Personal Jurisdiction and the Stream of Commerce

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Abstract
This article evaluates the stream of commerce theory of personal jurisdiction in light of existing precedent and the constitutional imperative of due process. Part II briefly describes the factual background of Asahi and the various opinions rendered in the case. Part III outlines the development of jurisdictional doctrine since International Shoe, emphasizing the meaning of "purposeful availment" and its fluid role in the due process equation governing state court jurisdiction. Part IV then traces the evolution of the stream of commerce theory since International Shoe. Part V examines and rejects criticisms of the stream of commerce theory, and concludes that under any reasonable interpretation of the due process parameters on jurisdiction, the stream of commerce theory as it is ordinarily used - as a justification for specific jurisdiction - ought to survive constitutional scrutiny. Therefore, any defendant who knows or should know that a product he markets will be used and may cause injury in a foreign jurisdiction should be amenable, as a constitutional matter, to suit there in a cause of action related to the product. To the extent that the plaintiffs chosen forum is truly inconvenient one, the doctrine of forum non conveniens is available to relieve the defendant of any onerous litigation burdens.

Keywords
minimum contacts, personal jurisdiction, civil procedure, stream of commerce, Asahi

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Personal Jurisdiction and the Stream of Commerce

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I. Introduction

Ever since the "minimum contacts" analysis of International Shoe Co. v. Washington1 supplanted the pure territorial theory of personal jurisdiction embodied in Pennoyer v. Neff,2 the Supreme Court’s jurisdictional decisions have been marked by inconsistencies and theoretical vagaries. For example, the Court has alternatively emphasized and undermined the role of state sovereignty in the due process calculus of personal jurisdiction;3 wavered in the importance it has attached to the concept of "purposeful availment" of the benefits of a particular forum state’s laws;4 and sought unsuccess-

1. 326 U.S. 310 (1945).
2. 95 U.S. 714 (1878).
3. Compare, e.g., World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980) [hereinafter World-Wide Volkswagen] (due process clause "acts to ensure that the States through their courts do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system") and Hanson v. Denckla, 357 U.S. 235, 251 (1958) [hereinafter Hanson] (due process limitations on state court exercise of personal jurisdiction "are a consequence of territorial limitations on the power of the respective States") with Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n.10 (1982) ("It is true that we have stated that the requirement of personal jurisdiction, as applied to state courts, reflects an element of federalism and the character of state sovereignty vis-a-vis other States . . . the restriction on state power described in World-Wide Volkswagen Corp., however, must be seen ultimately as a function of the individual liberty interest preserved by the Due Process Clause.") and Phillips Petroleum Corp. v. Shutts, 472 U.S. 797, 807 (1985) (due process limitations of personal jurisdiction "represent[] a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.").


4. See, e.g., Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985) [hereinafter Burger King] (treating purposeful availment as a means to allocate the burden of persuasion on the question of whether a court’s assertion of jurisdiction would be fair); World-Wide Volkswagen, (treating purposeful availment as a means to define "contacts" relevant to the
fully to distinguish between the "mere" foreseeability that a person's conduct may cause injury in a particular jurisdiction (which the Court has said is an insufficient basis for asserting personal jurisdiction),\(^5\) and the foreseeability of "being haled into court there" (which it has said is sufficient).\(^6\) Thus, the Court's personal jurisdiction decisions ultimately take on a distinctive savor of ad hoc decisionmaking and lend little principled guidance to the lower courts.

In *Asahi Metal Industries Co. v. Superior Court*,\(^7\) the Court recently had the opportunity to clarify some of the ambiguities surrounding personal jurisdiction doctrine. The case presented a critical issue that has divided the lower courts: whether and to what extent a defendant whose product makes its way into a state via the "stream of commerce" is subject to suit in the courts of that state.\(^8\) The stream of commerce theory of personal jurisdiction posits that a defendant who markets an article in such a way that it can be expected to be carried through the stream of commerce into a remote jurisdiction can be subjected to suit in that jurisdiction if the product causes injury there. Unfortunately, the three opinions rendered in *Asahi* not only fail to resolve this question, but also renew

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\(^1\) For discussions of the purposeful availment requirement, *see generally* R. Casad, supra note 3, at §§ 2.02(4)[e], 2.04(2)[e](ii), 2.05, 2.07, 7.02[2]; Gottlieb, supra note 3, at 1294-1303; Perschbacher, *Minimum Contacts Reapplied: Mr. Justice Brennan Has it His Way in Burger King Corp. v. Rudzewicz*, 1986 Ariz. St. L.J. 585; Stein, supra note 3, at 735-38; Note, *Constitutional Limitations on State Long Arm Jurisdiction*, 49 U. Chi. L. Rev. 156, 170-72 (1982).

\(^2\) World-Wide Volkswagen, 444 U.S. at 295-96.

\(^3\) Id. at 297.


\(^6\) *Asahi Metal Indus. v. Superior Court* [hereinafter *Asahi*] also presented a second troublesome question: whether an alien defendant is entitled to more, less, or the same level of protection from state court assertions of jurisdiction than similarly situated domestic defendants. The Court ultimately resolved the case on grounds that implicitly considered, but did not expressly depend, on the defendant's status as an alien (Japanese) corporation.
old ones about the conceptual foundations underlying the law of personal jurisdiction.

This article evaluates the stream of commerce theory of personal jurisdiction in light of existing precedent and the constitutional imperative of due process. Part II briefly describes the factual background of *Asahi* and the various opinions rendered in the case. Part III outlines the development of jurisdictional doctrine since *International Shoe*, emphasizing the meaning of "purposeful avail­ment" and its fluid role in the due process equation governing state court jurisdiction. Part IV then traces the evolution of the stream of commerce theory since *International Shoe*. Part V examines and rejects criticisms of the stream of commerce theory, and concludes that under any reasonable interpretation of the due process parameters on jurisdiction, the stream of commerce theory as it is ordinarily used—as a justification for specific jurisdiction—ought to survive constitutional scrutiny. Therefore, any defendant who knows or should know that a product he markets will be used and may cause injury in a foreign jurisdiction should be amenable, as a constitutional matter, to suit there in a cause of action related to the product. To the extent that the plaintiff's chosen forum is truly an inconvenient one, the doctrine of *forum non conveniens* is available to relieve the defendant of any onerous litigation burdens.

II. Uncertain Implications for the Stream of Commerce Theory of Personal Jurisdiction

A. *Asahi Metal Industries Co. v. Superior Court*

*The Asahi* case arose out of a motorcycle accident involving two California residents, one of whom was killed. The surviving accident victim brought a products liability action in a California state court alleging that the accident was caused by defects in the motorcycle's tire, tube, or sealant. He named as defendants Sterling May Co., the California retailer, and Cheng Shin Rubber Industrial Co., the Taiwanese manufacturer of the motorcycle tire. Cheng Shin impleaded and sought indemnity from Asahi Metal Industries, a major Japanese concern that had manufactured the tube's valve assembly. Eventually, the plaintiff settled his claims.

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against the original defendants. Cheng Shin's claim against Asahi for indemnity, as well as several other indemnity claims among the direct defendants, remained.

Asahi sought dismissal of Cheng Shin's indemnity action on the ground that the state court lacked personal jurisdiction over it. Asahi was a major Japanese producer and exporter of tire valve assemblies whose product was incorporated into motorcycle tires sold around the world. Although Asahi had never sold its valves directly to California companies, for ten years it had regularly sold valves to Cheng Shin for incorporation into the latter's motorcycle tires, and some of these tires were in turn regularly sold to the California manufacturer of the motorcycle involved in the accident.\(^{10}\) The California Court of Appeals held that assertion of jurisdiction under the California long arm statute would be unconstitutional,\(^{11}\) but the California Supreme Court reversed.\(^ {12}\)

The United States Supreme Court granted certiorari and reversed. Justice O'Connor cast the issue in the case as whether the mere awareness on the part of a foreign defendant that the components it manufactured, sold, and delivered outside the United States would reach the forum state in the stream of commerce constitutes "minimum contacts"... such that the exercise of jurisdiction "does not offend 'traditional notions of fair play and substantial justice.'"\(^ {13}\)

But the issue was not whether "mere awareness" constitutes "minimum contacts." Asahi's relevant contacts with California were that its products were sold and allegedly caused injury there. The issue was whether specific jurisdiction might properly be based on contacts of this nature.\(^ {14}\)

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10. *Id.* at 41, 702 P.2d at 545, 216 Cal. Rptr. at 387.
14. *Id.* at 1033. "Specific" personal jurisdiction exists when a defendant's contacts with the forum state arise out of or are related to the cause of action. "General" personal jurisdiction exists when the defendant's contacts with the forum state do not arise out of or are unrelated to the cause of action. Generally speaking, courts demand a higher quality and quantity of contacts to support an assertion of general jurisdiction than of specific jurisdiction. See generally Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 414-16 & nn.8-9 (1984) [hereinafter Helicopteros]; Sobeloff, *Jurisdiction of State Courts Over Non-residents in Our Federal System*, 43 CORNELL L.Q. 196 (1957) (introducing concept of general and isolated contact jurisdiction); von Mehren & Trautman, *Jurisdiction to
The opinions in the case create new uncertainties in the law of personal jurisdiction. Although all nine justices concurred in the judgment of reversal, the three separate opinions filed in the case reveal a deep schism in the Court concerning the meaning and role of purposeful availment, particularly in the stream of commerce context.

