IN THE STREAM OF THE COMMERCE CLAUSE: REVISITING ASAHI IN THE WAKE OF LOPEZ AND MORRISON

Andrew Kurvers Spalding*

The U.S. Supreme Court’s latest plunge into the stream of commerce theory of personal jurisdiction left the doctrine in a confused and confusing state. In Asahi Metal Industry Co. v. Superior Court of California, the Court could not form a majority on the question of what degree of contact with a forum state is sufficient to subject a corporate defendant to a court’s jurisdiction. Lower courts have thus been left to either selectively draw on the various opinions issued in that case, or utterly ignore them and rely on prior cases. The confusion among lower courts on this issue has been accumulating for sixteen years, and counting.

In the meantime the Court has begun a minor jurisprudential revolution in an area of the law which, at first glance, might appear unrelated. In United States v. Lopez and United States v. Morrison, the Court struck down acts of Congress under the Commerce Clause in a manner not seen since before the New Deal. In doing so, the Court resurrected the core constitutional principle of federalism and exhibited a new commitment to its protection. In the similarly bold and controversial case of New York v. United States, involving the related Tenth Amendment, the Court indicated the purpose of its new commitment to protecting constitutional federalism: it is one of many constitutional mechanisms intended to insure the protection of individual liberties. Thus, among the distinct themes of the modern Court is a commitment to protecting individual liberties by enforcing the constitutional principle of federalism.

Despite the seeming irrelevance of the Commerce Clause to establishing personal jurisdiction in accordance with due process, the Court’s commitment to federalism suggests an answer to the question left unresolved in Asahi. At stake in the issue of personal jurisdiction is a fundamental right recognized

---

* J.D., William S. Boyd School of Law, University of Nevada, Las Vegas (2003).
2 E.g., Lesnick v. Hollingsworth & Vose Co., 35 F.3d 939 (4th Cir. 1994); Boit v. Gar-Tec Prod., Inc., 967 F.2d 671 (1st Cir. 1992); Dehmlow v. Austin Fireworks, 963 F.2d 941 (7th Cir. 1992); Falkirk Mining Co. v. Japan Steel Works, Ltd., 906 F.2d 369 (8th Cir. 1990); Irving v. Owens-Corning Fiberglas Corp., 864 F.2d 383 (5th Cir. 1989).
5 U.S. CONST. art. I, § 8, cl. 3.
6 E.g., Carter v. Carter Coal Co., 298 U.S. 238 (1936) (invalidating a congressional act which set prices and labor conditions in the coal industry).
8 Id. at 181.
since this nation's onset: government by consent. The document which lent philosophical justification to the American Revolution — the Declaration of Independence — was premised on the notion that a citizen may be held accountable to a sovereign's laws only when that citizen has voluntarily consented to its jurisdiction.9 The cases involving the stream of commerce and in personam jurisdiction implicate this same issue: whether a corporate defendant's conduct may be deemed sufficient to render it legitimately obligated to a forum state's jurisdiction.10 At stake in the personal jurisdiction issue, then, is nothing less than the core political concept of government by consent. Because these cases usually involve products liability law, and because products liability law is state-based, the question becomes whether a corporate defendant's conduct suggests that it may be held subject to the laws of a given state. In the stream of commerce debate, the right to government by consent is thus inextricably linked to state sovereignty.

This note will show that of the two principle opinions in Asahi discussing the stream of commerce, only one is seriously committed to preserving the principle of government by consent. That opinion, authored by Justice O'Connor, protects the right of a corporate defendant to voluntarily consent to, or to withdraw its consent from, a forum state's jurisdiction. Justice O'Connor does this by treating each state as a distinct and sovereign jurisdiction to which a defendant must voluntarily and purposefully offer its consent before it may be subject to the state's laws. Thus, Justice O'Connor preserves the individual right of government by consent through honoring constitutional federalism.11 The Court's recent commitment to protecting those individual rights safeguarded by constitutional federalism thus suggests, if not demands, a resolution to the Asahi dilemma. If the Court is to be consistent in its enforcement of constitutional federalism, it must resolve the Asahi debate in favor of Justice O'Connor's model.

Part I of this note will discuss the foundational cases in the stream of commerce debate, and show how the issue of government by consent is a central, albeit unspoken, issue in those cases. Part II will explore the tension inherent in the contemporary Court's treatment of the stream of commerce. Part III will briefly outline the contours of the Court's new commitment to federalism, and the purpose of this commitment. Part IV will conclude the note by indicating how the new federalism may be used to resolve the Asahi question.

I. THE FOUNDATIONAL CASES AND THE THEORETICAL THEMES

A. Pennoyer v. Neff and Liberal/Republican Political Thought

The fact pattern in Pennoyer v. Neff12 is familiar to every graduate of the first year law school curriculum, and is well documented in the scholarship.13

9 See infra text accompanying notes 41-49.
10 See infra Parts I-II.
11 The alternative opinion, authored by Justice Brennan, significantly devalues both the right to consent and state sovereignty.
12 95 U.S. 714 (1877).
At a sheriff's sale, Sylvester Pennoyer purchased a piece of property in Oregon formerly owned by Marcus Neff. The land was sold to satisfy a default judgment against Neff, a non-resident. In the initial action, Neff was served only by publication. The Supreme Court ruled that the Oregon court lacked jurisdiction over Neff and his land because the land was not brought within the authority of the court prior to the action's commencement.

In justifying its ruling, the Court articulated two "well-established principles of public law respecting the jurisdiction of an independent State over persons and property." It prefaced its discussion by noting that the States are not fully independent sovereigns, since many of their original powers are now vested in the government created by the Constitution. However, except for those restrictions enumerated in the Constitution, "they possess and exercise the authority of independent States," and certain principles of public law apply. The first principle is "that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory." This sovereignty enables the authority to provide certain forms of substantive law, especially with respect to land and contract, and to prescribe the procedures for enforcing them. The second principle of public law follows from the first: "no State can exercise direct jurisdiction and authority over persons or property without its territory." Drawing on the writings of Justice Story, the Court deemed "elementary" the principle that "the laws of one State have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions."

The Court claimed authority to review these state court judgments under the Fourteenth Amendment, declaring that proceedings in a court which does not have jurisdiction over the defendant violates due process of law. Despite the acknowledged ambiguity of the phrase, due process must entail a proceeding "according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights." A valid proceeding requires "a tribunal competent by its constitution," and competence includes, among other things, personal jurisdiction over the defendant.

14 Pennoyer, 95 U.S. at 716.
15 Id.
16 Id.
17 Id. at 735.
18 Id. at 722.
19 Id.
20 Id.
21 Id.
22 Id.
23 Id.
26 At that time, the Fourteenth Amendment was not yet ten years old.
27 Pennoyer, 95 U.S. at 733.
28 Id.
29 Id.
Pennoyer’s legendary, if not infamous, status in the history of civil procedure jurisprudence has evoked, if not provoked, a barrage of scholarship. The principal issue of this controversy is the source of these two “fundamental” principles of sovereignty, often referred to as “territorialism,” and their relevance to the Due Process Clause of the Fourteenth Amendment. One group of commentators alleges that these principles of sovereignty were imported primarily from international law. Accordingly, such jurisprudence violates the original purpose of the Due Process Clause. The Pennoyer Court’s invocation of the “eternal principles” of public law is thus an “abstract pastiche,” which is not only devoid of meaning, but utterly unworkable in practice. Conversely, Pennoyer’s territorialism is defended on the grounds that it has a stronger basis than international law. Some scholars give credence to the Court’s reference to natural law, finding merit in the assertion that jurisdiction is justified only when a state acts on persons or things within its borders. Although federalism is not explicit in the Due Process Clause, it is nonetheless a fundamental principle of the Constitution as indicated in other clauses, and thus may be considered in interpreting the Due Process Clause.

