The Persistent Problem of Purposeful Availment

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ABSTRACT

For the second time in 25 years, personal jurisdiction has perplexed the 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* stating 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 non-resident 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 25 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 a 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* was itself 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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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—that focused on purposeful availment. This is not surprising because the issue of whether a state court may properly exercise jurisdiction over a non-resident defendant who did not consent to jurisdiction and was not present in that state arises frequently in all types of litigation. It is surprising 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.

It had been nearly 25 years since the Supreme Court last considered whether a state court may exercise personal jurisdiction over a non-resident defendant who has no physical presence in the forum jurisdiction. That decision, Asahi Metal Industry Co. v. Superior Court, resulted in no majority opinion. All nine 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 California (the forum state) and that defendant’s contact with California was not relevant unless such contact was the result of defendant’s purposeful availment of California. But the Justices disagreed sharply regarding the proper 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 its conduct, purposefully availed itself of California. 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. The passage of time has only amplified the lack of clarity. The lower courts have not reached a consensus about the meaning and

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) (“the 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 25 years. In that 1990 decision, the Court upheld the exercise of personal jurisdiction by a California court over a non-resident, natural-person defendant who was validly served with process while physically located in California. See Burnham v. Superior Court, 495 U.S. 604 (1990).
5 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....”).
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. Nicastro did not result in a majority opinion. Instead, the Justices split 4-2-3. Six Justices agreed that the defendant did not purposefully avail itself of the forum state and therefore personal jurisdiction was improper, but the Justices again split sharply in their reasoning.

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 will limit the number of defendants who may be sued in state courts. Justice Ginsburg (dissenting with Justices Kagan and Sotomayor) want to extend the personal jurisdiction doctrine to make a foreign defendant amenable 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. Justice Breyer (joined by Justice Alito concurring in the judgment) rejected Justice Kennedy’s view, but indicated he was not yet willing to join Justice Ginsburg. Before resolving the issue of purposeful availment, he wants to wait for a case that requires the Court to confront the “many recent changes in commerce and communication.”

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6 See Patrick J. Borchers, J. McIntyre Machinery, Goodyear and the Incoherence of the Minimum Contacts Test, 44 Creighton L. Rev. 1245, 1245 (2011) (“The Supreme Court performed miserably.”); id. at 1246 (describing the Court’s opinion in J. McIntyre as “a disaster.”); 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. at @n.61 (forthcoming) (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, A Critical Appraisal of the Supreme Court’s Decision in J. McIntyre Machinery, Ltd. v. Nicastro, at (2011) (http://ssrn.com/abstract=1938472) (stating that the three McIntyre opinions “exacerbated rather than ameliorated the doctrinal confusion” and that each opinion “demonstrated a disappointing level of judicial competence); Mike Richards, Whose Due Process, Law & Liberty Bulletin (Oct. 4, 2011, http://www.nyujll.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 by introducing substantial uncertainty about the basic nature of the due process question to be answered.”).

7 Nicastro, 131 S.Ct. at 2791 (Breyer, J., concurring in the judgment).
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, the Due Process Clause 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 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 plaintiff can establish *either* of the following two circumstances:

1. defendant had a “regular flow” or “regular course” of product sales in the forum State, rather than a small number of isolated sales; or
2. defendant purposefully targeted forum State customers which would include “special state-related design, advertising, advice, marketing” or other similar targeting activity directed toward the state or its customers.

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*, Justice White wrote that a corporation that purposefully avails itself of a particular state

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\text{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.}^8
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It is not always feasible, however, for a corporation to sever its connection to a state. Sometimes a corporation has no ability to control whether a product reaches a particular state. Where it is not reasonably feasible\(^9\) 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 non-resident 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\(^{10}\) who makes sales exclusively from its West Virginia shop cannot prevent its cups and saucers from ending up in Hawaii. A Hawaii resident might visit West Virginia or a West

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\(^8\) *World-Wide Volkswagen*, 444 U.S. at 297.

\(^9\) By “reasonably feasible,” I mean something that is literally possible to achieve and also is economically and technologically practical given the circumstances.

\(^{10}\) See *Nicastro*, 131 S.Ct. at 2793 (Breyer, J., concurring in the judgment) (“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).”).
Virginia resident 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 responds to an ad placed in the Honolulu Star-Advertiser by the West Virginia manufacturer by calling a toll-free telephone number, purchasing the cups and saucers with a credit card and arranging for the manufacturer to ship them to Hawaii. The West Virginia potter could have prevented this contact with Hawaii but did not.

These are the relatively easy cases. The cases that have been difficult for the Court—where there is an intervening distributor, for example—are also best understood, however, by considering whether it is reasonably feasible for a defendant to prevent its contact with the 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 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 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 causes injury. It is a simple matter for a manufacturer to avoid marketing its product in certain undesirable states. It defies reason and reality to conclude that a manufacturer who seeks to sell its product nationwide 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. Past cases make clear that this interest can be waived both before and after litigation arises. It also can be forfeited after litigation commences by an inattentive or careless defendant. 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.11

This analysis also confirms that Nicastro was wrongly decided for two independent reasons. The U.K. end product manufacturer had control over the distribution of its product and easily could have avoided New Jersey. The manufacturer also marketed its product in the entirety of the United States, 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 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.12 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.”13 Absent defendant’s consent to jurisdiction,14 defendant’s presence within the territory of the forum state was a prerequisite to that state court’s rendition of a judgment against the defendant.15

B. The International Shoe Minimum Contacts Test.

In its seminal 1945 decision of International Shoe Co. v. Washington,16 the Supreme Court abandoned its test of “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

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13 Kevin M. Clermont, PRINCIPLES OF CIVIL PROCEDURE § 4.2 at 214 (2d ed. 2009); see also Jack H. Friedenthal, et al., CIVIL PROCEDURE § 3.2 at 100-01 (4th ed. 2005); Pennoyer, 95 U.S. 720 (“The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established.”). Personal jurisdiction is sometimes referred to, even today, as “territorial jurisdiction.” Id. at § 3.1 at 99 (citing Restatement Second of Judgments 55 (1982)).
14 Friedenthal, supra n.13, § 3.5 at 106-07.
16 326 U.S. 310 (1945).
between the defendant and the forum state. 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. The test asks whether a non-resident defendant has sufficient “minimum contacts” with the forum state such that the exercise of jurisdiction would not “offend traditional notions of fair play and substantial justice.”

In *International Shoe*, the Supreme Court distinguished between the concepts of “general jurisdiction” and “specific jurisdiction.” The Supreme Court recently reiterated this distinction in *Goodyear Tires Operations, S.A. v. Brown*, a “general jurisdiction” case that was argued and decided on the same date as *Nicastro*. General jurisdiction exists when a defendant has substantial in-state activity that is “continuous and systematic.” 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. For example, an individual may be sued in his or her domicile state and a corporation may be sued in its state of incorporation and 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. By contrast, adjudicatory authority is “specific” when the lawsuit arises out of or derives from the defendant’s contacts with the forum. 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 connections.

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17 Quill Corp. v. North Dakota, 504 U.S. 298, 308 (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”).
18 Richard D. Freer, CIVIL PROCEDURE § 2.4.3 at 81 (2d ed. 2009); Clermont, supra n. 13, § 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.”).
20 Id. at 318. The Court stated: “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.” Id.
22 Id. at 2853-54.
23 Id. at 2853.
24 Id.
25 Id. at 2854.
26 Id.
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 non-resident 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 consider 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 establishing the constitutional unfairness of the forum. 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.”

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. 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.