Justice O'Connor's opinion can effectively be viewed as two separate opinions—Part II.A., which addresses the stream of commerce/purposeful availment issue, and in which only three other justices joined, and Part II.B., which deals with the international aspects of the case, and in which all members of the Court except Justice Scalia joined. This article is concerned principally with the potential impact of Part II.A. In Part II.A., four members of the Court in effect concluded that the stream of commerce theory of personal jurisdiction could not survive constitutional scrutiny. Specifically, the O'Connor plurality took the position that a defendant who knows that its product will make its way into a jurisdiction via the stream of commerce has nevertheless not purposefully directed its activities toward that jurisdiction. Under the O'Connor plurality's view, some level of purposeful activity is a prerequisite to amenability to suit, and Asahi's contacts with California were not in fact purposeful. Thus, these four justices strongly suggest that the stream of commerce theory is fundamentally flawed, and that assertions of jurisdiction based on that theory are unconstitutional.15

In an opinion by Justice Brennan, four justices indicated their support of the stream of commerce theory: "'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.'"16 In Justice Brennan's view, a defendant who has engaged in a marketing scheme that makes use of these "'eddies and streams,'" knowing that his product is being sold in a remote jurisdiction, has notice of the possibility of suit there. A defendant's act of placing his product in the stream of commerce satisfies any threshold requirement of purposeful conduct. At first blush, the Brennan plurality opinion, in which Justices White, Mar-

Adjudicate: A Suggested Analysis, 79 Harv. L. Rev. 1121, 1136-63 (1966). The extent to which contacts may be "related to" a cause of action even though they do not "arise out of" it and whether this is a distinction without a difference, are unclear. See Helicopteros, 466 U.S. at 415 n.10; id. at 426-27 (Brennan, J., dissenting).

16. 107 S. Ct. at 1035 (Brennan, J., concurring in part and in judgment).
shall, and Blackmun joined, appears to ensure that at least four members of the Court would uphold the theory. But Justices White and Blackmun also joined in Justice Stevens’ somewhat confusing opinion; consequently, these two justices’ views on the issue are not completely clear.

Justice Stevens suggests, first, that the Court should not have addressed the purposeful availment question at all, and second, that the validity of the stream of commerce theory in a particular case depends on several quantitative factors that were probably, though not definitely, present in *Asahi*. As noted, it is difficult to know the extent to which other members of the Court share Justice Stevens’ views, because Justices White and Blackmun, who purported to join Justice Brennan’s opinion, also concurred in this opinion.

**B. Fallout from Asahi**

The lower courts have variously interpreted the fragmented *Asahi* decision as it relates to the stream of commerce question. Some courts appear to view the case as sounding the death knell for the stream of commerce theory of personal jurisdiction. In *Sollinger v. Nasco International, Inc.*, a copyright infringement case, the Vermont district court implied that *Asahi* would preclude basing jurisdiction on the defendant’s act of placing its infringing products into the stream of commerce, but upheld the assertion of personal jurisdiction on other grounds. Similarly, in *Witbeck v. Bill Cody’s Ranch Inn*, the Supreme Court of Michigan viewed *Asahi* as consistent with that court’s own prior decisions rejecting the stream of commerce theory as a basis for asserting jurisdiction.

Conversely, the Texas Supreme Court in *Keen v. Ashot Ashkelon, Ltd.*, simply ignored *Asahi*’s pronouncements on this subject, relying on earlier decisions of the Court that can be read to endorse the stream of commerce theory as a legitimate basis for upholding an assertion of jurisdiction.

Some courts have sought to avoid the potential implications of *Asahi* by limiting the decision to the facts of that particular case.

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17. Id. at 1038. (Stevens, J., concurring in part and in judgment).
20. 748 S.W.2d 91 (Tex. 1988).
Thus, in *Dittman v. Code-a-Phone Corp.*, an Indiana district court asserted that "a major distinction" can be drawn between a manufacturer of component parts whose product is incorporated into another's and sold in remote jurisdictions, as in *Asahi*, and a manufacturer who sells finished products to an intermediate distributor who, in turn, markets those products abroad. And in *McBead Drilling Co. v. Kremco, Ltd.*, the Louisiana Supreme Court did not view *Asahi* as dispositive of the stream of commerce theory because the case involved an alien defendant seeking indemnity from another alien defendant in a domestic forum. In *Asahi*, the Louisiana court reasoned, there was "clearly an insufficient relationship among the California forum, the Japanese corporate defendant, and the litigation of the indemnity issue."

Finally, many courts have simply acknowledged *Asahi*’s ambiguity concerning the validity of the stream of commerce theory. They cite the decision’s lack of a majority opinion on the subject, as well as its potential inconsistency with some of the Court’s prior decisions, as a basis for concluding, as did one Michigan district court, that *Asahi* “reflects the debate, both among the Justices and the circuits, over what exactly constitutes minimum contacts via the stream of commerce.”

As these cases demonstrate, *Asahi* leaves a major gap in the law of personal jurisdiction. The only certainty is that the present Court is deeply divided over the scope and validity of the stream of commerce theory. This division appears to stem from more fundamental disputes concerning the meaning of "purposeful availment," its role in determining the appropriateness of jurisdiction, and whether federalism concerns ought to continue to influence jurisdictional doctrine. The three *Asahi* opinions will undoubtedly continue to be the basis of much judicial speculation as to the Court’s future treatment of stream of commerce cases. The remainder of this article will trace the development of the purposeful availment requirement,

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23. 509 So. 2d 429 (La. 1987).
24. Id. at 433 n.7.
outline the history of the stream of commerce theory and evaluate the various views represented in Asahi in light of the Court's previously articulated jurisdictional doctrine.

III. The Concept of "Purposeful Availment"

A. Minimum Contacts Theory and the Origins of the Purposeful Availment Requirement

Before 1945, in deference to due process, the U.S. Supreme Court had consistently held that a court could not assert nonconsensual\(^{27}\) personal jurisdiction over a person or thing that was not physically present within its jurisdiction. This territorial theory of jurisdiction treated each state as an independent sovereign whose authority to legislate and adjudicate did not extend beyond its borders.\(^{28}\) As American society became more complex and mobile, the

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27. Even under the territorial model of personal jurisdiction of Pennoyer v. Neff [hereinafter Pennoyer], a defendant could consent to a state court's assertion of jurisdiction. See generally J. Friedenthal, M. Kane, and A. Miller, Civil Procedure § 3.5 (1985). State courts and legislatures in the post-Pennoyer, pre-International Shoe era used the consent theory as a means of circumventing the limitations of the territorial approach related to physical presence. Statutes requiring corporations to consent to service of process within the forum state as a condition of doing business became commonplace, as did nonresident motorist statutes that implied consent to suit by anyone driving a motor vehicle within the state. A consent theory is difficult to justify, of course, if personal jurisdiction rules exist to protect state sovereignty; a private litigant should not be able unilaterally to waive one state's objection to another state's judicial overreaching. Despite this fundamental defect in the consent theory, the Supreme Court routinely upheld state court assertions of personal jurisdiction that could be characterized as consensual under express or implied consent statutes. See, e.g., Hess v. Pawloski, 274 U.S. 352 (1927) (upholding nonresident motorist statute creating implied consent to be sued); St. Clair v. Cox, 106 S. 350 (1882) (upholding state statute requiring corporation's consent to service of process as a condition of doing business within the state).

For other criticisms of the consent theory, see Stein, supra note 3, at 696: Kurland, The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts, 25 U. Chi. L. Rev. 569, 575-82 (1958).

28. The territorial theory of jurisdiction arose from Pennoyer, 95 U.S. 714, 722 (1877), and was purportedly based on "well established principles of [international] law." Id. at 722. Justice Field relied on a leading nineteenth century treatise on international law, J. Story, Commentaries on the Conflict of Laws, Foreign and Domestic (1834 ed. and photo reprint 1972) [hereinafter Commentaries]. The principles from which Justice Field seems to derive an absolute prescription against extraterritorial assertion of jurisdiction are two of the three maxims set forth in Story's great treatise. But Story's third maxim provided that the laws of one country may have an effect in another through the express or tacit consent of the other country. Story realized that an effective international system requires sovereign states to recognize the laws of other governments if the interests of that state are not thereby prejudiced:
limitations of the strict territorial theory became increasingly apparent. Courts and legislatures developed elaborate fictions to bring intuitively reasonable assertions of in personam jurisdiction within its parameters.29

In the 1945 case International Shoe Co. v. Washington, the Supreme Court partially abandoned the pretenses of the territorial theory in favor of a “flexible” approach intended to ensure fairness to defendants called to court. The Court said there that “due process requires only that in order to subject a defendant to a judgment in personam . . . he have certain minimum contacts with it such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”30 Among the relevant considerations as to whether this-constitutional standard was met were the extent of the inconvenience of defending in a remote forum, whether the defendant’s “contacts” with the forum were continuous and sys-

29. The fictions associated with the consent theory of personal jurisdiction are one example of how states attempted to circumvent Pennoyer’s limiting principles. See supra note 27. Courts dealt with the special problem of corporations in yet another way: by reasoning that a corporation was “present,” and therefore was subject to suit, wherever it was “doing business.” This “doing business” inquiry “soon substituted that shibboleth for any theory. Without looking back of the words, the courts held that jurisdiction existed if the corporate defendant was ‘doing business’ within the jurisdiction but no jurisdiction existed if it were not ‘doing business.’” Kurland, supra note 27, at 585. Although International Shoe had generally been perceived as replacing the “doing business” test for personal jurisdiction with minimum contacts analysis, the Court recently appeared to revive the doctrine in Helicopteros when it relied heavily on an ancient “doing business” case, Rosenberg Bros. & Co. v. Curtis Brown Co., 260 U.S. 516 (1923), as justification for denying the Texas courts power to exercise general jurisdiction over a foreign defendant having limited contacts with Texas. See R. Casad, supra note 3, at § 2.04[2][e][viii] (Supp. 1986). Subpart II.A. of Justice O’Connor’s AsaJ-J opinion, as well as Justice Stevens’ opinion, contains language reminiscent of the “doing business” line of cases.

tematic (as opposed to isolated or sporadic), whether the plaintiff's cause of action was related to the defendant's contacts with the forum, and whether the defendant had received the benefits and protection of the laws of the state.31

*International Shoe* represented a major departure from pure territorial jurisdictional analysis in favor of one based primarily on "fairness" or "reasonableness." The Court made no effort to define the concept of "contacts." Presumably, any nexus between the defendant's activities and the forum state constituted a "contact" for purposes of minimum contacts analysis.32

The Court's next jurisdictional decision, *McGee v. International Life Insurance Co.*, 33 resolved a question that had divided the lower courts: whether a single contact was sufficient to support jurisdiction.34 *McGee* was significant largely because it made clear that specific jurisdiction could be based on an isolated contact.35 It left intact the jurisdictional analysis set out in *International Shoe*.

