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The Persistent Problem of Purposeful Availment

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The Persistent Problem of Purposeful Availment

HENRY S. NOYES

For the second time in twenty-five years, personal jurisdiction has perplexed the U.S. Supreme Court. The problem is purposeful availment. All of the Justices agree that specific jurisdiction does not exist without purposeful availment, but the Court could not cobble together a majority opinion in J. McIntyre Machinery, Ltd. v. Nicastro to clarify what purposeful availment means or what it requires.

This Article sets forth a simple—yet meaningful and necessary—solution. Purposeful availment is best understood by its negative: no court should find a nonresident defendant subject to personal jurisdiction for a contact with the forum state that the defendant could not reasonably prevent. Put another way, where it is not reasonably feasible for a defendant to sever its connection with the state, purposeful availment does not exist. Conversely, where it is reasonably feasible for a defendant to prevent its contact with a state but it has not done so, there is presumptively purposeful availment and, subject to the fairness balancing, specific jurisdiction.

This principle is consistent with the understanding reached by the Court more than twenty-five years ago and shared by a majority of the current Justices that personal jurisdiction is an individual liberty interest that is protected by the Due Process Clause. Because it is an individual liberty interest, the purposeful availment requirement must be applied in such a manner that an economic actor can structure its conduct so as to avoid subjecting itself to jurisdiction in a disfavored forum.

Application of this principle leads to clear, but certain to be controversial, resolution of several questions left unresolved by the Court in McIntyre v. Nicastro. It also makes clear that Nicastro itself was wrongly decided. First, component part manufacturers generally do not control the distribution and point of sale of the end product into which their component part is incorporated. Thus, absent some additional conduct targeting the forum state, component part manufacturers do not purposefully avail themselves of a particular state where the end product is sold, even where there is a regular flow of a large quantum of the component parts into that state. Second, end product manufacturers retain nearly complete control over the initial point of sale of their products. Thus, an end product manufacturer has purposefully availed itself of every state where the product is sold to consumers—even where the manufacturer sold the product to a distributor who sold the product to a retailer who sold the product to a consumer. Third, a manufacturer who markets its product nationwide has purposefully availed itself of every state where the product is sold and causes injury.

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The Persistent Problem of Purposeful Availment

HENRY S. NOYES*

I. INTRODUCTION

The Supreme Court decided two personal jurisdiction cases in 2011. One of the two was a specific jurisdiction case—*J. McIntyre Machinery, Ltd. v. Nicastro*¹—that focused on purposeful availment. This is not surprising because the issue of whether a state court may properly exercise jurisdiction over a nonresident defendant who did not consent to jurisdiction and who was not present in that state arises frequently in all types of litigation.² What *is* surprising is that it took so long for the Court to consider the issue despite the fact that the rules and standards for specific jurisdiction—and, in particular, what constitutes purposeful availment—have long remained unclear.

Prior to the two personal jurisdiction cases that the Supreme Court promulgated in 2011, it had been nearly twenty-five years since the Supreme Court last considered whether a state court may exercise personal jurisdiction over a nonresident defendant who has no physical presence in the forum jurisdiction.³ That decision, *Asahi Metal Industry Co. v. Superior Court*,⁴ did not result in a majority opinion. All nine Justices agreed that the Due Process Clause governed the exercise of personal jurisdiction, that the Due Process Clause required analysis of the defendant's contact with California (the forum state), and that the defendant's contact with California was not relevant unless such contact was the result of defendant's purposeful availment of California.⁵ But the Justices disagreed sharply regarding the appropriate standard for determining whether a defendant's contact with the forum state rises to the level of purposeful availment and whether the defendant in *Asahi* had, by

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¹ 131 S. Ct. 2780 (2011).

² *Id.* at 2785 (plurality opinion); see also Russell J. Weintraub, *A Map out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531, 531 (1995) (“[T]he threshold determination of personal jurisdiction has become one of the most litigated issues in state and federal courts . . .”).

³ The Supreme Court has considered only one other major personal jurisdiction case in the last twenty-five years. In that 1990 decision, the Court upheld the exercise of personal jurisdiction by a California court over a nonresident, natural-person defendant who was validly served with process while physically located in California. *Burnham v. Super. Ct.*, 495 U.S. 604, 607, 627–28 (1990).

⁴ 480 U.S. 102 (1987).

⁵ See discussion *infra* Part III.B.

its conduct, purposefully availed itself of California.⁶ Thus, *Asahi* did little to clarify the rules and standards for determining when a state does or does not have jurisdiction over an absent defendant.⁷ The passage of time has only amplified the lack of clarity. The lower courts have not reached a consensus about the meaning and application of “purposeful availment” and, of the nine Justices who participated in *Asahi*, only Justice Scalia remains on the Supreme Court today.

For those expecting some clarity regarding the rules and standards for specific jurisdiction, especially regarding the meaning and application of the purposeful availment requirement, *Nicastro* is a disappointment.⁸ *Nicastro* did not result in a majority opinion. Instead, the Justices split four-two-three. Six Justices agreed that the defendant did not purposefully avail itself of the forum state and that personal jurisdiction was therefore improper, but the Justices again split sharply in their reasoning.⁹ What, if anything, can we learn from *Nicastro*? The result in *Nicastro* was not surprising in that it was arguably consistent with existing precedent. But the various opinions in *Nicastro* reveal a great deal about the views of the *current* Supreme Court Justices regarding personal jurisdiction. Justice Kennedy—writing for Justices Thomas and Scalia and Chief Justice Roberts—wants to establish a new, more rigorous approach to personal jurisdiction that would limit the number of defendants who may be sued in state courts and would eliminate the fairness analysis as redundant.¹⁰ Justice Ginsburg—joined in her dissent by Justices Kagan and

⁶ See *id.*

⁷ *Nicastro*, 131 S. Ct. at 2785 (plurality opinion) (“The rules and standards for determining when a State does or does not have jurisdiction over an absent party have been unclear because of decades-old questions left open in *Asahi* . . .”).

⁸ See Patrick J. Borchers, J. McIntyre Machinery, Goodyear, and the Incoherence of the Minimum Contacts Test, 44 CREIGHTON L. REV. 1245, 1245 (2011) (describing the Court’s opinion in *J. McIntyre* as “a disaster” and stating that the Court “performed miserably”); see also John N. Drobak, *Personal Jurisdiction in a Global World: A Comment on the Supreme Court’s Recent Decisions in Goodyear Dunlop Tires and Nicastro*, 90 WASH. L. REV. (forthcoming 2012), available at <http://ssrn.com/abstract=2031301> (“The finding of a lack of personal jurisdiction in *Nicastro* is the worst result in any personal jurisdiction case decided by the Supreme Court in the modern era.”); Allan Ides, *Foreword: A Critical Appraisal of the Supreme Court’s Decision in J. McIntyre Machinery, Ltd. v. Nicastro*, 45 LOY. L.A. L. REV. 341, 345 (2012) (stating that the three *McIntyre* opinions “exacerbated rather than ameliorated the doctrinal confusion” and that each opinion “demonstrated a disappointing level of judicial competence”); Wendy Collins Perdue, *What’s Sovereignty Got to Do with It? Due Process, Personal Jurisdiction, and the Supreme Court*, 63 S.C. L. REV. 729, 729 (2012) (“Personal jurisdiction . . . seems to inspire foolish remarks and poor opinions, and *Nicastro*, may set a new low in that regard.”); Michael Richards, *Whose Due Process?*, N.Y.U. J.L. & LIBERTY (Oct. 4, 2011), <http://www.nyu.jll.com/2011/10/whose-due-process.html> (“*J. McIntyre* actually worsens the state of affairs and further confuses the jurisdictional analysis not only by failing to offer a clear framework for courts to use but also by introducing substantial uncertainty about the basic nature of the due process question to be answered.”).

⁹ See *infra* Part IV.

¹⁰ See discussion *infra* Part VI.A.

Sotomayor—wants to extend the personal jurisdiction doctrine to subject a foreign defendant to suit in a forum state court when it targets the U.S. (in its entirety) as a market and its product is sold in the forum state.¹¹ Justice Breyer—joined concurring in the judgment by Justice Alito—rejected Justice Kennedy’s view, but indicated that he was not *yet* willing to join Justice Ginsburg.¹² Before resolving the issue of purposeful availment, Justice Breyer wants to wait for a case that requires the Court to confront the “many recent changes in commerce and communication.”¹³

A careful parsing of the various *Nicastro* opinions provides significant guidance to state and federal trial courts struggling to resolve personal jurisdiction issues. Several established principles remain valid. The exercise of personal jurisdiction is limited by the Due Process Clause, which still requires analysis of the defendant’s contact with the forum state, and such contact is still not relevant unless it was the result of the defendant’s purposeful availment of the forum state.

We also learned that a majority of the Court appears to accept the views expressed in each of the three *Asahi* opinions as valid proof of purposeful availment for an end product manufacturer. Thus, an end product manufacturer has purposefully availed itself of the forum state when the plaintiff can establish *either* of the following two circumstances: (1) the defendant had a “regular flow” or “regular course” of product sales in the forum state, rather than a small number of isolated sales;¹⁴ or (2) the defendant purposefully targeted forum state customers which would include “special state-related design, advertising, advice, marketing” or other similar targeting activity directed toward the forum state or its customers.¹⁵

Where does that leave us on the meaning and application of purposeful availment? In this Article, I argue that purposeful availment can best be understood by its negative. In the Court’s opinion in *World-Wide Volkswagen Corp. v. Woodson*,¹⁶ Justice White wrote that a corporation that purposefully avails itself of a particular state “has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State.”¹⁷

It is not always feasible, however, for a corporation to sever its

¹¹ See discussion *infra* Part VI.B.

¹² See discussion *infra* Part VI.C.

¹³ *Nicastro*, 131 S. Ct. at 2791 (Breyer, J., concurring).

¹⁴ See discussion *infra* Part V.B.

¹⁵ See *id.*

¹⁶ 444 U.S. 286 (1980).

¹⁷ *Id.* at 297.

connection to a state. Sometimes a corporation has no ability to control whether a product reaches a particular state. Where it is not reasonably feasible¹⁸ to prevent the contact with the forum state, purposeful availment—and therefore specific jurisdiction—does not exist. Conversely, where it is reasonably feasible for a nonresident defendant to sever its connection to a state but it has not done so, there is presumptively purposeful availment of that state.

For example, a small manufacturer of cups and saucers located in West Virginia who makes sales exclusively from its West Virginia shop cannot prevent its cups and saucers from ending up in Hawaii.¹⁹ A resident of Hawaii might visit West Virginia, or a resident of West Virginia might purchase a set of cups and saucers to send as a wedding gift to a relative in Hawaii. It is not reasonably feasible for the West Virginia manufacturer to “sever” such ties to Hawaii and thus there is no purposeful availment—even if the purchaser told the manufacturer at the time of the sale, “I can’t wait to send these lovely cups and saucers to my cousin in Hawaii!” By contrast, there is purposeful availment for a single sale made to a Hawaii resident who, in response to an ad placed in the *Honolulu Star-Advertiser* by the West Virginia manufacturer, calls a toll-free telephone number, purchases the cups and saucers with a credit card, and arranges for the manufacturer to ship them to Hawaii. The West Virginia manufacturer could have prevented this contact with Hawaii but did not.

These are the relatively easy cases. Even the cases that have been difficult for the Court—where there is an intervening distributor, for example—are best understood by considering whether it is reasonably feasible for a defendant to prevent its contact with the forum state. For example, component part manufacturers generally do not control the distribution and point of sale of the end product into which their component part is incorporated. For the component part manufacturer, the target “consumer” is the end product manufacturer. Thus, absent some additional conduct targeting the forum state, component part manufacturers do not purposefully avail themselves of a particular state, even where there is a regular flow of a large quantum of the component parts into that state. This conclusion will limit the exercise of personal jurisdiction and insulate, to a degree, component part manufacturers from liability.

End product manufacturers, on the other hand, retain nearly complete

¹⁸ By “reasonably feasible,” I mean something that is literally possible to achieve and also is economically and technologically practical given the circumstances.

¹⁹ See *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2793 (2011) (Breyer, J., concurring) (“What might appear fair in the case of a large manufacturer which specifically seeks, or expects, an equal-sized distributor to sell its product in a distant State might seem unfair in the case of a small manufacturer (say, an Appalachian potter) who sells his product (cups and saucers) exclusively to a large distributor, who resells a single item (a coffee mug) to a buyer from a distant State (Hawaii).”).

control over the point of sale of their products. Thus, an end product manufacturer has purposefully availed itself of every state where the product is sold to consumers—even where the manufacturer sold the product to a distributor, who sold the product to a retailer, who, in turn, sold the product to a consumer. This conclusion will greatly expand the exercise of personal jurisdiction over end product manufacturers, particularly foreign end product manufacturers.

Likewise, the Court must adopt Justice Ginsburg’s position that a manufacturer who markets its product to the entire United States has purposefully availed itself of every state where the product is sold and subsequently causes injury.²⁰ It is a simple matter for a manufacturer to avoid marketing its product in certain undesirable states. Therefore, it defies reason and reality to conclude that a manufacturer who seeks to sell its product in *every* state has not purposefully availed itself of *any* state.

This analysis is consistent with the notion that personal jurisdiction is an individual interest that is protected by the Due Process Clause. This interest can be waived both before and after litigation arises.²¹ An objection to personal jurisdiction can also be forfeited or waived by an inattentive or careless defendant after litigation commences. Because personal jurisdiction is an individual liberty interest protected by the Due Process Clause, it must be applied in such a manner that it fosters “a degree of predictability to the legal system” that makes it reasonably feasible for careful and assiduous “potential defendants to structure their primary conduct” so as to avoid purposeful availment of disfavored forums.²²

This analysis also confirms that *Nicastro* was wrongly decided for two independent reasons. First, the United Kingdom end product manufacturer had control over the distribution of its product and easily could have avoided distribution in New Jersey. Second, the manufacturer also marketed its product in the entirety of the United States, thus hoping for sales in New Jersey and every other state.

II. A BRIEF OVERVIEW OF PERSONAL JURISDICTION

A complete history of the development of the law of personal jurisdiction is beyond the scope of this Article. A brief overview of the development of the law of personal jurisdiction is necessary, however, to identify and separate those issues that were settled from those that were

²⁰ *See id.* at 2794–95 (Ginsburg, J., dissenting) (arguing that, under past Supreme Court jurisprudence, a manufacturer who markets its product to the entire United States is subject to personal jurisdiction in every state where the product is sold); *see also* discussion *infra* Part VIII.F.

²¹ *See* discussion *infra* Part VII (discussing how courts will need to assess objections to the exercise of personal jurisdiction over nonresident defendants).

²² *World-Wide Volkswagen*, 444 U.S. at 297.

unsettled as the Court considered *Nicastro*.

A. *Territoriality*

Since the adoption of the Fourteenth Amendment, the Supreme Court has recognized that the Due Process Clause protects a defendant against a state court's exercise of power over that defendant unless the state court has personal jurisdiction over that defendant.²³ The Supreme Court initially grounded personal jurisdiction on a theory of "exclusive power based on territoriality: each state sovereign had jurisdiction, exclusive of all other sovereigns' jurisdiction, to bind persons and things present within its territorial boundaries."²⁴ Absent the defendant's consent to jurisdiction,²⁵ the defendant's presence within the territory of the forum state was a prerequisite to that state court's obtaining a judgment against the defendant.²⁶

B. *The International Shoe Minimum Contacts Test*

In its seminal 1945 decision *International Shoe Co. v. Washington*,²⁷ the Supreme Court abandoned its then-existing test—"is the defendant physically in the state"—in favor of a test that focuses on the reasonableness of exercising jurisdiction in the light of the relationship between the defendant and the forum state.²⁸ Although still a Due Process issue, the *International Shoe* test of personal jurisdiction is based on a conceptual scheme with two prongs: (1) contact between the defendant and the forum state; and (2) fairness.²⁹ The test asks whether a nonresident defendant has sufficient "minimum contacts" with the forum state such that the exercise of jurisdiction would not "offend traditional notions of fair

²³ *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877), *overruled in part by Shaffer v. Heitner*, 433 U.S. 186 (1977).

²⁴ KEVIN M. CLERMONT, *PRINCIPLES OF CIVIL PROCEDURE* § 4.2 at 214 (2d ed. 2009); *see also Pennoyer*, 95 U.S. at 720 ("The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established."); JACK H. FRIEDENTHAL ET AL., *CIVIL PROCEDURE* § 3.2 at 100–01 (4th ed. 2005). Personal jurisdiction is sometimes referred to, even today, as "territorial jurisdiction." *Id.* § 3.1 at 99 (citing *RESTATEMENT (SECOND) OF JUDGMENTS* § 55 (1982)).

²⁵ FRIEDENTHAL, *supra* note 24, § 3.5 at 106–07.

²⁶ *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (citing *Pennoyer*, 95 U.S. at 733).

²⁷ 326 U.S. 310 (1945).

²⁸ *See Quill Corp. v. North Dakota*, 504 U.S. 298, 307 (1992) (describing *International Shoe* as "the seminal case" and noting that the Supreme Court's personal jurisdiction jurisprudence "ha[s] abandoned more formalistic tests that focused on a defendant's 'presence' within a State in favor of a more flexible inquiry into whether a defendant's contacts with the forum made it reasonable, in the context of our federal system of Government, to require it to defend the suit in that State").

²⁹ RICHARD D. FREER, *CIVIL PROCEDURE* § 2.4.4 at 81 (2d ed. 2009); CLERMONT, *supra* note 24, § 4.2 at 212 ("[D]ue process dictates both that the forum must have *power* over the target of the action and that litigating the action there must be *reasonable*.").

play and substantial justice.”³⁰

In *International Shoe*, the Supreme Court distinguished between the concepts of “general jurisdiction” and “specific jurisdiction.”³¹ The Supreme Court recently reiterated this distinction in *Goodyear Dunlop Tires Operations, S.A. v. Brown*,³² a “general jurisdiction” case that was argued and decided on the same date as *Nicastro*. General jurisdiction exists when a defendant engages in substantial in-state activity that is “continuous and systematic.”³³ When a court has “general jurisdiction” over a defendant, the defendant may be sued in the forum state even where the lawsuit is *wholly unrelated* to the defendant’s contacts with the forum state.³⁴ For example, an individual may be sued in his or her domicile state, while a corporation may be sued either in its state of incorporation or in the state where it has its principal place of business—even if the events giving rise to the lawsuit have nothing to do with the forum state.³⁵ By contrast, adjudicatory authority is “specific” when the lawsuit arises out of or derives from the defendant’s contacts with the forum state.³⁶ Where a court determines that it has “specific jurisdiction” over a defendant, it means *that specific action* can proceed in that court. It does not mean that that defendant can be sued in that forum generally—that is, for other matters unrelated to the defendant’s contacts with the forum state.³⁷

The *Nicastro* decision and this Article focus on specific jurisdiction. In particular, I consider the rules and standards for the exercise of jurisdiction over (1) a nonresident defendant (2) who is not present (and therefore *not* served with process) in the forum state and (3) has neither consented to jurisdiction nor (4) waived or forfeited the objection to jurisdiction. This is the factual scenario where the *International Shoe* test applies and the forum court must evaluate the defendant’s contacts with the forum state and the fairness of forcing an unwilling defendant to litigate in a foreign forum.