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. 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

27 Burger King Corp. **v.** Rudzewicz, 471 U.S. 462, 478 (1985); Clermont, *supra* n. 13, § 4.2 at 212; Freer, *supra* n. 18, § 2.4.3 at 85-86.
28 Freer, *supra* n. 16, § 2.4.3 at 80; see also Friedenthal, *supra* n. 11, § 3.11 at 135-36 (4th ed. 2005); Richard D. Freer, *Personal Jurisdiction In the Twenty-First Century: The Ironic Influence of Justice Brennan*, at 2 ([http://ssrn.com/abstract=1969142](http://ssrn.com/abstract=1969142)) (“Only if a defendant-initiated contact is established will a court consider the farness and reasonableness of jurisdiction.”).
29 Freer, *supra* n. 27 at 9 (“if there is no contact caused by purposeful availment, there can be no jurisdiction”).
30 Freer, *supra* n. 17, § 2.4.3 at 81; Friedenthal, *supra* n. 12, § 3.11 at 139-41.
31 Friedenthal, *supra* n.12, § 3.10 at 128-29.
power extends to claims less related to that activity.” Even a single contact will constitute “minimum contacts” sufficient to support the exercise of personal jurisdiction, however, when the contact with the forum state is the very basis for the action.

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. In conducting the analysis of fairness, the Court has identified five relevant factors. The burden on the non-resident defendant of litigating in the forum is balanced against (1) the forum state’s interest in adjudicating the dispute; (2) the plaintiff’s interest in obtaining convenient and effective relief; (3) the interstate judicial system’s interest in obtaining the most efficient resolution possible; (4) “the shared interest of the several states in furthering fundamental substantive social policies.”

III. THE PROBLEM OF PURPOSEFUL AVAILMENT.

The Supreme Court first discussed the concept of purposeful availment in its 1958 decision of Hanson v. Denckla. Hanson involved a Delaware corporate defendant who had established a trust in 1935 for Mrs. Donner, a Pennsylvania resident, and then acted as trustee. Mrs. Donner moved to Florida in 1944 where she remained until her death in 1952. When litigation regarding the trust ensued in Florida state court, the defendant objected to lack of personal jurisdiction. 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. 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.”

The Court later clarified that the 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 proximately result from actions by the defendant himself that create a substantial connection with the forum state.

32 Clermont, supra n. 13, § 4.2 at 223; id. at 229 (“an increase in unrelatedness requires a higher level of activity”); see also Freer, supra n. 18, § 2.4.3 at 72-73.
33 See McGee v. International Life Ins. Co., 355 U.S. 220 (1957); Hess v. Pawlowski, 274 U.S. 352 (1927); Freer, supra n. 18, § 2.4.3 at 72-73; id. at § 2.4.4; Friedenthal, supra n. 13, § 3.10 at 128.
34 357 U.S. 235 (1958)
35 Id. at 238-39.
36 Id. at 253.
37 Burger King, 471 U.S. at 475 (internal citations and quotations omitted).
But the meaning and application of the purposeful availment requirement have given courts, academics and practitioners fits. 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 v. Woodson,* plaintiffs brought a products liability action in Oklahoma state court. Plaintiffs had purchased a new Audi automobile from defendant Seaway Volkswagen, Inc., the local car dealership in Massena, New York. One year later, Plaintiffs left their New York home for a new home in Arizona. 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. Plaintiffs sued the local New York dealership (Seaway) where they had purchased the car and the regional distributor (World-Wide Volkswagen). 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.

Both Seaway and World-Wide were incorporated and had their principal places of business in New York. Although both companies had contractual relationships with the manufacturer and importer of plaintiffs’ Audi, they were fully independent corporations. 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.” In fact, there was no evidence “that any automobile sold by World-wide or Seaway ha[d] ever entered Oklahoma with the single exception of the vehicle involved in the present case.” The Oklahoma state court nevertheless rejected defendants’ argument and the Oklahoma Supreme Court denied defendants’ writ petition, because “the product being sold and distributed by 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.”

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38 444 U.S. 286 (1980).
39 Id. at 288.
40 Id.
41 Id.
42 Id. Plaintiffs also sued the German manufacturer (Audi) and the U.S. importer (Volkswagen of America), but neither of those defendants contested personal jurisdiction.
43 Id. at 289.
44 Id.
45 Id.
46 Id.
48 Id. at 354.
In a 6-3 opinion, the Supreme Court reversed.49 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.”50 Determining whether maintenance of the suit would offend traditional notions of fair play and substantial justice is a test of reasonableness or fairness.51

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.52 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.”53

The Court acknowledged that “an automobile is mobile by its very design and purpose” and it was therefore foreseeable that plaintiff’s automobile would be driven to Oklahoma and cause injury there. The Court held, however, that defendant’s product being placed by 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 non-resident defendants.54 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.55

The Court limited the scope of its holding by noting that defendants did not seek to serve the Oklahoma market either directly or indirectly.56 Although a number of Volkswagen service centers were located in Oklahoma, 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.”57

Justice Brennan dissented, arguing that defendants “purposefully inject[ed] the [Audi] into the stream of interstate commerce” and the Audi was then “predictably [] used in the forum State.”58 Justice Marshall (joined by Justice Blackmun) also dissented, arguing that jurisdiction was proper because it was based “on the deliberate and purposeful

49 444 U.S. at 299.
50 Id. at 291-92 (internal quotations omitted).
51 Id. at 292.
52 Id. at 292-93.
53 Id. at 295.
54 Id. at 295-96.
55 Id. at 297.
56 Id. at 297-98.
57 Id. at 298-99.
58 Id. at 306-07 (Brennan, J., dissenting).
actions of the defendants themselves in choosing to become part of a nationwide, indeed a global, network for marketing and servicing automobiles.”

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*, involved a product liability claim resulting from a vehicle collision. Plaintiff lost control of his motorcycle and collided with a tractor, injuring plaintiff and killing his passenger wife. Plaintiff filed a product liability action in California state court, alleging that his motorcycle’s tire, tube and sealant were defective. Plaintiff sued several defendants, including component parts manufacturer Cheng Shin Rubber Industrial Co., Ltd. (Cheng Shin), the Taiwanese manufacturer of the tube. 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.

California’s long arm statute authorizes the exercise of jurisdiction to the full extent permitted by the United States Constitution, but Asahi moved to quash the service of summons on grounds that the exercise of personal jurisdiction by the California state court was inconsistent with the Due Process Clause of the Fourteenth Amendment. 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. 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.

Cheng Shin bought a significant number of valve assemblies—approximately 850,000 over a five-year period—from Asahi, but these sales were a small part of Cheng Shin’s overall business. Cheng Shin estimated that approximately 20 percent of its sales in the United States were in California, but the record did not indicate what percentage of

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59 Id. at 314 (Marshall, J., dissenting).
61 Id. at 105.
62 Id. at 105-06.
63 Id. at 106.
64 Id.
65 Id.
66 Id. at 106-08.
67 Id.
68 Id.
Cheng Shin’s total sales were made to the United States.\(^69\) 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.\(^70\) 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.”\(^71\) 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.”\(^72\)

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 international scale.”\(^73\) 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.” 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.”\(^74\)

All nine justices of the Supreme Court voted to reverse, finding that the exercise of personal jurisdiction would violate the Due Process Clause. 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.\(^75\) 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.\(^76\) In addition, the Court made special note of the policy implications given the international context of the dispute:

\(^{69}\) Id.
\(^{70}\) Id.
\(^{71}\) Id. at 107.
\(^{72}\) Id.
\(^{73}\) Id.
\(^{74}\) Id. at 108.
\(^{75}\) Id. at 113.
\(^{76}\) Id. at 114-15.
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 interest in Government’s foreign relations policies, will be best served by a careful inquiry into the reasonableness of the assertion of jurisdiction in a 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. 77

The justices could not agree, however, whether Asahi had established minimum contacts with the State of California 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 focused on the concept of purposeful availment. 78 Justice O’Connor emphasized that minimum contacts with the jurisdiction only counted if they were based on an act of the defendant of bringing its products to the forum State with the expectation that they will 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…” 79

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. 80 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.” 81 This would include

an 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. 82

The O’Connor plurality found that Cheng Shin failed to “demonstrate[] any activity by Asahi to purposefully avail itself of the California market.” 83

77 Id. at 115.
78 Id. at 109-13 (plurality opinion).
79 Id. at 109.
80 Id. at 110.
81 Id. at 112.
82 Id.
83 Id. at 112-13. 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
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.’”84 Justice Brennan concluded that the Court’s decision in *World-Wide Volkswagen* distinguished between the circumstance where a consumer 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.85

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.86

Justice Stevens also concurred in the result, but wrote separately (joined by two other Justices) to state that the fact that the exercise of jurisdiction would be unreasonable and unfair alone required reversal.87 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.88 Justice Stevens noted that “whether or not [Asahi’s] conduct rose 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.”89 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.”90 This activity was, for Justice Stevens, far more than simply placing a product in the stream of commerce.91

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84 Id. at 116 (Brennan, J., concurring in the judgment).
85 Id. at 119-20.
86 Id. at 117.
87 Id. at 121 (Stevens, J., concurring in the judgment).
88 Id. at 122.
89 Id.
90 Id.
91 Id.
IV. J. MCINTYRE MACHINERY, LTD. V. NICASTRO.