31. *Id.* at 317-19.

32. In the years following *International Shoe*, courts developed classes of cases in which jurisdiction was almost automatically treated as "fair" or "unfair." Where a defendant's contacts were "continuous and systematic" and the plaintiff's cause of action was related to them, the exercise of jurisdiction was considered consistent with the due process clause. Where the contacts were more isolated and the cause of action unrelated, jurisdiction was generally deemed inappropriate. *See generally* Donahue v. Far Eastern Air Transp. Corp., 652 F.2d 1032, 1036 (D.C. Cir. 1981), and cases cited therein. For discussions of the early post-*International Shoe* cases, *see generally* Kurland, *supra* note 27, at 593-611; Note, *The Growth of the International Shoe Doctrine*, 16 U. CHI. L. REV. 523 (1949).


34. *See* Smyth v. Twin State Improvement Corp., 116 Vt. 569, 573, 80 A.2d 664, 666 (1951) (citation omitted):

> We are of the opinion that the United States Supreme Court has left undecided whether isolated tortious activity could result in a proper subjection of a foreign corporation to suit in the forum when the cause of action arose out of that activity; no generally applicable standards can be ascertained from the decisions beyond the *International Shoe* case . . . The American Law Institute indicates that the issue is open as of 1948.

*Smyth* upheld single act, specific jurisdiction. *Id.* at 575-77, 80 A.2d at 669. *But see* Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc., 239 F.2d 502, 505 (4th Cir. 1956); Note, *supra* note 32, at 530-31 (suggesting that courts generally are reluctant to assert jurisdiction based on continuous and substantial operations if the cause of action is not related to the operations).

35. "[A] fair interpretation of *McGee* is that jurisdiction over a nonresident is permissible whenever he voluntarily performs a single act within the forum, provided, of course, that the asserted cause of action is related to the single act upon which jurisdiction is predicated." Note, *In Personam Jurisdiction Over Nonresident Manufacturers in Product Liability Actions*, 63 Mich. L. Rev. 1028, 1030 (1965).
The basic formula for testing state court in personam jurisdiction thus remained unchanged until the Court's 1958 decision in *Hanson v. Denckla.* In *Hanson,* the Court refined the meaning of "minimum contacts," holding that only those contacts resulting from the defendant's "purposeful availment" of the forum state's legal and procedural benefits were relevant to minimum contacts analysis. This definition significantly altered *International Shoe's* approach, which viewed whether or not the defendant had benefitted from the forum state's laws as but one relevant factor.

The case involved a Delaware bank acting as trustee for a settlor who had moved from Pennsylvania to Florida. The settlor continued her communications with the bank from Florida until her death. The final administration of the trust led to two lawsuits involving the bank, the first in Florida and the second in Delaware. The bank failed to appear in the Florida suit and the Florida court entered judgment against it. The Delaware court, however, entered a judgment inconsistent with the Florida court's judgment, accepting the argument that the Florida court had lacked jurisdiction over the bank in the prior proceedings. On appeal, the plaintiffs from the Florida lawsuit demanded that the Florida judgment be reinstated.

Applying its refined minimum contacts test, the Court found that the requisite purposeful availment of Florida's laws was lacking because the bank's contacts with Florida had resulted exclusively from the settlor's *unilateral* act of moving to Florida and directing the bank, from Florida, to take certain actions concerning the trust. Accordingly, it held that the Florida judgment was invalid.

*Hanson's* treatment of the purposeful availment question has proven problematic because the Court did not clearly articulate what it meant by purposeful availment. The Court insisted that the minimum contacts test was grounded in "territorial limitations on the power of the respective States," suggesting implicitly that the requirement of purposeful availment ensured that a state would not exceed the scope of its sovereign authority. Yet it did not really

37. *Id.* at 253.
38. *Id.* at 242.
39. *Id.* at 252.
40. *Id.* at 251.
explain how purposeful availment is related to sovereignty, and it is difficult to see the purported link between these two concepts.41

Whatever the explanation for this linkage, Hanson made clear that International Shoe should not be construed as a complete repudiation of the sovereignty-based, territorial theory of jurisdiction. This insistence that the due process limitations on personal jurisdiction embody sovereignty concerns is the primary source of the theoretical inconsistencies in the Court's more recent personal jurisdiction decisions. Indeed, it appears to be at the heart of the justices' dispute in Asahi over the validity of the stream of commerce theory. The remainder of this part discusses what in a sense is the key to resolving the question of the validity of the stream of commerce theory: the meaning and role of purposeful availment.

B. The Meaning of Purposeful Availment

For nearly two decades after Hanson, the Court paid scant attention to how the jurisdictional principles developed in International Shoe, McGee, and Hanson, were playing out in state and lower federal courts.42 Over the past eleven years, however, the Court has exhibited a renewed interest in personal jurisdiction doctrine. Several cases decided during this period involved claims that specific conduct did not amount to purposeful availment within the meaning of Hanson.

The first case after Hanson to present the purposeful availment issue was Shaffer v. Heitner, decided in 1977.43 In Shaffer, a shareholder derivative suit brought in Delaware against officers and directors of a Delaware corporation, the Supreme Court rejected a simplistc territorial approach to quasi in rem jurisdiction, holding that all assertions of personal jurisdiction, whether in personam, in

41. One explanation is that the purposeful availment creates a reciprocity between the state and the defendant that justifies the state court's assertion of jurisdiction over the defendant. That is, a defendant who has deliberately taken advantage of some aspects of a state's sovereign powers, as by engaging in business activities within the state that are expressly regulated and protected by the statutes of the state, should not complain when another of those powers (i.e. the power to adjudicate) is exerted against it.

42. "In the decades following [International Shoe, McGee, and Hanson] the Supreme Court routinely denied petitions for certiorari in jurisdictional cases, leaving the states free to experiment with long-arm legislation." Juenger, Judicial Jurisdiction in the United States and in the European Communities: A Comparison, 82 Mich. L. Rev. 1195, 1199 (1984).

rem, or quasi in rem, are subject to minimum contacts analysis. The Court then went on to consider whether the defendants' contacts with the forum state were constitutionally sufficient to support jurisdiction.

Unfortunately, the Court's consideration of the purposeful availment issue was cursory, offering virtually no guidance as to the meaning of the concept. The plaintiff contended that because Delaware law provided substantial benefits to the defendants, it was "only fair and just" that they be amenable to suit there. The Court found this unpersuasive, on the ground that the defendants had "had nothing to do with the State of Delaware" and "had no reason to expect to be haled before a Delaware court." 44

This reasoning is implausible. Each of the defendants had purchased shares of stock in the corporation, the situs of which was Delaware under Delaware law. This is "having something to do with Delaware"—that is, contact with the state—if only in a metaphysical sense. Moreover, one wonders where corporate fiduciaries of a Delaware corporation would expect to be sued for breach of duty in a derivative suit if not in Delaware. 45 Shaffer obviously did little to clarify what sort of conduct would meet the threshold requirement of purposeful contacts with a state.

Kulko v. Superior Court, 46 decided the following year, similarly failed to articulate a clear definition of purposeful availment. In Kulko, a California resident sought modification in a California state court of the child custody and child support provisions of a Haitian divorce decree. The defendant's only "contact" with the state was that he allowed his daughter to live there with her mother despite the terms of the divorce decree giving him custody during the school year.

The Supreme Court agreed that California could not constitutionally assert jurisdiction against the father based on his "acquiescence" to his daughter's desire to live in California. "A father who agrees, in the interests of family harmony and his children's preferences, to allow them to spend more time in California than was required under a separation agreement can hardly be said to

44. Id. at 216.
45. Compare Weintraub, supra note 3, at 493 (footnote omitted) ("It is fair to compel directors to respond to a stockholders' derivative suit in the state of incorporation . . . they could 'reasonably anticipate being haled into court there' to account for their actions.").
have "purposefully availed himself" of the "benefits and protections" of California's laws." The Court emphasized that the defendant had not obtained any benefits from California. The Court attributed any financial "benefits" to the father resulting from his daughter's decision to live in California to her absence from New York, where the father lived, and to the mother's failure to initiate a support modification proceeding in New York.

Although the result in Kulko seems intuitively correct, it is difficult to articulate why the father's contacts with California did not result from purposeful conduct on his part. Unlike the bank in Hanson, which had played no part in the settlor's decision to move to Florida and could not have prevented the move, the father in Kulko did have the ability to prevent his child from moving to California. He had chosen not to do so in the interest of family harmony. In this sense, at least, his contacts with California can be viewed as resulting from his own purposeful acts.