Under the *International Shoe* test, the plaintiff bears the burden of establishing a relevant contact. The defendant bears the burden of

³⁰ *Int’l Shoe*, 326 U.S. at 316 (internal quotation marks omitted).

³¹ *See id.* at 318 (“While it has been held . . . that continuous activity of some sorts within a state is not enough to support the demand that the corporation be amenable to suits unrelated to that activity, there have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.” (citations omitted)).

³² 131 S. Ct. 2846 (2011).

³³ *Id.* at 2853.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* (quoting *Int’l Shoe*, 326 U.S. at 318).

³⁷ *Id.* at 2851.

establishing the constitutional *unfairness* of the forum.³⁸ Absent establishment of a relevant contact, the issue of fairness is irrelevant. “No matter how overwhelming the showing of fairness in the forum might be, there can be no jurisdiction without an initial finding that the defendant has a relevant contact with the forum.”³⁹

Not all of the defendant’s contacts with the forum state are relevant. A relevant contact must involve “purposeful availment”: the defendant’s conduct must be intentionally directed toward the forum state.⁴⁰ Serendipitous contacts between the defendant and the forum state do not count. For example, the unilateral act of the plaintiff taking defendant’s product into the forum state does not constitute purposeful availment. Likewise, a contact is relevant only if the contact makes it foreseeable that the defendant might eventually be sued in the forum state as a result of its conduct directed toward the state.⁴¹

Simply identifying a relevant contact is not the end of the inquiry. The *International Shoe* test requires a balancing of “minimum contacts” against fairness. The minimum contacts portion of the test assesses both the quantity of contacts and the “quality” of contacts between the defendant and the forum state.⁴² The greater the quantity of relevant contacts, the more likely that jurisdiction will be appropriate. The higher the “quality” of the relevant contacts, the more likely that jurisdiction will be proper. The “quality” of a contact with the forum state is determined by its relationship to the facts that give rise to the underlying lawsuit. And the “quality” of the contacts is more important than the quantity. “*International Shoe Co. v. Washington* made the point that as the level of the defendant’s state-directed activity increases, the state’s constitutional power extends to claims less related to that activity.”⁴³ Even a single contact, however, will constitute “minimum contacts” sufficient to support the exercise of personal jurisdiction when the contact with the forum state is the very basis for the action.⁴⁴

³⁸ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985); CLERMONT, *supra* note 24, § 4.2 at 212; FREER, *supra* note 29, § 2.4.4 at 85.

³⁹ FREER, *supra* note 29, § 2.4.4 at 80; *see also* FRIEDENTHAL, *supra* note 24, § 3.11 at 135–36 (4th ed. 2005); Richard D. Freer, *Personal Jurisdiction in the Twenty-First Century: The Ironic Influence of Justice Brennan*, 63 S.C. L. REV. 551, 552 (2012) (“Only if a defendant-initiated contact is established will a court consider the fairness and reasonableness of jurisdiction.”).

⁴⁰ Freer, *supra* note 39, at 561 (“[I]f there is no contact caused by purposeful availment, there can be no jurisdiction.”).

⁴¹ FREER, *supra* note 29, § 2.4.4 at 81; FRIEDENTHAL, *supra* note 24, § 3.11 at 139–41.

⁴² FRIEDENTHAL, *supra* note 24, § 3.10 at 128–29.

⁴³ CLERMONT, *supra* note 24, § 4.2 at 223; *see also id.* § 4.2 at 229 (“[A]n increase in unrelatedness requires a higher level of activity.”); FREER, *supra* note 29, § 2.4.3 at 72–73 (discussing same).

⁴⁴ *See McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 222 (1957) (stating that, over time, courts had established that certain minimum contacts—such as “consent,” “presence,” and

If the plaintiff establishes the requisite minimum contacts, then the burden switches to the defendant to establish unfairness—that it would offend traditional notions of fair play and substantial justice to require this defendant to litigate in this forum. The Court has identified five relevant factors to the fairness analysis. The (1) burden on the nonresident defendant of litigating in the forum is balanced against: (2) the forum state’s interest in adjudicating the dispute; (3) the plaintiff’s interest in obtaining convenient and effective relief; (4) the interstate judicial system’s interest in obtaining the most efficient resolution possible; and (5) “the shared interest of the several states in furthering fundamental substantive social policies.”⁴⁵

III. THE PROBLEM OF PURPOSEFUL AVAILMENT

The Supreme Court first discussed the concept of purposeful availment in its 1958 decision *Hanson v. Denckla*.⁴⁶ *Hanson* involved a Delaware corporate defendant who had established a trust in 1935 for Mrs. Donner, a Pennsylvania resident, and who then acted as trustee.⁴⁷ In 1944, Mrs. Donner moved to Florida, where she remained until her death in 1952.⁴⁸ When litigation regarding the trust ensued in Florida state court, the defendant objected to personal jurisdiction.⁴⁹ The Supreme Court agreed with the defendant and held that the unilateral activity of a plaintiff or non-party does not satisfy the requirement of minimum contacts with the forum state.⁵⁰ The Court wrote that “it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.”⁵¹

The Court later clarified:

This purposeful availment requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts, or of the unilateral activity of another party or a third person. Jurisdiction is proper, however, where the contacts

“doing business”—permitted courts to exercise personal jurisdiction when the contact with the forum state is the very basis of the action); *Hess v. Pawlowski*, 274 U.S. 352, 353–56 (1927) (permitting a Massachusetts agent to exercise personal jurisdiction over a Pennsylvania resident where the motor vehicle accident in question occurred in Massachusetts itself); FREER, *supra* note 29, § 2.4.3 at 72–73; *id.* § 2.4.4 at 74–76; FRIEDENTHAL, *supra* note 24, § 3.10 at 128.

⁴⁵ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

⁴⁶ 357 U.S. 235 (1958).

⁴⁷ *Id.* at 238.

⁴⁸ *Id.* at 239.

⁴⁹ *Id.* at 250.

⁵⁰ *Id.* at 253.

⁵¹ *Id.*

proximately result from actions by the defendant *himself* that create a substantial connection with the forum state.⁵²

Still, the meaning and application of the purposeful availment requirement has given rise to frustration in the courts, and among academics and practitioners alike. To understand the divergent views of the Supreme Court Justices, it helps to review the Supreme Court's most recent (pre-*Nicastro*) decisions.

A. World-Wide Volkswagen v. Woodson

In *World-Wide Volkswagen Corp. v. Woodson*,⁵³ the plaintiffs brought a products liability action in Oklahoma state court.⁵⁴ The plaintiffs had purchased a new Audi automobile from defendant Seaway Volkswagen, Inc., a local car dealership in Massena, New York.⁵⁵ One year after the purchase, the plaintiffs left their New York home for a new home in Arizona.⁵⁶ The plaintiffs were driving their Audi through Oklahoma on the way to Arizona when they were rear-ended by another car and injured in the resulting fire.⁵⁷ The plaintiffs sued the local New York dealership (Seaway) where they had purchased the car and the regional distributor (World-Wide Volkswagen).⁵⁸ World-Wide and Seaway then entered special appearances to argue that the exercise of personal jurisdiction by the Oklahoma state court would violate the Due Process Clause of the Fourteenth Amendment.⁵⁹

Both Seaway and World-Wide were incorporated and had their respective principal places of business in New York.⁶⁰ Although both companies had contractual relationships with the manufacturer and importer of the plaintiffs' Audi, they were fully independent corporations.⁶¹ Neither Seaway nor World-Wide "d[id] any business in Oklahoma, ship[ped] or s[old] any products to or in that State, ha[d] an agent to receive process there, or purchase[d] advertisements in any media calculated to reach Oklahoma."⁶² In fact, there was no evidence "that any automobile sold by World-[W]ide or Seaway ha[d] ever entered Oklahoma

⁵² *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (citations omitted) (internal quotation marks omitted).

⁵³ 444 U.S. 286 (1980).

⁵⁴ *Id.* at 288.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* Plaintiffs also sued the German manufacturer (Audi) and the U.S. importer (Volkswagen of America), but neither of those defendants contested personal jurisdiction. *Id.*

⁶⁰ *Id.* at 288–89.

⁶¹ *Id.* at 289.

⁶² *Id.*

with the single exception of the vehicle involved in the present case.”⁶³ The Oklahoma state court nevertheless rejected the defendants’ argument and the Oklahoma Supreme Court denied the defendants’ writ petition,⁶⁴ because “the product being sold and distributed by the petitioners is by its very design and purpose so mobile that petitioners can foresee its possible use in Oklahoma” and “petitioners derive substantial income from automobiles which from time to time are used in the State of Oklahoma.”⁶⁵

In a 6-3 opinion, the U.S. Supreme Court reversed.⁶⁶ The Court reaffirmed the principle that a state court may exercise personal jurisdiction over a nonresident defendant only if (1) there “exist minimum contacts between the defendant and the forum State” and (2) “maintenance of the suit does not offend traditional notions of fair play and substantial justice.”⁶⁷ According to the Court, determining whether maintenance of the suit would offend traditional notions of fair play and substantial justice is a test of reasonableness or fairness.⁶⁸

The Court noted that the “limits imposed on state jurisdiction by the Due Process Clause, in its role as guarantor against inconvenient litigation, have been substantially relaxed over the years” due largely to the increase in interstate and international commerce and the availability and affordability of modern communication and transportation.⁶⁹ The Court nevertheless held that the exercise of personal jurisdiction in this case would be inappropriate because the defendants “carr[ied] on no activity whatsoever in Oklahoma.”⁷⁰

The Court acknowledged that “an automobile is mobile by its very design and purpose” and it was therefore *foreseeable* that the plaintiffs’ automobile would be driven to Oklahoma and cause injury there.⁷¹ The Court held, however, that the defendants’ product being placed by the defendants in the “stream-of-commerce” and taken to Oklahoma through the unilateral act of the plaintiffs, although foreseeable, did not warrant the exercise of personal jurisdiction over the nonresident defendants.⁷² The Court noted that a finding of jurisdiction would frustrate the ability of “potential defendants to structure their primary conduct” so as to avoid suit in Oklahoma and other jurisdictions.⁷³

⁶³ *Id.*

⁶⁴ *World-Wide Volkswagen Corp. v. Woodson*, 585 P.2d 351, 355 (Okla. 1978), *rev’d*, 444 U.S. 286 (1980).

⁶⁵ *Id.* at 354.

⁶⁶ *World-Wide Volkswagen Corp.*, 444 U.S. at 299.

⁶⁷ *Id.* at 291–92 (internal quotation marks omitted).

⁶⁸ *Id.* at 292.

⁶⁹ *Id.* at 292–93.

⁷⁰ *Id.* at 295.

⁷¹ *Id.*

⁷² *Id.* at 295–98.

⁷³ *Id.* at 297.

The Court limited the scope of its holding by noting that the defendants did not seek to serve the Oklahoma market either directly or indirectly.⁷⁴ Although a number of Volkswagen service centers were located in Oklahoma, the defendants did not own or operate these service centers and they earned no direct revenue from the service centers. The Court described this as a “collateral relation” to Oklahoma that did “not stem from a constitutionally cognizable contact with that State.”⁷⁵

Justice Brennan dissented, arguing that the defendants “purposefully inject[ed] the [Audi] into the stream of interstate commerce” and the Audi was then “predictably used in the forum State.”⁷⁶ Justice Marshall (joined by Justice Blackmun) also dissented, arguing that jurisdiction was proper because it was based “on the deliberate and purposeful actions of the defendants themselves in choosing to become part of a nationwide, indeed a global, network for marketing and servicing automobiles.”⁷⁷

B. *Asahi Metal Industry Co. v. Superior Court*

Seven years later, the Court revisited the issue of specific jurisdiction. Like *World-Wide Volkswagen, Asahi Metal Industry, Co. v. Superior Court*,⁷⁸ involved a product liability claim resulting from a vehicle collision. There, the plaintiff lost control of his motorcycle and collided with a tractor, injuring the plaintiff and killing his passenger wife.⁷⁹ The plaintiff filed a product liability action in California state court, alleging that his motorcycle’s tire, tube and sealant were defective.⁸⁰ The plaintiff sued several defendants, including component parts manufacturer Cheng Shin Rubber Industrial Co, Ltd. (Cheng Shin), who was the Taiwanese manufacturer of the tube.⁸¹ Cheng Shin then filed a cross-complaint seeking indemnification from another component part manufacturer, Asahi Metal Industry Co., Ltd. (Asahi), the Japanese manufacturer of the tube’s valve assembly. The plaintiff later settled and dismissed all of his claims. As a result, the only remaining claim for the California state court to resolve was the Taiwanese company’s claim for indemnity against the Japanese company.⁸²

California’s long-arm statute authorizes the exercise of jurisdiction to the full extent permitted by the United States Constitution.⁸³ Asahi moved

⁷⁴ *Id.* at 297–98.

⁷⁵ *Id.* at 298–99.

⁷⁶ *Id.* at 306–07 (Brennan, J., dissenting).

⁷⁷ *Id.* at 314 (Marshall, J., dissenting).

⁷⁸ 480 U.S. 102 (1987).

⁷⁹ *Id.* at 105.

⁸⁰ *Id.* at 105–06.

⁸¹ *Id.* at 106.

⁸² *Id.*

⁸³ CAL. CIV. PROC. CODE § 410.10 (West 2012).

to quash the service of summons on the grounds that the exercise of personal jurisdiction by the California state court was inconsistent with the Due Process Clause of the Fourteenth Amendment.⁸⁴ Asahi was a Japanese corporation that had no offices, property, or agents in California and it solicited no business and had no direct sales in California.⁸⁵ Asahi manufactured tire valve assemblies in Japan and sold them to Cheng Shin and other tire manufacturers. Cheng Shin also purchased valve assemblies from other manufacturers. Asahi's sales to Cheng Shin took place in Taiwan. Cheng Shin incorporated the valve assemblies it purchased from Asahi and other valve assembly manufacturers into tire tubes manufactured in Taiwan.⁸⁶

Cheng Shin bought a significant number of valve assemblies—approximately 1,350,000 over a five-year period—from Asahi, but these sales were a small part of Cheng Shin's overall business.⁸⁷ Cheng Shin estimated that approximately twenty percent of its sales in the United States were in California, but the record did not indicate what percentage of Cheng Shin's total sales were made to the United States.⁸⁸ In an informal survey of one cycle store in California, an attorney for Cheng Shin determined that the store contained 115 tire tubes. Of those 115 tubes, 21 contained Asahi valve stems and 12 of the 21 Asahi valve stems were incorporated in Cheng Shin tire tubes.⁸⁹ An affidavit of a manager of Cheng Shin responsible for purchasing component parts stated:

In discussions with Asahi regarding the purchase of valve stem assemblies the fact that [Cheng Shin] sells tubes throughout the world and specifically the United States has been discussed. I am informed and believe that Asahi was fully aware that valve stem assemblies sold to my Company and to others would end up throughout the United States and in California.⁹⁰

The president of Asahi, by contrast, declared that Asahi had “never contemplated that its limited sales of tire valves to Cheng Shin in Taiwan would subject it to lawsuits in California.”⁹¹

The California Superior Court denied the motion to quash, stating: “Asahi obviously does business on an international scale. It is not unreasonable that they defend claims of defect in their product on an

⁸⁴ *Asahi*, 480 U.S. at 106.

⁸⁵ *Id.* at 106–08.

⁸⁶ *Id.* at 106–07.

⁸⁷ *Id.* at 106.

⁸⁸ *Id.*

⁸⁹ *Id.* at 107.

⁹⁰ *Id.*

⁹¹ *Id.* (internal quotations marks omitted).

international scale.”⁹² The California Court of Appeal disagreed, concluding that “it would be unreasonable to require Asahi to respond in California solely on the basis of ultimately realized foreseeability that the product into which its component was embodied would be sold all over the world including California.”⁹³ The California Supreme Court agreed with the superior court and concluded that the exercise of personal jurisdiction was proper because “Asahi knew that some of the valve assemblies sold to Cheng Shin would be incorporated into tire tubes sold in California, and that Asahi benefited indirectly from the sale in California of products incorporating its components.”⁹⁴

All nine Justices of the U.S. Supreme Court voted to reverse, finding that the exercise of personal jurisdiction would violate the Due Process Clause.⁹⁵ Eight Justices signed on to Part II.B. of Justice O’Connor’s opinion, which concluded that the exercise of personal jurisdiction over Asahi would offend “traditional notions of fair play and substantial justice.”⁹⁶ The only remaining parties to the action were a Japanese corporation and a Taiwanese corporation. The indemnification claim arose from a transaction that took place in Taiwan. The burden on defendant Asahi to defend an action in a foreign legal system was great. The interests of Cheng Shin and the California court in exercising personal jurisdiction over Asahi were minimal.⁹⁷ In addition, the Court made special note of the policy implications given the international context of the dispute:

The procedural and substantive interests of other nations in a state court’s assertion of jurisdiction over an alien defendant will differ from case to case. In every case, however, those interests, as well as the Federal Government’s interest in its foreign relations policies, will be best served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum State.⁹⁸

The Justices could not agree, however, whether Asahi had established minimum contacts with California necessary to satisfy that portion of the personal jurisdiction test. Justice O’Connor—joined by Chief Justice Rehnquist and Justices Powell and Scalia—wrote a plurality opinion that

⁹² *Id.* (citations omitted) (internal quotation marks omitted)

⁹³ *Id.* at 107–08 (citations omitted) (internal quotation marks omitted).

⁹⁴ *Id.* at 108.

⁹⁵ *Id.* at 102–04.

⁹⁶ *Id.* at 102–04, 113 (internal quotation marks omitted).

⁹⁷ *Id.* at 114–15.