In September 2010, the Supreme Court granted certiorari in *J. McIntyre Machinery, Ltd. v. Nicastro*, 92 a case whose facts would require the Court to revisit its muddled jurisprudence regarding purposeful availment.93 *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.94

Plaintiff Robert Nicastro filed a products liability action in New Jersey state court against defendant J. McIntyre Machinery, Ltd. (J. McIntyre), a company incorporated in England and operating its principal place of business there as well.95 Nicastro injured his hand at work in New Jersey while running a metal-shearing machine that J. McIntyre had manufactured in England.96 Following defendant’s objection to the New Jersey state court’s exercise of personal jurisdiction and subsequent appeals, the Supreme Court of New Jersey held that the exercise of jurisdiction was appropriate.

Jurisdictional discovery revealed that “defendant does not have a single contact with New Jersey short of the machine in question ending up there.”97 Although one of defendant’s machines ended up in New Jersey, defendant never marketed or shipped goods to New Jersey.98 Instead, the offending machine was sold to plaintiff’s New Jersey employer by defendant’s “exclusive American distributor,” a separate company.99 The New Jersey Supreme Court noted that defendant had no “presence or minimum contacts in [New Jersey]—in any jurisprudential sense—that would justify a New Jersey court to exercise jurisdiction…”100 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 of a New Jersey court in a product liability action.”101 Defendant designed and manufactured the product to conform to United States specifications and engaged a

92 131 S.Ct. 62 (2010).
93 See, e.g., Howard Wasserman, *Clarifying Personal Jurisdiction...or Not*, http://prawfsblawgblogs.com/prawfsblawg/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).”)
94 *Nicastro*, 131 S.Ct. 2780.
95 131 S.Ct. at 2786 (plurality opinion).
96 Id.
97 131 S.Ct. at 2790.
98 Id. at 2786.
100 Id. at 61.
101 Id. at 73.
distributor to market and distribute the machines to the entire U.S. market. Thus, 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.

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 defendant’s contact with the forum state was not relevant unless such contact was the result of defendant’s purposeful availment of the forum state. 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 not appropriate for an accident that occurred in New Jersey and injured a New Jersey resident.

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, 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, all nine justices agreed that defendant’s contact with the forum state was not relevant unless such contact was the result of 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 the agreed-upon standard, the result in *Nicastro* was arguably consistent with the Court’s prior

102 Id. at 57-58.
103 Id. at 52, 78-79.
104 *Nicastro*, 131 S.Ct. at 2786-87, 2790-91 (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 days 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. *International Shoe Co. v. Washington*, 326 U. S. 310, 316 (1945).” *Goodyear*, 546 U.S. --, 131 S.Ct. at 2850.
105 546 U.S. --, 131 S.Ct. 2780.
precedent. \textsuperscript{106} Nicastro involved a single, isolated product that ended up in New Jersey. 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 that its product would be purchased and utilized in New Jersey.” \textsuperscript{107} Under the Court’s \textit{World-Wide Volkswagen} and \textit{Asahi} decisions, the New Jersey court lacked jurisdiction over defendant J. McIntyre. There was only one contact with New Jersey and, although the contact was the basis for the action against defendant, there was no purposeful availment because it was not part of a regular course of conduct or dealing. \textsuperscript{108}

The facts of the Nicastro case do not constitute purposeful availment pursuant to Justice O’Connor’s \textit{Asahi} plurality. Defendant did not target New Jersey (other than as one of the 50 United States). The sale of defendant’s product in New Jersey was between the non-party distributor and did not “come about by an action of the defendant purposefully directed toward the forum State.” \textsuperscript{109} As noted by Justice Breyer, there was “no ‘something more,’ such as special state-related design, advertising, advice, marketing, or anything else.” \textsuperscript{110}

The facts of \textit{Nicastro} also do not constitute purposeful availment pursuant to Justice Brennan’s \textit{Asahi} plurality. This was a single, isolated product that ended up in New Jersey.

\textsuperscript{106} See id. at 2791 (Breyer, J., concurring in the result) (“the outcome of this case is determined by precedents”); id. at 2794 (“I would adhere strictly to our precedents and the limited facts found by the New Jersey Supreme Court”); \textit{but see} Drobak, \textit{supra} n. 6 at @fn79 (“Perhaps the most unusual aspects of the opinions in \textit{Nicastro} is the claim by the concurrence that they are doing ‘no more than adhering to our precedents.’”). 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 Wendy Collins Perdue, \textit{Aliens, the internet and “Purposeful Availment”: A Reassessment of Fifth Amendment Limits on Personal Jurisdiction}, 98 Nw. U. L. Rev. 455 (2004).

\textsuperscript{107} \textit{Nicastro v. McIntyre Machinery America, Ltd.}, 201 N.J. 48, 987 A.2d 575 at @n.5 (2010).

\textsuperscript{108} \textit{World-Wide Volkswagen}, 444 U.S. at 297-99 (1980); \textit{but see} Mike Richards, \textit{Purposeful Availment and Commercial Exploitation}, Law & Liberty Bulletin (Nov. 16, 2011, http://www.nyujill.com/2011/11/purposeful-availment-and-commercial.html) (“Permitting New Jersey courts to exercise jurisdiction over J. McIntyre would have been entirely consistent with \textit{World-Wide Volkswagen}.”); \textit{compare} Clermont, \textit{supra} n. 13, § 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.”).

\textsuperscript{109} \textit{Asahi}, 480 U.S. at 112 (plurality opinion).

\textsuperscript{110} \textit{Nicastro}, 131 S.Ct. at 2792 (Breyer, J., concurring in the judgment).
Jersey, rather than a “regular …flow” or “regular course” of sales in New Jersey. \(^{111}\) Purposeful availment was lacking because defendant’s product was not regularly sold in the forum state through a chain of distribution. \(^{112}\)

The facts of *Niastro* also do not constitute purposeful availment pursuant to Justice Stevens’s *Asahi* concurrence. For Justice Stevens, “whether or not [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].” \(^{113}\) 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.” \(^{114}\) This activity was, for Justice Stevens, far more than simply placing a product in the stream of commerce. \(^{115}\)

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.

[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, see *Nelson v. Park Industries, Inc.*, 717 F. 2d 1120 (CA7 1983), cigarette lighters, see *Oswalt v. Scripto, Inc.*, 616 F. 2d 191 (CA5 1980), or wire-rope splices, see *Hedrick v. Daiko Shoji Co.*, 715 F. 2d 1355 (CA9 1983), the Court would presumably find the defendant amenable to suit in that State. \(^{116}\)

Justice Ginsburg acknowledged the fact that this was a single product rather than a regular course of dealing, but she argued that the cost and unique character of this single item nevertheless should justify jurisdiction despite the fact that there is only one such product in all of New Jersey. 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.