According to Professor Kogan, however, this scholarship collectively suffers from a failure to place Pennoyer in the proper historical and intellectual context. He writes that the Pennoyer Court, in the wake of the recent ratification of the Fourteenth Amendment and post-Civil War politics, was using the “personal jurisdiction doctrine as one important means by which federal courts could police the states with respect to upholding the civil rights of American citizens.” Kogan points out that, beginning with his dissent in the Slaughterhouse Cases just four years earlier, Justice Field sought to develop a Fourteenth Amendment jurisprudence rooted in a tradition of political thought known as classical liberalism, or as manifested in this nation’s history, American republicanism. The influence of classical liberalism in the formation of

30 E.g., Daan Braveman, *Interstate Federalism and Personal Jurisdiction*, 33 *Syracuse L. Rev.* 533, 544 (1982) (arguing that the Fourteenth Amendment is concerned only with the defendant’s rights, and not at all with federalism or state sovereignty); Drobak, *supra* note 13, at 1023-34 (arguing that Pennoyer borrows these notions of state sovereignty from international law and common law and integrates them into a Due Process Clause which is concerned only about individual rights).

31 E.g., Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses (Part Two)*, 14 *Creighton L. Rev.* 735, 808 (1981) (arguing the original purpose of the Due Process Clause, requiring only that states treat all citizens equally, renders the territorial component of the Pennoyer ruling irrelevant and incorrect).


33 E.g., *id.* at 693.

34 *Id.*


36 *Id.* at 298.

37 Butchers’ Benevolent Ass’n v. Crescent City Live-Stock Landing and Slaughter-House Co., 83 U.S. (16 Wall.) 36 (1873) (Field, J., dissenting) (arguing for an expansive reading of the Fourteenth Amendment based on extra-constitutional, natural-law notions of freedom of contract).

the Constitution is well documented. This intellectual tradition is concerned with limiting state power and ensuring equal rights before the law.

Professor Kogan sees the influence of John Locke, and his theories of natural law, in Justice Field's Pennoyer opinion. Locke developed his theory of individual rights and the role of the state by beginning with the concept of a "state of nature," in which humans loosely associate, but no government exists. Each individual enjoys her natural liberty, and seeks to preserve and improve her life. The principal means of improvement is the accumulation of personal property, which one comes to own through mixing her labor with natural materials, the results of which she is entitled to enjoy. Each person, then, has a "natural" right to life, liberty, and property. These are natural because they exist prior to, and regardless of, the existence of government. This state of nature becomes corrupted by human self-interest, which leads persons to violate the natural rights of others. This same self-interest would prevent the harmed individual from fairly punishing the transgressor; thus is born the need for government. All persons in the state of nature, recognizing the need for an impartial third person to enforce natural rights, consent to the establishment of a government. The express and limited purpose of this government is the protection of rights. This government is legitimate because, and only because, its citizens have consented to its establishment.

Locke was not so naïve as to believe that all citizens explicitly consent to their government’s authority. He recognized that consent may be either express or tacit, the latter of which is the most common. He defined at length the meaning of tacit consent:

Every man, that hath any possessions, or enjoyment, of any part of the dominions of any government, doth thereby give his tacit consent, and is as far forth obliged to obedience to the laws of that government, during such enjoyment, as any one under it; whether this his possession be of land, to him and his heirs for ever, or a lodging only for a week; or whether it be barely traveling freely on the highway; and in effect, it reaches as far as the very being of any one within the territories of that government.

39 One scholar writes, "[Locke] developed a set of political ideas which has very largely served as the basis for American political values and for the institutional structure which American and British government has since assumed. His importance for American political thought can hardly be overestimated." D. MINAR, IDEAS AND POLITICS: THE AMERICAN EXPERIENCE 47 (1964) quoted in Kogan, supra note 35, at 26 (citing Donald L. Doernberg, "We the People": John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action, 73 CAL. L. REV. 52, 57 n.31 (1985); see also, e.g., NATHAN TARCOW, LOCKE’S EDUCATION FOR LIBERTY (1984); THOMAS L. PANGLE, THE SPIRIT OF MODERN REPUBLICANISM (1988).
40 Kogan, supra note 35, at 298.
42 Id.
43 Id.
44 Id. at 42-52.
45 Id.
46 Id.
47 Id. at 64.
By conducting oneself within the territory of a government, one enjoys that government's protections. With this protection comes an obligation to abide by that jurisdiction's laws. By such voluntary conduct, the subject has tacitly consented to the government's authority, creating a social contract. Locke argued that if this government fails to protect individual rights, it becomes illegitimate and the people are no longer obligated to recognize its authority.\(^4\) This is precisely the argument of *The Declaration of Independence*.\(^4\)

According to Kogan, Justice Field saw a state's assertion of personal jurisdiction as "implicating a citizen's property right of ownership and control over one's physical self."\(^5\) Kogan cites Locke's passages in the *Second Treatise* in which he discusses the right of private property: "every man has a property in his own person \(...) the labor of his body and the work of his hands, we may say, are properly his."\(^5\) Kogan considers the right to property "fundamental" to Locke, and claims that the philosopher was concerned in his writings "not with liberty in the abstract, but with the liberty of the freeholders."\(^5\) Whether Locke's theories may be reduced to an apology for property interests is debatable.\(^5\) Regardless, Kogan ultimately sees the Lockean influence in Justice Field's Fourteenth Amendment jurisprudence as essentially about the protection of economic rights.\(^5\) Though his article does little to interpret the *Pennoyer* facts in light of Locke's theory of property, its role may be "self-evident." Marcus Neff had a natural right to his property in Oregon. Because Neff was not a citizen, he had not offered his tacit consent to the authority of Oregon law. The Oregon courts could legitimately enforce Neff's obligations under Oregon law, and thus deprive him of his natural right to that property for failure to uphold his obligations, only after the courts has established its authority over him. This authority, according to Justice Field, must be established prior to the commencement of the action. Because the Oregon courts failed to attach Neff's property at that time, they failed to establish personal jurisdiction.\(^5\)

---

48 *Id.* at 107-24.

49 While many may recite from memory Jefferson's invocation of self-evident truths in *The Declaration of Independence*, less well-known is the second half of the same sentence, wherein he wrote, "to pursue these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government." THOMAS JEFFERSON, *The Declaration of Independence*, in *The Portable Thomas Jefferson* 235 (Merrill D. Peterson ed., Penguin Books 1977). Jefferson is relying on Locke's social contract theory to philosophically justify the American Revolution.

50 *Id.* at 300.

51 *Id.* at 307 (quoting J. LOCKE, *THE SECOND TREATISE OF GOVERNMENT* 17 (Peardon ed., 1952)).