⁹⁸ *Id.* at 115.

focused on the concept of purposeful availment.⁹⁹ Justice O'Connor emphasized that minimum contacts with the jurisdiction only counted if they were based on an act of the defendant bringing its products to the forum state with the expectation that they would be purchased by consumers in the forum state—as opposed to serendipitous or fortuitous contact with the jurisdiction based on “a *consumer's* unilateral act of bringing the defendant's product into the forum State.”¹⁰⁰

The mere act of manufacturing a product and placing it “in the stream of commerce” where it might eventually be swept into the forum state is not enough to justify the exercise of personal jurisdiction.¹⁰¹ Instead, the O'Connor plurality indicated that the contact with the forum state “must come about by an action of the defendant purposefully directed toward the forum State.”¹⁰² This would include:

[A]n intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State. But a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.¹⁰³

The O'Connor plurality concluded that Cheng Shin failed to “demonstrate[] any action by Asahi to purposefully avail itself of the California market.”¹⁰⁴

The Brennan plurality concurred in the result—based on the conclusion that it would be unreasonable to exercise jurisdiction in this instance—but disagreed with the O'Connor plurality about the “interpretation . . . of the stream-of-commerce theory” and “the conclusion that Asahi did not ‘purposefully avail itself of the California market.’”¹⁰⁵ Justice Brennan concluded that the Court's decision in *World-Wide Volkswagen* distinguished between the circumstance where a consumer

⁹⁹ *Id.* at 109–13 (plurality opinion).

¹⁰⁰ *Id.* at 109.

¹⁰¹ *Id.* at 110.

¹⁰² *Id.* at 112.

¹⁰³ *Id.*

¹⁰⁴ *Id.* Justice O'Connor explicitly refused to consider whether “Congress could, consistent with the Due Process Clause of the Fifth Amendment, authorize federal court personal jurisdiction over an alien defendant based on the aggregate of *national* contacts, rather than on the contacts between the defendant and the State in which the federal court sits.” *Id.* at 113 n.*.

¹⁰⁵ *Id.* at 116 (Brennan, J., concurring).

unilaterally and fortuitously transported a defendant's product to the forum state and one in which the defendant's product was regularly sold in the forum state through an established chain of distribution.¹⁰⁶ On this point, Justice Brennan stated:

The stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale. As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise. Nor will the litigation present a burden for which there is no corresponding benefit. A defendant who has placed goods in the stream of commerce benefits economically from the retail sale of the final product in the forum State, and indirectly benefits from the State's laws that regulate and facilitate commercial activity. These benefits accrue regardless of whether that participant directly conducts business in the forum State, or engages in additional conduct directed toward that State.¹⁰⁷

Justice Stevens also concurred in the result, but wrote separately (joined by two other Justices) to state that the fact alone that the exercise of jurisdiction would be unreasonable and unfair required reversal.¹⁰⁸ Although he therefore found it unnecessary for the O'Connor plurality to "articulate 'purposeful direction' or any other test as the nexus between an act of a defendant and the forum State that is necessary to establish minimum contacts," he concluded that the O'Connor plurality had misapplied that very test.¹⁰⁹ Justice Stevens noted that "[w]hether or not [Asahi's] conduct r[ose] to the level of purposeful availment require[d] a constitutional determination that is affected by the volume, the value and the hazardous character of the components."¹¹⁰ Asahi and Cheng Shin had engaged in "a regular course of dealing that result[ed] in deliveries of over 100,000 units annually over a period of several years."¹¹¹ This activity was, for Justice Stevens, far more significant than simply placing a product in the stream of commerce.¹¹²

¹⁰⁶ *Id.* at 119–20.

¹⁰⁷ *Id.* at 117.

¹⁰⁸ *Id.* at 121 (Stevens, J., concurring).

¹⁰⁹ *Id.* at 122.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

IV. *J. MCINTYRE MACHINERY, LTD. V. NICASTRO*

In September 2010, the Supreme Court granted certiorari in *J. McIntyre Machinery, Ltd. v. Nicastro*,¹¹³ a case whose facts would require the Court to revisit its muddled jurisprudence regarding purposeful availment.¹¹⁴ *Nicastro* involved a foreign manufacturer who placed its product into the “stream of commerce” by selling it to a U.S. distributor based in Ohio who then sold the product to a New Jersey business where it ultimately injured a New Jersey resident in New Jersey.¹¹⁵

Plaintiff Robert Nicastro filed a products liability action in New Jersey state court against the defendant J. McIntyre Machinery, Ltd. (“J. McIntyre”), a company incorporated in England and operating its principal place of business there as well.¹¹⁶ Nicastro injured his hand at work in New Jersey while running a metal-shearing machine that J. McIntyre had manufactured in England.¹¹⁷ Following the defendant’s objection to the New Jersey state court’s exercise of personal jurisdiction and subsequent appeals, the New Jersey Supreme Court held that the exercise of jurisdiction was appropriate.

Jurisdictional discovery revealed that the “defendant does not have a single contact with New Jersey short of the machine in question ending up in this state.”¹¹⁸ Although one of the defendant’s machines ended up in New Jersey, the defendant never marketed or shipped goods to New Jersey.¹¹⁹ Instead, the offending machine was sold to the plaintiff’s New Jersey employer by the defendant’s “exclusive American distributor,” a separate company.¹²⁰ The New Jersey Supreme Court acknowledged that the defendant had no “presence or minimum contacts in [New Jersey]—in any jurisprudential sense—that would justify a New Jersey court to exercise jurisdiction.”¹²¹ That court concluded, nevertheless, that “a foreign manufacturer that places a defective product in the stream of commerce through a distribution scheme that targets a national market, which includes New Jersey, may be subject to the in personam jurisdiction

¹¹³ 131 S. Ct. 62 (2010).

¹¹⁴ See, e.g., Howard Wasserman, *Clarifying Personal Jurisdiction . . . or Not*, PRAWFSBLAWG (June 28, 2011, 4:05 PM), <http://prawfsblawg.blogspot.com/2011/06/clarifying-personal-jurisdiction-or-not.html> (“The Court granted cert in *McIntyre* to resolve a question that had been left open 25 years ago in *Asahi*: whether putting a product into the stream of commerce expecting it to reach a particular state was sufficient purposeful availment or whether the defendant must somehow ‘target’ the forum (through some ‘plus’ activities).”).

¹¹⁵ *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2786 (2011).

¹¹⁶ *Id.* (plurality opinion).

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 2790 (internal quotation marks omitted).

¹¹⁹ *Id.* at 2786.

¹²⁰ *Nicastro v. McIntyre Mach. Am., Ltd.*, 987 A.2d 575, 577 (N.J. 2010).

¹²¹ *Id.* at 582.

of a New Jersey court in a product-liability action.”¹²² The defendant designed and manufactured the product to conform to U.S. specifications and engaged a distributor to market and distribute the machines to the entire U.S. market.¹²³ Thus, the defendant J. McIntyre knew or should have known that its products would be sold and distributed to customers located in each of the United States, including New Jersey.¹²⁴

As in *Asahi*, all nine Supreme Court Justices agreed that the exercise of personal jurisdiction was governed by the Due Process Clause, that the Due Process Clause required analysis of the defendant’s contact with the forum state, and that the defendant’s contact with the forum state was not relevant unless such contact was the result of the defendant’s purposeful availment of the forum state.¹²⁵ The Supreme Court agreed on little else, however, as the Justices—reminiscent of *Asahi*—split into three groups. In a 4-2-3 decision, the Supreme Court held that the exercise of jurisdiction by New Jersey state courts over J. McIntyre was improper for an accident that occurred in New Jersey and injured a New Jersey resident.¹²⁶

V. *NICASTRO* DOES NOT BREAK NEW GROUND

A. *International Shoe Provides the Appropriate “Test” and Requires Purposeful Availment*

The Supreme Court’s decision in *Nicastro* does not break much, if any, new ground. None of the Justices suggested that any of the Supreme Court’s existing personal jurisdiction precedent should be overturned. All nine Justices agreed that the exercise of personal jurisdiction was governed by the Due Process Clause and that the *International Shoe* test provided the appropriate analysis. All nine Justices analyzed the defendant’s contact with the forum state and agreed that the contact was not relevant unless such contact was the result of the defendant’s purposeful availment of the forum state.

B. *The Result in Nicastro Is Consistent with the Court’s Prior Precedent*

Although there was significant disagreement about the application of

¹²² *Id.* at 589.

¹²³ *Id.* at 579–80.

¹²⁴ *Id.* at 577, 592–93.

¹²⁵ *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2786–87, 2790–91 (2011) (plurality opinion); *id.* at 2791–93 (Breyer, J., concurring in the judgment); *id.* at 2796, 2798–99, 2801 (Ginsburg, J., dissenting). In another personal jurisdiction case, argued and decided on the same day as *Nicastro*, a unanimous Supreme Court stated: “A state court’s assertion of jurisdiction exposes defendants to the State’s coercive power, and is therefore subject to review for compatibility with the Fourteenth Amendment’s Due Process Clause.” *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2850 (2011).

¹²⁶ *Nicastro*, 131 S. Ct. at 2786.

the agreed-upon standard, the *result* in *Nicastro* is consistent with the Court's prior precedent.¹²⁷ *Nicastro* involved a single, isolated product that ended up in New Jersey. The defendant made no sales in New Jersey, had no presence in New Jersey, had "no contacts with the state of New Jersey," did not directly sell or solicit business in New Jersey, and "had no expectation that its product would be purchased and utilized in New Jersey."¹²⁸ Under the Court's *World-Wide Volkswagen* and *Asahi* decisions, the New Jersey court lacked jurisdiction over the defendant J. McIntyre. There was only one contact with New Jersey and, although the contact was the basis for the action against the defendant, there was no purposeful availment because it was not part of a regular course of conduct or dealing.¹²⁹

The facts of *Nicastro* do not constitute purposeful availment pursuant to Justice O'Connor's *Asahi* plurality. The defendant did not target New Jersey (other than as one of the fifty States). The sale of defendant's product in New Jersey was between the plaintiff's employer and the non-party distributor and did not "come about by *an action of the defendant purposefully directed toward the forum State*."¹³⁰ As noted by Justice Breyer, there was "no 'something more,' such as special state-related design, advertising, advice, marketing, or anything else."¹³¹

The facts of *Nicastro* also do not constitute purposeful availment

¹²⁷ See *id.* at 2791 (Breyer, J., concurring) ("[T]he outcome of this case is determined by our precedents."); *id.* at 2794 (Breyer, J., concurring) ("I would adhere strictly to our precedents and the limited facts found by the New Jersey Supreme Court."); *In re Chinese Mfrs. Drywall Prods. Liab. Litig.*, MDL No. 2047, 2012 WL 3815669, at *21 (E.D. La. Sept. 4, 2012) ("Justice Breyer's concurrence provides a clear directive to the Court to apply existing Supreme Court precedent on specific personal jurisdiction and the stream-of-commerce doctrine."). But see *Drobak*, *supra* note 8 ("Perhaps the most unusual aspect of the opinions in *Nicastro* is the claim by the concurrence that they are doing 'no more than adhering to our precedents.'" (footnote omitted)). For an argument that purposeful availment should not be a constitutional requirement for the exercise of personal jurisdiction over a non-U.S. defendant by a federal court, see generally Wendy Collins Perdue, *Aliens, the Internet and "Purposeful Availment": A Reassessment of Fifth Amendment Limits on Personal Jurisdiction*, 98 NW. U. L. REV. 455 (2004).

¹²⁸ *Nicastro v. McIntyre Mach. Am., Ltd.*, 987 A.2d 575, 579 (N.J. 2010) (internal quotation marks omitted).

¹²⁹ See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297–99 (1980). But see Mike Richards, *Purposeful Availment and Commercial Exploitation*, N.Y.U. J.L. & LIBERTY (Nov. 16, 2011), <http://www.nyu.jll.com/2011/11/purposeful-availment-and-commercial.html> [hereinafter Richards, *Purposeful Availment*] ("Permitting New Jersey courts to exercise personal jurisdiction over J. McIntyre would have been entirely consistent with *World-Wide Volkswagen*"); CLERMONT, *supra* note 24, § 4.2 at 224–25 ("The lower courts currently appear to be split, but they do seem to be moving toward a new consensus that only slightly shortens the prior jurisdictional reach down the stream of commerce. More decisions, and the better ones, hold that an in-state purchase gives the state power over a nondirect seller with an actual awareness of its products' being regularly sold there, and that such personal jurisdiction normally will not be unreasonable.").

¹³⁰ *Asahi Metal Indus. Co., Ltd. v. Super. Ct.*, 480 U.S. 102, 112 (1987) (plurality opinion).

¹³¹ *Nicastro*, 131 S. Ct. at 2792 (Breyer, J., concurring).

pursuant to Justice Brennan's *Asahi* plurality. This was a single, isolated product that ended up in New Jersey, rather than a "'regular . . . flow' or 'regular course' of sales in New Jersey."¹³² Purposeful availment was lacking because defendant's product was not regularly sold in the forum state through a chain of distribution.¹³³

The facts of *Nicastro* also do not constitute purposeful availment pursuant to Justice Stevens's *Asahi* concurrence. For Justice Stevens, "[w]hether or not [the defendant's] conduct rises to the level of purposeful availment requires a constitutional determination that is affected by the volume, the value, and the hazardous character of the [defendant's products]."¹³⁴ J. McIntyre produced a single product that ended up in New Jersey. By contrast, *Asahi* had engaged in a "higher quantum of conduct" as part of "a regular course of dealing that result[ed] in deliveries of over 100,000 units annually over a period of several years."¹³⁵ This activity was, for Justice Stevens, far more than simply placing a product in the stream of commerce.¹³⁶

In her dissent, Justice Ginsburg correctly pointed out the distinct character of the product at issue—a \$24,900 shearing machine used to process recyclable metals. Justice Ginsberg stated:

[J. McIntyre's] machine . . . is unlikely to sell in bulk worldwide, much less in any given State. By dollar value, the price of a single machine represents a significant sale. Had a manufacturer sold in New Jersey \$24,900 worth of flannel shirts, cigarette lighters, or wire-rope splices, the Court would presumably find the defendant amenable to suit in that State.¹³⁷

Although the machine was expensive, it was a single product rather than a regular course of dealing. This would be a departure from the Court's prior precedent. The Court rejected jurisdiction in *World-Wide Volkswagen*—a case involving a single automobile—despite the fact that automobiles are significant purchases that are priced comparably to the \$25,000 shearing machine in *Nicastro*.¹³⁸

Justice Ginsburg also argued that the defendant foreign automobile manufacturer in *World-Wide Volkswagen*—Audi—was subject to

¹³² *Id.*

¹³³ *Asahi*, 480 U.S. at 119–20 (Brennan, J., concurring).

¹³⁴ *Id.* at 122 (Stevens, J., concurring).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Nicastro*, 131 S. Ct. at 2803 n.15 (Ginsburg, J., dissenting) (citations omitted).

¹³⁸ See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298–99 (noting that the defendants derived "substantial revenue from goods used in Oklahoma" but rejecting the exercise of personal jurisdiction).

jurisdiction and, therefore, the defendant J. McIntyre should be subject to the New Jersey court's jurisdiction in *Nicastro*.¹³⁹ Unlike J. McIntyre, however, Audi did not object to jurisdiction.¹⁴⁰ Furthermore, Audi was selling thousands of automobiles throughout the United States, and Volkswagen (which owned Audi) operated "an extensive chain of Volkswagen service centers throughout the country, including some in Oklahoma."¹⁴¹ Thus, Audi was in a significantly different, and worse, position than J. McIntyre. Even under Justice O'Connor's *Asahi* plurality opinion, Audi purposefully availed itself of Oklahoma by intentionally directing its conduct there through sales, marketing, and services offered to Oklahoma residents.

Justice Breyer's concurrence noted that "[t]he Supreme Court of New Jersey adopted a broad understanding of the scope of personal jurisdiction based on its view that '[t]he increasingly fast-paced globalization of the world economy has removed national borders as barriers to trade.'"¹⁴² Justice Breyer determined, however, that the facts of the case did not require the Court to consider changes to communications and international commerce in order to resolve the dispute. He therefore concluded that the outcome was determined by application of the Court's existing precedent.¹⁴³ In particular, the defendant did not make any sales to New Jersey and made only one sale to its distributor that ended up in New Jersey. Justice Breyer cited *World-Wide Volkswagen* for the proposition that "a single sale to a customer who takes an accident-causing product to a different State (where the accident takes place) is not a sufficient basis for asserting jurisdiction."¹⁴⁴ He further cited the separate opinions in *Asahi* as "strongly suggest[ing] that a single sale of a product in a State does not constitute an adequate basis for asserting jurisdiction over an out-of-state defendant, even if that defendant places his goods in the stream of

¹³⁹ *Nicastro*, 131 S. Ct. at 2803–04 (Ginsburg, J., dissenting). Justice Ginsburg did acknowledge, however, that the Court had never "considered in any prior case the now-prevalent pattern presented here—a foreign country manufacturer enlisting a U.S. distributor to develop a market in the United States for the manufacturer's products." *Id.* at 2802.

¹⁴⁰ *World-Wide Volkswagen Corp.*, 444 U.S. at 288 n.3 (1980).

¹⁴¹ *Id.* at 298–99.

¹⁴² *Nicastro*, 131 S. Ct. at 2791 (Breyer, J., concurring) (quoting *Nicastro v. McIntyre Mach. Am., Ltd.*, 987 A.2d 575, 577 (N.J. 2010)).

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 2792. Professor Steinman appropriately notes that "Justice Breyer does not acknowledge a significant tension between his 'single sale' idea and the Court's decision in *McGee v. Int'l Life Insurance Co.*" Adam N. Steinman, *The Lay of the Land: Examining the Three Opinions in J. McIntyre Machinery, Ltd. v. Nicastro*, 63 S.C. L. REV. 481, 508 (2012). Unlike the insurer in *McGee*, who dealt directly with the insured in selling a life insurance policy, the U.K. manufacturer retained a U.S. distributor. Thus, *McGee* is distinguishable, but the distinction is unsatisfying given Justice Breyer's analysis.

commerce, fully aware (and hoping) that such a sale will take place.”¹⁴⁵

Justice Breyer expressed a willingness to consider a change in personal jurisdiction law based on “relevant contemporary commercial circumstances.”¹⁴⁶ But *Nicastro* did not present such circumstances and the result fit within existing precedent.