Justice Ginsburg also argued that the defendant foreign automobile manufacturer in the *World-Wide Volkswagen* case—Audi—was subject to jurisdiction and therefore defendant J. McIntyre should be subject to the New Jersey courts’ jurisdiction in *Nicastro*. \(^{117}\) Unlike J. McIntyre, however, Audi did not object to jurisdiction. \(^{118}\)

\(^{111}\) Id.
\(^{112}\) *Asahi*, 480 U.S. at 119-20 (Brennan, J., concurring in the judgment).
\(^{113}\) Id. at 122 (Stevens, J., concurring in the judgment).
\(^{114}\) Id.
\(^{115}\) Id.
\(^{116}\) *Nicastro*, 131 S.Ct. at 2803 n.15 (Ginsburg, J., dissenting).
\(^{117}\) Id. at 2803-04. Justice Ginsburg did acknowledge, however, that the Court had never “considered in any prior case the now-prevalent pattern presented here—a
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.” 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 service 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.’” Justice Breyer determined, however, that the facts of the case did not require the Court to consider changes to communications and international commerce to resolve the dispute. He therefore concluded that the outcome was determined by application of the Court’s existing precedents. In particular, 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.” And he 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 commerce, fully aware (and hoping) that such a sale will take place.”

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118 *World-Wide Volkswagen*, 444 U.S. at 288.
119 Id. at 298.
120 *Nicastro*, 131 S.Ct. at 2791 (Breyer, J., concurring in the result) (quoting *Nicastro v. McIntyre Machinery America, Ltd.*, 201 N. J. 48, 52, 987 A. 2d 575, 577 (2010)).
121 Id.
122 Id. at 2791-92.
123 Id. Professor Allan Ides argues that Justice Breyer got it wrong when he concluded that *McIntyre* fit within existing precedent. *See* Ides, *supra* n. 6 at 21-25. 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 24. 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 23 (“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.* at 24 (“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”).
Justice Breyer expressed a willingness to consider a change in personal jurisdiction law based on “relevant contemporary commercial circumstances.” But sick did not present such circumstances and the result fit within existing precedent.

VI. ALTHOUGH NICASTRO DID NOT BREAK NEW GROUND, IT DOES TELL US A SIGNIFICANT AMOUNT ABOUT 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 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 actually began his opinion by noting that Due Process is an “individual[] right.” Justice Kennedy also approved the basic International Shoe test and he reaffirmed the requirement that defendant’s contacts with the forum state must result from purposeful availment. Nothing new or controversial there.

But Justice Kennedy early on made clear that he is not satisfied with existing personal jurisdiction theory nor does he believe that personal jurisdiction is, at its core, about individual rights or liberty. Personal jurisdiction is about federalism concerns—protecting and maintaining the States’ sovereign authority. His opening discussion cited Giacco v. Pennsylvania for the proposition that the “Due Process clause protects an

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124 Nicastro, 131 S.Ct. at 2794 (Breyer, J., concurring in the result).
125 Id. at 2786-87 (plurality opinion).
126 See id. at 2787.
127 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.”); see also 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. 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 defendant 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.
individual’s right to be deprived of life, liberty or property only by the exercise of lawful power.”129 He then cited Steel Co. v. Citizens for Better Environment,130 for the proposition 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.”131

Although both cases deal with issues of sovereign power, neither Giacco nor Citizens for Better Environment is a personal jurisdiction case. Giacco involved a Pennsylvania statute authorizing a jury to impose the cost of criminal prosecution on a defendant acquitted of a misdemeanor charge. 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 defendants to protect themselves against arbitrary and discriminatory imposition of costs.132 Citizens for Better Environment involved subject matter jurisdiction, not personal jurisdiction. The Supreme Court held that plaintiffs lacked standing and the Court never mentioned or considered the Due Process Clause.133 Justice Kennedy also cites Burnham v. Superior Court,134 for the proposition that “neither statute nor judicial decree may bind strangers to the State.”135 Burnham, however, is a case in which jurisdiction was valid because defendant was effectively served with process while physically present in the forum state.

These cases tell us nothing about the application of the personal 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,136 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.’”137

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 “the personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of

129 Nicastro, 131 S.Ct. at 2786 (emphasis added).
131 Nicastro, 131 S.Ct. at 2786-87 (emphases added).
132 382 U.S. 399.
135 Id. at 608-09.
137 Id. at 472 n. 13 (quoting Insurance Corp. of Ireland v. Companies des Bauxites de Guinee, 456 U.S 694, 702-03 n.10 (1982)).
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. Insurance Corp., 456 U. S., at 702. But whether a judicial judgment is lawful depends on whether the sovereign has authority to render it.140

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.141 Furthermore, “jurisdiction is in the first instance a question of authority rather than fairness.”142

Justice Kennedy then 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 concurrence as “advocating a rule based on general notions of fairness and foreseeability.”143 This is a plain mischaracterization of Justice Brennan’s concurrence in Asahi.144 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.145 He did not need to write separately about fairness.

Justice Kennedy explicitly rejected Justice Brennan’s Asahi concurrence—at least as he had misrepresented it—because it “is inconsistent with the premises of lawful judicial

138 456 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.
139 Borchers, supra n. 6 at 1263.
140 Nicastro 131 S.Ct. at 2789 (plurality opinion).
141 Id. at 2788; compare Perdue, supra n. 105 at 458 (“The view that personal jurisdiction involves an allocation of sovereign authority is also consistent with how personal jurisdiction is approached internationally.”).
142 Nicastro, 131 S.Ct. at 2789.
143 Id.; see also id. at 2788 (“the opinion made foreseeability the touchstone of jurisdiction.”).
144 In earlier opinions, Justice Brennan had advocated an approach under which all of the International Shoe factors, including defendant’s contacts with the forum, were assessed “under a general rubric of fairness.” Freer, supra n. 27 at 2.
145 Asahi, 480 U.S. at 116, 121 (Brennan, J., concurring in the judgment).
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.”

Justice Kennedy approved the part of Justice O’Connor’s *Asahi* plurality opinion regarding purposeful availment that focuses on whether defendant’s activities demonstrate “an intent or purpose to serve the market in the forum State.”

The 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.

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. 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.” For Justice Kennedy, the determination of “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. 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 an intent to invoke or benefit from the protection of its laws.”

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146 *Nicastro*, 131 S.Ct. at 2789; *see also* id. at 2790 (noting the “undesirable consequences of Justice Brennan’s approach”).
147 Id. at 2790 (“the authority to subject a defendant to judgment depends on purposeful availment, consistent with Justice O’Connor’s opinion in *Asahi*”); *see also* id. (“Respondent has not established that J. McIntyre engaged in conduct purposefully directed at New Jersey.”).
148 Id. at 2788.
149 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.”).
150 Id. at 2789; *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 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.”).
151 Id. at 2788; *see also* id. (“submission” to sovereign authority occurs “through contact with and activity directed at a sovereign”)
152 Id. at 2791.

Justice Kennedy did not offer any specifics on what evidence would satisfy his requirement that plaintiff demonstrate that defendant’s activities manifest an intention to submit to the power of the forum State. We do know that the issue will only arise when defendant objects that the forum State lacks jurisdiction and thus 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. Plaintiff therefore must establish defendant’s implied, but intentional, submission to the forum State’s authority through exposition of “defendant’s activities” in or affecting the forum state.

This sounds a lot like the International Shoe test, with its focus on defendant’s contacts with the forum State. But Justice Kennedy added a new, heightened requirement to proof of purposeful availment before one can consider the “fairness” of the exercise of personal jurisdiction. Purposeful availment exists where the defendant, by its actions within the forum or directed toward the forum, “invok[es] the benefits and protections of” the forum States’ laws. 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.” Likewise, where 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.

Thus, Justice Kennedy would raise the bar for purposeful availment. For Justice Kennedy, 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.” Instead, defendant’s activities must also manifest an intent to submit to sovereign authority. And although Justice Kennedy focused on defendant’s intentions, he would not permit courts to consider defendant’s expectations when determining defendant’s intention.

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153 Id. at 2787 (citing International Shoe for the proposition that “[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”).
154 Id. (“Freeform notions of fundamental fairness divorced from traditional practice cannot transform a judgment rendered in the absence of authority into law.”).
155 Id. (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).
156 Id.
157 Id. at 2791.
158 Burger King, 471 U.S. at 475 (internal citations and quotations omitted).
159 Nicastro, 131 S.Ct. at 2788.
160 Id. at 2789 (“it is the defendant’s actions, not his expectations, that empower a State’s courts to subject him to judgment”).
If Justice Kennedy’s analysis were adopted it would essentially grant 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.