52 Kogan, *supra* note 35, at 308.


55 *See supra* text accompanying notes 12-25.
Kogan’s Lockean analysis works wonders in advancing our understanding of what was at stake in *Pennoyer*. Justice Field, rather than smuggling foreign notions of sovereignty into the Fourteenth Amendment, was actually preserving and extending the intellectual foundations of the Constitution to support its recent addition. His undeniably novel interpretation of the Due Process Clause was part of a greater mission, invited by the recent ratification of the Fourteenth Amendment, to protect the natural rights of citizens from state intrusions. Kogan’s analysis, however, may be unduly narrow. *Pennoyer* did involve personal property, and for that reason an analysis based on the right to property is appropriate. But Locke’s theory of consent, natural law, the social contract, individual rights, and legitimate government was not limited to the protection of property. Neither should Justice Field’s opinion in *Pennoyer* be so limited. While Kogan is correct in understanding Field’s two principles of justice as rooted in Lockeian thought, those two principles should not be limited to the protection of property.

Consider the language of Field’s second principle: a state may not exercise jurisdiction over “persons or property” outside its territory. Field is not limiting his principle of state sovereignty to matters involving property, while conspicuously including matters not involving property in the statement. Neither were Justice Story’s principles so limited, as Field consistently quotes his commentaries to refer to litigation involving persons or property. Even though the fact pattern before the *Pennoyer* Court involved a proceeding in rem, Field’s principle of state sovereignty is stated so as to apply to jurisdictional questions in all proceedings, whether in rem or not. If Field was influenced by Locke, as Kogan rightly points out, this influence must extend beyond Locke’s theory of property.

If, as Field claims, jurisdictional questions must be answered according to “rules and principles which have been established by our systems of jurisprudence,” to which principles does he refer? The answer, at least in part, must be the principle that informs *The Declaration of Independence* and the Constitution, not to mention Field’s own jurisprudence: Lockeian consent. A territory may not extend its authority to persons outside its borders because those persons have not voluntarily consented to its jurisdiction. A person may consent through the possession of property, provided the courts attach that property. A person may also consent tacitly, through conduct within a jurisdiction that suggests she has taken on the benefits of the social contract and, in so doing, assumes its obligations. A government’s authority is not legitimate, and its courts have no personal jurisdiction, until a citizen suggests through her own voluntary conduct that she has entered the social contract and is thus bound by its laws.

*Pennoyer v. Neff*, then, is ultimately about integrating into the Due Process Clause a principle recognized since the American Revolution: government by consent. While personal jurisdiction is to become substantially more complex in subsequent cases, this principle remains central. A court does not have juris-

56 See supra text accompanying notes 26-29.
57 See supra text accompanying notes 18-25.
58 See supra text accompanying notes 18-25.
59 See supra text accompanying notes 18-25.
diction until a person has suggested by her conduct that she tacitly consents to its authority.

B. International Shoe and the New Deal

The Court’s personal jurisdiction jurisprudence underwent only slight modifications until after the Great Depression and the advent of the New Deal. In *International Shoe*, a Missouri corporation had been selling shoes in Washington state, though it maintained no offices there. All orders were transmitted to the office in Missouri, and the transactions were thus completed in that jurisdiction. When an action was brought against the corporation by the State to collect unpaid unemployment compensation payments, the corporation alleged that its limited conduct in Washington did not constitute “presence,” and thus denied the court personal jurisdiction.

Citing *Pennoyer*, the Court explained that “presence” in the literal sense was traditionally a requirement for establishing jurisdiction. But since the *capias ad respondendum* has given way to personal service of summons or other forms of notice, due process required that the defendant have “certain minimum contacts with it such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” In explaining this latter phrase, the Court considered the “inconveniences” which the suit would place on the defendant. The Court recognized, however, that traditional notions of fairness and justice cannot be reduced to a mere estimate of inconveniences. Whether due process is satisfied depends on the “quality and nature of the activity in relation to the fair and orderly administration of the laws.” In assessing this relationship, the Court invoked language which is more heavily dependent on *Pennoyer*, and the intellectual climate of which it was a part, than the Court or scholars have subsequently acknowledged. When a corporation “exercises the privilege” of doing business in a given jurisdiction, it enjoys the “benefits and protections of the laws of that state.” This privilege “may give rise to obligations,” and a legal procedure which enforces these obligations can “hardly be said to be undue.” It is thus “reasonable and just” according to our “traditional conception of fair play and substantial justice” to allow a state to “enforce the obligations” which the corporation had “incurred” there through its contacts.

---

62 *Id.* at 313.
63 *Id.*
64 *Id.* at 316.
65 *Id.* (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).
66 *Id.* at 317.
67 *Id.*
68 *Id.* at 319.
70 *Id.*
71 *Id.*
72 *Id.* at 320.
As with *Pennoyer*, writings on *International Shoe* have focused on what are variously called federalism, state sovereignty, or territorialism concerns and their relation to the essential purpose of the Due Process Clause. Some identify language in the Court's opinion that suggests the Court continues to transform the Due Process Clause into an instrument of federalism.73 Others find the opinion largely devoid of language which explicitly endorses the *Pennoyer*-era federalism concerns, though recognizing that the ruling is completely consistent with such principles.74 Still others declare that the *International Shoe* Court finally freed the Due Process Clause from the shackles of territorialism.75

What scholars have not discussed is the prominence of the Lockean notion of tacit consent in the Court's rationale. The Court found that the corporation's contacts with Washington allowed them to enjoy the privileges of the state's protection; these privileges thus gave rise to obligations. The Washington court's exercise of authority was in accord with due process, and thus legitimate, because the corporation's conduct suggested that it voluntarily consented to the court's jurisdiction. Evidently, remaining among the "traditional notions of fair play and substantial justice" is the notion that had been so influential from the founding through the Civil War era: the liberal notion of government by consent.

Curiously, Professor Kogan omits from his discussion of *International Shoe* any consideration of the Lockean principles which, by his own account, were integral to that case's precedent. This omission may reveal the danger of limiting one's analysis of *Pennoyer* to issues of property. Because *International Shoe* does not involve a proceeding in rem, the Lockean dimension of the ruling goes unnoticed. Kogan is nonetheless brilliant in revealing the influence of *International Shoe*'s historical context: the New Deal. That era in American politics, notes Kogan, redefined the relationship between the state and the individual.76 Rather than simply monitoring the interaction of autonomous individuals, the state began assuming responsibility for the outcome of these social processes, and thus initiated certain substantive goals for society.77 The state would resolve disputes not with respect to "existing boundaries or rights," but based on the selection and implementation of substantive social policies.78 Personal jurisdiction, then, became a question of centralized judicial administration, not a question of enforcing "natural" rights or republican political values.79

Kogan sees a primitive form of the New Deal conception of government in *International Shoe*. The comparatively simple notions of presence and consent that ruled the *Pennoyer* intellectual universe are now supplanted by "the fair and orderly administration of the laws."80 Such administration occurs not

---

73 E.g., Braveman, *supra* note 30, at 545-61.
74 E.g., Drobak, *supra* note 13, at 1039.
75 E.g., Stein, *supra* note 32, at 697.
76 Kogan, *supra* note 35, at 344.
77 Id. at 345-46.
78 Id. at 346 (quoting Donald H. Gjerdingen, *The Politics of the Coase Theorem and Its Relationship to Modern Legal Thought*, 35 BUFF. L. REV. 871, 876-77 (1986)).
80 Id. at 355.
through rigid enforcement of state boundaries, but by assessing the relative "conveniences" of various forums with respect to national social policies. In adopting this language, Kogan finds that the Court "entered the world of the activist state" in which matters of personal jurisdiction are largely administrative. The Court's jurisprudence in International Shoe "leaves the realm of sovereignty and enters the realm of fair administration."