VI. NICASTRO’S INSIGHT ON THE CURRENT JUSTICES’ VIEWS ON PURPOSEFUL AVAILMENT

A. Justice Kennedy’s Restrictive View of Purposeful Availment

1. Federalism Concerns Require Proof of Submission to Sovereign Authority

Justice Kennedy’s opinion in *Nicastro* is curious because he purported to stay within the bounds of existing personal jurisdiction doctrine and precedent, but a close look reveals that he sought to revisit (and shift) the foundation of personal jurisdiction theory. Justice Kennedy began his opinion by recognizing that Due Process is an “individual[] right.”¹⁴⁷ Justice Kennedy also approved the basic *International Shoe* test¹⁴⁸ and he reaffirmed the requirement that a defendant’s contacts with the forum state must result from purposeful availment.¹⁴⁹ There is nothing new or

¹⁴⁵ *Id.* Professor Allan Ides argues that Justice Breyer got it wrong when he concluded that *J. McIntyre* fit within existing precedent. Ides, *supra* note 8, at 371–76. In particular he argues that Justice Breyer’s conclusion is correct “only if adhering to precedents means revising those precedents to fit the conclusion.” *Id.* at 376. Yet, Professor Ides’s conclusion is based on a disagreement about how to read, interpret, and extend the three *Asahi* opinions to this new factual circumstance. *See id.* at 375 (“Justice Breyer simply and simplistically assumes that the language used by Justice Brennan to describe the flow of products is freely transferrable to the sale of heavy industrial machinery.”). And Professor Ides concedes that Justice Breyer’s argument is plausible. *See id.* (“It is just as plausible to infer that Justice Stevens would uphold jurisdiction in a case involving the single sale (low volume) of an expensive (high value) and dangerous (hazardous character) piece of industrial equipment as it is to infer the opposite.”).

¹⁴⁶ *Nicastro*, 131 S. Ct. at 2794 (Breyer, J., concurring).

¹⁴⁷ *Id.* at 2786–87 (plurality opinion).

¹⁴⁸ *See id.* at 2787.

¹⁴⁹ *See id.* at 2790 (“These facts may reveal an intent to serve the U.S. market, but they do not show that J. McIntyre purposefully availed itself of the New Jersey market.”); *id.* at 2785 (“As a general rule, the exercise of judicial power is not lawful unless the defendant ‘purposefully avails itself of privilege of conducting activities within the forum State’”); *id.* at 2787 (“As a general rule, the sovereign’s exercise of power requires some act by which the defendant ‘purposefully avails itself of the privilege of conducting activities within the forum State’”); *id.* (“In products liability cases like this one, it is defendant’s purposeful availment that makes jurisdiction consistent with ‘traditional notions of fair play and substantial justice.’”); *id.* at 2789 (“Furthermore, were general fairness considerations the touchstone of jurisdiction, a lack of purposeful availment might be excused where carefully crafted judicial procedures could otherwise protect the defendant’s interests, or where the plaintiff would suffer substantial hardship if forced to litigate in a foreign forum.”). Justice Kennedy also affirms the basic principles of general jurisdiction and distinguishes general jurisdiction from the specific jurisdiction issue involved in *Nicastro*. *Id.* at 2787.

controversial there.

But early on Justice Kennedy made clear that he is not satisfied with existing personal jurisdiction theory and he does not believe that personal jurisdiction is, at its core, about individual rights or liberty. Rather, in his view, personal jurisdiction is about federalism concerns—protecting and maintaining the states’ sovereign authority. His opening discussion cited *Giaccio v. Pennsylvania*¹⁵⁰ for the proposition that the “Due Process Clause protects an individual’s right to be deprived of life, liberty or property *only by the exercise of lawful power.*”¹⁵¹ He then cited *Steel Co. v. Citizens for a Better Environment*¹⁵² as support for his contention that “[t]his is no less true with respect to the *power of a sovereign* to resolve disputes through judicial process than with respect to the *power of a sovereign* to prescribe rules of conduct for those within its sphere.”¹⁵³

Although both cases deal with issues of sovereign power, neither *Giaccio* nor *Citizens for a Better Environment* is a personal jurisdiction case. *Giaccio* involved a Pennsylvania statute authorizing a jury to impose the cost of criminal prosecution on a defendant acquitted of a misdemeanor charge.¹⁵⁴ The Supreme Court held that the statute violated the Due Process Clause because of its vagueness and the absence of any standards sufficient to enable the defendants to protect themselves against arbitrary and discriminatory imposition of costs.¹⁵⁵ *Citizens for a Better Environment* involved subject matter jurisdiction, not personal jurisdiction.¹⁵⁶ The Supreme Court held that the plaintiffs lacked standing and thus the Court never mentioned or considered the Due Process Clause.¹⁵⁷ Justice Kennedy also cites *Burnham v. Superior Court*¹⁵⁸ for the proposition that “neither statute nor judicial decree may bind strangers to the State.”¹⁵⁹ *Burnham*, however, is a case in which jurisdiction was valid because the defendant was effectively served with process while physically present in the forum state.¹⁶⁰

These cases tell us nothing about the application of the personal

¹⁵⁰ 382 U.S. 399 (1966).

¹⁵¹ *Nicastro*, 131 S. Ct. at 2786 (emphasis added).

¹⁵² 523 U.S. 83 (1988).

¹⁵³ *Nicastro*, 131 S. Ct. at 2786–87 (emphases added).

¹⁵⁴ *Giaccio*, 382 U.S. at 402.

¹⁵⁵ *Id.*

¹⁵⁶ *Citizens for a Better Env’t*, 523 U.S. at 113 (Stevens, J., concurring).

¹⁵⁷ *Id.*

¹⁵⁸ 495 U.S. 604 (1990).

¹⁵⁹ *Nicastro*, 131 S. Ct. at 2787; *see also Burnham*, 495 U.S. at 608–09 (stating that the “proposition that the judgment of a court lacking jurisdiction is void” could traditionally be “embodied in the phrase *coram non iudice*, ‘before a person not a judge’—meaning, in effect, that the proceeding in question was not a *judicial* proceeding because lawful judicial authority was not present, and could therefore not yield a *judgment*”).

¹⁶⁰ *Burnham*, 495 U.S. at 610.

jurisdiction right pursuant to the Due Process Clause, but they do tell us something about Justice Kennedy's views on the foundation of the personal jurisdiction right. In describing the foundation of a challenge to personal jurisdiction, Justice Kennedy neither cited nor discussed the Supreme Court's 1985 statement in *Burger King Corp. v. Rudzewicz*¹⁶¹ that "[a]lthough this protection [of an individual's liberty interest] operates to restrict state power, 'it must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause,' rather than as a function 'of federalism concerns.'"¹⁶²

Justice Kennedy later reiterated that Due Process is an "individual" right and paid lip service to the Court's prior statement in *Insurance Co. of Ireland v. Compagnie des Bauxites* that "[t]he 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."¹⁶³ But, as characterized by Professor Patrick Borchers, Justice Kennedy nevertheless proceeded with "a bull-headed attempt to ground personal jurisdiction in a sovereignty theory"¹⁶⁴ rather than in an individual liberty theory. Exemplifying this viewpoint, Justice Kennedy opined:

Personal jurisdiction, of course, restricts "judicial power not as a matter of sovereignty, but as a matter of individual liberty," for due process protects the individual's right to be subject only to lawful power. But whether a judicial judgment is lawful depends on whether the sovereign has authority to render it.¹⁶⁵

For Justice Kennedy, it is not "individual liberty," but instead "sovereign authority" that is the "central concept" of Due Process in the context of personal jurisdiction.¹⁶⁶ Furthermore, "jurisdiction is in the first instance a question of authority rather than fairness."¹⁶⁷

Justice Kennedy provided some insight into his definition of purposeful availment by assessing the O'Connor and Brennan plurality opinions in *Asahi*. Justice Kennedy characterized Justice Brennan's *Asahi*

¹⁶¹ 471 U.S. 462 (1985).

¹⁶² *Id.* at 472 n.13 (quoting *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702–03 n.10 (1982)).

¹⁶³ *Compagnie des Bauxites*, 456 U.S. at 702. *Compagnie Des Bauxites* was a decision in which all nine Justices agreed on the result, eight Justices signed on to the Majority opinion, and one Justice concurred separately.

¹⁶⁴ Borchers, *supra* note 8, at 1263.

¹⁶⁵ *Nicastro*, 131 S. Ct. at 2789 (plurality opinion) (citation omitted).

¹⁶⁶ *Id.* at 2788–89; *cf.* Perdue, *supra* note 127, at 458 ("The view that personal jurisdiction involves an allocation of sovereign authority is also consistent with how personal jurisdiction is approached internationally.")

¹⁶⁷ *Nicastro*, 131 S. Ct. at 2789.

concurrence as “advocating a rule based on general notions of fairness and foreseeability.”¹⁶⁸ This is a plain mischaracterization of Justice Brennan’s concurrence in *Asahi*.¹⁶⁹ Justice Brennan *and seven other Justices* acknowledged and agreed that it would be unfair to subject *Asahi* to jurisdiction in California. Justice Brennan wrote *separately* to argue that *Asahi*, by its actions, purposefully availed itself of the California market and had engaged in sufficient minimum contacts.¹⁷⁰ He did not need to write separately about fairness. Justice Kennedy explicitly rejected Justice Brennan’s *Asahi* concurrence because—as he mischaracterizes—it “is inconsistent with the premises of lawful judicial power. This Court’s precedents make clear that it is the defendant’s actions, not his expectations, that empower a State’s courts to subject him to judgment.”¹⁷¹

By contrast, Justice Kennedy agreed with the purposeful availment approach in Justice O’Connor’s *Asahi* plurality opinion, which focuses on whether a defendant’s activities demonstrate “an intent or purpose to serve the market in the forum State.”¹⁷² There, Justice O’Connor explains that “[t]he defendant’s transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum; as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State.”¹⁷³

But Justice Kennedy was not satisfied with simply approving Justice O’Connor’s *Asahi* statement of purposeful availment because it did not go far enough for him.¹⁷⁴ He wanted the Court to adopt a more rigorous approach to purposeful availment that would require a plaintiff to demonstrate that “the defendant’s activities manifest an intention to submit to the power of a sovereign.”¹⁷⁵ For Justice Kennedy, the determination of

¹⁶⁸ *Id.*; see also *id.* at 2788 (“[T]he opinion made foreseeability the touchstone of jurisdiction.”).

¹⁶⁹ In earlier opinions, Justice Brennan had advocated an approach under which all of the *International Shoe* factors, including the defendant’s contacts with the forum, were assessed “under a general rubric of fairness.” FREER, *supra* note 29, § 2.4.4 at 79–80 (describing the “Fairness Factors” extrapolated from the Supreme Court’s personal jurisdiction jurisprudence).

¹⁷⁰ See *Asahi Metal Indus. Co., Ltd. v. Super. Ct.*, 480 U.S. 102, 116, 121 (1987) (Brennan, J., concurring) (explaining the reasoning for why *Asahi* had established sufficient minimum contacts in California).

¹⁷¹ *Nicastro*, 131 S. Ct. at 2789; see also *id.* at 2790 (noting the “undesirable consequences of Justice Brennan’s approach”).

¹⁷² See *id.* at 2790 (“[T]he authority to subject a defendant to judgment depends on purposeful availment, consistent with Justice O’Connor’s opinion in *Asahi*.”); *id.* (“Respondent has not established that J. McIntyre engaged in conduct purposefully directed at New Jersey.”).

¹⁷³ *Id.* at 2788.

¹⁷⁴ See *id.* at 2790 (“The conclusion that the authority to subject a defendant to judgment depends on purposeful availment, consistent with Justice O’Connor’s opinion in *Asahi*, does not by itself resolve many difficult questions of jurisdiction that will arise in particular cases.”).

¹⁷⁵ *Id.* at 2788; see also *id.* at 2791 (“Due process protects petitioner’s right to be subject only to lawful authority. At no time did petitioner engage in any activities in New Jersey that reveal an intent to invoke or benefit from the protection of its laws. New Jersey is without power to adjudge the rights

“whether the defendant’s activities manifest an intention to submit to the power of a sovereign” is the “principal inquiry” in a specific jurisdiction case.¹⁷⁶ Due Process protects the defendant from improper exercise of state power, unless the defendant has submitted to that power. Justice Kennedy concluded that New Jersey lacked jurisdiction because J. McIntyre did not “engage in any activities in New Jersey that reveal[ed] an intent to invoke or benefit from the protection of its laws.”¹⁷⁷

2. *Application of Justice Kennedy’s New Purposeful Availment Standard*

Justice Kennedy did not offer any specifics on what evidence would satisfy his requirement that a plaintiff demonstrate that a defendant’s activities manifested an intention to submit to the power of the forum state. We do know, however, that the issue will only arise when the defendant has not expressly consented to submit to the power of a sovereign either during the course of the litigation or prior to litigation by ex ante agreement and the defendant also has not waived or forfeited the objection to jurisdiction during litigation. In such case, the plaintiff must therefore use evidence of the defendant’s activities in or affecting the forum state in order to establish the defendant’s *implied, but intentional*, submission to the forum state’s authority.

This sounds a lot like the *International Shoe* test, which focuses on a defendant’s contacts with the forum state.¹⁷⁸ But Justice Kennedy added a new, heightened requirement of purposeful availment to prove *before* one can consider the “fairness” of the exercise of personal jurisdiction.¹⁷⁹ Purposeful availment exists where the defendant, by its actions within or directed toward the forum state, “invok[es] the benefits and protections of [the forum States’] laws.”¹⁸⁰ Where it is proper to “infer an intention to benefit from” the laws of the forum state, it is proper to infer “an intention to submit to the laws of the forum State.”¹⁸¹ Likewise, where the

and liabilities of J. McIntyre, and its exercise of jurisdiction would violate due process.”); *id.* at 2787 (setting forth examples of presence, citizenship, domicile, incorporation location of principal place of business “from which it is proper to infer an intention to benefit from and thus an intention to submit to the laws of the forum State”).

¹⁷⁶ *Id.* at 2788; *see also id.* (asserting that “submission” to sovereign authority occurs “through contact with and activity directed at a sovereign”).

¹⁷⁷ *Id.* at 2791.

¹⁷⁸ *See id.* at 2787 (“A court may subject a defendant to judgment only when the defendant has sufficient contacts with the sovereign such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.” (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945))).

¹⁷⁹ *See id.* (“Freeform notions of fundamental fairness divorced from traditional practice cannot transform a judgment rendered in the absence of authority into law.”).

¹⁸⁰ *Id.* (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

¹⁸¹ *Id.*

defendant's activities "reveal an intent to invoke or benefit from the protection of" the forum state's laws, it is proper to infer an intent to submit to the forum state's sovereign authority.¹⁸²

Thus, Justice Kennedy would raise the bar for purposeful availment. Purposeful availment does not simply "ensure[] that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous or attenuated contacts or of the unilateral activity of another party or a third person."¹⁸³ Instead, a defendant's activities must manifest an intent to submit to sovereign authority.¹⁸⁴ And although Justice Kennedy focused on a defendant's intentions, he would not permit courts to consider a defendant's expectations when determining the defendant's intention.¹⁸⁵

If Justice Kennedy's analysis were adopted, it would essentially grant complete immunity to component part manufacturers. It also would grant immunity to end product manufacturers who hire a middle man distributor to complete actual sales to individual states. By building in this layer of protection through its actions, end product manufacturers would be evidencing their intention *not to submit* to a state's sovereign power despite their certain intent to make sales in the forum state.

Justice Kennedy would raise the bar for purposeful availment, thereby minimizing the number of cases in which the state courts will have personal jurisdiction. But he also sought to eliminate the balancing test for fairness by making it redundant: "In products-liability cases like this one, it is the defendant's purposeful availment that makes jurisdiction consistent with traditional notions of fair play and substantial justice."¹⁸⁶ For Justice Kennedy, if there is purposeful availment because a defendant has manifested an intention to submit to the forum state's sovereign authority, it cannot offend traditional notions of fair play and substantial justice for the forum state's court to exercise jurisdiction over the defendant. Just to be clear, Justice Kennedy would greatly restrict the number of cases for which there is purposeful availment by requiring the plaintiff to prove that the defendant intended to submit to the power of the forum state. Because Justice Kennedy would raise the bar so high for establishing personal jurisdiction, he can safely eliminate as redundant the fairness inquiry of whether jurisdiction would offend traditional notions of fair play and substantial justice.

Finally, in a fitting bit of irony, Justice Kennedy opined that the Court

¹⁸² *Id.* at 2791.

¹⁸³ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (citations omitted) (internal quotation marks omitted).

¹⁸⁴ *Nicastro*, 131 S. Ct. at 2788.

¹⁸⁵ *Id.* at 2789 ("[I]t is the defendant's actions, not his expectations, that empower a State's courts to subject him to judgment.")

¹⁸⁶ *Id.* at 2787 (internal quotation marks omitted).

should fashion clear jurisdictional rules “whenever possible” in order to avoid the “significant expenses [that] are incurred just on the preliminary issue of jurisdiction.”¹⁸⁷ Even so, he asserted that the development and clarification of the principle of purposeful availment will occur on a case-by-case basis “in common-law fashion.”¹⁸⁸

3. *Back to the Future for Justice Kennedy?*

As Justice Ginsburg alluded to in her dissent, several of the concepts put forth by Justice Kennedy have already been considered and rejected by the Supreme Court in its earlier personal jurisdiction jurisprudence.¹⁸⁹ In attempting to identify the origins and constitutional foundation of personal jurisdiction, the Court and commentators alike have debated whether the primary concern of personal jurisdiction is the protection of state sovereignty and federalism or, alternatively, the protection of individual liberty.¹⁹⁰

But the Supreme Court has previously concluded that the restrictions on the ability of state courts to exercise jurisdiction over nonresidents is “ultimately a function of the individual liberty interest preserved by the Due Process Clause” because “[t]hat Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns.”¹⁹¹

Likewise, Justice Kennedy posits that the crucial inquiry in a specific jurisdiction case is “whether the defendant’s activities manifest an

¹⁸⁷ *Id.* at 2790.

¹⁸⁸ *Id.*; *see also id.* at 2789 (“[P]ersonal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis.”).

¹⁸⁹ *Id.* at 2798–99 (Ginsburg, J., dissenting) (“[T]he plurality’s notion that consent is the animating concept draws no support from controlling decisions of this Court.”); *see also* Borchers, *supra* note 8, at 1246 (stating that Justice Kennedy’s “plurality opinion attempted to roll back the clock by a century or more and re-ground personal jurisdiction in a dubious sovereignty theory that the Court had apparently rejected several times before”).

¹⁹⁰ *See* Allan Erbsen, *Impersonal Jurisdiction*, 60 EMORY L.J. 1, 6–7 (2010) (examining how “[l]iberty is a relational concept, and one cannot fully understand the relationship between a state and citizens of other states without understanding the web of relationships between individuals, states, and the national government”); Roger H. Transgrud, *The Federal Common Law of Personal Jurisdiction*, 57 GEO. WASH. L. REV. 849, 853–54 (1989) (discussing how the “Supreme Court began to develop the principles of federal law that would restrict state judicial power over noncitizens”).