Justice Kennedy sought to raise the bar for purposeful availment, thereby minimizing the number of cases in which the state courts will have personal jurisdiction. But he also would do away with 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.’”161 Thus, if there is purposeful availment because 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 was purposeful availment by requiring plaintiff to prove that defendant intended to submit to the power of the forum state. Because he would raise the bar so high for establishing personal jurisdiction, he can safely eliminate the fairness inquiry whether jurisdiction would offend traditional notions of fair play and substantial justice by making it redundant.

Finally, in a fitting bit of irony, Justice Kennedy noted that the Court should fashion clear jurisdictional rules “whenever possible” to help avoid the “significant expenses that are incurred just on the preliminary issue of jurisdiction.”162 Yet he also asserted that the development and clarification of the principle of purposeful availment will occur case-by-case “in common-law fashion.”163

3. Back to the Future for Justice Kennedy?

As noted by Justice Ginsburg in her dissent, several of the concepts offered by Justice Kennedy have been considered and rejected by the Supreme Court in its earlier personal jurisdiction jurisprudence.164 In attempting to identify the origins and constitutional foundation of personal jurisdiction, the Court and commentators have debated whether

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161 Id. at 2787.
162 Id. at 2790.
163 Id.; see also id. at 2789 (“personal jurisdiction requires a forum-by–forum, or sovereign-by-sovereign, analysis”).
164 Id. at 2798-99 (Ginsburg, J., dissenting); see also Borchers, supra n. 6 at 1246 (stating that Justice Kennedy's "plurality opinion attempted to roll back the clock by a century or more and ground personal jurisdiction in a dubious sovereignty theory that the Court had apparently rejected several times before").
the primary concern of personal jurisdiction is protection of state sovereignty and federalism concerns or, alternatively, the protection of individual liberty.\textsuperscript{165}

But the Supreme Court has previously concluded that the restrictions on the ability of state courts to exercise jurisdiction over non-residents is “ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns.”\textsuperscript{166}

Likewise, Justice Kennedy posits that the crucial inquiry in a specific jurisdiction case is “whether the defendant’s activities manifest an intention to submit to the power of a sovereign.”\textsuperscript{167} Justice Kennedy acknowledges that specific jurisdiction cases arise “despite [defendant] not having consented to the exercise of jurisdiction.”\textsuperscript{168} Thus, this inquiry sounds an awful lot like implied consent.\textsuperscript{169} Justice Ginsburg points out that the Supreme Court long ago rejected the concept of implied consent as the basis for personal jurisdiction.\textsuperscript{170}

Finally, Justice Kennedy’s focus on submission to sovereign authority raises the likelihood that the Court would be forced to revisit its jurisprudence regarding choice of


\textsuperscript{166} \textit{Compagnie Des Bauxites de Guinee}, 456 U.S. 694; see also \textit{Burger King}, 471 U.S. at 471 (“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 \textit{Companie des Bauxites de Guinee}, 456 U.S at 702-03 n.10; Shaffer v. Heitner, 433 U.S. 186, 204, and n. 20 (1977) (“the mutually exclusive sovereignty of the States [is not] the central concern of the inquiry into personal jurisdiction”)). \textit{Compare} Perdue, \textit{supra} n. 107 at 456 (“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....”).

\textsuperscript{167} \textit{Nicastro}, 131 S.Ct. at 2788 (plurality opinion); see also id. (“submission” to sovereign authority occurs “through contact with and activity directed at a sovereign”).

\textsuperscript{168} \textit{Nicastro}, 131 S.Ct. 2785.

\textsuperscript{169} \textit{Nicastro}, 131 S.Ct. at 2799 n.5 (Ginsburg, J., dissenting); Borchers, \textit{supra} n. 6 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.”); \textit{compare} Transgrud, \textit{supra} n. 165 at 890 (arguing that the personal jurisdiction inquiry should focus on political "consent").

\textsuperscript{170} \textit{Nicastro}, 131 S.Ct. at 2798-99 (Ginsburg, J., dissenting).
law issues. 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.” A sovereign’s legislative authority to regulate the conduct of a non-resident is surely as important to the defendant as its authority to exercise jurisdiction over that non-resident defendant. And the Court’s decisions currently provide that a state may apply its law even though it lacks personal jurisdiction, and vice versa.


Justice Ginsburg’s dissent reaffirms the International Shoe test and the Court’s prior specific jurisdiction doctrine. She urges that application of International Shoe and its progeny should “unequivocally” lead to a finding of jurisdiction. Yet she

171 See Stewart E. Sterk, Sovereignty, Liberty and Personal Jurisdiction: The J. McIntyre Muddle (SSRN, 2011); see also Borchers, supra n. 6 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, 1131 (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.”).

172 Nicastro, 131 S.Ct. at 2786-87 (plurality opinion) (emphasis added).


175 Nicastro, 131 S.Ct. at 2794-95 (Ginsburg, J., dissenting); 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.”); see also Goodyear, 131 S.Ct. 2850-51, 2853-54 (Justice Ginsburg writing for a unanimous court and reaffirming that the International Shoe test is appropriate for specific jurisdiction cases).

176 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-
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 everywhere possible in the United States. Thus, Justice Ginsburg’s dissent is premised upon a new concept—where defendant seeks to develop a market for its products everywhere in the United States, that activity constitutes purposeful availment of each of the individual States where the manufacturer’s product is sold.

Justice Ginsburg highlighted the facts disclosed during discovery that confirmed that defendant J. McIntyre hired McIntyre America as its exclusive U.S. distributor with the express purpose of selling as many of defendant’s products as possible “anywhere in” and “throughout” the United States. She 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?

Justice Ginsburg concluded that 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 appropriate.

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.

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177 Id.

178 Id. at 2796-97 (Ginsburg, J., dissenting).

179 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 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 state-side. 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.

180 Id. at 2801-02 & App.

181 Id. at 2801.
Justice Ginsburg pointedly attacked Justice Kennedy’s view of personal jurisdiction theory and precedent. She criticized Justice Kennedy’s conclusion that defendant’s efforts to develop the U.S. as a nationwide market is not even relevant to the jurisdictional inquiry. She also asserted that among “a few points on which there should be no genuine debate” is the recognition that “the constitutional limits on a state court’s adjudicatory authority derive from considerations of due process, not state sovereignty.” Justice Ginsburg then took Justice Kennedy to task over his “notion that consent is the animating concept” of personal jurisdiction because this notion is contrary to the Court’s prior precedents. “[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.”

C. Justice Breyer’s View Of Purposeful Availment.

1. All Three Asahi Approaches Seem Acceptable—And Plaintiff Failed to Satisfy Any One Of Them.

As noted earlier, Justice Breyer accepts the International Shoe test and his concurrence stays within the bounds of the Court’s prior personal jurisdiction decisions. 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.” For Justice Breyer, the Constitution demands both minimum contacts and purposeful availment, “each of which rests upon a particular notion of defendant-focused fairness.”

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.”

182 Id.
183 Id. at 2797.
184 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.”)
185 Id. at 2798-99.
186 Id. at 2799.
187 See supra Part _.
188 Nicastro, 131 S.Ct. at 2793 (Breyer, J., concurring in the result).
189 Id.
190 Id.
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.” He implicitly rejects Kennedy’s consent to sovereign authority approach by noting that the personal jurisdiction inquiry focuses on fairness to the defendant.

Justice Breyer also explicitly rejects the approach to purposeful availment taken by the New Jersey Supreme Court and urged by plaintiff in *Nicastro*.

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 in any of the fifty states.”

Awareness or foreseeability is not enough.

Although he concurs in the result with Justice Kennedy, nowhere does Justice Breyer reject the reasoning of Justice Ginsburg’s dissent. He does agree with Justice Ginsburg that personal jurisdiction is premised upon considerations of fairness to the defendant.