In International Shoe, the dual strands of the Court's personal jurisdiction jurisprudence begin to emerge: the liberal or republican strand that protects the principle of government by consent by enforcing state sovereignty, and the New Deal strand which seeks to administer national social policies by weighing multiple factors. In subsequent cases, these strands will become both more distinct, and more entangled.

II. THE CONTEMPORARY CONUNDRUM: WORLD-WIDE VOLKSWAGEN AND ASAHI

A. The Dichotomy Emerges: World-Wide Volkswagen

These two strands first began to divide the Court in World-Wide Volkswagen v. Woodson. In World-Wide Volkswagen, two New York residents had purchased an Audi automobile in New York and then embarked on a cross-country drive to their new residence in Arizona. While passing through Oklahoma, they were seriously injured in an accident. The couple brought a products-liability action in Oklahoma court, and joined as defendants the automobile manufacturer, its importer, its regional distributor (who was World-Wide Volkswagen), and its retail dealer, Seaway. The latter two parties entered special appearances, claiming that Oklahoma's exercise of personal jurisdiction would violate the Due Process Clause of the Fourteenth Amendment. World-Wide and Seaway were incorporated, and had their principal place of business, in New York; World-Wide distributed vehicles and parts to retailers in New York, New Jersey, and Connecticut. The Court had no evidence that either company did any business or advertising in Oklahoma or had an agent there.

These facts became an occasion for the Court to expand its personal jurisdiction analysis. Citing International Shoe, the Court again established that the defendant must have minimum contacts such that the suit does not offend traditional notions of fair play and substantial justice – it must be reasonable for the suit to be brought there. In explaining this formula, the Court added several
factors to the analysis. While the primary concern in assessing reasonableness
is the burden on the defendant, this burden is now to be considered "in the light
of other relevant factors." These factors include: "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 sev-
eral States in furthering fundamental substantive social policies." This new and more complex type of factor analysis clearly takes the
Court's jurisprudence further into the realm of the administrative state
described by Professor Kogan. Seemingly gone is the simple and straightfor-
ward commitment to state sovereignty. Instead, the Court has taken upon itself
the furtherance of "substantive social policies." To this end, it weighs multiple
factors involving the interests of various parties, all of which the Court
presumes itself capable of doing accurately. In its articulation of the test for
personal jurisdiction, the World-Wide Volkswagen Court would seem to have
single-handedly catapulted itself into a role as a centralized administrative
agency. The Court recognizes this change, and the concomitant relaxation of
state jurisdictional restrictions. This is justified, it asserts, by economic
changes: the "nationalization of commerce." "Nevertheless," the Court continues, "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 embodied in the Con-
stitution." From this point the tenor and substance of the majority opinion
took a marked turn as the Court invoked the Pennoyer-era principle of state
sovereignty and, in seemingly greater incongruity with the times, the Framers' intent. Founding-era political thought continues to govern the Court's analy-
thesis as it expounds the meaning of sovereignty, all the while relying on Inter-
national Shoe. The reasonableness of asserting jurisdiction over a non-
resident defendant must be assessed in "the context of our federal system of

91 Id.
92 Id. (citing McGee v. Int'l Life Ins. Co., 355 U.S. 220 (1957)).
93 Id. (citing Kulko v. Cal. Super. Ct., 436 U.S. 84, 92 (1978)).
94 Id.
95 See supra text accompanying notes 76-83.
96 World-Wide Volkswagen, 444 U.S. at 293 (quoting McGee, 355 U.S. at 223).
97 Id.
98 Id.
99 Some find reliance on International Shoe contrived. Lewis argues that Justice White has
completely misunderstood the meaning of that precedent, wherein the "fair and orderly
administration of the laws" is only about protecting defendants from a forum that is unfair by
virtue of its distance; he argues the clause has nothing to do, in International Shoe, with state
sovereignty. Haro.d S. Lewis Jr., The Three Deaths of "State Sovereignty" and the Curse of
Abstraction in the Jurisprudence of Personal Jurisdiction, 58 NOTRE DAME L. REV. 699,
713 (1983). Lewis fails to notice that fairness includes a notion of consent, and that this
notion requires the enforcement of state boundaries.
government." The constitutional principle of federalism informs due process so as to prohibit a state's exercise of jurisdiction over an individual "with which the state has no contacts, ties, or relations." Herein lies the crux of the analysis:

Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.

The reasonableness factors cannot compensate for a lack of minimum contacts, and thus cannot permit a state to exercise jurisdiction when the defendant has not availed itself of its protections. Federalism trumps reasonableness. Suddenly, the Court has reverted from its New Deal judicial administration analysis and upheld a commitment to the Lockean principle of government by consent. Judicial authority is illegitimate unless the defendant has, by her own voluntary conduct, consented to its jurisdiction. While the other factors remain important, they simply cannot permit a court to claim authority over an individual who has not knowingly, albeit tacitly, consented to such authority.

The remainder of the majority opinion continues along this trajectory. The Court finds an absence of "affiliating circumstances"; that is to say, the respondents "avail[ed] themselves of none of the privileges and benefits" of the forum's law. Such is the unmistakable language of Lockean tacit consent –

102 Id. at 294.
103 Id.
104 For a discussion of the federalism component, see, e.g., Drobak, supra note 13, at 1043-44; Murphy, supra note 60, at 267. Some commentators find that World-Wide Volkswagen is actually a far stronger endorsement of federalism than seen in precedent. See, e.g., Lewis, supra note 100, at 713 (arguing that World-Wide Volkswagen "amplified on the sovereignty concept"). The opinion also amplified Lewis' ire, who strongly states that the opinion's sovereignty component enjoys "scant standing in precedent," is little more than "fanciful orbiter dicta," and makes "no discernible decisional difference." Lewis, supra note 100, at 716. Whitten cannot see that the "purposeful activity" test bears any relation to state sovereignty, since it can be used to deny a state jurisdiction. It is thus, in his view, a subpart of the inconveniences analysis. Whitten, supra note 31, at 842. This perception reflects a failure to notice sovereignty's flip side – consent – and to appreciate the difference between a jurisprudence rooted in the judicial administration paradigm of the New Deal and one rooted in liberal/republican political thought. He is right, however, to point out that the Court fails to provide a "reasoned elaboration" of why the purposeful contacts analysis relates to state sovereignty. Id. at 843. Fortunately, that task is picked up by scholars such as Kogan. See supra text accompanying notes 50-55.
105 See supra text accompanying note 58.
106 Drobak suggests that the Court's focus on federalism "must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause"; accordingly, it should value federalism only insofar as it protects individual liberty, and may abandon the concept altogether if it fails to serve this purpose. Drobak, supra note 13, at 1016 (quoting Ins. Corp. of Ir. v. Campagnie des Bauxites de Guinee, 456 U.S. 694, 703 (1982)). He does not recognize that one such liberty the Due Process Clause protects is the right to government by consent, which cannot exist absent the continued enforcement of state boundaries.
in *International Shoe* language, they have not incurred the obligations that accompany the privilege of the law's protection. Countering the argument that an automobile winding up in Oklahoma is "foreseeable," they clarify that foreseeability is not the "mere likelihood that a product will find its way into the forum State." Instead, it means that "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." In other words, he understands that his conduct gives rise to the obligation to abide by that particular forum's laws. This allows defendants to choose the jurisdictions to which they are obligated—to choose which sovereigns to whom they will offer their voluntary consent. Then, if need be, they can sever their connection with the state—they can withdraw their consent. Developing the voluntariness requirement, the Court explains that the "unilateral activity" of the plaintiff can never render the defendant amenable to suit. Hence, another party cannot subject a defendant to a court's jurisdiction when that defendant has not voluntarily consented.

