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PURPOSE AND INTENT: SEEKING A MORE CONSISTENT APPROACH TO STREAM OF COMMERCE PERSONAL JURISDICTION

I. INTRODUCTION

Whether a court may exercise personal jurisdiction over a defendant because the defendant manufactured an allegedly defective product that caused an injury in the forum has proved to be a difficult question in the United States. Despite multiple efforts, the Supreme Court has not developed a definite standard for determining what conduct subjects a manufacturer to personal jurisdiction in a given forum.¹ This confusion arises largely out of the Court's varied interpretations of the "stream of commerce" theory of personal jurisdiction. Beginning with the Court's decision in *Asahi Metal Industry Co. v. Superior Court of California*,² two competing versions of the stream of commerce theory developed within the justices' opinions. The first, expressed by Justice Brennan, suggested that foreseeability of a product causing injury in the forum is sufficient to create the necessary minimum contacts to support personal jurisdiction.³ The alternative theory endorsed by Justice O'Connor does not recognize minimum contacts unless there is some conduct by the defendant—in addition to placing the product in the stream of commerce—that is directed specifically at the forum.⁴ Neither version of the theory commanded a majority of the Court, which led to plurality opinions and subsequent confusion among lower courts about how to properly assess personal jurisdiction in stream of commerce situations.

This Note seeks to examine this controversy in light of the Supreme Court's decision in the recent stream of commerce case, *J. McIntyre Machinery, Ltd. v. Nicastro*.⁵ After discussing the limited clarification that *J. McIntyre* offers regarding the limits of stream of commerce jurisdiction, the Note considers various approaches from the federal courts of appeals to examine how lower courts have applied the principles articulated by the Supreme Court. Finally, the Note suggests a guiding principle and a series

1. See William M. Richman, *Understanding Personal Jurisdiction*, 25 ARIZ. ST. L.J. 599, 600 (1993); Roger H. Transgrud, *The Federal Common Law of Personal Jurisdiction*, 57 GEO. WASH. L. REV. 849, 850 (1989).

2. 480 U.S. 102 (1987).

3. *Id.* at 117–18 (Brennan, J., concurring in part and concurring in the judgment).

4. *Id.* at 112 (O'Connor, J., plurality opinion).

5. 131 S. Ct. 2780 (2011).

of rules that would create a more definite and predictable framework for determining whether stream of commerce personal jurisdiction exists.

This Note argues that the jurisprudence surrounding *J. McIntyre* and *Asahi* largely conflates the doctrine of stream of commerce personal jurisdiction with the types of proof sufficient to support such jurisdiction. Further, this Note contends that the focus when determining personal jurisdiction in a stream of commerce context should be on the intent of the defendant regarding the forum, which serves as a means of determining whether there is purposeful availment that creates the necessary minimum contacts between the forum and defendant. A series of concrete rules are proposed to give form to this principle. First, this proposed framework seeks to address possibly the most difficult issue in stream of commerce jurisdiction analysis—whether or not the use of a distributor by the defendant shields the defendant from personal jurisdiction. The proposed rule directly connects the intent of the defendant regarding the relevant forum with the issue of purposeful availment, such that if a defendant intends to market its product in the forum, that forum may exercise personal jurisdiction over the defendant. Second, this framework retains the currently accepted rule that non-sales conduct in a forum, such as advertising, may create personal jurisdiction in a forum regardless of the defendant's intent when arranging distribution of its products. Third, purposeful availment of the national market constitutes purposeful availment of each state within the United States. Finally, this framework retains the independent reasonableness requirement, which serves largely as a safety valve for extreme situations in which the stream of commerce theory of personal jurisdiction creates jurisdiction in a manner that is fundamentally unfair to the defendant.

II. HISTORY

Early formulations of the standard for personal jurisdiction in the United States did not contemplate extraterritorial jurisdiction.⁶ In *Pennoyer v. Neff*,⁷ the Supreme Court definitively expressed the classic grounds for personal jurisdiction.⁸ In 1945, the Court expanded this

6. See 4 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1064 (3d ed. 2011).

7. 95 U.S. 714 (1877).