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191 Id. at 2794.
192 Id. at 2793 ("stating that the “constitutional demand for ‘minimum contacts’ and ‘purposeful availment’ each [...] rest upon a particular notion of defendant-focused fairness.”); id. (refusing 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 the defendant’s contacts with that forum, to subject the defendant to suit there"); id. at 2793-94 (concern for “basic fairness” and whether it would be “fundamentally unfair” to subject defendant to jurisdiction).
193 Id. at 2793.
194 Id. (quoting *Nicastro v. McIntyre Machinery America, Ltd.*, 201 N.J. 48, 76-77, 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.
195 Id. (“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.”).
196 Id. at 2793 (whether “it is fair...to subject defendant to suit there"); id. (the “constitutional demand for ‘minimum contacts’ and ‘purposeful availment’ [...] each ... rest upon a particular notion of defendant-focused fairness"); id. at 2793-94 (concern for "basic fairness of an absolute rule"); id. at 2794 ("fundamentally unfair").
He also indicates a willingness to consider in a future case the contemporary commercial circumstances that were considered in Justice Ginsburg’s dissent. But he refused to consider them in *Nicastro* because plaintiff bears the burden of establishing jurisdiction and the plaintiff in *Nicastro* failed to develop such facts in the record.

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

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

Although Justice Breyer found that the outcome of *Nicastro* was determined by the Court’s existing precedent, he expressed an interest in revisiting personal jurisdiction doctrine soon with a case with a fully developed factual record regarding “contemporary commercial circumstances.”

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.

In particular, Justice Breyer is concerned about, and interested in, manufacturers who advertise, market or sell products over the internet or through an internet-based retailer like Amazon.com. He also is concerned about the effect on foreign policy of exercising personal jurisdiction over foreign manufacturers, especially those who distribute their products primarily through an internet retailer such as Amazon.com.

197 Id. at 2791.
198 Id. at 2792-92.
199 Id. at 2792. 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 is product may end up in the forum State. Id.
200 Id. at 2794.
201 Id. at 2792-93.
202 Id. at 2793.
203 Oral argument in Goodyear at 21:12-18 (statement of Breyer, J.) (question posed by Justice Breyer to Benjamin J. Horwich, Assistant to the Solicitor General, “So..., you’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
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 struggled with the relevant difference, if any, that should be afforded treatment of a foreign manufacturer who simply makes a component part for a product that ends up in the United States and the treatment afforded an end product manufacturer.\(^{204}\) Justices Breyer, Scalia, Kagan and Ginsburg also expressed concern with whether the United States is in line with other countries with respect to the requirements for recognition and enforcement of foreign judgments against U.S. companies as compared to the requirement of purposeful availment for a foreign manufacturer who is sued in the U.S.\(^{205}\)

An expansive view of personal jurisdiction might lead to foreign companies refusing to do business in the United States. A restrictive view of personal jurisdiction might lead to outsourcing of business by U.S. companies to foreign subsidiaries who will then be immune to litigation and judgment in U.S. state courts even where their products are manufactured for U.S. consumers who are injured by the products.

VII. PURPOSEFUL AVAILMENT REQUIRES CONSIDERATION OF 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 non-resident defendants. Identifying the holding of *Nicastro* requires lower courts to determine “that position taken by the [Justices] who concurred in the judgment[] on the narrowest grounds.”\(^{206}\) Based on Justice Breyer’s concurrence,

\(^{204}\) Oral argument for *Nicastro* at 46:24-51:21.

\(^{205}\) Oral argument for *Nicastro* at 33:12-36:20; see Perdue, *supra* n. 105 at 461-465 (most countries do not require proof of purposeful availment).

\(^{206}\) Marks v. United States, 430 U.S. 188, 192-93 (1977) ("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
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 defendant’s activities must manifest an intention to submit to sovereign authority.  

- *International Shoe* provides the relevant test for specific jurisdiction and it requires minimum contacts for which there is purposeful availment.

- If plaintiff can establish minimum contacts and purposeful availment, the court must determine whether it would nonetheless be unfair to subject defendant to the jurisdiction of the forum state’s courts.

- A majority of the Court continues to reject the *pure* “Stream of Commerce” approach—there is no jurisdiction over defendant manufacturer who sells its product to a consumer in State A who then takes the product to State B where it causes injury to the consumer, even if the manufacturer is “aware” or “foresees” that the product may enter State B.

Although the three opinions in Nicastro reveal agreement on several principles—including the agreement 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 find a non-resident defendant subject 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 of the Court in World-Wide Volkswagen:


207 See supra Part ___.

208 See supra Part ___.

209 Nicastro, 131 S.Ct. at 2794 (Breyer, J., concurring in the judgment); id. at 2800-01, 2804 (Ginsburg, J., dissenting).

210 Id. at 2788 (plurality opinion); id. at 2792 (Breyer, J., concurring in the judgment).
When a corporation purposefully avails itself of the privilege of conducting activities within the forum state, *Hanson v. Denckla*, 357 U.S. at 357[211], 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."

Justice Ginsburg noted in her opinion that J. McIntyre had, in fact, purchased such product liability insurance.212 She cited scholarship indicating that such insurance is both readily available and relatively cheap.213 Likewise, a manufacturer can easily pass the costs on to its consumers by raising prices. Justice Breyer rightly pointed out, however, that the existence of insurance and the ability to raise prices may not be feasible for small-scale manufacturers who do not produce enough products to reasonably 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.” *World-Wide Volkswagen*, supra, at 297. 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.214

Thus, the availability of insurance and the ability to spread risk through targeted price increases may not be feasible for certain defendants and therefore it would be inappropriate to hold these defendants subject to personal jurisdiction in a far-flung forum. (Justice Breyer seems 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.”)

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 non-resident economic actor

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211 *World-Wide Volkswagen*, 444 U.S. at 297; see also *Nicastro*, 131 S.Ct. at 2794 (Breyer, J., concurring in the judgment); *Asahi*, 480 U.S. at 119 (Brennan, J., concurring in the judgment) (quoting *World-Wide Volkswagen*).

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

213 Id. at 2799 (Ginsburg, J., dissenting); see also Drobak, supra n.6 at @fn. 69 ("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.").

214 *Nicastro*, 131 S.Ct. at 2794 (Breyer, J., concurring in the judgment).
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 that state. This analysis is consistent with the
notion that personal jurisdiction is an individual interest that is protected by the Due
Process Clause.215 Past cases make clear that this interest may be waived or consented to
both before litigation arises and after and also may be forfeited by a careless defendant
who fails to diligently assert this right.216 If the interest is truly an individual liberty
interest then it must be applied in a manner such that it is reasonably feasible for non-
residents to 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
“gives 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.”217

This principle explains the Court’s prior decisions.

- In World-Wide Volkswagen, the New York dealership sold cars in New York.
  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”—placed in the stream of commerce.
  Thus, the Court rejects the pure stream of commerce theory of personal
  jurisdiction.

- In Hanson v. Denckla218 the Delaware corporate defendant established a trust in
  1935 for Mrs. Donner, a Pennsylvania resident, and then acted as trustee. It was

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215 See supra Part __.
216 See Nat'l Equip. Rental, Ltd. V. Szukhent, 375 U.S. 311 (1964); see also
    Compaignie Des Bauxites de Guinee, 456 U.S. at 704 (“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.”); Scott Dodson, Hybridizing
    Jurisdiction, 99 Cal. L. Rev. 1439, 1457-58 (2011) (“In its modern conception,
    personal ‘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.”).
218 357 U.S. 235 (1958)
not reasonably feasible for defendant to prevent Mrs. Donner from moving to Florida. Therefore defendant did not purposefully avail itself of Florida.\textsuperscript{219}

- In McGee, the Court found purposeful availment and personal jurisdiction based on a single contact with the forum state.\textsuperscript{220} Defendant mailed a reinsurance certificate to an individual in California and entered into a policy of insurance with the California resident. 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, defendant Asahi manufactured tire valve assemblies in Japan and shipped them to Taiwan, where they were sold to Cheng Shin. Cheng Shin purchased tire valve assemblies from several other manufacturers as well as Asahi. Cheng Shin incorporated the various tire valve assemblies in its finished tire tubes, which Cheng Shin sold throughout the world. 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 sever its connection with California. 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.’”\textsuperscript{221} It was an “easy” case for the Court to quickly decide that California did not have specific jurisdiction over Asahi. 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 California, there can be no purposeful availment.