In World-Wide Volkswagen Corp. v. Woodson, a 1980 five-to-four decision, the Court held that the defendant, an automobile retailer in New York, had not purposefully availed itself of the benefits of Oklahoma law by selling a vehicle to persons who later travelled through that state. The majority likened the consumer's "unilateral" act of driving an automobile through a remote jurisdiction to the "unilateral" activity involved in Hanson. The Court illustrated its conception of the meaning of purposeful contacts by contrasting the "isolated occurrence" involved in the case with one in which a defendant has "delivered its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state." The point seemed to be that when a defendant's activities make contacts with a particular jurisdiction very likely, contacts that arise may be considered purposeful within the meaning of Hanson. World-Wide Volkswagen thus appeared to resolve the question of purposefulness in terms of a defendant's reasonable expectations.

In Calder v. Jones, a case with facts analogous in some ways to Asahi's, the Court considered whether jurisdiction could be based on contacts created by distribution decisions of a third party. The

47. Id. at 94.
49. Id. at 298 (emphasis added).
 defendants were the author and the editor of an allegedly libelous story published in the National Enquirer. The alleged defamatory statements concerned a California resident. The defendants argued that because they had no control over where the magazine was distributed—that decision was made by the publishers—it was unfair to hold them accountable in California based on the fact that the Enquirer was widely circulated there.

The Court summarily rejected this argument, observing that the defendants clearly knew their out-of-state actions would have a "potentially devastating" effect in California. Although the Court never expressly discussed the concept of "purposeful availment" in Calder, the appellant briefed the issue,51 and the case must logically be viewed as being partially concerned with the meaning of that phrase.

Burger King Corp. v. Rudzewicz,52 decided in 1985, was the Supreme Court's last major jurisdictional decision before Asahi. The case dealt with the issue of purposeful availment in the context of a contractual dispute. The defendant Rudzewicz was part-owner of a Burger King franchise in Michigan. The Florida-based Burger King Corporation sued Rudzewicz and his partner in Florida for breach of contract and trademark infringement. The defendants had allegedly fallen behind in their monthly contract payments and had continued to use Burger King trademarks and trade secrets after being forbidden to do so by the company. The franchise agreement had been negotiated in Michigan through Burger King's regional office, which in turn had cleared the terms of the ultimate agreement with the Florida headquarters. The contract obligated Rudzewicz to make payments to the company in Florida and provided that disputes would be governed by Florida law. Rudzewicz contended that Florida could not constitutionally exercise jurisdiction over him due to his lack of substantial purposeful contacts with the state. The Eleventh Circuit accepted this argument, but the Supreme Court reversed in a 6-2 decision.53

In Burger King, the Court again viewed purposeful availment as a means for distinguishing between fortuitous and anticipated relationships with a particular state. Although Rudzewicz had no physical contacts with Florida and had established his relationship with

53. Justice Powell did not participate in the case. Id. at 487.
Burger King only through his dealings with the Michigan office, "he most certainly knew that he was affiliating himself with an enterprise based primarily in Florida." 54 The Court stated that the obvious level of control that Burger King had exercised over the contract negotiations, the nature of Rudzewicz's contractual relationship with the company, and the choice of law provision contained in the contract, all should have alerted him that he was entering into a relationship with a Florida resident, not a Michigan resident. Although his contacts with a Florida resident might arguably be viewed as indirect contacts with Florida, 55 the Court said that these contacts plainly did not result from a mere accident of fate, as had the retailer defendant's contacts with Oklahoma in *World-Wide Volkswagen*. Rudzewicz had every reason to expect that his contractual dealings with Burger King, though they originated in Michigan, would have an impact in Florida and could give rise to litigation there. In the majority's view, this was adequate to satisfy the purposeful availment criterion, which in turn justified a Florida court's assertion of jurisdiction over him.

The *Shaffer to Burger King* line of cases illustrates that, although the Supreme Court has never expressly defined purposeful availment, in recent years it has typically used that term to describe a pattern of behavior by a defendant that can objectively be expected to result in contacts between the defendant and the state in question. The Court's decisions indicate that the defendant must undertake affirmative acts that ultimately bring him in contact with the state, but they also make clear that "purpose" does not equal "subjective intent," that "purpose" has very little to do with "control," and that "purposeful" contacts need not be direct ones. Thus, the Court's inability to reach a consensus about whether Asahi's acts amounted to conduct "purposefully directed" toward California is difficult to comprehend.

54. *Id.* at 480.
55. On one hand, it seems somewhat disingenuous to characterize Rudzewicz's contacts as "indirect," inasmuch as he evidently made payments directly to Burger King at its Miami headquarters. But as both the Eleventh Circuit and Justice Stevens in his dissenting opinion observed, all negotiations leading to consummation of the contractual agreement took place in Michigan between Rudzewicz, his partner, and Burger King's Michigan office. The Michigan office furnished all services to which Rudzewicz was entitled and supervision to which he had agreed under the contract. In this sense, Burger King had "insulated itself from direct dealings with" Rudzewicz, *id.* at 489 (quoting Burger King v. MacShara, 724 F.2d 1505, 1512 (11th Cir. 1984)), and so the defendant's principal contacts with Florida were only indirect.
C. The Role of Purposeful Availment

In the same cases in which it was fleshing out the meaning of Hanson's purposeful availment requirement, the Court was trying to explain why the concept was integral to jurisdictional due process. The Hanson Court's statement that a defendant's purposeful availment of the benefits of a particular forum's laws was relevant to personal jurisdiction, added an important gloss to the fairness-oriented minimum contacts analysis. The Court justified this gloss by stating that personal jurisdiction doctrine purports to protect state sovereignty, and that requiring purposeful availment ensures that a state does not improperly transgress its territorial bounds in exercising its adjudicatory powers. The subsequent purposeful availment decisions, however, reflect considerable discomfort with both of these assertions. Not surprisingly, the vacillations in these later decisions have coincided with the Court's everchanging views regarding the emphasis that personal jurisdiction doctrine should accord to state sovereignty considerations.

In Shaffer, for example, the Court was anxious to repudiate the idea that territorial concerns ought to play a significant role in determining the limits of state court jurisdiction over nonresident defendants. Otherwise, it would be difficult to justify abolishing pure in rem and quasi in rem jurisdiction, which had been permissible bases for jurisdiction under the territorial model.

Likewise, in Kulko, the Court's overarching concern was with fairness, not sovereignty. Significantly, the Court's conclusion that the father had not purposefully availed himself of the benefits of California law did not end the matter, though under the Hanson formulation of the minimum contacts test it would have. Other factors, such as the potential adverse impact on California's exercise of jurisdiction on substantive social policies, were equally relevant and ultimately determinative.

Three years later, however, World-Wide Volkswagen vivified both the underlying premise of Hanson—that personal jurisdiction doctrine protects state sovereignty—and the correlative notion that jurisdiction is improper in the absence of purposeful availment. The Court insisted that the minimum contacts test:

56. Hanson, 357 U.S. at 251.
perform[s] two related, but distinguishable functions. It protects
the defendant against the burden of litigating in a distant or
inconvenient forum. And it acts to ensure that the States,
through their courts, do not reach out beyond the limits imposed
on them by their status as coequal sovereigns in a federal
system.  

The Court thus implied that the purposeful availment requirement
fosters the federalism aspect of minimum contacts analysis.  

Unfortunately, the Court’s reasoning on this subject is some­
what confusing. According to the majority, a defendant that has
purposefully availed itself of the benefits of a particular state “has
clear notice that it is subject to suit there.” What notice to the
defendant has to do with protecting federalism, however, is not
clearly explained. The Court’s reminder that a defendant on notice
that he may be sued in a particular state “can act to alleviate the risk
of burdensome litigation by . . . severing its connection with the
State” suggests that reciprocity of benefits and burdens is impor­
tant. Notwithstanding the confusion, World-Wide Volkswagen
plainly stood for the proposition that in the absence of purposeful
availment, there was no assurance that the exercise of jurisdiction
did not encroach on another state’s sovereignty.

In Burger King, the Court again retreated from its assertions
that due process limitations on jurisdiction exist to protect state
sovereignty. The case arguably represents a return to Interna­
tional Shoe’s basic “minimum contacts” framework. The opinion
does not expressly refer to any state sovereignty component of due
process; as in Shaffer, the Court’s primary concern in the case was
with whether the assertion of jurisdiction was “fair.”

60. Id. at 294.
61. Id. at 297.
62. Id.
63. The Court began its retreat in Insurance Corp. of Ireland v. Compagnie des
Bauxites de Guinee. 456 U.S. 694 (1982). While the Court acknowledged the sovereignty
rationale for due process limitations on jurisdiction, it stated that “[t]he personal jurisdic­
tion requirement recognizes and protects an individual liberty interest. It represents a
restriction on judicial power not as a matter of sovereignty, but as a matter of individual
liberty.” Id. at 702 (footnote omitted).
64. Of course, the very requirement that a defendant must have minimum contacts with
the forum state contains an element of federalism. Moreover, the Court also noted the
relevance of factors such as the forum state’s interest in the litigation and the interests of
the interstate judicial system. factors that implicitly take sovereignty concerns into
account. Burger King. 105 S. Ct. at 2184.
Burger King seems to establish the proposition that if a defendant’s contacts with the forum state result from purposeful availment, jurisdiction is presumptively “fair.” If they do not, the plaintiff appears to have the burden of showing that other factors weigh in favor of jurisdiction. Burger King thus casts the purposeful availment requirement in a new role: a threshold indicator of fairness that can conveniently allocate the burden of persuasion on the question of the appropriateness of jurisdiction. The case also suggests, however, that in some circumstances a state court could fairly assert personal jurisdiction even if the defendant had no purposeful contacts with the forum state.

The Court’s jurisdictional decisions antedating Asahi display erratic swings between a conviction that personal jurisdiction doctrine must protect federalism and the abandonment of that premise. With Burger King, purposeful availment inquiry apparently had evolved from a device to ensure that states did not overstep their territorial bounds to one that allocated the burden of persuasion on the question of fairness. Thus, although the concept of “purposeful availment” retains a special significance, Burger King left open the possibility that a defendant’s “nonpurposeful” contacts with a state will be constitutionally sufficient to support jurisdiction.