8. These grounds were consent to jurisdiction, presence in the forum, or domicile within the forum. *Id.*; see also 16 ROBERT C. CASAD, *Pennoyer v. Neff Recognized Physical Power Theory and Enunciated Traditional Bases for Jurisdiction*, in MOORE'S FEDERAL PRACTICE—CIVIL § 108.20 (3d ed. 1997).

traditional view of personal jurisdiction with its decision of *International Shoe Co. v. Washington*⁹ by authorizing the exercise of extraterritorial personal jurisdiction over nonresidents in some circumstances.¹⁰ Such jurisdiction, however, must be premised upon the party's exercise of the "privilege of conducting activities within a state. . . ."¹¹ The exercise of such a privilege may give rise to personal jurisdiction so long as the party's contacts with the forum are sufficient to make the existence of personal jurisdiction "reasonable and just according to our traditional conception of fair play and substantial justice."¹² In *Hanson v. Denckla*,¹³ the Supreme Court further refined the *International Shoe* principles when it pronounced a new rule requiring "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws"¹⁴ in order for personal jurisdiction to exist in a forum.

In 1980, the Supreme Court first considered what has become known as the stream of commerce theory as it applies to the concept of minimum contacts in *World-Wide Volkswagen Corp. v. Woodson*.¹⁵ The Court expressly stated that "[t]he forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State."¹⁶

The Court applied these principles directly to a stream of commerce scenario in *Asahi*, which considered whether the California courts had personal jurisdiction over a Japanese defendant in a cross-claim stemming from a product liability suit concerning an allegedly defective motorcycle tire.¹⁷ Although the Court directly considered whether the foreign defendant was subject to personal jurisdiction based on a stream of commerce theory, the resulting opinion did not provide a reliable test for

9. 326 U.S. 310 (1945).

10. *Int'l Shoe Co.*, 326 U.S. 310 (1945).

11. *Id.* at 319.

12. *Id.* at 320. See also WRIGHT, *supra* note 6, § 1067.

13. 357 U.S. 235 (1958).

14. *Id.* at 253.

15. 444 U.S. 286 (1980). *World-Wide Volkswagen* was a products liability action filed in Oklahoma to recover for injuries sustained in a car accident in Oklahoma against the car retailer and wholesaler who were both New York corporations with no connections to Oklahoma. *Id.* at 288–90. Although the Court rejected Oklahoma's jurisdiction over the New York defendants, it recognized the stream of commerce theory as a valid method for establishing minimum contacts. *Id.* at 297–98.

16. *Id.* (citing *Gray v. American Radiator & Standard Sanitary Corp.*, 176 N.E.2d 761 (Ill. 1961)).

17. 480 U.S. 102 (1987).

the stream of commerce issue.¹⁸ In fact, many commentators have expressed dissatisfaction with the Court's handling of the issue.¹⁹ Lower courts were also frustrated by the lack of certainty that the *Asahi* plurality opinions created.²⁰

In 2011, the Court revisited the issue of stream of commerce personal jurisdiction in *J. McIntyre Machinery, Ltd. v. Nicastro*.²¹ Commentators expressed hope that the Court would provide more reliable guidance on these issues.²² These hopes were largely dashed, however, as the Court was again unable to produce a majority opinion.²³

III. ASAHI'S COMPETING RATIONALES

In *Asahi*, the Court considered a products liability case in which the plaintiffs alleged that defective tires on a motorcycle caused a crash that injured the plaintiffs.²⁴ Eventually, only a cross-claim between two foreign defendants, Asahi and Cheng Shin, remained.²⁵ Asahi moved to quash Cheng Shin's service on the grounds that California could not exert jurisdiction over Asahi within the boundaries of the Due Process Clause of the Fourteenth Amendment.²⁶