The one case that does not fit the pattern as easily is Nicastro. In Nicastro, defendant was an end product manufacturer who sold its product to a distributor who then resold the product in New Jersey. The product injured a New Jersey resident in New Jersey. As an end product manufacturer, defendant had significantly more control over the point of sale of its product than a component parts manufacturer. This ability to control its destiny includes the ability to prevent the sale of its product in New Jersey, by restricting the

\textsuperscript{219} Today, 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. At the time that the Hanson trust was drafted in 1935, however, forum selection clauses were disfavored and presumptively unenforceable. See 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, 595-599 (2006).


\textsuperscript{221} Nicastro, 131 S.Ct. at 2803 (Ginsburg, J., dissenting) (quoting A. Uberti, 181 Ariz., at 572, 892 P. 2d, at 1361).
approved sales regions of its sole authorized distributor, and therefore supports a finding of purposeful availment.222

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.”223 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.”224 When Justice Breyer and Justice Alito confront such a case, they will conclude that an end product manufacturer who seeks to exploit all 50 of the United States as a market has purposefully availed itself of each state in which there is a sale of a product that causes injury to 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.

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, provision of a service or other conduct that might give rise to liability. By referring to the 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. Where a manufacturer hires a distributor who then distributes the product to a retailer who then 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.225 If the Indiana manufacturer wishes to focus on manufacturing (rather than

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222 Justice Breyer noted that defendant in the Nicastro case 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 in the judgment).
223 Id. at 2794.
224 Id. at 2791.
direct sales), it might hire a distributor. The Indiana manufacturer can easily and effectively avoid California by requiring that its distributor(s) agree, as part of the distribution agreement, not to distribute the product to consumers or retailers in California. Unlike litigation where the plaintiff resides, “litigation 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.”

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 unsavory states. 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 activity in California, there is presumptively purposeful availment of California for a lawsuit that arises from that conduct.

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. 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.

What steps could the New York dealer have taken to prevent the product from reaching Oklahoma?

- Go out of business altogether
- Get out of the business of selling cars
- Refuse to sell to Oklahoma residents
- Require each purchaser to contractually agree 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.

Pennsylvania, the solution would have been simple—it could have chosen not to sell its services to Pennsylvania residents.”).


227 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 place where the product was sold and caused injury” where a “local plaintiff [was] injured by the activity of a manufacturer seeking to exploit amultistate 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.
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”\(^{228}\) 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 product, even if the product is inherently mobile. Again, avoiding purposeful availment of a distant forum cannot require an individual or organization to simply avoid commerce altogether.

\(^{228}\) *Burger King*, 471 U.S. at 475 (internal citations and quotations omitted).
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 from Oklahoma, are you?”

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. 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 disfavored state. 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.

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229 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 this does not address or protect against injuries to third parties (non-purchaser passengers, for example) that occur in Oklahoma.

230 See infra Part VIII.E.

231 See infra Part VIII.E.
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.232

4. Require the purchaser to contractually agree that it will not take the product to Oklahoma, it will not permit the product to be taken to Oklahoma by a third party and it will not resell the product to anyone.

In order to avoid contact with Oklahoma, the New York dealership could require each purchaser to execute a purchase agreement that sought to prevent the product from reaching Oklahoma. 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 not be enforceable. In general, contractual provisions that eliminate or restrict the post-sale use or resale of a product or thing are void as contrary to public policy favoring the free movement of property in commerce.233 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 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.”234

232 See U.S. Const. Art. I Sec. 8 (interstate commerce); U.S. Const. Art. IV Sec. 2 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”).

233 See Zechariah Chafee Jr., Equitable Servitudes on Chattels, 41 Harv. L. Rev. 945, 981 (1928) (restraint on alienation of property is disfavored and generally void because it restricts the free movement of property in commerce); John D. Park & Sons, Co. v. Hartman, 153 F. 24, 39 (6th Cir. 1907) (such restrictions “offend against the ordinary and usual freedom of traffic in chattels”); see also Restatement (Second) of Property (Donative Transfers) §§ 3-4 (1981).

234 Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 404 (1911). Furthermore, these contractual provisions would be ineffective absent court action
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, such 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.\(^\text{235}\) The end product manufacturer then controls the system of distribution and the location of the initial sale for the end product. As discussed above\(^\text{236}\) and below,\(^\text{237}\) 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.\(^\text{238}\) Thus, absent some additional conduct 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

\(^\text{235}\) \(\text{See Gray v. American Radiator & Standard Sanitary Corp., 176 N.E.2d 761 (Ill. 1961).}
\(^\text{236}\) \(\text{See supra Part VIII.A.}
\(^\text{237}\) \(\text{See infra Part VIII.D.}
\(^\text{238}\) \(\text{A component part manufacturer purposefully avails itself of a particular state—say Oklahoma—where the component part manufacturer sells its component part directly to consumers in Oklahoma or to distributors or retailers who then make the product available to the public in Oklahoma. A component part manufacturer also will have purposefully availed itself of Oklahoma if it sells its component part to an end product manufacturer who is located in Oklahoma.} \)
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. Justice O’Connor’s opinion and Justice Stevens’s opinions both required some additional facts to support a finding of purposeful availment.239

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 Justice Stevens’s and Justice 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. 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 a dangerous and expensive motorcycle sold in California.

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 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 10 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

239 Asahi, 480 U.S. at 112 (plurality opinion) (finding that there was no “additional conduct of the defendant [indicating] an intent or purpose to serve the market in the forum state”); id. at 122 (Stevens, J., concurring in the result) (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 (id. at 117), but he would have found purposeful availment based on a pure stream of commerce theory. See World-Wide Volkswagen, 444 U.S. at 307 (Brennan, J., dissenting).
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 yes 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. An injured Oklahoma resident can sue a manufacturer of a product that is popular because it is well made, but an injured Oklahoma resident cannot sue a manufacturer of a product that is less popular because it is junky? The purposeful availment requirement should not depend upon such flawed reasoning.

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

Intel’s largest customers are end product computer makers Hewlett-Packard and Dell. 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 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 there way to Oklahoma, just like the automobile in *World-Wide Volkswagen.*

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240 As noted by Justice Ginsburg in her *Nicastro* dissent, there was no purposeful availment in that case based on sale of a single $24,900 product, but the Court presumably would find purposeful availment based on 24,900 sales of a $1 product. See *Nicastro*, 131 S.Ct. at 2803 n.15 (Ginsburg., J., dissenting).
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 throughout the world.243

Intel proudly proclaims that “[t]he Intel brand is consistently ranked as one of the most recognizable and valuable brands in the world.”244

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.245

If Intel chooses to market and promote its brand to Oklahoma consumers through its global or nation-wide 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 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.

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244 “Investor Information” available at http://files.shareholder.com/downloads/INTC/1649925816x0x452325/0866cb99-211d-4788-8f43-2768ae774a3e/Intel_2010_Annual_Report_and_Form_10-K.pdf
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. The end product manufacturer also can require the component part manufacturer to defend and indemnify them as part of their purchase agreement and they can demand that the component part manufacturer make safer and better component parts (or stop purchasing them altogether) if the cost of business become 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. 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. "The component maker, in contrast, has little control over where the product ends up." 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. If the end product manufacturer employs one or more distributors or sells the product to a retailer, it is a simple matter 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. On the other hand, where the location of an 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

246 Asahi, 480 U.S. at 110 (citing World-Wide Volkswagen).
247 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.
248 Asahi, 480 U.S. at 108, 113, 121.
249 Freer, supra n. 17 at 29.
250 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.
overcome the presumption, 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?  

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, 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.