¹⁹¹ *Ins. Corp. of Ir., Ltd. v. Compagnie Des Bauxites de Guinee*, 456 U.S. 694, 702–03 n.10 (1982); *see also* *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471 (1985) (“The Due Process Clause protects an individual’s liberty interest.”); *id.* at 472 n.13 (“Although this protection [of an individual’s liberty interest] operates to restrict state power, it ‘must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause,’ rather than as a function ‘of federalism concerns.’” (quoting *Compagnie des Bauxites de Guinee*, 456 U.S. at 702–03 n.10)); *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977) (“[T]he mutually exclusive sovereignty of the States . . . [is not] . . . the central concern of the inquiry into personal jurisdiction.”). *But see* *Perdue*, *supra* note 127, at 458 (“The role of jurisdiction as a doctrine for allocating power among sovereigns has been obscured by the Court’s focus on the Due Process Clause . . .”).

intention to submit to the power of a sovereign.”¹⁹² Justice Kennedy acknowledges that specific jurisdiction cases arise “despite [a defendant] not having consented to the exercise of jurisdiction.”¹⁹³ Thus, this inquiry sounds remarkably similar to “the long-discredited fiction of implied consent.”¹⁹⁴ Justice Ginsburg points out that the Supreme Court long ago rejected the concept of implied consent as the basis for personal jurisdiction.¹⁹⁵

Finally, Justice Kennedy’s focus on submission to sovereign authority raises the specter that the Court would be forced to revisit its jurisprudence regarding choice of law issues.¹⁹⁶ Justice Kennedy in fact ties the two concepts together when he writes that the Due Process Clause protects individuals against the unlawful exercise of power both “with respect to the power of a sovereign to resolve disputes through judicial process [and] with respect to *the power of a sovereign to prescribe rules of conduct for those within its sphere.*”¹⁹⁷ A sovereign’s legislative authority to regulate the conduct of a nonresident is surely as important to the defendant as its authority to exercise jurisdiction over that nonresident defendant.¹⁹⁸ And the Court’s decisions currently provide that a state may apply its law even

¹⁹² *Nicastro*, 131 S. Ct. at 2788 (plurality opinion); *see also id.* (stating that “submission” to sovereign authority occurs “through contact with and activity directed at a sovereign”).

¹⁹³ *Id.* at 2785.

¹⁹⁴ *Id.* at 2799 n.5 (Ginsburg, J., dissenting); *see also* Borchers, *supra* note 8, at 1264 (“Rather than attempting to recast minimum contacts as a proxy for state sovereignty, it would have been more intellectually honest if the plurality had said that it hoped to overrule *International Shoe* and return U.S. jurisdiction to *Pennoyer*-era notions of sovereignty and consent.”). *But see* Transgrud, *supra* note 190, at 890 (arguing that the personal jurisdiction inquiry should focus on political “consent”).

¹⁹⁵ *Nicastro*, 131 S. Ct. at 2798–99 (Ginsburg, J., dissenting).

¹⁹⁶ *See* Borchers, *supra* note 8, at 1269 (“To some extent, choice of law sits in the corner of the Supreme Court’s minimum contacts cases like the uninvited and brooding party guest.”); Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1130 (1966) (“Current American thinking respecting both adjudicatory jurisdiction and recognition of foreign judgments has placed little emphasis on choice-of-law considerations; either the problem is ignored or it is assumed that the concerns of the various interested communities in the underlying situation are adequately recognized and adjusted through choice of law.”).

¹⁹⁷ *Nicastro*, 131 S. Ct. at 2786–87 (plurality opinion) (emphasis added).

¹⁹⁸ *See* Alfred Hill, *Choice of Law and Jurisdiction in the Supreme Court*, 81 COLUM. L. REV. 960, 960–62 (1981) (discussing the Supreme Court’s rationale in *Allstate Ins. Co. v. Hague* regarding the choice of law); James Martin, *Personal Jurisdiction and Choice of Law*, 78 MICH. L. REV. 872, 873–75 (1980) (calling for a reevaluation of personal jurisdiction over defendants through unrelated minimum contacts within the venue state); Courtland H. Peterson, *Jurisdiction and Choice of Law Revisited*, 59 U. COLO. L. REV. 37, 37–40 (1988) (evaluating the effects of the *Allstate* decision on personal jurisdiction); Robert Allen Sedler, *Judicial Jurisdiction and Choice of Law: The Consequences of Shaffer v. Heitner*, 63 IOWA L. REV. 1031, 1032–34 (1978) (discussing the appropriate exercise of a state’s personal jurisdiction on a defendant); Louise Weinberg, *The Place of Trial and the Law Applied: Overhauling Constitutional Theory*, 59 U. COLO. L. REV. 67, 100–02 (1988) (considering the constitutional questions of personal jurisdiction in relation to state law and foreign defendants).

though it lacks personal jurisdiction, and vice versa.¹⁹⁹

B. Justice Ginsburg's View of Purposeful Availment

Justice Ginsburg's dissent reaffirms the *International Shoe* test and the Court's prior specific jurisdiction doctrine.²⁰⁰ She urges that application of *International Shoe* and its progeny should "unequivocally" lead to a finding of jurisdiction.²⁰¹ Yet, she acknowledges that the Court has never considered a fact pattern like that in *Nicastro*—a foreign defendant end product manufacturer who retains a U.S. distributor to market and sell the manufacturer's product throughout the fifty States.²⁰² Thus, Justice Ginsburg's dissent is premised upon a new concept—a defendant that seeks to develop a market for its products everywhere in the United States has purposefully availed itself of each of the individual states in which the manufacturer's product is sold.

Justice Ginsburg highlighted facts that were disclosed during discovery that confirmed that the defendant J. McIntyre had hired McIntyre America as its exclusive U.S. distributor with the express purpose of selling as many of the defendant's products as possible "anywhere in" and "throughout" the United States.²⁰³ The Justice asked rhetorically:

On what sensible view of the allocation of adjudicatory authority could the place of Nicastro's injury within the United States be deemed off limits for his products liability claim against a foreign manufacturer who targeted the United States (including all the States that constitute the Nation) as the territory it sought to develop?²⁰⁴

¹⁹⁹ Compare *Phillipps Petroleum Co. v. Shutts*, 472 U.S. 797, 805–06 (1985) (holding that the defendant utility company had standing to assert that Kansas lacked personal jurisdiction in a class action suit against it), with *Shaffer v. Heitner*, 433 U.S. 186, 216–17 (1977) (holding that a shareholder cannot bring suit against a company's non-domiciled directors in the state of the company's domicile).

²⁰⁰ *Nicastro*, 131 S. Ct. at 2794–95 (Ginsburg, J., dissenting); see also *id.* at 2804 ("While I dissent from the Court's judgment, I take heart that the plurality opinion does not speak for the Court, for that opinion would take a giant step away from the notions of 'fair play and substantial justice' underlying *International Shoe*." (citations omitted)); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2850–51, 2853–54 (2011) (reaffirming, in an unanimous opinion written by Justice Ginsburg, that the *International Shoe* test is appropriate for specific jurisdiction cases).

²⁰¹ *Nicastro*, 131 S. Ct. at 2794–95 (Ginsburg, J., dissenting). But see *id.* at 2802 (acknowledging that "this Court has not considered in any prior case the now-prevalent pattern presented here—a foreign-country manufacturer enlisting a U.S. distributor to develop a market in the United States for the manufacturer's products").

²⁰² *Id.* at 2802.

²⁰³ *Id.* at 2796–97.

²⁰⁴ *Id.* at 2797. Justice Ginsburg found this scenario so troubling that she mentioned it twice. The first time she asked:

A foreign industrialist seeks to develop a market in the United States for machines it manufactures. It hopes to derive substantial revenue from sales it makes to United

Justice Ginsburg concluded that the defendant had “purposefully availed itself” of the entire U.S. market and that, in similar circumstances, numerous other state and federal courts had found jurisdiction to be appropriate²⁰⁵:

In sum, McIntyre UK, by engaging McIntyre America to promote and sell its machines in the United States, “purposefully availed itself” of the United States market nationwide, not a market in a single State or a discrete collection of States. McIntyre UK thereby availed itself of the market of all States in which its products were sold by its exclusive distributor.²⁰⁶

Justice Ginsburg pointedly attacked Justice Kennedy’s view of personal jurisdiction theory and precedent. She criticized Justice Kennedy’s conclusion that the defendant’s efforts to develop the U.S. as a nationwide market is not even relevant to the jurisdictional inquiry.²⁰⁷ She also asserted that among “[a] few points on which there should be no genuine debate”²⁰⁸ is the recognition that “the constitutional limits on a state court’s adjudicatory authority derive from considerations of due process, not state sovereignty.”²⁰⁹ Finally, Justice Ginsburg denounced Justice Kennedy’s “notion that consent is the animating concept” of personal jurisdiction as one entirely contrary to the Court’s prior precedent.²¹⁰ Justice Ginsburg also stated that “a forum can exercise jurisdiction when its contacts with the controversy are sufficient; invocation of a fictitious consent, the Court has repeatedly said, is unnecessary and unhelpful.”²¹¹

States purchasers. Where in the United States buyers reside does not matter to this manufacturer. Its goal is simply to sell as much as it can, wherever it can. It excludes no region or State from the market it wishes to reach. But, all things considered, it prefers to avoid products liability litigation in the United States. To that end, it engages a U.S. distributor to ship its machines stateside. Has it succeeded in escaping personal jurisdiction in a State where one of its products is sold and causes injury or even death to a local user?

Id. at 2794.

²⁰⁵ *Id.* at 2801, app. at 2804–06.

²⁰⁶ *Id.* at 2801.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 2797.

²⁰⁹ *Id.* at 2798 (noting the contrast to Justice Kennedy’s plurality opinion which “assert[ed] that ‘sovereign authority,’ not ‘fairness’ is the ‘central concept’ in determining personal jurisdiction”).

²¹⁰ *Id.* at 2798–99.

²¹¹ *Id.* at 2799.

C. Justice Breyer's View of Purposeful Availment

1. All Three Asahi Approaches Appear Acceptable—and the Plaintiff Failed to Satisfy Any One of Them

As previously discussed, Justice Breyer accepts the *International Shoe* test and his concurrence stays within the bounds of the Court's prior personal jurisdiction decisions.²¹² He is unwilling to “abandon the heretofore accepted inquiry of whether, focusing upon the relationship between the defendant, the forum, and the litigation, it is fair, in light of defendant's contacts *with that forum*, to subject the defendant to suit there.”²¹³ For Justice Breyer, the Constitution demands both minimum contacts and purposeful availment, “each of which rests upon a particular notion of defendant-focused fairness.”²¹⁴

Justice Breyer explicitly rejects the reasoning of Justice Kennedy's *Nicastro* plurality opinion: “The plurality seems to state strict rules that limit jurisdiction where a defendant does not ‘inten[d] to submit to the power of a sovereign’ and cannot ‘be said to have targeted the forum.’ . . . I do not agree with the plurality's seemingly strict no-jurisdiction rule.”²¹⁵

Justice Breyer did not specifically address Justice Kennedy's elevation of consent to sovereign authority as the “central concept” of Due Process in the context of personal jurisdiction. But he nevertheless appears to reject that understanding. He states that he agrees with Justice Kennedy on the outcome of the case, but he “concur[s] only in the judgment of that opinion and not its reasoning.”²¹⁶ He implicitly rejects Justice Kennedy's consent to sovereign authority approach by arguing that the personal jurisdiction inquiry focuses on fairness to the defendant.²¹⁷

Justice Breyer also explicitly rejects the approach to purposeful availment taken by the New Jersey Supreme Court and urged by the plaintiff in *Nicastro*,²¹⁸ stating: “Under that view, a producer is subject to jurisdiction for a products liability action so long as it ‘knows or reasonably should know that its products are distributed through a nationwide distribution *system* that *might* lead to those products being sold

²¹² See discussion *supra* Part V.B (discussing Justice Breyer's opinion in *Nicastro*).

²¹³ *Nicastro*, 131 S. Ct. at 2793 (Breyer, J., concurring) (citation omitted) (internal quotation marks omitted).

²¹⁴ *Id.*

²¹⁵ *Id.* (citations omitted).

²¹⁶ *Id.* at 2794.

²¹⁷ See *id.* at 2793 (“[C]onstitutional demand for ‘minimum contacts’ and ‘purposeful[ly] avail[ment]’ each . . . rest upon a particular notion of defendant-focused fairness.”); *id.* (refusing to “abandon the heretofore accepted inquiry of whether . . . it is fair, in light of the defendant's contacts *with that forum*, to subject the defendant to suit there”); *id.* at 2793–94 (demonstrating a concern for “basic fairness” and whether it would be “fundamentally unfair” to subject defendant to jurisdiction).

²¹⁸ *Id.* at 2793.

in any of the fifty states.”²¹⁹ Awareness or foreseeability is not enough.²²⁰

Although he concurs in the result with Justice Kennedy, nowhere does Justice Breyer reject the reasoning of Justice Ginsburg’s dissent. Justice Breyer does agree with Justice Ginsburg that personal jurisdiction is premised upon considerations of fairness to the defendant.²²¹ He also indicates a willingness to consider in a future case the contemporary commercial circumstances that were considered in Justice Ginsburg’s dissent.²²² But he refused to consider them in *Nicastro* because the plaintiff bears the burden of establishing jurisdiction and the plaintiff in *Nicastro* failed to meet this burden.²²³

Justice Breyer seemed inclined to accept each of the three *Asahi* approaches as a valid way for a plaintiff to establish purposeful availment by an end product manufacturer such as the defendant McIntyre: (1) Justice O’Connor’s approach, that is, proof of purposeful targeting of New Jersey customers or “special state-related design, advertising, advice, marketing, or anything else”; (2) Justice Brennan’s approach, that is, proof of a “regular and anticipated flow of products” to New Jersey for retail sale as part of an established distribution system; and (3) Justice Stevens’s approach, that is, proof of a “regular course of dealing” that involves a certain level of volume, value, or particularly hazardous goods.²²⁴

2. Modern Concerns May Shape Justice Breyer’s Take on Personal Jurisdiction Doctrine

Although Justice Breyer reasoned that the outcome of *Nicastro* was determined by the Court’s existing precedent, he expressed an interest in quickly revisiting personal jurisdiction doctrine in a case with a fully

²¹⁹ *Id.* (emphasis added) (quoting *Nicastro v. McIntyre Mach. Am. Ltd.*, 987 A.2d 575, 592 (2010)). Although he explicitly rejects this reasoning, Justice Breyer limits his rejection to “the context of this case.” *Id.* Elsewhere, however, he notes that the Court has “strongly suggested” that foreseeability or awareness or even the hope that a product will end up in the forum State is not enough to constitute purposeful availment. *Id.* at 2792.

²²⁰ *See id.* at 2792 (“And the Court, in separate opinions, has strongly suggested that a single sale of a product in a State does not constitute an adequate basis for asserting jurisdiction over an out-of-state defendant, even if that defendant places his goods in the stream of commerce, fully aware (and hoping) that such a sale will take place.”).

²²¹ *See id.* at 2793 (questioning whether “it is fair . . . to subject the defendant to suit there”); *id.* (“[T]he constitutional demand for ‘minimum contacts’ and ‘purposeful[] avail[ment],’ each . . . rest upon a particular notion of defendant-focused fairness.”); *id.* at 2793–94 (demonstrating concern for “basic fairness of an absolute rule”); *id.* at 2794 (acknowledging that there is a question of “fundamental[] unfair[ness]”).

²²² *Id.* at 2791.

²²³ *Id.* at 2792.

²²⁴ *Id.* Justice Breyer approves the Brennan approach to the extent that it includes a “regular . . . flow” or “regular course” of product sales in the forum State. He does not approve the Brennan approach to the extent that it finds purposeful availment whenever the manufacturer is aware or can foresee that its product may end up in the forum State. *Id.*

developed factual record regarding “contemporary commercial circumstances.”²²⁵ On that score, Justice Breyer stated: “Because the incident at issue in this case does not implicate modern concerns, and because the factual record leaves many open questions, this is an unsuitable vehicle for making broad pronouncements that refashion basic jurisdictional rules.”²²⁶

In particular, Justice Breyer expressed concerns over manufacturers who advertise, market, or sell products over the Internet or through an Internet-based retailer like Amazon.com.²²⁷ He also expressed concern about the effect of exercising personal jurisdiction over foreign manufacturers—especially those who distribute their products primarily through an Internet retailer such as Amazon.com—on foreign policy.²²⁸

Justice Breyer is not the only Justice struggling to define the scope of the purposeful availment requirement and to assess its national and international impact. At oral argument in *Nicastro*, Justices Kennedy, Scalia, and Roberts grappled with the relevant difference in treatment, if any, that should be afforded to a foreign manufacturer who simply makes a component part for a product that ends up in the United States as compared to that treatment afforded to an end product manufacturer.²²⁹ Justices Breyer, Scalia, Kagan, and Ginsburg also expressed concern over whether the United States is in line with other countries regarding the requirements for recognition and enforcement of foreign judgments against U.S. companies, as compared to the purposeful availment requirement for a foreign manufacturer who is sued in the United States.²³⁰

On the one hand, an expansive view of personal jurisdiction might lead foreign companies to refuse to do business in the United States. On the other hand, a restrictive view of personal jurisdiction might lead U.S.

²²⁵ *Id.* at 2794.

²²⁶ *Id.* at 2792–93.

²²⁷ *Id.* at 2793.

²²⁸ Justice Breyer questioned Benjamin J. Horwich, Assistant to the Solicitor General, in oral arguments: “[Y]ou’ve heard the [oral] arguments in [*Nicastro*]. I mean, it seemed that potentially can subject the smallest manufacturer to liability throughout the world because it uses the Internet. . . . I don’t know what the foreign policy—you’ve heard treaties discussed, et cetera. Do you want to say anything?” Transcript of Oral Argument at 21:12–18, *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 1846 (2011) (No. 10-76); *see also id.* at 21:22–22:1 (“The . . . brief answer is that the Internet questions, in particular, are so complicated and, indeed, so potentially far-reaching that in a case that presented them, our interest might very well be different.”); Transcript of Oral Argument at 31:11–17, *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011) (No. 09-1343) (“[M]y problem is a sort of policy problem . . . I don’t see how the world’s going to work or develop if in fact every small business everywhere in the world has to know . . . the law of every 50 States and hire lawyers and come here, rather than making the accident victim go there.”).

²²⁹ Transcript of Oral Argument at 46:24–51:21, *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011) (No. 09-1343).

²³⁰ *Id.* at 33:12–36:20; *see also* *Perdue*, *supra* note 127, at 461–65 (observing that most countries do not require proof of purposeful availment).

companies to outsource business to foreign subsidiaries who—even in a case where the outsourced product is manufactured for a U.S. consumer who is subsequently injured by the product—will then be immune to litigation and judgment in U.S. state courts.

