigation and to prevent States from encroaching on sister States' sovereignty. *Id.* at 294.

Justice Brennan in dissent argued against the majority's *International Shoe* interpretation and argued that *International Shoe* standards were obsolete. "The clear focus in *International Shoe* was on fairness and reasonableness," Justice Brennan opined. *Id.* at 300. To the extent State Sovereignty bore on the personal jurisdiction inquiry, Justice Brennan centered it on the "forum State's interest in the case." *Id.*

*International Shoe*, according to Justice Brennan, served its purpose, but its model was outdated. "Business people, no matter how local their businesses, cannot assume that goods remain in the business' locality. Customers and goods can be anywhere else in the country usually in a matter of hours..." *Id.* at 309. Due process in the personal jurisdiction context requires fairness, and fairness "no longer require[s] the extreme concern for defendants that was once necessary." *Id.*

Justice Marshall, despite joining Justice Brennan's dissent, took a less extreme position in his own dissent. By "choosing to become a part of a nationwide, indeed a

global, network for marketing and servicing automobiles," which included dealerships in Oklahoma that service out-of-state vehicles, *World-Wide Volkswagen* was put on notice that it could potentially have to litigate injury claims in Oklahoma. *Id.* at 314. Vehicles, after all, are intended to travel. A "reasonable businessman" is thereby put on notice that a product defect may become manifest wherever that vehicle travels. *Id.* at 315.

Justice Marshall marked a distinction between corporate bodies and natural persons in the personal jurisdiction context. In rejecting foreseeability as the personal jurisdiction base-line, the majority opinion pointed to *Kulko v. California Superior Court*, 436 U.S. 84: although an ex-husband could foresee his ex-wife moving from New York—their marriage domiciliary—to California, the husband could not be haled into California courts in a child-support action without some meaningful contacts by the husband with California. *Woodson*, 444 U.S. at 296.

Justice Marshall rejected the Court's reliance on *Kulko*. Two facts distinguished *Kulko* from the present case for Justice Marshall. First, *Kulko* involved personal jurisdiction "over a nonresident individual." *Id.* at 316. It mattered to Justice Marshall, and Justice Brennan, that *Kulko* involved an individual qua natural person, as opposed to a "businessman" acting on a corporation's behalf. *Id.* at 315–16.

Second, the action centered on the non-resident individual's personal relationship with his ex-wife, not on any commercial activity. *Id.* at 316–17. The quality and nature of the non-resident defendant's activities mattered most in the personal jurisdiction analysis for Justice Marshall: "Commercial activity is more likely to cause effects in a larger sphere, and the actor derives an economic benefit from the activity that makes it fair to require him to answer for his conduct where its effects are felt." *Id.*

#### **Enter Liberty**

By reintroducing State sovereignty into the personal jurisdiction analysis, *Woodson* created what some courts deemed a quandary: if the minimum contacts test serves, in part, to prevent States from impairing sister States' sovereignty, then a non-

resident defendant could not waive his personal jurisdiction objection without also impairing the sovereignty of the State where jurisdiction is proper. See *Insurance Corporation of Ireland, Ltd. v. Compagnie des Bauzites de Guinee*, 456 U.S. 694 (1982). Justice White, who wrote the majority opinion in *Woodson*, attempted to reconcile this seeming disjunction in *Insurance Corporation of Ireland*: “The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.” *Id.* at 702.

*Insurance Corporation of Ireland* marks the first time the Court centers the due process, personal jurisdiction inquiry on individual liberty. Of course, the Court really had no choice, since the Due Process Clause on its face protects life, liberty, and property. Even so, Justice White’s opinion in *Insurance Corporation of Ireland* seemed to conflict with his opinion in *Woodson*. Justice White addressed this seeming contradiction in a footnote:

The restriction on state sovereign power described in [*Woodson*]... must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns.

*Id.* at 703 n.10. One would think the Court finally settled on a guiding principle to the personal jurisdiction, due process analysis. But he or she would be wrong.

#### **Asahi and Nicaastro: Mid-stream Confusion**

The contrasting opinions in *Woodson* came to a head in *Asahi Metal Industry Company v. Superior Court of California*, 480 U.S. 102 (1986). Justice O’Connor and three other justices adopted what has come to be known as the “stream-of-commerce plus” theory. For these justices, it is not enough that a nonresident corporation simply places an item in the stream of commerce; the nonresident corporation must take additional action directed at the forum, such as advertise in the state, solicit business there, or design its product specific to the forum. *Id.* at 112. “[A] defendant’s awareness that the stream of commerce may or will sweep the product

into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum.” *Id.*

Justice Brennan, joined by three other justices, opted into the “pure stream” theory, the content of which lower courts derived from his dissent in *Woodson*. The stream of commerce metaphor, according to Justice Brennan, refers to “the regular and anticipated flow of products from manufacture to distribution to retail sale.” *Id.* at 117. If a participant in the chain is merely aware that the product is being marketed in the forum, it is on notice that it may be required to litigate in the state. *Id.* Thus, *Asahi* did not clarify what due process required before a State could assert jurisdiction over a nonresident under the stream of commerce theory.