Unlike sales by brick and mortar retailers that occur at the site of their store that has a physical presence at a particular location 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 availment of disfavored states beyond simply the word of the purchaser. The

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251 Nicastro, 131 S.Ct. at 2793 (Breyer, J., dissenting).
252 Zippo Manufacturing Co. v. Zippo Dot Com, Inc., 952 F.Supp. 1119, 1126-27 (W.D. Pa. 1997) (“If 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.”).
254 See e.g., http://www.bellepente.com/2011-07_Order_Form.pdf; see also http://www.wineinstitute.org/initiatives/stateshippinglaws (list of states where direct shipping is prohibited).
advent of geolocation technology allows the operators of “internet sites to automatically and accurately identify a user’s geographic location.”255 Thus, internet sales would allow a manufacturer to effectively implement policies to avoid a disfavored forum.256

Internet poker sites, for example, have used geolocation technology to prevent users located in disfavored forums from accessing their services.257 In one lawsuit in Kentucky, the judge ordered the seizure of the domain names of 141 internet gambling sites, but indicated that the seizure would be rescinded once those sites established that they had installed a “geographical block[] which has the capability to block and deny access to their on-line gambling sites through the use of any of the Defendants 141 Domain Names from any users or consumers within the territorial boundaries of the Commonwealth” of Kentucky.258

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 retailers target geographic markets—for example, by use of popup advertisements—where their products will be particularly well-received.259

255 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); 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 (“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.”); Dan Jerker B. Svantesson, Geolocation Technologies and Other Means of Placing Borders on the ‘Borderless’ Internet, 23 J. Marshall J. Computer & Info. L. 101, 109, 110 (2004) (internet users’ location revealed by their IP address).

256 King, supra n.255 at 63 (“This capability—unavailable jus 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.”).

257 See Kevin F. King, Geolocation and Federalism on the Internet, Cutting Internet Gambling’s Gordian Knot, 11 Colum. Sci. & Tech. L. Rev. 41, 60 n. 101 (2010); see also http://news.bluffmagazine.com/pokerstars-blocks-washington-residents-from-playing-online-15911/ (Internet poker site blocks residents of, and visitors to, State of Washington).


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.260

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.261


Ginsburg’s view that marketing to the entire United States constitutes purposeful availment of each state where the product is sold was accepted by 3 members of the Court and may be accepted by 2 additional justices.262 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 circumstances” and the “modern day consequences” of “changes in commerce and communication.”263 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 presumptively purposeful availment when it was reasonably feasible for a non-resident defendant to prevent contacts with a particular state but the defendant chose not to do so. It also will avoid absurd and unfair results. Consider the following scenarios.

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active target the user’s jurisdiction or...[make a choice to] refrain from interacting with users located in particular places.”

260 Spencer, supra n. 255 at 75-76.
261 Reidenberg, supra n. 259 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.”).
262 See supra Part ___.
263 Nicastro, 131 S.Ct. at 2791, 2794 (Breyer, J., concurring in the judgment).
Scenario 1: 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 New Jersey-based 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 defendant targeted potential New Jersey customers.264

Scenario 2: 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 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 New Jersey-based worker for the New Jersey business in New Jersey.

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

Scenario 3: A U.K. manufacturer hires a U.S. distributor and asks the distributor to distribute the product in 49 states (including New Jersey) and the District of Columbia. The U.K. manufacturer targets businesses in every state except New

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264 See Nicastro, 131 S.Ct. at 2788 (plurality opinion) (“The defendant’s transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum”); id. at 2789-90 (“foreign corporations will often target or concentrate on particular states, subjecting them to specific jurisdiction in those forums”); id. at 2792 (Breyer, J., concurring in the judgment) (“Here, the relevant facts ... 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, advice, 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 2800 (Ginsburg, J., dissenting) (“On what measure of reason and fairness can it be considered undue to require McIntyre UK to defend in New Jersey as an incident of its efforts to develop a market for its industrial machines anywhere and everywhere in the United States?”); id. at 2801 (“How could McIntyre UK not have intended, by its actions targeting a national market, to sell its products in the fourth largest destination for imports among all States of the United States and the largest scrap metal market?”).
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 New Jersey-based worker for the New Jersey business in New Jersey.

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

Scenario 4—J. McIntyre Machinery, Ltd. v. Nicastro: A U.K. manufacturer hired a U.S. company to act as its “exclusive American distributor” to distribute its product “throughout the United States.” The U.K. Manufacturer did not instruct its distributor to avoid particular States. Instead, 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.”

The U.K. manufacturer marketed its product in the United States by, among other things, attending 16 years worth of annual trade shows held in New Orleans, Orlando, San Antonio, and San Francisco. At the trade shows, the U.K. Manufacturer exhibited its products, hoping to reach “anyone interested in the machine in the United States.” 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 New Jersey-based worker for the New Jersey business in New Jersey.

Here, six justices determined that defendant’s actions did not constitute purposeful availment. As Justice Kennedy noted, “[t]hese facts may reveal an intent to serve the U.S. market, but they do not show that J. McIntyre availed itself of the New Jersey market.” This is absurd because it is contrary to reason to conclude that a manufacturer who seeks to sell its product nationwide (e.g., in every state) has not purposefully availed itself of any state. But even aside from the flawed logic of this

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266 399 N.J. Super., at 548, 945 A.2d, at 97.
267 Id. at App. 161a.
268 Id. at App. 114a-115a.
269 Id. at App. 114a-115a.
271 Nicastro, 131 S.Ct. at 2790 (plurality opinion).
272 See Mike Richards, Purposeful Availment and Commercial Exploitation, Law & Liberty Bulletin (Nov. 16, 2011, http://www.nyujll.com/2011/11/purposeful-availment-and-commercial.html) (“Under this rule, a defendant who reaps the benefits of a national market is subject to jurisdiction [sic] only a single market; whereas a defendant that asked its distributor to focus on sales in, say, a dozen states would be subject to jurisdiction in all of them.”); see also Drobak, supra n.6 at
reasoning, it would have been a simple matter (and entirely effective) 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. Make a contractual agreement with the distributor that the distributor will not sell to New Jersey. Absent such an agreement, refuse to engage the distributor. Done. No sales in New Jersey.

IX. CONCLUSION

Justice Breyer opened his Nicastro opinion by acknowledging “that there have been many recent changes in commerce and communication…which are not anticipated by [the Court’s] precedents.”273 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.274 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.275

The point here is not that the court should modify its personal jurisdiction doctrine to expand the exercise of jurisdiction over non-residents. 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. McIntyre U.K. looked at the U.S. as a single market. If McIntyre U.K. wanted to avoid New Jersey, it could have done so easily and effectively. McIntyre U.K. chose to accept the risk of causing their product to be sold in New Jersey. That is purposeful availment. The Supreme Court’s opinion in Nicastro should be short-lived. It is inconsistent with personal jurisdiction doctrine and the reasoning behind the purposeful availment requirement.

@fn.67 ("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.").

273 Nicastro, 131 S.Ct. at 2791 (Breyer, J., concurring in the judgment).
275 World-Wide Volkswagen, 444 U.S. at 292-93; see also Hanson v. Denckla, 357 U.S. 235, 250-51 (1958) ("As technological progress has increased the flow of commerce between the States, the need for jurisdiction has undergone a similar increase."); Burger King, 471 U.S. at 476 ("it 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").
On the other hand, component part manufacturers generally lack the ability to control where their component part 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 then end up in the hands of consumers in most or all states. That is not purposeful availment because the component part manufacturer cannot “structure its primary conduct” so as to avoid purposeful availment and amenability to a lawsuit in disfavored forums.276

Component part manufacturers will have extra protection from a finding of purposeful availment. 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.277 End product manufacturers can respond by limiting the states where their products are sold. States might then compete to attract end product manufacturers and their products’ 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.”278 End product manufacturers also could expand the range of states where they make their product available by charging a greater price in states where laws are not as favorable.279

And, of course, a finding of purposeful availment does not mean there is necessarily personal jurisdiction over a non-resident defendant. Justice Breyer will draw comfort from the fact that a defendant can still argue it would be unfair to exercise jurisdiction despite defendant’s purposeful availment of the forum state.


277 Daniel Klerman, Personal Jurisdiction and Products Liability: An Economic Analysis, (ssrn January 17, 2012) at 35 (“a rule that allows the plaintiff to sue where she purchased the product is likely to lead to the best results.”); see also id. at 33-34 (“litigation 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.”)

278 Id. at 2.

279 Id. at 2-3.