IV. The Stream of Commerce Theory of Personal Jurisdiction

The foregoing discussion has illustrated that the notion of purposeful availment has played a central role in the Court’s personal jurisdiction theories. The stream of commerce theory, which Burger King left open, suggests that a defendant’s contacts with the forum state must be purposeful to support personal jurisdiction.

65. The critical language in Burger King is as follows:

Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with “fair play and substantial justice.” Thus courts in “appropriate case[s]” may evaluate “the burden on the defendant,” “the forum State’s interest in adjudicating the dispute,” “the plaintiff’s interest in obtaining convenient and effective relief,” “the interstate judicial system’s interest in obtaining the most efficient resolution of controversies,” and the “shared interest of the several States in furthering fundamental substantive social policies.” These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required. On the other hand, where a defendant who has purposefully directed his activities toward forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.

Burger King, 105 S. Ct. at 2184-84 (citations omitted). This language seems to envision circumstances in which jurisdiction would be appropriate without a showing of purposeful availment.
jurisdiction jurisprudence. Part IV will demonstrate that courts have facilitated the expansion and enforcement of state and federal substantive policies in a number of areas by interpreting the concept of purposeful availment to include a defendant’s act of placing its products in the stream of commerce. These areas include products liability, intellectual property, environmental law, and tax.

A. The Need for Extended Jurisdiction

The evolution of personal jurisdiction doctrine coincided with an era of rapid changes in the substantive tort law governing products liability. Beginning in the early 1960s, the privity of contract requirement, which had circumscribed the utility of warranty theories of products liability, was eliminated by statute or judicial fiat in many jurisdictions. States then began adopting section 402A of the Restatement (Second) of Torts, which made manufacturers and distributors of defective products strictly liable for design, manufacturing, and marketing defects that caused injuries to persons or property. To date, at least thirty-eight states have

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66. Early in this century, many state courts created a food products exception to the privity of contract requirement for breach of warranty actions. In 1960, New Jersey abolished the privity requirement in products liability actions in the leading case of Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960). Within the next few years, most other state high courts followed suit. See generally 1 Prod. Liab. Rep. (CCH) § 1210 and cases cited therein. In addition, many state legislatures adopted U.C.C. § 2-318 of the Uniform Commercial Code, which expressly abolishes the requirement of horizontal privity in warranty actions and has been interpreted in many jurisdictions to abolish the vertical privity requirement as well. See generally J. White & R. Summers, Uniform Commercial Code 401-10 (2d ed. 1980). Although strict products liability theories have supplanted the need to rely on warranty theories in personal injury and property damage cases in most jurisdictions, the latter are still important in states that have refused to adopt strict liability. They may also be important where innocent bystanders, rather than direct consumers of products, are injured as a result of product defects. See King & Neville, The Bystander's Right Under Strict Liability Does Exist: A Call for Reform of the Restatement, 25 St. Louis U. L.J. 543 (1981); Note, Strict Products Liability to the Bystander: A Study in Common Law Determinism, 38 U. Chi. L. Rev. 625 (1971).

67. Section 402A provides:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and
embraced the basic theory of strict liability articulated in section 402A; another eight have some variation of strict liability in defective products cases.68

These developments made it far more likely that plaintiffs alleging injuries caused by defective products would have the interest and incentive to sue defendants having few if any direct contacts with the state in which injury occurred. Not surprisingly, the stream of commerce theory originated and has been invoked most often in products liability cases.69 In products liability cases, the theory enables courts to assert specific jurisdiction over all defendants who may be liable. In such actions, state tort law generally contemplates joint and several liability for defendants within the chain of distribution. The plaintiff usually has the option of suing the retailer, distributor, or manufacturer, or all of them, even though she likely had direct contact only with the retailer.

In such cases, jurisdictional problems arise because those defendants higher than the retailer in the chain of distribution often have no "direct" connections with the forum state. The defective product manufactured or marketed by these remote defendants enters the stream of commerce outside the forum state. Perhaps it was purchased there by a broker or other middleman and sold to entities operating within the forum state.70 Alternatively, as was the case in

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
(2) The rule stated in Subsection (1) applies although
(a) the seller has exercised all possible care in the preparation and sale of his product, and
(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Restatement (Second) of Torts § 402A (1963). The seller of a product includes the manufacturer, distributor, and retailer. Id., comment f. Most jurisdictions that have adopted section 402A have extended its protection to bystanders as well as direct purchasers of products, thus significantly broadening the class of persons entitled to sue for personal injuries or property damage resulting from product defects. See King & Neville, supra note 66, at 569-73; W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on the Law of Torts § 100 (W. Keeton 5th ed. 1984).

68. For a listing of jurisdictions that have adopted section 402A of the Restatement or some variation of strict liability theory, see 1 Prod. Liab. Rep. (CCH) § 4016.


70. E.g., Oswalt v. Scripto, Inc., 616 F.2d 191 (5th Cir. 1981); Pennington Grain & Seed, Inc. v. Murrow Bros. Seed Co., Inc., 400 So. 2d 157 (Fla. Dist. Ct. App. 1981);
Asahi, the defective product may have been incorporated as a component part of a finished product that was distributed in the forum state or even nationwide. Typically, the remote defendant claims that the relevant long arm statute does not authorize jurisdiction over him and that he lacks sufficient minimum contacts with the forum state to support an assertion of jurisdiction over him.

The stream of commerce theory has also been invoked in cases alleging patent, copyright, and trademark infringement and violations of federal antitrust, tax, and environmental laws. It is par-

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particularly important in cases where an alien defendant has committed the alleged violation of federal law abroad. Such defendants often have no direct contacts with the United States, much less with any particular state, because they insulate themselves from direct dealings in this country through various intermediaries. Accordingly, they can be sued in this country only to the extent that their indirect marketing contacts are deemed constitutionally sufficient under *International Shoe* and its progeny.

**B. Origins and Evolution of the Stream of Commerce Theory**

After *International Shoe*, state legislatures began to devise long arm statutes with expansively worded provisions designed to take advantage of the broad implications of minimum contacts analysis. Most statutes specified the contacts and nature of conduct that would subject a defendant to the jurisdiction of the state’s courts, and they generally provided for specific jurisdiction only. A few states

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75. The federal courts have exclusive jurisdiction over patent and copyright infringement cases, see 28 U.S.C. § 1338(a) (1986), and concurrent jurisdiction over trademark infringement cases. *Id.* There is no federal statute authorizing nationwide service of process against defendants in such cases, and so under Fed. R. Civ. P. 4(e), the federal court must use state law standards to assess the validity of its assertion of personal jurisdiction. Rule 4(e) thus requires the federal court to consider the constitutional sufficiency of a defendant’s contacts with the state in which the federal court is sitting rather than its aggregate contacts with the United States.

In federal tax and antitrust cases, federal statutes permit nationwide service of process. See 26 U.S.C. § 7402(b) (1982) (tax suits by U.S.); 15 U.S.C. § 22 (1982) (antitrust). In these cases, the propriety of personal jurisdiction turns on whether the defendant’s contacts with the United States as a whole are constitutionally sufficient to support jurisdiction.

Some commentators have urged that, in cases of alien defendants involving a federal question, an aggregate contacts theory should be used irrespective of whether a state or federal long arm statute is being used as a basis to acquire jurisdiction. See, e.g., Lilly, *Jurisdiction Over Domestic and Alien Defendants*, 69 Va. L. Rev. 85. In *Asahi*, the Supreme Court expressly declined to address the aggregate contacts theory. *Asahi*. 107 S. Ct. at 1033.

opted for extremely broad statutes permitting their courts to exercise jurisdiction whenever doing so was consistent with due process.\textsuperscript{77}

Beginning in the early 1960s, the enumerated jurisdiction statutes were interpreted nearly uniformly as conferring jurisdiction in "single tort" cases where an isolated contact with the forum state resulted in injury to the plaintiff.\textsuperscript{78} Statutory language was seldom viewed as an obstacle to such an assertion of jurisdiction, and the constitutionality of such assertions seemed settled by McGee.\textsuperscript{79} Accordingly, most state and federal courts upheld the constitutionality of single tort jurisdictional provisions based on McGee's reasoning.\textsuperscript{80} The broad general jurisdiction statutes were also interpreted to confer jurisdiction in single tort cases.

The stream of commerce theory evolved quite naturally from these single tort cases. One of the earliest decisions endorsing the theory was \textit{Gray v. American Radiator & Standard Sanitary Corp.},\textsuperscript{81} an influential and widely cited case interpreting Illinois' long arm statute. \textit{Gray} was a stream of commerce case in the purest sense: an Illinois plaintiff injured in an explosion caused by an allegedly defective water heater sued both the Pennsylvania manufacturer of the water heater and Titan, the Ohio manufacturer of a valve.


\textsuperscript{78} For examples of cases interpreting specific jurisdiction statutes to confer jurisdiction based on a single act, see \textit{Currie. The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois}, 1963 \textsc{U. Ill. L.F.} 533, passim; \textit{Note, Retroactive Expansion of State Court Jurisdiction Over Persons}, 63 \textsc{Colum. L. Rev.} 1105 (1963).

\textsuperscript{79} \textit{See supra} notes 33-35 and accompanying text.