The Supreme Court tried one more time to bring clarity to the stream of commerce test in *Nicaastro*, but split again. Justice Kennedy’s opinion—Joined by Chief Justice Roberts, and Justices Scalia and Thomas—adopted the “stream-of-commerce plus” theory. Justice Ginsberg’s dissent—joined by Justices Sotomayor and Kagan—adopted the “pure stream” theory, more or less.

Most telling, the two concurring Justices, Alito and Breyer, agreed with Justice Kennedy’s opinion that mere awareness cannot constitute a predicate for a State to assert personal jurisdiction over a non-resident. See *Nicaastro*, 131 S. Ct. at 2793. Further, the dissenting Justices agreed that “liberty” is the guiding personal jurisdiction principle. See *Id.* at 2798.

The plurality opinion and dissenting opinion, however, were at complete odds when it came to how federalism concerns inform personal jurisdiction. The plurality articulated a clear place for federalism concerns in the personal jurisdiction inquiry:

If the defendant is a domestic domiciliary, the courts of its home State are available and can exercise general jurisdiction. And if another State were to assert jurisdiction in an inappropriate case, it would upset the federal balance, which posits that each State has a sovereignty that is not subject to unlawful intrusion by other States.

*Id.* at 2789. The dissent expressly disclaimed any room for federalism principles in the personal jurisdiction context. *Id.* at 2798.

So we return to the question with which we started: why the disjunction between rule and principle?

#### **A Principled Approach to Personal Jurisdiction**

As practitioners, we shoulder the burden to make arguments that forge coherent legal rules. And, carrying that burden, we have to

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face the dismal reality that politics drives this issue for many judges. When we talk liberty and corporate bodies today, it sets off political triggers in even judicious minds. Immediately, a debate ensues about *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010), and whether for-profit corporate entities should enjoy free speech rights compatible with natural persons’ rights. Or a *Burwell v. Hobby Lobby*, 573 U.S. \_\_\_\_ (2014), debate ensues (even though *Hobby Lobby* raised a statutory issue under the Religious Freedom Restoration Act).

Inevitably, liberty will arise in the personal jurisdiction analysis, because the Due Process Clause protects that interest. The Court has not expressly distinguished liberty afforded an individual over liberty afforded a corporate body that is owned and run by individuals. Nor has the Court provided any principled basis upon which one could rationally conclude that such a distinction exists.

When our clients' due process rights are at stake, we cannot allow a court to throw its hands in the air and say, "no standards exist in product liability cases." A standard does exist. The Court in *Daimler* rejected the notion that "reciprocal fairness" guides the personal jurisdiction inquiry. One month later, the Court unanimously reaffirmed that due process protects a non-

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resident's liberty interest to have claims asserted against him adjudicated by a tribunal with lawful authority over him. The Court made no distinction between an individual and a for profit entity.

No one disputes that reasonableness and fairness play a role in the personal jurisdictional analysis after a court establishes minimum contacts. See *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 113 (1986). But that is the second jurisdictional prong, where the burden falls to the defendant to demonstrate that personal jurisdiction over him in the state would be unreasonable, notwithstanding his voluntary contacts with the state. *Id.* The *Daimler* Court rejected "reciprocal fairness" as a contact-related principle.

Though the Court in *Nicastro* could not agree on how federalism concerns, which derived from comity principles, inform the jurisdictional analysis, the Court in near unanimity articulated a role for comity in the analysis. The Court has not articulated a clear distinction as to why interstate comity informs general jurisdiction, but not specific jurisdiction. Dual sovereignty between the federal government and state governments and individual sovereignty of the respec-

tive States is a constitutional fact. Our organic documents are imbued with this fact.

The dissent in *Nicastro* was correct to point out that federalism is not mentioned in the Due Process Clause. But neither were the public law principles that were incorporated in that Clause by the Court in *Pennoy* that inform the general jurisdiction inquiry according to the Court in *Daimler AG*. "Federalism" and "comity" are not expressly stated in many if not most constitutional clauses. It does not follow, therefore, that these principles do not inform our understanding of those clauses.

Two principles clearly inform personal jurisdiction. The liberty principle holds: Due process protects a non-resident defendant's right to be subject only to lawful power. The comity principle holds: each State possesses the right as a co-equal sovereign to develop its own laws and to protect its residents and their property within its jurisdiction. Each State must afford non-resident defendants due process in accord with the Fourteenth Amendment to exercise personal jurisdiction over them in part to foster rapport amongst the States.

In product liability cases, where specific jurisdiction is asserted, the rule most consistent with these principles comes from the plurality in *Nicastro*, which adopts the "stream-of-commerce plus" rule in *Asahi*: it is not enough that a nonresident corporation simply places an item in the stream of commerce; the nonresident corporation must take additional action directed at the forum, such as advertise in the state, solicit business there, or design its product specific to the forum. This rule ties jurisdiction to the defendant's own volition directed toward the forum, such that the forum's jurisdiction assertion would not offend its sister States' sovereign right to protect persons and property within their jurisdictional borders. 