VII. PURPOSEFUL AVAILMENT AND A DEFENDANT’S ABILITY TO “SEVER ITS CONNECTION WITH” THE FORUM STATE

Although *Nicastro* produced no majority opinion, the views expressed in the plurality opinions will guide state and federal trial courts in assessing objections to the exercise of personal jurisdiction over nonresident defendants. Identifying the holding of *Nicastro* requires lower courts to determine the “position taken by those [Justices] who concurred in the judgment[] on the narrowest grounds.”²³¹ Based on Justice Breyer’s concurrence, *Nicastro* reaffirms existing precedent and, for the most part, personal jurisdiction doctrine:

- A majority of the Court rejects Justice Kennedy’s understanding of purposeful availment—that a defendant’s activities must manifest an intention to submit to sovereign authority.²³²
- *International Shoe* provides the relevant test for specific jurisdiction and it requires minimum contacts for which there is purposeful availment.²³³
- If a plaintiff can establish minimum contacts and purposeful availment, the court must determine whether it would nonetheless be unfair to subject a defendant to the jurisdiction of the forum state’s courts.²³⁴
- A majority of the Court continues to reject the *pure* “Stream of Commerce” approach—there is no jurisdiction over a defendant manufacturer who sells its product to a consumer in State A who then takes the product to State B where the product causes injury to the consumer, even if the manufacturer is “aware” or “foresees”

²³¹ *Marks v. United States*, 430 U.S. 188, 193 (1977); *see also id.* (“When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds’” (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976))); *see generally* Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756 (1980).

²³² *See* discussion *supra* Part VI.A (discussing Justice Kennedy’s opinion regarding purposeful availment in relation to the majority opinion).

²³³ *See* discussion *supra* Part II.B (discussing the applicability of the *International Shoe* test).

²³⁴ *E.g.*, *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2794 (Breyer, J., concurring); *id.* at 2800–01, 2804 (Ginsburg, J., dissenting).

that the product may enter State B.²³⁵

Although the three opinions in *Nicastro* reveal agreement on several principles—including the shared view that purposeful availment is a requirement—they did not resolve the confusion regarding what constitutes purposeful availment.

This Article identifies one simple organizing principle that must guide the Court in its quest to define and apply the purposeful availment requirement: no court should subject a nonresident defendant to personal jurisdiction for a contact with the forum state that the defendant cannot reasonably prevent. Put another way, where it is not reasonably feasible for a defendant to sever its connection with the forum state, purposeful availment (and therefore specific jurisdiction) does not exist. Conversely, where it is reasonably feasible for a defendant to sever its connection to a state but it has not done so, there is presumptively purposeful availment of that state and, subject to the fairness balancing, specific jurisdiction over the defendant.

Justice White discussed this concept when writing for a six-person majority in *World-Wide Volkswagen*:

When a corporation purposefully avails itself of the privilege of conducting activities within the forum state . . . it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State.²³⁶

Justice Ginsburg noted in her opinion that J. McIntyre had, in fact, purchased such product liability insurance.²³⁷ She cited scholarship indicating that such insurance is both readily available and relatively cheap.²³⁸ Likewise, a manufacturer can easily pass the costs on to its consumers by raising prices. Justice Breyer rightly pointed out, however,

²³⁵ See, e.g., *id.* at 2788 (plurality opinion); *id.* at 2792 (Breyer, J., concurring).

²³⁶ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (citations omitted); see also *Nicastro*, 131 S. Ct. at 2794 (Breyer, J., concurring) (“It may be that a larger firm can readily alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State. . . . But manufacturers come in many shapes and sizes. It may be fundamentally unfair to require a small [business] . . . to respond to products-liability tort suits in virtually every State in the United States.” (internal quotation marks omitted)); *Asahi Metal Indus. Co., Ltd. v. Super. Ct.*, 480 U.S. 102, 119 (Brennan, J., concurring) (“[I]t is that the defendant’s conduct and connection with the forum State are such that he should reasonably anticipate being haled into Court there.” (quoting *World-Wide Volkswagen*, 444 U.S. at 297) (internal quotation marks omitted))).

²³⁷ *Nicastro*, 131 S. Ct. at 2797 (Ginsburg, J., dissenting).

²³⁸ *Id.* at 2799 (Ginsburg, J., dissenting); see also Drobak, *supra* note 8 (“People in business should buy liability insurance; that is just part of doing business. Their insurance companies can defend suits more easily than injured victims can sue at the home of the defendant.”).

that the existence of insurance and the ability to raise prices may *not* be feasible for small-scale manufacturers who do not reasonably produce enough products to spread the costs of protecting against their risk:

It may be that a larger firm can readily “alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State.” But manufacturers come in many shapes and sizes. It may be fundamentally unfair to require a small Egyptian shirt maker, a Brazilian manufacturing cooperative, or a Kenyan coffee farmer, selling its products through international distributors, to respond to products-liability tort suits in virtually every State in the United States, even those in respect to which the foreign firm has no connection at all but the sale of a single (allegedly defective) good. And a rule like the New Jersey Supreme Court suggests would require every product manufacturer, large or small, selling to American distributors to understand not only the tort law of every State, but also the wide variance in the way courts within different States apply that law.²³⁹

Thus, the availability of insurance and the ability to spread risk through targeted price increases may be impractical for certain defendants and therefore it would be inappropriate to subject these defendants to personal jurisdiction in a distant forum. Justice Breyer appears to ignore the answer to his own hypothetical—that the “unfairness” of exercising jurisdiction is limited by the inquiry into whether such exercise would “offend traditional notions of fair play and substantial justice.”²⁴⁰

But one course of conduct *must* be available to potential defendants of all sizes and types in order to subject them to jurisdiction in a foreign forum. A nonresident economic actor must be able to pattern its conduct so as to sever its connection with that state. A potential defendant must be able to structure its actions to avoid purposeful availment of a particular state if it wishes to avoid jurisdiction in that state. This analysis is consistent with the notion that personal jurisdiction is an individual interest that is protected by the Due Process Clause.²⁴¹ Existing precedent confirms that this interest may be waived or consented to both before litigation arises and after, and also may be forfeited by a careless defendant

²³⁹ *Nicastro*, 131 S. Ct. at 2794 (Breyer, J., concurring) (citations omitted).

²⁴⁰ *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (internal quotation marks omitted).

²⁴¹ See discussion *supra* Part I (discussing the interaction between personal jurisdiction and the Due Process Clause).

who fails to diligently assert this right.²⁴² If the interest is truly an individual liberty interest then it must be applied so that nonresidents can reasonably structure their conduct so as to avoid purposeful availment and ultimately the power of the forum state's courts. As the Supreme Court stated in *World-Wide Volkswagen*, the purposeful availment requirement embodied in the Due Process Clause lends "a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."²⁴³

This principle explains the Court's prior decisions:

- In *World-Wide Volkswagen*, the New York dealership sold cars in New York.²⁴⁴ Once the car was sold in New York, the customer was free to take it to Oklahoma. It was not possible for defendant to prevent customers from taking their cars to other states absent getting out of the business of car sales. Because it was not reasonably feasible for the dealership to prevent the car from going to Oklahoma there was no purposeful availment. This same reasoning applies to any product—even a product that is not "mobile by nature"²⁴⁵—placed in the stream of commerce. Thus, the Court rejects the pure stream of commerce theory of personal jurisdiction.²⁴⁶
- In *Hanson v. Denckla*,²⁴⁷ the Delaware corporate defendant established a trust in 1935 for Mrs. Donner, a Pennsylvania resident, and then acted as trustee.²⁴⁸ It was not reasonably feasible for the defendant to prevent Mrs. Donner from moving to Florida. Therefore, the defendant did not purposefully avail itself

²⁴² See *Ins. Corp. of Ir. v. Compagnie Des Bauxites de Guinee*, 456 U.S. 694, 704 (1982) ("In sum, the requirement of personal jurisdiction may be intentionally waived, or for various reasons a defendant may be estopped from raising the issue. These characteristics portray it for what it is—a legal right protecting the individual."); *Nat'l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315–16 (1964) ("[P]arties to a contract may agree in advance to submit to the jurisdiction of a given court, to permit notice to be served by the opposing party, or even to waive notice altogether."); Scott Dodson, *Hybridizing Jurisdiction*, 99 CALIF. L. REV. 1439, 1457–58 (2011) ("In its modern conception, personal jurisdiction 'represents a restriction on judicial power not as a matter of sovereignty but as a matter of individual liberty.' Because of this basis, the requirement of personal jurisdiction can, like other personal rights, be waived, consented to, or forfeited. It is even subject to estoppel principles imposed under the aegis of the Federal Rules of Civil Procedure's sanctions provisions." (citations omitted)).

²⁴³ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

²⁴⁴ *Id.* at 289.

²⁴⁵ *In re Holiday Airline Corp.*, 620 F.2d 731, 734 (9th Cir. 1980).

²⁴⁶ *World-Wide Volkswagen*, 444 U.S. at 298–99.

²⁴⁷ 357 U.S. 235 (1958).

²⁴⁸ *Id.* at 238.

of Florida.²⁴⁹

- In *McGee*, the Court found purposeful availment and personal jurisdiction based on a single contact with the forum state.²⁵⁰ The defendant mailed a reinsurance certificate to an individual in California and entered into a policy of insurance with the California resident.²⁵¹ The defendant could have severed—simply and effectively—its connection with California by refusing to mail any policies to California residents and by refusing to insure California residents.
- In *Asahi*, the defendant Asahi manufactured tire valve assemblies in Japan and shipped them to Taiwan, where they were sold to Cheng Shin.²⁵² Cheng Shin purchased tire valve assemblies from several other manufacturers as well as from Asahi.²⁵³ Cheng Shin incorporated the various tire valve assemblies in its finished tire tubes, which Cheng Shin sold throughout the world.²⁵⁴ One of Asahi’s tire valve assemblies was incorporated in a Cheng Shin tire tube, which was incorporated in a Honda Motorcycle, which was ultimately sold in California. It was not reasonably feasible for Asahi to prevent the sale of the motorcycle in California and thereby to sever its connection with California. The defendant “was a component-part manufacturer with ‘little control over the final destination of its products once they were delivered into the stream of commerce.’”²⁵⁵ It was an “easy” case for the Court to quickly decide that California did not have specific jurisdiction over Asahi.²⁵⁶ The individual Justices struggled, however, to determine whether there was purposeful availment. When one considers that it was not reasonably feasible for Asahi to prevent its products from reaching California, it again becomes an easy case. Absent additional conduct by Asahi directed toward

²⁴⁹ *Id.* at 252. Today, a defendant might include a forum selection clause in the trust document in order to avoid having to litigate in Florida or any other disfavored forum. When the *Hanson* trust was drafted in 1935, however, forum selection clauses were disfavored and presumptively unenforceable. Henry S. Noyes, *If You (Re)Build It, They Will Come: Contracts to Remake the Rules of Litigation in Arbitration’s Image*, 30 HARV. J.L. & PUB. POL’Y 579, 595–99 (2007) (discussing the rise of contracts that modify litigation rules and courts’ initial resistance to enforcing them).

²⁵⁰ See *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 223 (1957) (finding that the suit was based on a contract which had substantial connection with the forum state of California).

²⁵¹ *Id.* at 221–22.

²⁵² *Asahi Metal Indus. Co., Ltd. v. Super. Ct.*, 480 U.S. 102, 106 (1987).

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2803 (2011) (Ginsburg, J., dissenting) (quoting *Uberti v. Leonardo*, 892 P.2d 1354, 1361 (Ariz. 1995)).

²⁵⁶ *Asahi*, 480 U.S. at 116 (plurality opinion).

California, there can be no purposeful availment.²⁵⁷

The one case that does not fit the pattern as easily is *Nicastro*. In *Nicastro*, the defendant was an end product manufacturer who sold its product to a distributor who then resold the product in New Jersey.²⁵⁸ The product injured a New Jersey resident in New Jersey.²⁵⁹ As an end product manufacturer, the defendant had significantly more control over the point of sale of its product than a component parts manufacturer.²⁶⁰ This ability to control its destiny included the ability to prevent the sale of its product in New Jersey by restricting the approved sales regions of its sole authorized distributor, and therefore supported a finding of purposeful availment.²⁶¹

As will be shown below, I believe that *Nicastro* will be short-lived. Justice Breyer, joined by Justice Alito, refused to join Justice Ginsburg's opinion "without a better understanding of the relevant contemporary commercial circumstances."²⁶² Instead he elected to wait for a case that permits "full consideration of the modern-day consequences" of the "many recent changes in commerce and communication."²⁶³ When Justices Breyer and Alito confront such a case, they will likely conclude that an end product manufacturer who seeks to exploit all fifty States as a market has purposefully availed itself of each state in which its product is sold and is therefore subject to personal jurisdiction when the product injures a consumer in that state. If an end product manufacturer wishes to "sever its connection with any particular state" in order to avoid being haled into that state's courts, it is a simple matter to refrain from marketing its product in that state and to refuse to permit its product to be sold to consumers in that state.

²⁵⁷ *Id.*

²⁵⁸ *Nicastro*, 131 S. Ct. at 2786.

²⁵⁹ *Id.*

²⁶⁰ *See id.* at 2803 (Ginsburg, J., dissenting) (distinguishing *Nicastro* from *Asahi*, in which the defendant was a component parts manufacturer).

²⁶¹ Justice Breyer noted that the defendant in *Nicastro* did *not* engage in any additional conduct that would clearly support a finding of purposeful availment: purposeful targeting of New Jersey customers or "special state-related design, advertising, advice, marketing, or anything else"; a "regular . . . flow or regular course of sales in New Jersey"; or a regular course of dealing that involve a certain level of volume, value or particularly hazardous goods. *Id.* at 2792 (Breyer, J., concurring) (internal quotation marks omitted).

²⁶² *Id.* at 2794.

²⁶³ *Id.* at 2791.

VIII. PROPER APPLICATION OF THE PURPOSEFUL AVAILMENT REQUIREMENT

A. *Location of the Initial Sale, Service, or Conduct*

An economic actor controls the location of the initial sale of product, provision of a service, or other commercial conduct that might give rise to liability. By initial sale, I mean the location of the initial transaction whereby the product is available to the public for purchase and passes to the hands of a consumer. The consumer may be an individual or it may be a business—even a business that intends to resell the product. The initial sale need not be the point at which the product leaves the hands of the manufacturer. When a manufacturer hires a distributor who then distributes the product to a retailer, who in turn makes the product available to the public, the initial sale occurs at the location where the retailer sold the item to an individual consumer.

It is a relatively simple matter for an Indiana manufacturer to avoid an initial sale in California: make all initial sales in Indiana, or refuse to make initial sales in California.²⁶⁴ If the Indiana manufacturer wishes to focus on manufacturing (rather than direct sales), it might hire a distributor. The Indiana manufacturer can easily avoid California by requiring that its distributor(s) agree(s), as part of the distribution agreement, not to distribute the product to consumers or retailers in California. Unlike litigation brought where the plaintiff resides, litigation brought in the state of original purchase allows the manufacturer to tailor prices so that purchasers in each state bear the costs of that court's biases, thus removing the incentive for courts to be biased.²⁶⁵

Likewise, an economic actor who resides in Indiana can limit the provision of services to Indiana or it can refuse to provide services in California and other states unfavorable to foreign defendants. Finally, an individual or organization that resides in Indiana can limit its activities to the State of Indiana or it can refuse to travel to and conduct activity in California. Thus, where an economic actor makes an initial sale in California, or provides services in California, or engages in commercial activity in California, there is presumptively purposeful availment of California for a lawsuit that arises from that conduct.²⁶⁶

²⁶⁴ See *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1126–27 (W.D. Pa. 1997) (“If [the defendant] had not wanted to be amenable to jurisdiction in Pennsylvania, the solution would have been simple—it could have chosen not to sell its services to Pennsylvania residents.”).

²⁶⁵ Daniel Klerman, *Personal Jurisdiction and Products Liability*, 4 (USC Ctr. in Law, Econ. & Org., Research Paper No. C12-2), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1987223.

²⁶⁶ Justice Ginsburg's dissenting opinion in *Nicastro* included an Appendix of lower court decisions that are consistent with the notion that “jurisdiction is appropriately exercised by courts of the

B. *Subsequent Movement to the Forum State*

Once the initial sale is made and the product leaves the manufacturer's hands, is it possible for the manufacturer to prevent its movement to a particular state? In *World-Wide Volkswagen*, the Court confirmed that the manufacturer is not responsible for the unilateral actions of a consumer in taking the product to another state—even though the product was inherently mobile.²⁶⁷ The Court implicitly recognized that the New York dealership did not purposefully avail itself of Oklahoma because it was not reasonably feasible to prevent the contact with Oklahoma.²⁶⁸

What steps could the New York dealer have taken to prevent the product from reaching Oklahoma? It could (1) go out of business altogether; (2) get out of the business of selling cars; (3) refuse to sell to Oklahoma residents; or (4) require each purchaser to agree contractually that it will not take the product to Oklahoma *and* it will not permit the product to be taken to Oklahoma by a third party *and* it will not resell the product to anyone.

1. *Go out of Business Altogether*

It is inconsistent with the traditional understanding of purposeful availment to conclude that the only effective way for a business to avoid purposeful availment of a particular state is to go out of business. Purposeful availment requires some intentional action by the defendant that “create[s] a substantial connection with the forum State.”²⁶⁹ Establishing a business in New York is not an intentional act that creates a substantial connection with Oklahoma. If an economic actor in New York possesses a product or service that people outside of New York covet, the purposeful availment requirement must be applied such that it is at the very least *possible* to deliver the product or service in New York while avoiding purposeful availment of Oklahoma.

2. *Get out of the Business of Selling Cars*

Even if the New York dealership got out of the business of selling cars, any product it sold could be taken to Oklahoma through the stream of commerce. *World-Wide Volkswagen* makes clear that purposeful availment of Oklahoma cannot be based on the simple act of selling a

place where the product was sold and caused injury” where a “local plaintiff [was] injured by the activity of a manufacturer seeking to exploit a multistate or global market.” *Nicastro*, 131 S. Ct. at 2804 (Ginsburg, J., dissenting). Rather than discuss those cases, I refer the reader to the Appendix to Justice Ginsburg's dissent.

²⁶⁷ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980).

²⁶⁸ *Id.* at 297–99.

²⁶⁹ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (internal quotation marks omitted).

product, even if the product is inherently mobile.²⁷⁰ Again, avoiding purposeful availment of a distant forum cannot require an individual or organization simply to avoid commerce altogether.