The majority opinion thus remains strongly rooted in the republican tradition. While never denying its authority to engage in judicial administration, it refuses to allow such comparatively flimsy notions as "convenience" and "reasonableness" to override the core principle of liberal government: consent. The two paradigms at work in the Court's personal jurisdiction jurisprudence—American republicanism and the New Deal—may thus be completely compatible. But the majority in *World-Wide Volkswagen* refused to let the New Deal factors demolish bedrock constitutional theory. The New Deal factors may complement liberal theory, but cannot supplant it.

---

108 Id. at 295-96.
109 Id. at 297.
110 Whitten again fails to see the principle of tacit consent, which is itself tacit, in the purposeful activity test. He claims that the Court's application of this test in *World-Wide Volkswagen* is "keyed to a physical, subjective type of territorial activity by the defendant," which ignores the "practical inquiry" into the reasonableness of suit. Whitten, supra note 31, at 849. The Court does not focus exclusively on the "practical" aspects because it recognizes a principle at stake that no practicalities can trump: tacit consent. Again, Professor Whitten's analysis is oblivious to any intellectual influence which might precede the New Deal.
111 Stein is unique among commentators in recognizing this dimension to the Court's jurisprudence, noting that the Court requires a "consensual arrangement between the defendant and the forum state." Stein, supra note 32, at 722.
112 *World-Wide Volkswagen*, 444 U.S. at 297.
113 Id. at 298 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).
114 Professor Braveman recognizes the consent element here, and offers two objections. Braveman, supra note 30, at 543-53. First, he cannot see that the exercise of jurisdiction actually intrudes on the sovereignty of a sister state, since oftentimes multiple states have an interest in a single lawsuit; if each refrained from exercising jurisdiction when the interests of another were implicated, no state could ever proceed with a suit. Id. Second, he suggests that the concern for harmonizing the interests of multiple states is entirely distinct from protecting the rights of defendants. *Id.* The first objection is irrelevant, since the fact that multiple states may have an interest in a given lawsuit has no bearing on the question of whether the defendant has consented to the jurisdiction of the forum state. The second objection fails to see the necessary interdependence of consent and state sovereignty in a federalist system. Because each state is a distinct jurisdiction, protecting the right to consent to any of them necessitates recognizing state boundaries for jurisdictional purposes.
The same may not be said for Justice Brennan, whose dissent presumed a very different relationship between New Deal administration and traditional state sovereignty. The majority's emphasis on the defendant's contacts, in Brennan's view, accords too little weight to the other reasonableness factors, specifically the forum State's interest and the inconvenience to the defendant. Brennan does not seek to abolish the purposefulness requirement entirely. Instead, he argues that an automobile dealer does indeed intend that his product will be used to travel to distant states. In selling the product, the dealer does "purposefully inject the vehicle into the stream of interstate commerce." While this argument may appear to preserve the principle of consent, consider the ramifications. In selling an automobile, the dealer thereby consents to every jurisdiction to which the vehicle may be driven. As a result, the mere sale of a single automobile is the immediate and automatic act of consent to jurisdiction in every court in the United States. If that consent is to be informed, and if the dealer is to structure his conduct so as to comply with the laws of every jurisdiction to which he has just consented, he must know and accommodate the laws of all fifty states. Should he wish to withdraw his consent from one state, he must withdraw it from all. Consequently, Justice Brennan's notion of consent is so broad that it becomes meaningless. Under Brennan's analysis, consent ceases to be a voluntary act made toward a particular jurisdiction.

Justice Brennan's lack of concern for the principle of consent becomes more apparent in his consideration of the New Deal factors. Though he acknowledges, as did the majority, that the economy has changed dramatically since the ruling in International Shoe, he finds that these changes carry very different implications. Given the "tremendous mobility of goods and people," he writes, "I do not think that the defendant should be in complete control of the geographical stretch of his amenability to suit." A defendant should be held to answer for a products liability suit in any jurisdiction, regardless of whether he brings his products there deliberately, or his products reach the jurisdiction through the unilateral act of another. "Jurisdiction," he boldly announces, "is no longer premised on the notion that nonresident defendants have somehow impliedly consented to suit." Brennan's basis for this claim in the Court's precedent is unclear, given the Court's consistent use of the minimum contacts test. It would seem that Brennan is suggesting that jurisdiction should not be based on implied consent. Indeed, he may want to go much further; as he writes in the Court's earlier personal jurisdiction cases, "notions of state sovereignty were impractical and exaggerated." This far exceeds the oft-repeated notion that the modern national economy renders state sovereignty impractical; in Justice Brennan's view, it was always impractical. In ultimate testimony to his belief that the New Deal has completely extirpated the Ameri-

115 World-Wide Volkswagen, 444 U.S. at 299-300 (Brennan, J., dissenting). Justice Brennan is concerned not with theoretical principles that apply to the defendant, but with the defendant's "actual inconvenience"; see Murphy, supra note 60, at 270.
116 World-Wide Volkswagen, 444 U.S. at 306 (Brennan, J., dissenting).
117 Id. at 311.
118 Id.
119 Id. at 312.
can liberal/republican notion of consent, he writes, "I cannot see how a defendant's right to due process is violated if the defendant suffers no inconvenience."\footnote{120}

Justice Brennan's desire to abandon tacit consent could not be more unequivocal, and his principled disagreement with the majority could not be more pronounced. He seeks not to qualify, but to completely abandon the dual principles of consent and state sovereignty in due process jurisprudence. Rather than grafting the new theory of judicial administration onto traditional principles of liberal/republican political thought, he wants to supplant them. Thus two distinct camps emerge within the Supreme Court on the issue of personal jurisdiction. The majority, relying on the minimum contacts test, believes that the New Deal reasonableness factors are properly applied only when at least some voluntary act on the part of the defendant establishes contacts with the forum. This camp relies principally on traditional liberal political thought, though it concedes that the new economy may necessitate a degree of centralized judicial administration. Justice Brennan, as the flag-bearer of the dissident camp, seeks to abandon the outmoded notions of government by consent and its American corollary, federalism. Instead, he envisions a Supreme Court which assesses the relative weight of various factors to determine which forum would most further the substantive social policies the Court has elected to enforce. These two camps will bring the Court, and the law, to loggerheads in the near future.