18. Kim Dayton, *Personal Jurisdiction and the Stream of Commerce*, 7 REV. LITIG. 239, 278 (1988).

19. See Jay Conison, *What Does Due Process Have to Do with Jurisdiction?*, 46 RUTGERS L. REV. 1071, 1076 (1994); Wendy C. Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B.C. L. REV. 529, 529–31 (1991); Transgrud, *supra* note 1, at 850; Kevin C. McMunigal, *Desert, Utility, and Minimum Contacts: Toward a Mixed Theory of Personal Jurisdiction*, 108 YALE L.J. 189, 189–90 (1998); Patrick J. Borchers, *Jurisdictional Pragmatism: International Shoe's Half-Buried Legacy*, 28 U.C. DAVIS L. REV. 561, 564 (1995).

20. See, e.g., *Ruston Gas Turbines, Inc. v. Donaldson Co. Inc.*, 9 F.3d 415, 420 (5th Cir. 1993) (“*Asahi* does not provide clear guidance on the ‘minimum contacts’ prong, and therefore we will continue to follow the stream of commerce analysis in *World-Wide Volkswagen*.” (citation omitted)); *Pennzoil Prods. Co. v. Colelli & Assocs., Inc.*, 149 F.3d 197, 205 (3d Cir. 1998) (noting the lack of a clear standard in *Asahi* and the differing approaches that the circuit courts have taken to applying *Asahi*).

21. 131 S. Ct. 2780 (2011).

22. See, e.g., Jonathan A. Berkelhammer, *Supreme Court to Readdress Stream of Commerce Theory of Personal Jurisdiction*, 78 DEF. COUNS. J. 350, 351 (2011); WRIGHT, *supra* note 6, at § 1067.4.

23. See Patrick J. Borchers, *J. McIntyre Machinery, Goodyear, and the Incoherence of the Minimum Contacts Test*, 44 CREIGHTON L. REV. 1245, 1245–46 (2011) (referring to the decision as a “disaster”).

24. *Asahi Metal Indus. Co. v. Sup. Ct. of Cal.*, 480 U.S. 102, 105 (1987).

25. One of the defendants in the action, Cheng Shin Rubber, manufactured the tires in Taiwan. *Id.* at 106. Cheng Shin brought a cross-claim against codefendant Asahi Metal Industry Co., which manufactured the tire's valve stems in Japan, seeking indemnification. *Id.* All of the other claims in the action were eventually settled and dismissed, leaving only the indemnification claim between Cheng Shin and Asahi. *Id.*

26. *Id.*

Although the Court unanimously held that the California courts did not have personal jurisdiction over Asahi, it could not produce a majority opinion.²⁷ Opinions by Justice O'Connor and Justice Brennan each won the support of four Justices. Justice Stevens wrote a separate opinion.²⁸

A. Justice O'Connor's Opinion

Justice O'Connor's opinion, joined by Chief Justice Rehnquist, and Justices Powell and Scalia, concluded that when a defendant places a product in the stream of commerce with the knowledge that the product will eventually end up in the forum state the action will not constitute minimum contacts between the defendant and the forum.²⁹ O'Connor stressed that there must be "[a]dditional conduct of the defendant [indicating] an intent or purpose to serve the market in the forum State."³⁰ Such conduct must be directed at the market in the forum state.³¹

Justice O'Connor's opinion succinctly demonstrates the importance of purposeful availment to the stream of commerce theory. The "constitutional touchstone" of personal jurisdiction remains minimum contacts with the forum state.³² Further, such contacts arise from conduct in which the defendant "purposefully avails itself of the privilege of conducting activities within the forum State. . . ."³³ Forum-directed conduct serves as Justice O'Connor's method of determining whether the defendant has created minimum contacts through purposeful availment.³⁴

27. *Id.* at 112–13 (O'Connor, J., plurality opinion). Note, however, that O'Connor's opinion also argued that regardless of the issue of stream of commerce there would not be personal jurisdiction as it would be unreasonable under the circumstances of the case. "Considering the international context, the heavy burden on the alien defendant, and the slight interests of the plaintiff and the forum State, the exercise of personal jurisdiction by a California court over Asahi in this instance would be unreasonable and unfair." *Id.* at 116. This is an independent reasonableness test, which must also be satisfied in order to establish personal jurisdiction. *See infra* note 207.