3. *Refuse to Serve or Sell to Oklahoma Residents*

In order to avoid contact with Oklahoma, a provider of a service or a manufacturer of a product could refuse to conduct business with Oklahoma residents. The first problem with this approach is its ineffectiveness in preventing the product from eventually reaching Oklahoma. Refusing to sell products in New York to Oklahoma residents would not effectively prevent contact with Oklahoma because it would not prevent other (non-Oklahoma) purchasers from taking the product to Oklahoma. Nor would it effectively prevent resale of the product to an Oklahoma resident. It also would be a simple matter for an Oklahoma resident to arrange for a straw man purchase by a non-Oklahoma purchaser.

But even if the seller could not guarantee that no Oklahoman purchased a product, we might conclude that the seller had avoided *purposeful* availment of Oklahoma if it reasonably attempted to prevent sale to an Oklahoma resident but was thwarted by the unilateral furtive actions of the buyer. Because the seller can reasonably and simply *attempt* to avoid sales to Oklahoma residents, should we *require* it to do so or be subject to a finding of purposeful availment of Oklahoma based on a single sale of a product in New York to an Oklahoma resident who later took the product to Oklahoma where it caused injury?

Consider how this attempt to prevent contact with a particular state would work in practice. The seller (or provider of a service) could post a sign on the front of their New York business that states “Oklahomans not welcome” or “We refuse to serve [or sell to] Oklahoma residents.” The host at a restaurant would have to inquire of each customer, “You are not a resident of Oklahoma, are you?”²⁷¹

If this seems a bit bizarre, compare such a requirement with Internet retailers who identify the location of their customers to ensure that they do not sell goods or services that are prohibited or restricted in particular states.²⁷² As discussed below, however, Internet sales are different because they involve a purchaser who has not traveled to the state where the manufacturer makes authorized sales, but instead has remained in the

²⁷⁰ *World-Wide Volkswagen*, 444 U.S. at 297–99.

²⁷¹ A New York dealership could seek to avoid being haled into Oklahoma’s courts for litigation involving an injury to an Oklahoma purchaser by requiring the execution of a purchase agreement with a forum selection clause requiring all disputes to be litigated in New York. But such an outcome does not address or protect against injuries to third parties (non-purchaser passengers, for example) that occur in Oklahoma.

²⁷² See discussion *infra* Part VIII.E.

disfavored state.²⁷³ Sales that occur in New York but are made to residents of Oklahoma do not involve purposeful availment of the State of Oklahoma; they involve purposeful availment of the State of New York, which happens to have some transient Oklahoma residents within its borders.

Ultimately, adoption of a rule that would require a manufacturer that sells its product in New York to attempt to refuse to sell to Oklahoma residents would require economic actors to engage in discrimination against the residents of disfavored states. Such a rule should be rejected because it conflicts with other constitutional principles, including freedom against restraints on interstate commerce and the rights of citizens of one state to travel freely to other states.²⁷⁴

4. *Require the Purchaser to Make Contractual Agreements to Limit Contacts*

In order to avoid contact with Oklahoma, the New York dealership could require each purchaser to execute a purchase agreement whereby the purchaser agree not to take the product to Oklahoma, not to allow the product to be taken to Oklahoma by a third party, and not to resell the product. Does the Due Process Clause require the dealer to make such efforts or risk a finding of purposeful availment? Again, the car dealership in *World-Wide Volkswagen* did not attempt to do so, yet the Court found that there was no purposeful availment.

Furthermore, such contractual provisions are highly suspect and might be unenforceable. In general, contractual provisions that eliminate or restrict the post-sale use or resale of property are void as contrary to public policy favoring the free movement of property in commerce.²⁷⁵ More than one hundred years ago, the Supreme Court stated:

But because a manufacturer is not bound to make or sell, it does not follow in case of sales actually made he may impose upon purchasers every sort of restriction. Thus, a general restraint upon alienation is ordinarily invalid. The right of alienation is one of the essential incidents of a right of general property in movables, and restraints upon alienation

²⁷³ *See id.*

²⁷⁴ U.S. CONST. art. I, § 8 (“The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States.”); U.S. CONST. art. IV, § 2 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”).

²⁷⁵ *See* John D. Park & Sons, Co. v. Hartman, 153 F. 24, 39 (6th Cir. 1907) (stating that such restrictions “offend against the ordinary and usual freedom of traffic in chattels”); RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS §§ 3–4 (1981) (discussing restraints on alienation); Zechariah Chafee, Jr., *Equitable Servitudes on Chattels*, 41 HARV. L. REV. 945, 981 (1928) (discussing that restraint on alienation of property is disfavored and generally void because it restricts the free movement of property in commerce).

have been generally regarded as obnoxious to public policy, which is best subserved by great freedom of traffic in such things as pass from hand to hand. General restraint in the alienation of articles, things, chattels, except when a very special kind of property is involved, such as a slave or an heirloom, have been generally held void.²⁷⁶

Economic actors have control over the state or states where an *initial, authorized* sale takes place or a service is provided. By contrast, economic actors lack the ability to restrict the movement, use, or resale of their products or services. Attempts to control the post-sale movement, use, and resale of products and services are likely to be ineffective and of dubious legality. Therefore, post-sale activity that results in contact with another state should not constitute purposeful availment of that state.

C. Component Part Manufacturers

A component part manufacturer does not sell its product directly to consumers in a particular state, but instead sells the component part to another manufacturer (end product or component-part) who incorporates the component part into an end product.²⁷⁷ The end product manufacturer then controls the system of distribution and the location of the initial sale for the end product. As discussed above²⁷⁸ and below,²⁷⁹ it is a simple matter for the end product manufacturer to prevent the initial sale of a product to consumers/end users in a particular state.

Based on the limited ability of a component part manufacturer to control the location of the initial sale of the end product, it is not reasonably feasible for a component part manufacturer to sever its connection with a particular state.²⁸⁰ Thus, absent some additional conduct

²⁷⁶ *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 404 (1911) (internal quotation marks omitted). Furthermore, these contractual provisions would be ineffective absent court action to *enforce* them. See *Shelley v. Kraemer*, 334 U.S. 1, 20–21 (1948) (refusing to enforce contract between private parties which contained a racially restrictive covenant); 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 16.3 (3d ed. 1999) (examining the cases relating to the state commandment or state encouragement of private activities). This state action to enforce contractual provisions that discriminate against residents of a certain state might raise Dormant Commerce Clause concerns. See *id.* § 11.9 (discussing state statutes burdening the exportation of local products).

²⁷⁷ See *Gray v. Am. Radiator & Standard Sanitary Corp.*, 176 N.E.2d 761, 766–67 (Ill. 1961) (applying the stream of commerce theory to assert jurisdiction over a component part manufacturer that sold no components directly in Illinois, but did sell them to a manufacturer who incorporated them into a final product that was sold in Illinois).

²⁷⁸ See discussion *supra* Part VIII.A.

²⁷⁹ See discussion *infra* Part VIII.D.

²⁸⁰ A component part manufacturer purposefully avails itself of a particular state—for example, Oklahoma—where the component part manufacturer sells its component part directly to consumers in Oklahoma or to distributors or retailers who then make the product available to the public in Oklahoma.

on the part of a New York component part manufacturer, there is no purposeful availment of Oklahoma when its product is incorporated in an end product that is later sold in Oklahoma and causes injury there.

The Supreme Court's decision in *Asahi* is consistent with this conclusion. Although *Asahi* resulted in three separate opinions regarding purposeful availment and none garnered a majority of the Justices, a majority of the Court agreed that defendant Asahi did not purposefully avail itself of California simply by selling its component parts to Cheng Shin.²⁸¹ Justices O'Connor's and Stevens's opinions both required some additional facts to support a finding of purposeful availment.²⁸²

Furthermore, the additional conduct that gives rise to purposeful availment by the component part manufacturer *must* include conduct indicating an intent or purpose to serve the market as described by Justice O'Connor in her *Asahi* plurality opinion. This type of conduct—such as advertising in the state, providing customer service in the state, or designing the product for the state—is entirely under the control of the component part manufacturer. If the component part manufacturer wishes to sever its connection to the state, it can readily do so by refusing to engage in such conduct.

By contrast, the additional conduct identified in Justices Stevens's and Brennan's *Asahi* concurrences—proof of a regular course of dealing that involves a certain level of volume, value, or particularly hazardous goods—is not within the control of the component part manufacturer.²⁸³ Defendant Asahi did not control whether its tire valve assembly ended up in a tire on a safe and inexpensive tricycle sold in Australia or on a dangerous and expensive motorcycle sold in California.²⁸⁴

A component part manufacturer can take action to increase the likelihood that its product will end up in Oklahoma. If it makes the best component part in the world, the volume of sales of its product will increase along with the probability that the product will end up in

A component part manufacturer also will have purposefully availed itself of Oklahoma if it sells its component part to an end product manufacturer who is located in Oklahoma.

²⁸¹ *Asahi Metal Indus. Co., Ltd. v. Super. Ct.*, 480 U.S. 102, 112–13 (1987).

²⁸² *Id.* at 112 (finding that there was no “[a]dditional conduct of the defendant . . . [indicating] an intent or purpose to serve the market in the forum State”); *id.* at 122 (Stevens, J., concurring) (noting that defendant Asahi engaged in a “higher quantum of conduct” that included a “regular course of dealing that result[ed] in deliveries of over 100,000 units annually over a period of several years”). Justice Brennan noted that there was a “regular flow” of product through established channels of distribution but he would have found purposeful availment based on a pure stream of commerce theory. *Id.* at 117; *see also* *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 307 (1980) (Brennan, J., dissenting) (discussing how state highway programs contribute to the value of automobile dealerships' business, and that these contacts are sufficient enough to require such a business to submit to a state's jurisdiction).

²⁸³ *Asahi*, 480 U.S. at 121–22.

²⁸⁴ *Id.* at 112–13.

Oklahoma. Consider the following hypothetical:

Hoosier, Inc. makes a widget. The widget is a component part in various cellular phones. Hoosier does no advertising and it has no website. In order to purchase a widget (not yet installed in a phone), one must go to the “Hoosier Store,” located in the back of the Hoosier factory in Bloomington, Indiana. Brad Pitt gets a Hoosier widget installed in his phone. He falls in love with it. He goes on *The Ellen DeGeneres Show* and jumps up and down on a couch screaming “I love this Hoosier Widget.” Motorobo, an Illinois corporation that manufactures cell phones and sells them in ten Midwestern states, sends its purchasing agents to the Hoosier Store and places an order for \$5 million worth of widgets for each of the next five years. Motorobo arranges to pick up the widgets in Bloomington. Motorobo incorporates the Hoosier widget in its latest line of phones. Sales are strong, especially in Brad Pitt’s birthplace, Oklahoma. For each of three consecutive years, Motorobo sells phones containing more than \$1 million worth of Hoosier widgets in Oklahoma.

Has Hoosier, Inc. purposefully availed itself of Oklahoma if there is a lawsuit claiming a phone purchased in Oklahoma contained a defective widget? If a regular course of conduct or a quantum of sales can establish purposeful availment, then the answer must be yes. And it remains so despite the fact that Hoosier, Inc. cannot reasonably “sever its connection with Oklahoma.” Sales are high because Hoosier, Inc. makes widgets that are high quality and popular. If it made lesser quality widgets, they would be less popular and there would not be a regular course of conduct or regular sales of its product (albeit by the end product manufacturer) in Oklahoma. Can it be that an injured Oklahoma resident is able to bring suit against a manufacturer of a product that is popular because it is well made and therefore many of the products end up in Oklahoma? But an injured Oklahoma resident cannot bring suit against a manufacturer of a product that is less popular because it is poorly made and therefore only a few such products end up in Oklahoma? Even if the low quality product is so poorly made that it injures every person that uses it? The purposeful availment requirement should not engender such anomalous results.

Furthermore, the determination of whether there is a high volume of sales is arbitrary.²⁸⁵ Therefore, a component part manufacturer lacks

²⁸⁵ As noted by Justice Ginsburg in her *Nicastro* dissent, there was no purposeful availment in that case based on the sale of a single \$24,900 product. The Court presumably would, however, find

purposeful availment based solely on a high volume of its product ending up in a particular state even where the high volume results from a regular course of sales between the component part manufacturer and an end product manufacturer who sells the end product in that state.

Consider Intel, for example. Intel is the world's largest semiconductor chip maker and describes itself as a component part manufacturer: "We design and manufacture computing and communications components, such as microprocessors, chipsets, motherboards, and wireless and wired connectivity products."²⁸⁶

Intel's largest customers are end product computer makers Hewlett-Packard and Dell.²⁸⁷ If Intel wanted to sever any connection with Oklahoma—thereby avoiding purposeful availment of Oklahoma—it could choose to manufacture its semiconductor chips in California and to sell them exclusively in California. Likewise, Intel could choose to manufacture and sell its semiconductor chips in every state but Oklahoma. Such sales might include other component part manufacturers, end product manufacturers, and even consumers. But the Intel chips would still make their way to Oklahoma, just like the automobile in *World-Wide Volkswagen*. If Intel did everything possible to avoid Oklahoma, there should be no purposeful availment.

If Intel chooses to engage in conduct designed to result in the sale of its semiconductor chips to purchasers (other manufacturers, distributors, consumers, etc.) in Oklahoma, however, then it has purposefully availed itself of Oklahoma for lawsuits arising from use of those chips.

Even if it does not make sales to Oklahoma, Intel might choose to engage in certain conduct directly targeting Oklahoma that constitutes purposeful availment of Oklahoma. Although Intel primarily makes the microprocessor that powers other companies' end products, Intel engages in a significant amount of sales to end product consumers/users:

We sell our products primarily to original equipment manufacturers (OEMs) and original design manufacturers (ODMs). ODMs provide design and/or manufacturing services to branded and unbranded private-label resellers. In addition, we sell our products to other manufacturers, including makers of a wide range of industrial and communications equipment. Our customers also include those who buy PC components and our other products through distributor, reseller, retail, and OEM channels

purposeful availment based on 24,900 sales of a \$1 product. *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2803 n.15 (2011) (Ginsburg, J., dissenting).

²⁸⁶ INTEL CORP., 2010 ANNUAL REPORT 1 (2010), available at <http://www.intc.com/intelAR2010/download/index.html>.

²⁸⁷ *Id.* at 8.

throughout the world.²⁸⁸

Intel proudly proclaims that “[t]he Intel brand is consistently ranked as one of the most recognizable and valuable brands in the world.”²⁸⁹ The company asserts:

Our corporate marketing objectives are to build a strong, well-known Intel corporate brand that connects with businesses and consumers We promote brand awareness and generate demand through our own direct marketing as well as co-marketing programs. Our direct marketing activities include television, print, and Internet advertising, as well as press relations, consumer and trade events, and industry and consumer communications. We market to consumer and business audiences, and focus on building awareness and generating demand for increased performance, improved energy efficiency, and other capabilities such as Internet connectivity and security.²⁹⁰

If Intel chooses to market and promote its brand to Oklahoma consumers through its global or nationwide marketing activities, then it has purposefully availed itself of Oklahoma—even if it makes no sales in Oklahoma.

To recap, absent proof of additional conduct by a defendant targeting the forum state, a component part manufacturer has not purposefully availed itself of the forum state based on injuries caused by the component product in the forum state even where a high volume of the component product ends up in the forum state.

This does not leave injured consumers without recourse. Where the forum state lacks jurisdiction over the component part manufacturer, the injured consumer will seek relief from the end product manufacturer and distributor. As described below, these parties control the location of the initial sale and the price of the product at the initial sale. They are in the best position to refuse to sell the end product in particular states, to acquire products liability insurance, and to set appropriate prices given the risks of litigation in each state.²⁹¹ The end product manufacturer also can require the component part manufacturer to defend and indemnify the end product manufacturer as part of their purchase agreement; they can further demand that the component part manufacturer make safer and better component

²⁸⁸ *Id.* at 7.

²⁸⁹ *Id.* at Investor Information.

²⁹⁰ *Id.* at 9.

²⁹¹ See *Asahi Metal Indus. Co., Ltd. v. Super. Ct.*, 480 U.S. 102, 110 (1987) (discussing why the manufacturer and distributor should be subject to suit in particular states where they have marketed their goods (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980))).

parts—or stop purchasing them altogether—if the cost of business becomes too high as a result of defects in the component parts.

D. *End Product Manufacturers*

Unlike component part manufacturers, end product manufacturers retain nearly complete control over the location of the initial sale of their products.²⁹² The end product manufacturer either sells the product directly to the consumers or it sells the product to a distributor or retailer that sells it to the consumer. End product manufacturers can design and control the distribution system for their products.²⁹³ “The component maker, in contrast, has little control over where the product ends up.”²⁹⁴

If an end product manufacturer wishes to “sever its connection [with any particular] state” in order to avoid being haled into that state’s courts, it is a simple matter to refrain from marketing its product to that state and to refuse to make sales in that state.²⁹⁵ Thus, the end product manufacturer should be subject to personal jurisdiction wherever the product is sold and causes injury.²⁹⁶ If the end product manufacturer employs one or more distributors or sells the product to a retailer, it is easy to require, as a condition of its agreement to permit the distributor to distribute the product, that the distributor or retailer is precluded from making sales to designated states.

To recap, where the location of an initial sale for an end product occurs in the forum state, an end product manufacturer has presumptively purposefully availed itself of the forum state where the product causes injury in the forum state.²⁹⁷ On the other hand, where the location of an

²⁹² By referring to the location of the initial sale, I mean the handing off of the product from manufacturer or an authorized distributor or retailer to the consumer. I do not mean unauthorized sales or resales.

²⁹³ See *Asahi*, 480 U.S. at 108, 121 (O’Connor, J., concurring) (stating that Asahi may not have designed, but was aware of the distribution system for its product).

²⁹⁴ Freer, *supra* note 39, at 29.

²⁹⁵ *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1126–27 (W.D. Pa. 1997) (“If [the defendant] had not wanted to be amenable to jurisdiction in Pennsylvania, the solution would have been simple—it could have chosen not to sell its [Internet news] services to Pennsylvania residents.”).

²⁹⁶ See *Asahi*, 480 U.S. at 115 (majority opinion) (“[T]hose who use Asahi components in their final products, and sell those products in California, [should be] subject to application of California tort law.”); see also Rodger D. Citron, *The Case of the Retired Justice: How Would Justice John Paul Stevens Have Voted in J. McIntyre Machinery, Ltd. v. Nicastro?*, 63 S.C. L. REV. 643, 666 (2012) (“J. McIntyre was not selling components but rather a finished product, albeit through the use of a distributor. This difference from *Asahi* supports the exercise of jurisdiction because J. McIntyre had control over whether to attempt to sell, or not sell, its products in New Jersey.” (footnote omitted)).