B. The Court at a Theoretical Impasse: Asahi.

The Court's most recent foray into personal jurisdiction left it in a quagmire from which it has not, in sixteen years, attempted to escape. In \textit{Asahi Metal Industry Co. v. Superior Court of California},\footnote{121} a California motorcyclist was injured in an accident that he alleged was due to a defective rear tire.\footnote{122} He brought suit against several defendants, including Cheng Shin, the Taiwanese manufacturer of the tire tube.\footnote{123} Cheng Shin in turn filed a third party claim for indemnification against Asahi, the Japanese manufacturer of the valve assembly in the tire tube.\footnote{124} Cheng Shin then settled with the injured motorcyclist, leaving only its suit against Asahi.\footnote{125} Asahi moved to dismiss for lack of jurisdiction\footnote{126} claiming they conducted no business activity of any kind in California.\footnote{127} Asahi sold valves to Cheng Shin knowing they would be sold in California, but did not engage in any deliberate conduct of its own in California.\footnote{128} Approximately one percent of Asahi's sales were to Cheng Shin, and approximately twenty percent of Cheng Shin's sales were in California; thus

\begin{footnotes}
\item[120] \textit{Id.} at 309.
\item[121] 480 U.S. 102 (1987).
\item[122] \textit{Id.} at 105-06.
\item[123] \textit{Id.} at 106.
\item[124] \textit{Id.}
\item[125] \textit{Id.}
\item[126] \textit{Id.}
\item[127] \textit{Id.}
\item[128] \textit{Id.}
\end{footnotes}
about one fifth of one percent of Asahi's products were sold in the jurisdiction where suit was brought.129

The Court ultimately agreed that the reasonableness factors applied to these circumstances could not justify a lawsuit in California.130 However, on the issue of whether Asahi established minimum contacts with California, no opinion commanded a majority. Instead, four justices signed on to each of two opinions. One was authored by Justice O'Connor, the other by Justice Brennan. The split can also be characterized as a theoretical impasse which parallels the majority/dissent dichotomy in World-Wide Volkswagen: one opinion is strongly committed to the principle of tacit consent and federalism, while the other dilutes these concepts beyond recognition in the furtherance of substantive social policies.

Justice O'Connor's opinion begins by invoking what she considers the "constitutional touchstone" of the personal jurisdiction analysis: voluntary conduct directed toward the forum.131 The Due Process Clause requires that a defendant "purposefully avail itself of the privilege of conducting activities, thus invoking the benefits and protections of its laws."132 As discussed above,133 this is the language of tacit consent. Further clarifying the word formula and buttressing its commitment to consent, Justice O'Connor specifies that it must be "actions by the defendant himself that create a 'substantial connection' with the forum State."134 Citing World-Wide Volkswagen, O'Connor reaffirmed that a consumer's unilateral act of bringing the product into the forum state is an insufficient constitutional basis for establishing personal jurisdiction.135 Applied to the facts, the O'Connor plurality136 found that Asahi never engaged in any act "purposefully directed" toward California; mere awareness that their product will wind up there did not establish voluntary, tacit consent.137

129 Id. For a more detailed account of the facts, see Howard B. Stravitz, Sayonara to Minimum Contacts: Asahi Metal Industry Co. v. Superior Court, 39 S.C.L. Rev. 729, 783-87 (1988).
130 Asahi, 480 U.S. at 114.
131 Id. at 108-09 (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985)).
132 Id.
133 See supra text accompanying note 59.
134 Asahi, 480 U.S. at 108-09 (quoting Burger King, 471 U.S. at 474).
135 Id.
136 Morton alleges that the result in Asahi serves to "weaken the link" between the minimum contacts analysis and asserting jurisdiction, since a majority agreed that even where minimum contacts are established, the reasonableness factors may still undermine jurisdiction. Bruce N. Morton, Contacts, Fairness and State Interests: Personal Jurisdiction after Asahi Metal Industry Co. v. Superior Court of California, 9 Pace L. Rev. 451, 490 (1989). One might also say that the holding strengthens the role of minimum contacts, because although these justices did not find contacts sufficient, they agreed that they were necessary.
137 Id. Stravitz points out that the O'Connor opinion, read literally, suggests that a foreign part manufacturer could not be sued in a jurisdiction where its product was "systematically and continuously distributed with its knowledge and acquiescence" as long as the manufacturer did not engage in "consumer oriented activity" in that jurisdiction. The holding permits manufacturers to escape liability by "insulating the manufacturing process from the distribution process." Stravitz, supra note 128, at 790. Accord Kim Dayton, Personal Jurisdiction and the Stream of Commerce, 7 Rev. Litig. 239, 271 (1988). This may be true, and is a serious objection. However, the costs of ameliorating this problem through Justice Bren-
This analysis is expressly rejected by Justice Brennan, who believes that the stream of commerce refers to "the regular and anticipated flow of products from manufacture to distribution to retail sale."\footnote{Asahi, 480 U.S. at 117 (Brennan, J., dissenting).} Thus, as long as the manufacturer is aware that the product "is being marketed" in the forum State, a lawsuit is not surprising.\footnote{Id.} Notice the passive form of the verb. Besides provoking the ire of legal writing professors (and few others), it demonstrates the theory of personal jurisdiction that Brennan expounded in *World-Wide Volkswagen*.\footnote{See supra text accompanying notes 115-20.} The conduct of another party may be sufficient to subject a defendant to jurisdiction if that conduct is reasonably anticipated. Since jurisdiction for Justice Brennan is not founded on consent, and notions of federalism and state sovereignty have always been exaggerated and impractical, whether the defendant has knowingly and purposefully engaged in conduct directed to that forum is irrelevant.

Unlike *World-Wide Volkswagen*, however, Justice Brennan's reasoning has ceased to be a mere dissent. Now, the two camps of personal jurisdiction jurisprudence have achieved positions of rough equality. Neither commands a majority. Whether the Court will remain committed to the core republican principle of government by consent, or instead, will allow the New Deal to completely extirpate that intellectual tradition, is a question not yet answered. Or at least, to find an answer, one must look beyond the personal jurisdiction cases.