\textsuperscript{81} 22 \textsc{Ill. 2d} 432, 176 N.E.2d 761 (1961). Although \textit{Gray} is widely perceived as the first case to invoke the stream of commerce theory, the opinion did not actually use the phrase "stream of commerce." The first decision explicitly to link the phrase with personal jurisdiction doctrine appears to have been \textit{Williams v. Connolly}, 227 F. Supp. 539, 546 (D. Minn. 1964). An early Oklahoma case had upheld jurisdiction in what was essentially a stream of commerce case under an ancient "doing business" statute. \textit{S. Howes Co. v. W. P. Milling Co.}, 277 P.2d 655 (Okla. 1954).
incorporated into the heater. Titan's sole apparent contact with Illinois was that its product had caused injury there.\textsuperscript{82} The cause of action unquestionably was related to this contact.

Gray addressed both the statutory and the constitutional questions implicit in asserting jurisdiction based on the stream of commerce theory. The Illinois long-arm statute authorized jurisdiction over any defendant that "commits a tortious act within the state."\textsuperscript{83} Although Titan had never been in Illinois and had never committed any physical act there, the court held that it fell within the statutory language. Analogizing to rules governing choice of law and commencement of the running of the statute of limitations, the court reasoned that because the "last act" giving rise to the lawsuit—the explosion—had occurred in Illinois, and because that injury could be attributed to Titan's tortious behavior, Titan had committed a tortious act within the state as the statute required.\textsuperscript{84}

The court explained its conception of the constitutional issue in the following terms:

The relevant decisions since Pennoyer v. Neff show a development of the concept of personal jurisdiction from one which requires service of process within the State to one which is satisfied either if the act or transaction occurs there or if a defendant has engaged in a sufficiently substantial course of activity in the state, provided always that reasonable notice and opportunity to be heard are afforded . . . the trend in defining due process of law is away from the emphasis on territorial limitations and toward emphasis on providing adequate notice and opportunity to be heard: from the court with immediate power over the defendant, toward the court in which both parties can most conveniently settle their dispute.\textsuperscript{85}

Given this understanding of the constitutional test for personal jurisdiction, the court reasoned, assertion of jurisdiction over the Ohio defendant was undoubtedly permissible:

\textit{[I]f a corporation elects to sell its products for ultimate use in another State, it is not unjust to hold it answerable there for any damages caused by defects in those products . . . . Where the alleged liability arises . . . from the manufacture of products

\textsuperscript{82} The court assumed that, apart from the heater that injured the plaintiff, a substantial number of water heaters containing Titan's valves were sold in Illinois. But it is unclear from the opinion whether the record supports this assumption and whether this fact was essential to the outcome of the case.


\textsuperscript{84} Gray, 22 Ill. 2d at 435-36, 176 N.E.2d at 763.

\textsuperscript{85} Id. at 440-41, 176 N.E.2d at 765.
presumably sold in contemplation of use here, it should not matter that the purchase was made from an independent middleman or that someone other than the defendant shipped the product into [the state]."  

In Gray, the court was plainly mistaken in suggesting that territorial concerns were no longer a significant aspect of the constitutional test for personal jurisdiction. Hanson had made that clear three years earlier. Moreover, the Supreme Court had never intimated that the litmus test of due process was whether the forum selected was "the court in which both parties can most conveniently settle their dispute." Nevertheless, the court did address the critical question of whether the defendant had purposefully availed itself of the benefits of Illinois law. The court observed that the defendant had engaged in a course of conduct that predictably had resulted in the use of its products in Illinois, a use from which it received economic benefits.  

Most courts and commentators have perceived Gray as consistent with the constitutional framework established in International Shoe, McGee, and Hanson. After all, cases upholding jurisdiction on a stream of commerce theory are but one step removed from cases in which an out-of-state manufacturer ships its product directly to an in-state distributor or retailer. In the latter type of case, the

86. Id. at 442, 176 N.E.2d at 766.
87. Id. at 443, 176 N.E.2d at 766.
88. Id. For an important contemporaneous discussion of the Gray decision, see Currie, supra note 78, at 545-60. See also von Mehren & Trautman, supra note 14, at 1151-52.
89. E.g., Baker v. Associated Banking Corp., 592 F.2d 550 (9th Cir. 1979); McBreen v. Beech Aircraft Corp., 543 F.2d 26, 30 (7th Cir. 1976) (dictum); Jones Enter. v. Atlas Serv. Corp., 442 F.2d 1136, 1140 (9th Cir. 1971); Blum v. Kawaguchi, 331 F. Supp. 216 (D. Neb. 1971); Phillips v. Anchor Hocking Glass Corp., 100 Ariz. 251, 413 P.2d 732 (1966); Currie, supra note 78, at 560 ("the upholding of jurisdiction in Gray . . . was a commendable decision . . . fully consistent with the due-process requirement of fundamental fairness").

[Where a corporation with substantial contacts within state X ships into that state a product which it has manufactured in State Y and an injury occurs in State X because of an alleged defect in the product, the corporation may constitutionally be called upon to defend a products liability suit brought in state X where the injury occurred. This result also obtains where the manufacturer has elected to distribute his wares through independent wholesalers instead of through its own corporate apparatus so that it is only very indirectly responsible for the product reaching the injured consumer. The present trend is to take the next logical step and hold that corporation answerable where it introduces its product into the
manufacturer has purposefully established a contact with the state in question. It has derived economic benefits from the contact. *Hanson*’s purposeful availment requirement is clearly met.

When a product comes into a state via the efforts of an out-of-state distributor, a broker, or the manufacturer of a finished product into which the product has been incorporated, the manufacturer’s contacts may not be as direct, but they are nevertheless the result of its purposeful activity. If it wishes to avoid accountability for its product’s defects in a particular state, a manufacturer has the option of distributing its product through intermediaries who will not sell it there. It seems questionable to suggest that a state cannot assert specific jurisdiction when the manufacturer fully expects its goods to be sold within the state, and the goods subsequently cause injury there.

Initially, many courts embracing the stream of commerce theory after *Gray* reasoned that whenever it was “foreseeable” to the defendant that its product would find its way into the state, the notice function of the due process requirement was satisfied.91 This “foreseeability” test permitted state courts to entertain suits not just against defendants who place goods in the stream of commerce with the expectation that they would be marketed in a particular state, but also against defendants who market consumer goods anywhere, because manufacturers can always foresee that such goods may be taken by their purchasers to remote jurisdictions.

Of course, this broad foreseeability conception of the theory is inconsistent with *World-Wide Volkswagen*, in which the Court stated that the portability or mobility of a consumer good does not, by itself, furnish adequate notice of the possibility of being sued in a

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91. See, e.g., Eyerly Aircraft Co. v. Killian, 414 F.2d 591, 597 (5th Cir. 1969) (jurisdiction proper where defendant “introduced [carnival ride] into interstate commerce with reason to know that the ride would probably eventually nomadize through the state”); Atlantic Tubing & Rubber Co. v. International Engraving Co., 364 F. Supp. 787, 791-92 (D.R.I. 1973) (construing *Gray* to permit assertion of jurisdiction whenever it is foreseeable that defendant’s product may cause injury in the state) (dictum); Anderson v. National Presto Indus., 257 Iowa 911, 135 N.W. 639, 643 (1965) (jurisdiction proper over manufacturer whose products are “ordinarily designed for commercial sale in whatever markets may be found for them”); Blamey v. Brown, 270 N.W.2d 884 (Minn. 1978) (jurisdiction proper where defendant could foresee that sale of liquor at Wisconsin border bar could have consequences in Minnesota).
remote jurisdiction. But *World-Wide Volkswagen* cannot be perceived as a repudiation of a stream of commerce theory based on the notion of *expectation* rather than *foreseeability*. Indeed, the majority distinguished cases such as *Gray*, in which a corporation has "deliver[ed] its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State," and stated explicitly in dicta that the assertion of jurisdiction in such a case would not violate due process.

The Supreme Court's express sanction of the stream of commerce theory in *World-Wide Volkswagen*, which was reiterated in *Burger King*, appeared to resolve any lingering doubts about its validity. Most courts subsequently accepted the theory, many basing their decisions on the Court's earlier dicta. Indeed, after *World-Wide Volkswagen*, a number of states amended their long arm statutes to provide explicitly for personal jurisdiction over defendants whose products enter the state through the regular course of commerce. By the time the Court rendered its *Asahi* decision early in 1987, courts in at least sixteen states and most federal

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93. Id. at 298.
94. Id. at 297-98.
95. 471 U.S. at 474 n.17.
98. *Alliance Clothing, Ltd. v. District Court*, 187 Colo. 400, 532 P.2d 351 (1975); *Waters v. Deutz Corp.*, 479 A.2d 273 (Del. 1984); *Nicolet, Inc. v. Benton*, 467 So. 2d
appellate courts had ruled that the stream of commerce theory comport with the principles articulated in International Shoe and its progeny.

V. Justifying and Defending the Stream of Commerce Theory: The Asahi Opinions

As Part III above demonstrated, the Court’s decisions have been somewhat inconsistent in their pronouncements of the meaning and role of purposeful availment inquiry, with Shaffer, Kulko, and Burger King emphasizing fairness and Hanson and World-Wide Volkswagen focusing on sovereignty concerns. But Asahi raised the question in the context of the stream of commerce theory, a context that had never been considered directly by the Court. The three Asahi opinions are suggestive of a fundamental disagreement among the justices concerning the meaning of purposeful availment and its relevance to jurisdictional analysis. More troublesome is that the dissension on the Court may undermine the validity of the stream of commerce theory as it has been understood and utilized by the lower courts.

This part of the article considers the rationale given by the O’Connor plurality and some lower courts for rejecting the stream of commerce theory in specific jurisdiction cases. It contends that this reasoning cannot be reconciled with the Court’s prior jurisdictional decisions. It further contends that the approach taken by a few lower courts, and perhaps by Justice Stevens—under which the
appropriateness of jurisdiction turns primarily on quantitative factors—is also flawed. This part concludes by suggesting that regardless of how one conceives the purposes of the due process limitation on state court personal jurisdiction, those purposes are not impaired when a court relies on the stream of commerce theory to support its assertion of specific jurisdiction.