²⁹⁷ Likewise, a distributor or retailer who makes sales of a product or provides a service in the forum state has presumptively purposefully availed itself of the forum state where the product causes injury in the forum state. Each of the participants in the sale of an end product can protect against litigation in the forum state by requiring the purchaser to enter into a purchase agreement that contains a forum selection clause.

initial sale of an end product occurs in some state other than the forum state, an end product manufacturer has presumptively *not* purposefully availed itself of the forum state where the product causes injury in the forum state. In order to overcome the presumption, the plaintiff must establish additional conduct by the defendant indicating an intent or purpose to serve the forum state market as described by Justice O'Connor in her *Asahi* opinion. As discussed in the following section, conduct that indicates an intent or purpose to serve the entire United States market constitutes purposeful availment of each state where the product is sold and causes injury.

E. *Internet Sales and the World Wide Web*

Purposeful availment by economic actors who make sales over the Internet or promote their brand or product on the World Wide Web also is best understood by consideration of the ability to sever a connection with a particular state. Consider the examples that concerned Justice Breyer when drafting his opinion in *Nicastro*:

But what do those standards [set forth in Justice Kennedy's plurality opinion] mean when a company targets the world by selling products from its Web site? And does it matter if, instead of shipping the products directly, a company consigns the products through an intermediary (say, Amazon.com) who then receives and fulfills the orders? And what if the company markets its products through popup advertisements that it knows will be viewed in a forum?²⁹⁸

If a company makes initial sales of its products to consumers by direct Internet sales, the company can elect not to make sales to consumers who are physically located in disfavored states. The company might simply ask the residency of the purchaser or require verification from the purchaser that they do not reside in a disfavored state. Alternatively, the company could elect to make sales to consumers from all states, but refuse to ship to customers in disfavored states. In the wake of the Supreme Court's 2005 decision in *Granholm v. Heald*,²⁹⁹ wineries are not allowed to ship to residents of states that prohibit direct shipment of alcohol to consumers. Many wineries still make Internet sales of their wine to consumers, but they refuse to ship to residents of particular states.³⁰⁰

²⁹⁸ *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2793 (2011) (Breyer, J., concurring).

²⁹⁹ 544 U.S. 460, 492–93 (2005).

³⁰⁰ See, e.g., *Shop/Shipping*, VINASA, <http://www.viansa.com/index.cfm?method=storeproducts.showList&productcategoryid=65271df0-911e-ca9a-6938-5c68dc82ca7a> (last visited July 8, 2012) (listing shipping restrictions for Viansa winery); *State Shipping Laws for Wineries Portal*, WINE INST.,

Unlike in-store sales by brick-and-mortar retailers that have a physical presence in a particular state, retailers who choose to sell products over the Internet have purposefully accessed a nationwide pool of potential customers. Internet retailers also have an *additional, effective* tool for avoiding purposeful avilment of disfavored states beyond simply the word of the purchaser. The advent of geolocation technology allows the operators of “[i]nternet sites to automatically and accurately identify a user’s geographic location.”³⁰¹ Thus, Internet sales would allow a manufacturer to implement effective policies to avoid a disfavored forum.³⁰²

Internet poker sites, for example, have used geolocation technology to prevent users located in disfavored forums from accessing their services.³⁰³ In one lawsuit in Kentucky, the judge ordered the seizure of the domain names of 141 Internet gambling sites; the seizure was ordered subject to rescission once the sites installed a “geographical block [capable of] block[ing] and deny[ing] access to their on-line gambling sites . . . [by] any users or consumers within the territorial boundaries of the Commonwealth” of Kentucky.³⁰⁴

If a manufacturer consigns sales of its products through an intermediary—like Amazon.com—who receives and fulfills the orders, the manufacturer can require as a condition of the consignment that the Internet retailer honor its choice not to sell and ship its products to consumers in disfavored states.

Geolocation technology is particularly useful because it helps Internet

<http://www.wineinstitute.org/initiatives/stateshippinglaws> (last visited July 8, 2012) (showing a map of states where direct shipping is prohibited).

³⁰¹ Kevin F. King, *Personal Jurisdiction, Internet Commerce and Privacy: The Pervasive Legal Consequences of Modern Geolocation Technologies*, 21 ALB. L.J. SCI. & TECH. 61, 63 (2011) [hereinafter King, *Personal Jurisdiction*]; see also A. Benjamin Spencer, *Jurisdiction and the Internet: Returning to Traditional Principles to Analyze Network-Mediated Contacts*, 2006 U. ILL. L. REV. 71, 91 (2006) (“The technology exists to identify the geographical location of prospective users (for example, through the user’s IP address or digital certificates) and to deny entry to undesirable users.” (footnote omitted)); Dan Jerker B. Svantesson, *Geo-location Technologies and Other Means of Placing Borders on the ‘Borderless’ Internet*, 23 J. MARSHALL J. COMPUTER & INFO. L. 101, 110 (2004) (stating that Internet users’ locations may be revealed by their IP addresses).

³⁰² King, *Personal Jurisdiction*, *supra* note 301, at 63 (“This capability—unavailable just a few years ago—has begun to revolutionize Internet commerce and communication by enabling content localization, customization, and access regulation on a scale previously thought to be impossible.”).

³⁰³ See Kevin F. King, *Geolocation and Federalism on the Internet: Cutting Internet Gambling’s Gordian Knot*, 11 COLUM. SCI. & TECH. L. REV. 41, 58–59 n.101 (2010) (detailing online poker sites’ use of geolocation tools to block certain customers from accessing their servers); Jessica Welman, *PokerStars Blocks Washington Residents from Playing Online*, BLUFF MAG. (Oct. 1, 2010), <http://news.bluffmagazine.com/pokerstars-blocks-washington-residents-from-playing-online-15911/> (discussing an Internet poker site’s decision to stop taking Washington state residents as customers in the wake of a state supreme court decision outlawing online gambling).

³⁰⁴ *Kentucky v. 141 Internet Domain Names*, No. 08-CI-1409, at *39 (Franklin Cir. Ct. Oct. 16, 2008), available at <http://www.gpwa.org/news/Kentucky.vs.141.Internet.Domains.pdf>.

retailers target geographic markets—for example, by use of popup advertisements—where their products will be particularly well-received.³⁰⁵ As one scholar has explained:

Because it is now technologically possible to restrict the accessibility of Internet material to specific geographical areas, applying a traditional analysis to nongeographically restricted Internet activity yields a presumption that those Internet actors purposefully avail themselves of every jurisdiction they permit their virtual conduct to reach. However, the widespread fear shared by many courts and commentators that this application of unaltered traditional jurisdictional principles will result in universal jurisdiction over Internet actors is unfounded. Universal jurisdiction will hardly be the inevitable outcome of applying traditional principles, given the ability of defendants to avoid the presumption of purposeful availment by employing geographical restriction techniques and the role that the “arising-out-of” and “reasonableness” requirements of the analysis can play in limiting unwarranted assertions of jurisdiction.³⁰⁶

As demonstrated above, because Internet retailers have the ability to sever their connection with a particular state, there is presumptively purposeful availment where they choose not to do so.³⁰⁷

F. *Courts Should Adopt Justice Ginsburg’s Position That Marketing to the Entire United States Constitutes Purposeful Availment of Each State Where the Product Is Sold*

Justice Ginsburg’s view that marketing to the entire United States constitutes purposeful availment of each state where the product is sold was accepted by three members of the Court and *may* be accepted by two additional Justices.³⁰⁸ Justice Breyer, joined by Justice Alito, indicated that he is open to a rule of broader applicability if presented with a case that requires consideration of “relevant contemporary commercial

³⁰⁵ Joel R. Reidenberg, *Technology and Internet Jurisdiction*, 153 U. PA. L. REV. 1951, 1962 (2005) (“[G]eolocation of users demonstrates that Internet participants actively target the user’s jurisdiction or . . . [make a choice to] refrain from interacting with users located in particular places.”).

³⁰⁶ Spencer, *supra* note 301, at 75–76.

³⁰⁷ See Reidenberg, *supra* note 305, at 1962 (“In effect, the technological choice either to filter or not to filter becomes a normative decision to ‘purposefully avail’ of the user’s forum state. Technological innovation that enhances interactivity also shifts the burden from demonstrating that a jurisdiction was targeted to showing that reasonable efforts were made to avoid contact with the jurisdiction.”).

³⁰⁸ See discussion *supra* Part VI.

circumstances” and of the “modern day consequences” of “changes in commerce and communication.”³⁰⁹ Thus, state and trial courts should be open to such a position.

Ultimately, the Supreme Court must accept Justice Ginsburg’s position. It is consistent with the concept that there is purposeful availment when it was reasonably feasible for a nonresident defendant to prevent contacts with a particular state, but the defendant chose not to do so. It will also prevent absurd and unfair results. Consider the following scenarios.

1. *Scenario One*

A U.K. manufacturer hires a U.S. distributor and asks the distributor to distribute the product in New Jersey. The U.K. manufacturer targets New Jersey businesses by marketing and promoting its product in hopes of selling its product to them. New Jersey is the only market targeted by the manufacturer and the only state where the product is sold. The marketing efforts are successful; a sale occurs in New Jersey and the product—which is defective—later injures a worker for the New Jersey business in New Jersey.

All nine Justices would agree that such conduct constitutes purposeful availment by defendant U.K. manufacturer because the defendant targeted potential New Jersey customers.³¹⁰

2. *Scenario Two*

A U.K. manufacturer hires a U.S. distributor and asks the distributor to distribute the product in a five-state region (New Jersey, Pennsylvania, Maryland, New York, and Delaware). The U.K. manufacturer targets businesses in the five-state region by marketing and promoting its product in the hopes of selling its product to them. The five-state region is the only market targeted by the manufacturer and the product is sold only in these five states. The marketing efforts are successful; a sale occurs in New Jersey and the product—which is defective—later injures a worker for the New Jersey business in New Jersey.

³⁰⁹ J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2791, 2794 (2011) (Breyer, J., concurring).

³¹⁰ *Id.* at 2790 (plurality opinion) (“Respondent has not established that J. McIntyre engaged in conduct purposefully directed at New Jersey.”); *id.* at 2792 (Breyer, J., concurring) (“Here, the relevant facts found by the New Jersey Supreme Court show no ‘regular . . . flow’ or ‘regular course’ of sales in New Jersey; and there is no ‘something more,’ such as special state-related design, advertising, marketing, or anything else. Mr. Nicastro, who here bears the burden of proving jurisdiction, has shown no specific effort by the British Manufacturer to sell in New Jersey.”); *id.* at 2801 (Ginsburg, J., dissenting) (“In sum, McIntyre UK, by engaging McIntyre America to promote and sell its machines in the United States, ‘purposefully availed itself’ of the United States market nationwide, not a market in a single State or a discrete collection of States. McIntyre UK thereby availed itself of the market of all States in which its products were sold by its exclusive distributor.”).

Again, all nine Justices would agree that such conduct constitutes purposeful availment of New Jersey because the defendant targeted potential New Jersey customers.³¹¹

3. *Scenario Three*

A U.K. manufacturer hires a U.S. distributor and asks the distributor to distribute the product in forty-nine states (including New Jersey) and the District of Columbia. The U.K. manufacturer targets businesses in every state *except* New York by marketing and promoting its product in hopes of selling its product to them. The U.K. manufacturer took care to avoid marketing its product in New York. The marketing efforts are successful, a sale occurs in New Jersey and the product—which is defective—later injures a worker for the New Jersey business in New Jersey.

Again, all nine Justices presumably would agree that the defendant’s actions constitute purposeful availment of New Jersey because the defendant targeted potential New Jersey customers while choosing to avoid a disfavored forum in New York.³¹²

4. *Scenario Four: J. McIntyre Machinery, Ltd. v. Nicastro*

A U.K. manufacturer hired a U.S. company to act as its “exclusive distributor for the entire United States.”³¹³ The U.K. manufacturer did not instruct its distributor to avoid particular states. Instead, the defendant designed and manufactured the product to conform to United States specifications and instructed the distributor to sell its product “anywhere in the United States.”³¹⁴

The U.K. manufacturer marketed its product in the United States by, among other things, attending sixteen years worth of annual trade shows held in New Orleans, Orlando, San Antonio, and San Francisco.³¹⁵ At the trade shows, the U.K. manufacturer exhibited its products, hoping to reach anyone interested in the machine in the United States.³¹⁶ The marketing efforts were successful. A sale occurred in New Jersey to a New Jersey business, and the product—which was defective—later injured a worker for the New Jersey business in New Jersey.³¹⁷

In this case, six Justices determined that the defendant’s actions did not constitute purposeful availment. As Justice Kennedy noted, “These facts may reveal an intent to serve the U.S. market, but they do not show that J.

³¹¹ *Id.* at 2792.

³¹² *Id.*

³¹³ *Nicastro v. McIntyre Mach. Am., Ltd.*, 945 A.2d 92, 104 (N.J. Super. Ct. App. Div. 2008).

³¹⁴ *Nicastro v. McIntyre Mach. Am., Ltd.*, 987 A.2d 575, 578, 593 (N.J. 2010).

³¹⁵ *Id.* at 579.

³¹⁶ *Id.* at 578–79.

³¹⁷ *Id.* at 577–78.

McIntyre purposefully availed itself of the New Jersey market.”³¹⁸

This argument is illogical; it is contrary to reason to conclude that a manufacturer who endeavors to sell its product in *every* state has *not* purposefully availed itself of *any* state.³¹⁹ But even aside from this flawed logic, it would have been easy for J. McIntyre to refuse to market its product to New Jersey customers *and to require its distributor to refuse to sell its product to New Jersey customers*. All J. McIntyre had to do was make a contractual agreement with the distributor that the distributor would not sell to New Jersey. Absent such an agreement, J. McIntyre could refuse to engage the distributor. Had J. McIntyre done this, there would have been no sales in New Jersey that subsequently led to its being haled to court there.

IX. CONCLUSION

Justice Breyer opened his *Nicastro* concurrence by acknowledging “that there have been many recent changes in commerce and communication . . . which are not anticipated by [the Court’s] precedents.”³²⁰ But it was more than fifty years ago that the Court recognized that the expansion of commerce, the availability of long-distance transportation, and the increase in communication technology has resulted in an expansion of the exercise of jurisdiction over foreign corporations and nonresidents.³²¹ Since that time, the Supreme Court has repeatedly acknowledged that the “limits imposed on state jurisdiction by the Due Process Clause, in its role as guarantor against inconvenient litigation, have been substantially relaxed over the years” due to the increase in national and international commerce and the availability and affordability of modern communication and transportation.³²²

The point here is *not* that the Court should modify its personal jurisdiction doctrine to expand the exercise of jurisdiction over

³¹⁸ J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2790 (2011) (plurality opinion).

³¹⁹ See Richards, *Purposeful Availment*, *supra* note 129 (“Under this rule, a defendant who reaps the benefits of a national market is subject to jurisdiction [sic] only a single state; whereas a defendant that asked its distributor to focus on sales in, say, a dozen states would be subject to personal jurisdiction in all of them.”); Drobak, *supra* note 8 (“If the defendant had told its distributor to sell to customers ‘in all 50 states,’ would the plurality have found the requisite intention to target New Jersey? What if the defendant had told the distributor to sell to customers in Alabama and then listed the other 49 states by name? There is absolutely no difference between telling a distributor to serve the U.S. market and the two examples just mentioned.”).

³²⁰ *Nicastro*, 131 S. Ct. at 2791 (Breyer, J., concurring).

³²¹ *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 222–23 (1957).

³²² *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980); see also *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) (“[I]t is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines.”); *Hanson v. Denckla*, 357 U.S. 235, 250–51 (1958) (“As technological progress has increased the flow of commerce between States, the need for jurisdiction . . . has undergone a similar increase.”).

nonresidents. Rather, the point is that the Court cannot base its personal jurisdiction jurisprudence on a fiction. Today, commerce is often national or even global. Corporations are, by their nature, driven by a desire for profit. Like the U.K. manufacturer in *Nicastro*, end product manufacturers generally want to sell their products anywhere and everywhere.³²³ McIntyre U.K. viewed the U.S. as a single market. If McIntyre U.K. wanted to *avoid* New Jersey, it could have done so. Instead, McIntyre U.K. chose to accept the risk of its product being sold in New Jersey. That is purposeful availment. The Supreme Court's opinion in *Nicastro* should be short-lived because it is inconsistent with personal jurisdiction doctrine and the reasoning behind the purposeful availment requirement.

On the other hand, component part manufacturers generally lack the ability to control where their products are sold after they are incorporated in an end product. Where a component part manufacturer makes a product that is very popular because of its high quality, it will be incorporated into end products manufactured by numerous end product manufacturers. It will inevitably wind up in the hands of consumers in most or all fifty states. That is not purposeful availment because the component part manufacturer cannot "structure [its] primary conduct" so as to avoid purposeful availment and to forestall being subjected to a lawsuit in a disfavored forum.³²⁴

Component part manufacturers will have extra protection where purposeful availment is established. End product manufacturers, by contrast, will purposefully avail themselves of every state where their products are sold and cause injury. This is consistent with the purposeful availment requirement and it is the optimal result.³²⁵ End product manufacturers can respond by limiting the states where their products are sold. States might then compete to attract end product manufacturers, as well as their distributors and retailers, to sell the product in a particular state "by weakening their product liability law or otherwise tilting their procedural and choice of law rules to favor defendants."³²⁶ End product manufacturers also could expand the range of states where they make their product available by charging a greater price in states with less favorable

³²³ *Nicastro*, 131 S. Ct. at 2799 (Ginsburg, J., dissenting) ("This case is illustrative of marketing arrangements for sales in the United States common in today's commercial world. A foreign-country manufacturer engages a U.S. company to promote and distribute the manufacturer's products, not in any particular State, but anywhere and everywhere in the United States the distributor can attract purchasers.").

³²⁴ *World-Wide Volkswagen*, 444 U.S. at 297.

³²⁵ Klerman, *supra* note 265, at 34 ("[A] rule that allows the plaintiff to sue where she purchased the product is likely to lead to the best results.").

³²⁶ *Id.* at 4.

laws.³²⁷

And, of course, a finding of purposeful availment does not mean that there is necessarily personal jurisdiction over a nonresident defendant. Justice Breyer will take comfort in the fact that a defendant can still argue that it would be unfair to exercise jurisdiction despite the defendant's purposeful availment of the forum state.

³²⁷ *See id.* (“A jurisdictional rule which allowed plaintiffs to sue where they bought the product (but not necessarily where the accident occurred) allows manufacturers to vary the price depending on the legal characteristics of the state where the product was sold.”).