III. *In Search of a Guiding Principle: the Court's New Federalism*

firearm in a school zone a federal offense.\textsuperscript{146} As in the personal jurisdiction cases,\textsuperscript{147} the Court acknowledged the economic changes which necessitated the modern expansion of federal authority,\textsuperscript{148} and cited the post-New Deal cases in which the Court broadened Congress' commerce powers.\textsuperscript{149} But in an apparent attempt to temper the otherwise radical appearance of its imminent holding, the Court claimed that even these cases acknowledged the "outer limits" of congressional authority to regulate interstate commerce.\textsuperscript{150} It then articulated these limits, producing the three-prong test for the Interstate Commerce Clause. First, citing \textit{United States v. Darby},\textsuperscript{151} and \textit{Heart of Atlanta Motel, Inc. v. United States},\textsuperscript{152} Congress may regulate the "use of the channels of interstate commerce."\textsuperscript{153} Second, citing the \textit{Shreveport Rate Cases}\textsuperscript{154} and \textit{Perez v. United States},\textsuperscript{155} Congress may "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce," even if the threat is intrastate in origin.\textsuperscript{156} Finally, citing \textit{Jones & Laughlin},\textsuperscript{157} activity may be regulated when it "substantially affects" interstate commerce.\textsuperscript{158} Finding that the prohibition of guns in school zones is neither a channel nor an instrument of interstate commerce, the Court expounds the substantially affects test.\textsuperscript{159} Though past cases, such as \textit{Wickard},\textsuperscript{160} permitted the aggregation of activities that do not separately have a substantial effect, the Court explains that aggregation may only occur where the activity is economic in nature.\textsuperscript{161} The Gun-Free School Zones Act is a criminal statute that makes no reference to any sort of economic activity,\textsuperscript{162} and thus the effect of bringing guns near schools cannot be aggregated for purposes of a commerce analysis.\textsuperscript{163} The Court notes that congressional findings pertaining to the economic impact of such conduct, while not normally required, would assist the Court in its analysis; however,

\textsuperscript{146} \textit{Id.}  
\textsuperscript{147} See supra Part I.  
\textsuperscript{148} Lopez, 514 U.S. at 556.  
\textsuperscript{149} \textit{Id.}  
\textsuperscript{150} \textit{Id.} For a thorough discussion of the relation of \textit{Lopez} to precedent, see Russell F. Pannier, \textit{Lopez and Federalism}, 22 WM. MITCHELL L. REV. 71 (1996).  
\textsuperscript{151} 312 U.S. 100 (1941) (upholding a congressional act that prohibited the shipment in interstate commerce of lumber that was manufactured in violation of labor laws).  
\textsuperscript{152} 379 U.S. 241 (1964) (upholding a provision of the Civil Rights Act of 1964 that prohibited racial discrimination in hotels that served patrons in interstate travel).  
\textsuperscript{154} Houston, E. & W. Tex. Ry. Co. v. United States, 234 U.S. 342 (1914) (upholding an order of the Interstate Commerce Commission that prohibited charging different rates for different train shipment routes).  
\textsuperscript{155} 402 U.S. 146 (1971) (upholding a provision of the Consumer Credit Protection Act which regulated credit transactions).  
\textsuperscript{156} Lopez, 514 U.S. at 558.  
\textsuperscript{157} NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (permitting the NLRB to prohibit the termination of steelworkers' employment for labor activity).  
\textsuperscript{158} Lopez, 514 U.S. at 558-59.  
\textsuperscript{159} \textit{Id.} at 559.  
\textsuperscript{160} Wickard v. Filburn, 317 U.S. 111 (1942).  
\textsuperscript{161} Lopez, 514 U.S. at 560.  
\textsuperscript{162} For an analysis of \textit{Lopez}'s effect on other areas of congressional regulation, see Julian Epstein, \textit{Evolving Spheres of Federalism After U.S. v. Lopez and Other Cases}, 34 HARV. J. ON LEGIS. 525 (1997).  
\textsuperscript{163} Lopez, 514 U.S. at 561.
they were not provided. Thus, for the first time in sixty years, the Court struck down an act of Congress for exceeding the limits of the Interstate Commerce Clause.

The Court begins to illuminate the policy considerations behind this holding by citing precedent; and in a seemingly further effort to maintain a façade of continuity with precedent, it again cites the early New Deal case of Jones & Laughlin. Congress’ Commerce Clause authority must always be considered “in the light of our dual system of government.” The danger of neglecting this core constitutional element of federalism, according to the Court, is that an unbounded Commerce Clause jurisprudence will eventually “obliterate the distinction between what is national and what is local and create a completely centralized government.” Thus the Lopez Court resurrected constitutional principles that its Commerce Clause jurisprudence had neglected, in practice if not in rhetoric, since the New Deal: federalism and state sovereignty. The Court’s opinion, though, is surprisingly devoid of an explanation of why it has elected to bring back these concepts into its jurisprudence. Why is federalism important? What is lost by “obliterating” the national/local distinction? Ultimately, what is at stake? These questions are not answered in Lopez.

Suspicions that the Lopez holding would be little more than a curious aberration were assuaged by the Court’s controversial decision striking down the Violence Against Women Act, United States v. Morrison. That Act provided a civil cause of action for victims of violent acts motivated by gender. A female college student brought suit under the Act against two fellow students for an alleged rape. She won, and the male students appealed, arguing that the Act exceeded congressional authority under the Commerce Clause. The Court invoked the three-prong Lopez test, and, paralleling that case, analyzed the instant facts under the third prong: the substantial affects test.

164 Id. at 562-63. For a focused examination of this component of Lopez, see Barry Friedman, Legislative Findings and Judicial Signals: A Positive Political Reading of United States v. Lopez, 46 CASE W. RES. L. REV. 757 (1996).
166 Lopez, 514 U.S. at 568. Several scholars argue that such radical decisions regarding the scope of congressional authority ought to be left to the political process. See, e.g., Lino A. Graglia, United States v. Lopez: Judicial Review Under the Commerce Clause, 74 TEX. L. REV. 719 (1996); Tom Stacy, What’s Wrong with Lopez, 44 U. KAN. L. REV. 243 (1996).
171 Id. at 601-02.
172 Id.
173 Id.
174 Id. at 609.
similarity with that precedent, the Court found arguments that violence against women is a commercial or economic activity unpersuasive. Congress had attempted to meet the Court's *Lopez* requirements by providing express findings of the economic effects of gender-motivated violence, including the deterrent effects on interstate travel and business, diminished national productivity, and increased medical costs. If such arguments were taken seriously, wrote the Court, Congress would be able to regulate other, more common forms of criminal conduct, the economic consequences of which would be far greater. The Court found this line of reasoning to be a slippery slope, ultimately encroaching on "other areas of traditional state regulation." It thus exceeded *Lopez*'s degree of congressional scrutiny by actually disregarding congressional findings.

The logic of those findings - that noneconomic or noncommercial activities may be aggregated - was rejected by the Court in *Lopez*, and was again rejected in *Morrison*. That logic invoked the policy concern that now seems fundamental to a Commerce Clause analysis: the obliteration of the national/local distinction. In buttressing this policy, the Court here invoked the Framers' intent, finding that it "can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and the vindication of its victims." Again, the Court is bringing the principles of federalism and state sovereignty back to the fore. But as in *Lopez*, the *Morrison* Court does not explain why these principles have again become paramount.

For an explanation of the purposes which federalism serves, one may look to cases addressing that clause, which is the flip side of the enumerated powers: the Tenth Amendment. *New York v. United States* involved a congressional act which provided a series of incentives to states to comply with nuclear waste disposal requirements. These incentives were of three types: one involved monetary incentives administered by the Secretary of Energy; another involved the denial of future access to disposal facilities; and the third required the states to take title to all improperly disposed waste, thereby becoming liable

---

175 For an argument that the use of *Lopez* demonstrates the ambiguity of that holding, and the inevitable confusion it will generate, see Sara E. Kropf, The Failure of United States v. *Lopez*: Analyzing the Violence Against Women Act, 8 S. CAL. REV. L. & WOMEN'S STUD. 373 (1999); see also Glenn H. Reynolds, Lower Court Readings of *Lopez*, Or What if the Supreme Court Held a Constitutional Revolution and Nobody Came?, 2000 WIS. L. REV. 369 (examining lower courts' usage of *Lopez*).