A. The O'Connor Plurality: Faulty Premises and Troubling Implications

Courts that have rejected the stream of commerce theory usually base their decisions on two premises. The first is that placing an article in the stream of commerce, with knowledge that it will be marketed and used in a remote jurisdiction, does not amount to purposeful availment as that term was used in Hanson and World-Wide Volkswagen. The second is that a state court may never assert personal jurisdiction over a defendant unless that defendant has purposefully availed itself of the benefits of the forum state's laws. To the extent that these premises purport to be derived from the Supreme Court's most recent jurisdictional decisions, both are faulty.

The O'Connor plurality opinion illustrates the faultiness of these premises. It insists that Asahi had not engaged in acts constituting "purposeful availment," a position with which the Brennan plurality expressly disagreed. 101 Justice O'Connor accepted, for the purposes of decision, that Asahi knew that a significant number of its valves were incorporated into tires marketed in California. She reasoned, however, that because Asahi did not "create, control, or employ" Cheng Shin's distribution network, did not specifically design its valves for use in California, and therefore did not have the kind and quantum of contacts that enable courts to conclude that a corporation is "doing business" within a state, it had never purposefully availed itself of the California market. In essence, the O'Connor plurality treated the facts underlying the cause of action in Asahi as conceptually indistinguishable from the facts underlying Hanson and World-Wide Volkswagen.

Yet surely there is a critical difference between the retailer defendant in World-Wide Volkswagen, whose contacts with

102. Id. at 1033.
Oklahoma resulted exclusively from the plaintiff's activities (i.e. travelling through Oklahoma and having an accident there) and a defendant such as Asahi, whose contacts were the result of its own decision to sell its component parts to a manufacturer engaged in a worldwide marketing scheme. Courts, including the Supreme Court in *World-Wide Volkswagen*, and commentators have consistently recognized a distinction between "portable tort" cases, in which a plaintiff-consumer or other third party is exclusively responsible for taking the injury-causing agent into the forum state, and true stream of commerce cases, in which a product causes injury in a jurisdiction where it was originally sold. In the former category of cases, a defendant derives no measurable economic benefit from the plaintiff's ability to carry the product across state lines, and thus cannot be said to have availed itself of that particular market. In the latter category, the defendant who adopts a marketing scheme that expressly contemplates sales in a remote jurisdiction certainly profits as a result of its intermediary's sales within that jurisdiction. Thus, even if purposeful availment is an essential aspect of fairness, one who deliberately places his product into the stream of commerce under circumstances clearly indicating that the product will be sold in state X has met this threshold requirement as to state X. Presumptively, he ought to be subject to a lawsuit related to the product there unless other fairness considerations dictate otherwise.

Why, then, have four justices in *Asahi* and several lower courts insisted that the stream of commerce theory does not adequately encompass purposeful availment? One explanation may be that they failed to perceive a difference between "foreseeability" and "expectation." The O'Connor plurality thought that it was merely foreseeable to Asahi that its valves would make their way to California, and foreseeability alone, according to *World-Wide Volkswagen*, does not furnish constitutionally sufficient notice of a court's potential claim to jurisdiction. This is absurd. Because Cheng Shin had sold tires containing Asahi's valves to a California motorcycle manufacturer for a number of years, the possibility that one of those valves, if defective, might cause injury in California


was not merely foreseeable. It was virtually certain. Wherever one draws the line between foreseeability and expectation, the facts of almost any pure stream of commerce case, including those of *Asahi*, seem to fall on the side of expectation.

Another explanation may be that the O'Connor plurality equates "unilateral" acts by third parties with "indirect" acts requiring the assistance of third parties. *Hanson* and *World-Wide Volkswagen* said that the conduct of third parties alone cannot create contacts sufficient to support jurisdiction.106 But these cases did not say that contacts created with the help of third parties are irrelevant to the jurisdictional question. In both cases, the defendant's contacts with the forum state materialized after the relationship giving rise to the lawsuit was formed and resulted from a third party's decision to cross state lines. In *Asahi*, however, the defendant's contacts with the forum state were created when its products made their way into the forum state, which was before its relationship began with the original plaintiff—when the plaintiff purchased the motorcycle with a defective tire valve.107 The plaintiff's purchase was the expected result of Asahi's marketing strategy of selling to a Taiwanese tire manufacturer that did business within California. Although Cheng Shin had assisted Asahi in establishing its pre-accident relationship with the state, Asahi's contacts with California were not exclusively the result of "unilateral" activity by a third party. Indeed, a variation of this argument had been rejected in *Calder*, in which the Court had held that the defendants' nonparticipation in the distribution of offending magazines did not warrant characterizing their activities as nonpurposeful.108

The notion that indirect contacts with a state are not purposeful has serious implications. For example, it suggests that a remote manufacturer can always insulate itself from lawsuits in any state (or country) other than its own by selling its products F.O.B. at a single location, by using a single "independent" distributor to distribute its product nationwide, or by using brokers who theoretically are "responsible" for any direct contacts with a particular forum. Such a scenario could have a serious adverse impact on the development of state products liability law, impair enforcement of many federal

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106. *Id.* at 298: *Hanson*, 357 U.S. at 253.
laws, and result in heavy litigation burdens on all parties involved in these lawsuits.

One could argue that the O'Connor plurality’s view that Asahi had not purposefully directed its activities toward California was influenced by the fact that only an indemnity action was at stake.\footnote{109. At least one court has limited Asahi’s pronouncements on the stream of commerce theory to indemnity cases. See McBead Drilling Co. v. Kremco, Ltd., 509 So. 2d 429, 433 n.7 (La. 1987).} Cheng Shin, after all, was the entity that was directly responsible for distributing Asahi’s product in California. In this sense, Cheng Shin is arguably much like the plaintiff in \textit{World-Wide Volkswagen}; and the case is similar to the portable tort cases that are not generally perceived as falling within the stream of commerce theory.

Yet the O’Connor plurality did not limit its rejection of the stream of commerce theory to indemnity cases not involving a plaintiff actually injured by a defective product. What the opinion said about the purposeful availment requirement would have prevented the original plaintiff from suing Asahi in California as well. Moreover, there is little support in the Court’s past decisions for drawing this kind of distinction.\footnote{110. See supra text accompanying note 15.} If the O’Connor plurality had confined its reasoning to indemnity cases, it would have been suggesting that whether or not a defendant’s connections with a state are the result of purposeful availment depends on who the plaintiff is. This misdirects the inquiry from the nature of the defendant’s activities to the nature of the cause of action and confuses the narrow question of what constitutes purposeful availment with the broader one of whether the assertion of jurisdiction is reasonable.

A less obvious, but in some respects more troubling, consequence of viewing the stream of commerce theory as constitutionally inadequate is that this would conform to the narrow and now questionable \textit{Hanson} view that the virtually dispositive test for jurisdictional propriety is whether there has been purposeful availment. As noted earlier, the Court’s most recent pre-\textit{Asahi} decisions shifted the theoretical focus away from sovereignty concerns toward a pure assessment of whether the exercise of jurisdiction is “fair.”\footnote{111. See supra text accompanying note 65.} One consequence of this, which \textit{Burger King} tends to support, is that the concept of purposeful availment assumes its original role as a fairness factor. Other factors include whether: (1) the court is asserting
specific or general jurisdiction, (2) the chosen forum is a convenient one, and (3) the state has an interest in regulating the matter at issue.

That the O'Connor plurality placed so much emphasis on purposeful availment may suggest a division on the Court about the role of federalism in personal jurisdiction doctrine. The only recent cases that treated the question of purposeful availment as dispositive were those in which territorial concerns were deemed predominant: Hanson and World-Wide Volkswagen. The disagreement among the justices about whether the stream of commerce theory is constitutionally adequate may mask a more basic split about the conceptual underpinnings of personal jurisdiction doctrine. If some members of the Court disagree with the current trend toward repudiating the idea that personal jurisdiction doctrine protects state sovereignty, they should express their disagreement explicitly.

Moreover, even if one does believe that the due process limitations on personal jurisdiction should protect state sovereignty, the stream of commerce theory is consistent with such an approach. In international law, one well-recognized aspect of territorial jurisdiction is "effects" jurisdiction: a state has jurisdiction over acts having tangible consequences or effects within the state.112 Effects jurisdiction justifies, for example, a state's criminalizing conduct that actually takes place outside the state but that causes injury within the state.113 In most circumstances, the exercise of effects

112. Effects jurisdiction is based on the objective territorial principle of international law. See generally Note, Extraterritorial Application of the Export Administration Act of 1979 Under International and American Law, 81 Mich. L. Rev. 1308, 1327-1329 (1983). Although the scope of effects jurisdiction is unclear and the U.S. courts' extension of the principle to cover intangible economic effects criticized, it appears that most authorities and states would recognize effects jurisdiction where effects are direct, immediate, and form a part of the actus reus that is sought to be regulated. "'[M]any countries ... interpret criminal law in the sense that offenses, the authors of which at the moment of commission of [the crime] are in the territory of another state, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offense, and more especially its effects, have taken place there ...." Case of the S.S. Lotus (France and Turkey), 1927 P.C.I.J., Ser. A., No. 10, 19-23 (Judgment of Sept. 7), 2 World Ct. Rep. (1930). See also Timberline Lumber Co. v. Bank of Am., 549 F.2d 597, 611-12 (9th Cir. 1976); Jennings, Extraterritorial Jurisdiction and the United States Antitrust Laws, 1957 Brit. Y.B. Int'l L. 146, 160; Rosenthal, Jurisdictional Conflicts Between Sovereign Nations, 19 INT'L L. 487, 494 (1985). The Supreme Court expressly acknowledged the validity of effects jurisdiction in Calder v. Jones. 465 U.S. 783, 789 (1984).

jurisdiction is fully compatible with territorial limitations because one aspect of the entire criminal transaction occurs within the state’s borders.