176 *Morrison*, 529 U.S. at 614 (quoting H.R. CONF. REP. No. 103-711, at 385 (1994)).

177 Id. at 615.

178 Id.

179 Id.

180 Id. at 617.

181 Id. at 618.

182 Id.


185 Id. at 150-52.
for all associated damages.\textsuperscript{186} While the first two passed constitutional muster, the third raised a federalism concern. It provided states the "choice" between regulating the waste disposal according to congressionally mandated standards, or becoming legally liable for undisposed waste.\textsuperscript{187} Either action would effectively "commandeer" states into federal service, crossing the line between encouragement and coercion.\textsuperscript{188} The Constitution gives Congress the power to regulate individuals, not states.\textsuperscript{189} A state may not be compelled to comply with federal regulations; it must be given an alternative that is not itself another form of regulatory coercion.\textsuperscript{190} So stringent is this constitutional prohibition that a state's officials may not even consent to such a practice.\textsuperscript{191}

As in the modern commerce cases, the Court is here resurrecting the principles of federalism and state sovereignty. The Court advances our understanding of federalism beyond those cases, however, by offering a more sophisticated analysis of the underlying policies. In explaining why a congressionally imposed standard can violate a state's constitutional protections even when that state's officials have consented, the Court writes that the answer "follows from an understanding of the fundamental purpose served by our Government's federal structure."\textsuperscript{192} This fundamental purpose is precisely what the Lopez and Morrison opinions failed to provide. States are not protected for their own sake; that is, the Court makes the somewhat shocking claim that federalism and state sovereignty are not ends in and of themselves, but serve a more fundamental purpose. That purpose is the protection of individuals: "federalism secures to citizens the liberties that derive from the diffusion of sovereign power."\textsuperscript{193} Federalism is thus another constitutional mechanism designed to protect individual rights. For this reason, states "cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution."\textsuperscript{194} The Constitution does not protect the states' right to consent; it protects the citizens' right to consent.

The Court explains that the purpose of federalism is the protection of individual rights. While federalism is obviously not the only mechanism for the protection of individual rights, there are rights that cannot be protected without a strong commitment to preserving state sovereignty in our federalist scheme.\textsuperscript{195} One such right, in the view of the author, is the right to freely consent to the authority of a state government and thus be obligated to its jurisdiction.

\begin{footnotes}
\item[186] Id. at 152-54.
\item[187] Id. at 175.
\item[188] Id.
\item[189] Id. at 178.
\item[190] Id. at 176.
\item[191] Id. at 181.
\item[192] Id.
\item[193] Id. (quoting Coleman v. Thompson, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)).
\item[194] Id. at 182.
\item[195] For an in-depth analysis of the relationship between federalism and individual liberties, see Calabresi, supra note 141.
\end{footnotes}
IV. CONCLUSION: INTEGRATING THE NEW FEDERALISM INTO THE PERSONAL JURISDICTION DOCTRINE

As in New York, the stream of commerce issue in personal jurisdiction implicates a right which can only be protected through the recognition of state sovereignty. Thus, the policy concerns articulated in that case, and in the related Commerce Clause cases, apply with equal force to personal jurisdiction. Among the liberties which "derive from the diffusion of sovereign power" and are thus protected by the enforcement of federalism principles is the right to consent. This founding-era principle guided the earliest personal jurisdiction cases, and remains influential in Justice O'Connor's opinion in Asahi. The Supreme Court is now resurrecting such founding-era principles by protecting "traditional areas of state regulation" and once again calling our attention to the ways these principles remain foundational in constitutional law. The "dual system of government" that traditionally guided personal jurisdiction cases has, in the Commerce Clause and Tenth Amendment cases, again taken center stage as a necessary mechanism for the protection of core constitutional rights.

Of the two opinions in Asahi, only Justice O'Connor's is consistent with the Court's new focus on federalism and the distinct rights that federalism protects. Her emphasis on purposeful availment, which requires an action of the actual defendant in or directly toward the forum state, is uniquely consistent with the new federalism in two ways. First, it upholds the distinct jurisdiction of each state. An act of injecting a product into the economy is not, automatically and simultaneously, an act directed toward each and every state. States are respected as independent and co-equal jurisdictions with the authority to write and enforce their own law. Products liability is a "traditional area of state regulation," and Justice O'Connor's Asahi opinion protects this area in the same way, and for the same reasons, that such areas were protected in Lopez and Morrison. Secondly, in recognizing the distinct jurisdiction of each state, Justice O'Connor's opinion also protects the right of a defendant to voluntarily consent to, or withdraw its consent from, any given state. Thus, her opinion does not uphold federalism for its own sake; rather, it does so in order to protect a right long valued by our intellectual traditions and institutional practices.

By contrast, Justice Brennan's Asahi opinion does precisely what the Lopez Court feared would result from an unbounded Commerce Clause juris-

197 See supra Part I.
198 See supra text accompanying notes 130-36.
200 See supra Part III.
202 See supra Part I.
203 See supra text accompanying notes 130-36.
204 Morrison, 529 U.S. at 615.
205 See supra Part II.
prudence: "obliterate the distinction between what is national and what is local and create a completely centralized government."\textsuperscript{206} Denouncing notions of state sovereignty as "impractical and exaggerated,"\textsuperscript{207} Brennan would have a manufacturer who injects a product into the economy be subjected to an undifferentiated national jurisdiction. This is curious, given that products liability is state law. But worse, Brennan's disregard for the diffusion of power between the states and the federal government, and thus of the truly local character of products liability law, deprives a defendant of the right to consent. Regrettably, the most favorable explanation is that Justice Brennan simply does not value this core principle of American political thought and practice. At worst, however, he does not even recognize its relevance to the controversy. For, by his own admission, he "cannot see how a defendant's right to due process is violated if the defendant suffers no inconvenience."\textsuperscript{208}

Valuing state sovereignty and the right to consent by no means requires an abandonment of the other factors used to determine a suitable forum. The convenience of the parties, the state's interests, and other considerations can remain in the analysis, since they may reflect the reality of a national economy and the Court's modified role in an administrative state. But, as the majority in World-Wide Volkswagen took pains to emphasize, the Due Process Clause may, at times, necessarily deprive a state of jurisdiction "even if"\textsuperscript{209} the other criteria are met. This result may follow from the foundational concept in American liberal/republican political thought that government is not legitimate unless a citizen has voluntarily, albeit tacitly, consented to its jurisdiction.

In personal jurisdiction, as in its Commerce Clause cases, the Court must not be oblivious to the vast economic changes that have occurred since the founding; its jurisprudence must not disregard these plain social facts. But when the inevitable day arrives, and the Asahi issue is finally confronted, we would be wise to note what may be the most fundamental lesson of the Court's new federalism: when economic circumstances collide with core constitutional principles, in a legitimate regime, the constitutional principles must prevail.

\textsuperscript{206} Lopez, 514 U.S. at 557 (quoting Jones & Laughlin, 301 U.S. at 37).
\textsuperscript{207} World-Wide Volkswagen v. Woodson, 444 U.S. 286, 312 (1980).
\textsuperscript{208} Id. at 309.
\textsuperscript{209} Id. at 294.