A state’s exercise of personal jurisdiction over a defendant whose product causes injury within the state would seem consistent with effects jurisdiction for the same reason. The defendant’s conduct outside the jurisdiction has caused injury within it; hence, a court is justified in asserting personal jurisdiction. Surely a state has an interest in protecting its residents from injuries directly caused by out-of-state actors. A state does not infringe on the sovereignty of another state or otherwise impair federalism by exercising its judicial power to protect an injured resident. 114

Courts that have rejected the stream of commerce theory outright, 115 including the O’Connor plurality, seem disingenuous for their failure to distinguish the facts of the cases before them from cases such as Gray, the result of which had been approved expressly in World-Wide Volkswagen. Alternatively, the Court could explicitly repudiate its dicta in that case, and in more recent ones such as Burger King, that have affirmed the theory’s validity and seemingly rejected a territorial approach to personal jurisdiction.

More troublesome are the implications of the O’Connor plurality’s view, should it ultimately prevail in the Supreme Court, for future products liability litigation 116 and for litigation involving important areas of federal law and policy. In the products liability area, for example, the substantive tort law of most jurisdictions contemplates that all entities within the distribution chain should be liable to a consumer who is injured by a defective product. One purpose of this extensive liability scheme is to bring to bear on those who manufacture and market consumer products the greatest possible pressure to make those products safe. Construing the purposeful availment requirement narrowly to exclude marketing conduct erects an important procedural hurdle to effective and efficient enforce-

114. But see Currie, supra note 78, at 549 (stating that “[i]t would be odd if in a federal system [a state] could not enter a judgment against a man who stands in Indiana firing a gun at people in Illinois; the man who ships in food is in no different position”).
115. See supra note 8.
116. “The most ominous aspect of the [O’Connor plurality’s] opinion is that four Justices joined in the finding that Asahi did not have minimum contacts with California. Although none of the opinions say so directly, this means that jurisdiction over Asahi was not available in the California courts even on behalf of slain and mangled California residents.” Weintraub, Asahi Sends Personal Jurisdiction Down the Tubes, 23 Tex. Int'l L.J. 55, 66 (footnotes omitted).
ment of substantive tort policies by denying many litigants the opportunity to prosecute products liability claims in a single forum.

The notion that indirect contacts with a state, such as Asahi's contacts with California, are insufficient to support specific jurisdiction invites multistate marketing schemes dependent upon brokers, "independent" distributors, and similar middlemen whose presence along the chain of distribution will effectively insulate those truly responsible for product defects from liability to those whom their products have injured.117 Given the potentially serious impact of this view on the future development of state products liability law, and the certainty that this question will have to be resolved by the Supreme Court, it is unfortunate that the five other members of the Asahi Court were unable to articulate a coherent explanation of why existing jurisdictional doctrine readily accommodates the stream of commerce theory.

B. Justice Stevens: A Problematic View

At least two federal appellate courts have taken the position that the stream of commerce theory does not justify the assertion of personal jurisdiction, at least when a very small number of the defendant's products have been sold in a remote state.118 Justice Stevens' concurring opinion appears to espouse a similar view in suggesting that the validity of the stream of commerce theory depends on a number of quantitative factors which may vary from case to case.119 This approach ascribes a fundamentally different meaning to purposeful availment than is expressed in the Brennan plurality's opinion.120

According to the Stevens view, whether or not a defendant's act of placing a product in the stream of commerce can be characterized as "purposeful direction" of his activities toward a particular state, seems to turn on the quantum of sales made within the jurisdiction in question relative to the defendant's total sales, the value of those sales, and the hazardous nature of the products involved, rather than

117. See id. at 69-70.
118. Asahi, 107 S. Ct. at 1038 (Stevens, J., concurring in part and in judgment).
119. See supra text accompanying note 16.
120. Id.
the nature of the defendant's acts. While this view has some appeal, it raises new problems.

It may be that Justice Stevens' position is that the line between "foreseeability" and "expectation" must be drawn with reference to the number of the defendant's products that make their way into the state through marketing channels. Yet Justice Stevens' notion that "volume, value, and the hazardous character" of the defendant's indirect sales within the forum state are all relevant to the purposeful availment question suggests something different—that quantitative factors bear on whether a defendant's acts constitute purposeful availment. That is, he would seemingly focus on the extent of the defendant's contacts with the forum, rather than on the manner in which those contacts were created, to determine whether the defendant's acts constitute purposeful availment. This implies that Asahi would not have been amenable to suit in California if only one of its valves had been sold there and that particular valve caused an injury—even if Asahi actually knew this would occur. It also suggests that the retailer defendant in *World-Wide Volkswagen* might have been held to have purposefully availed itself of the benefits of the Oklahoma market if the plaintiffs had shown that hundreds of automobiles sold by the retailer were regularly driven through Oklahoma.

The difficulty with this analysis is that it confuses the narrow question of whether a defendant's acts constitute purposeful availment with the broader and fundamentally different question of whether a defendant's contacts are sufficient to support general jurisdiction. One can imagine a situation in which the flow of a defendant's products into a state via the stream of commerce is so steady and of such quantity that the defendant can be said to be doing business there, and, therefore, is amenable to jurisdiction in both related and unrelated lawsuits. Quantitative factors such as those noted by Justice Stevens are undoubtedly relevant to this type of inquiry. It is difficult to understand, however, how such quantitative factors are relevant to whether the defendant's acts constitute purposeful availment except insofar as they serve as evidence that the defendant knew or should have known that his product would be

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121. *Id.*

122. See generally *Helicopteros* 466 U.S. 408 (1984); *Beary v. Beech Aircraft Corp.* 818 F.2d 370 (5th Cir. 1987).

123. *Asahi*. 107 S. Ct. at 1038 (Stevens, J., concurring in part and in judgment).
used in a particular jurisdiction and might give rise to product-related litigation there.

A quantitative approach is problematic for another reason: it offers no guidance as to what level of interaction with the forum state counts as purposeful availment. In *Asahi*, Justice Stevens indicated that he would be "inclined" to hold that "a regular course of dealing that results in deliveries of over 100,000 units annually over a period of several years would constitute 'purposeful availment.'" 124 This implies that at some reduced level the defendant's conduct cannot be considered purposeful. How much less, however, is not clear. Would indirect sales in the state of 100,000 units during a single year constitute purposeful availment? Would direct sales of 150 units in four consecutive years suffice? Would sales amounting to .0005 percent of defendant's total annual revenues? A quantitative treatment of the purposeful availment issue raises practical problems that make it impossible to decide specific cases on any principled basis.

If the objective of personal jurisdiction rules is to provide "notice" to a defendant when his activities will subject him to a court's jurisdiction, then this "quantitative" approach fails in its essential purpose.

C. The Brennan Plurality: Hope for the Stream of Commerce Theory

Of the three opinions rendered in *Asahi*, only Justice Brennan's plurality opinion expresses unequivocal approval of the stream of commerce theory of personal jurisdiction. According to Justice Brennan, the theory is consistent with the Court's prior decisions on purposeful availment and with the underlying purposes of procedural due process. 125 In his view, a defendant whose product is marketed in a remote jurisdiction receives benefits from that jurisdiction irrespective of whether his marketing activity is direct or indirect. Moreover, when such a defendant is or should be aware that his product is being sold in a particular state, he likewise ought to know that a suit may be filed against him there if his product should cause injury. Thus, whether the purposeful availment...

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124. Id. at 1035-37 (Brennan, J., concurring in part and in judgment).
125. Indeed, inasmuch as the due process clause protects "persons", not "defendants," Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811 (1985), one can argue that not permitting a state court to assert jurisdiction over stream of commerce defendants might in some circumstances violate the due process rights of the innocent victims.
requirement serves to protect state sovereignty, to ensure notice (and hence, fairness), or both, the requirement is satisfied in a typical stream of commerce case.

Justice Brennan is surely correct. The stream of commerce theory rests on the premise that it is not unfair to assert specific jurisdiction over a defendant who knows or should know that his product is being marketed in a remote jurisdiction. Such a defendant is on notice that his product may cause injury in that jurisdiction, and should be on notice that he may be "haled into court" there to defend a civil action arising from the use of his product. In virtually all cases, the defendant has deliberately chosen a marketing scheme that contemplates distribution of his product within the remote jurisdiction. It has the power to prevent distribution there directly (by extracting appropriate contractual agreements with his distributors) or indirectly (by dealing only with manufacturers or distributors who do not do business within jurisdictions where it does not wish to be sued). The defendant has enjoyed economic benefits flowing from the sales of his product within the state. In short, no matter how one conceives the purposes of procedural due process in the personal jurisdiction context, they are not offended when a state court uses the stream of commerce theory as a justification for asserting personal jurisdiction over a nonresident defendant.

VI. Conclusion

The stream of commerce theory of personal jurisdiction has coexisted peacefully with the notion of "purposeful availment" since at least 1961, when Gray was decided. It has been used to justify jurisdiction, almost exclusively, in specific jurisdiction cases by plaintiffs who have suffered serious bodily injury, property damage, or economic injury. The theory allows states to realize the objectives of their products liability laws and allocate liability among joint tortfeasors in a single proceeding held in a single forum.

In light of the importance of the stream of commerce theory, the Supreme Court's failure to resolve the issue of its validity in Asahi is troubling. Those concerned about the future of products liability litigation can only hope that the Court will soon take steps to resolve the unfortunate ambiguities and uncertainties that are Asahi's legacy.