28. *Asahi*, 480 U.S. at 121 (Stevens, J., concurring in part and concurring in the judgment).

29. *Id.* at 112 (O'Connor, J., plurality opinion).

30. *Id.*

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

32. *Id.* at 108 (internal quotation marks omitted).

33. *Id.* at 109 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (internal quotation marks omitted)).

34. *Id.* at 112.

B. Justice Brennan's Opinion

Justice Brennan's opinion, joined by Justice Marshall, Justice White, and Justice Blackmun, did not accept the need for additional conduct on the part of the defendant.³⁵ He argued that the Court's opinion in *World-Wide Volkswagen* relied on foreseeability as a distinguishing characteristic between cases in which the Court found personal jurisdiction and others that lacked personal jurisdiction.³⁶ Brennan argued further that a defendant that regularly and foreseeably sends its products into the forum state benefits indirectly from the forum's laws that regulate commerce.³⁷ Finally, the Brennan opinion contended that where a defendant is aware that the final product is marketed in the forum, it cannot be surprised if it is subject to liability arising from a lawsuit in that forum.³⁸

Justice Brennan's foreseeability standard, like Justice O'Connor's forum-directed activity standard, relies on purposeful availment. For Justice Brennan, placing a product in the stream of commerce with the knowledge that it will be sold in the forum constitutes purposeful availment sufficient to create minimum contacts.³⁹

35. *Id.* at 116 (Brennan, J., concurring in part and concurring in the judgment). Although Brennan rejected O'Connor's stream of commerce analysis, he agreed with O'Connor's finding that the circumstances of the *Asahi* case prevented the fair imposition of personal jurisdiction: "This is one of those rare cases in which 'minimum requirements inherent in the concept of fair play and substantial justice . . . defeat the reasonableness of jurisdiction even [though] the defendant has purposefully engaged in forum activities.'" *Id.* (quoting *Burger King*, 471 U.S. at 477-78 (alteration in original)).

36. *Id.* at 120.

37. *Id.* at 117.

38. *Id.* ("The stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale. As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise.").

39. Justice Brennan quoted *World-Wide Volkswagen* for the proposition that the relevant foreseeability is "that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into Court there." *Id.* at 119 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295) (internal quotation marks omitted). He continued incorporating the language of *World-Wide Volkswagen* by emphasizing that the forum State "does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce *with the expectation that they will be purchased by consumers* in the forum State." *Id.* at 119-20 (quoting *World-Wide Volkswagen*, 444 U.S. at 297-98) (internal quotation marks omitted). Justice Brennan's emphasis on the defendant's expectation that the product will be sold in the forum speaks to the defendant's intent when it places a product in the stream of commerce. Thus, for Justice Brennan, foreseeability is a method of establishing purposeful availment that establishes minimum contacts.

C. Justice Stevens's Opinion

Justice Stevens argued that resolution of the stream of commerce issue was not required in *Asahi* because the exercise of jurisdiction would not be reasonable and fair.⁴⁰ He then continued to weigh in on the stream of commerce issues. Stevens contended that whether a product's foreseeable presence in the forum state amounted to minimum contacts was a function of "the volume, the value, and the hazardous character of the components."⁴¹

IV. APPLICATION OF *ASAHI* IN LOWER COURTS

The *Asahi* opinions created a difficult task for lower courts trying to apply the principles expressed by the Supreme Court.⁴² This led the lower courts to adopt differing methods for dealing with the issue of stream of commerce personal jurisdiction. Some courts returned to analyzing the cases under *World-Wide Volkswagen* and its more definite expression of the stream of commerce test.⁴³ Other courts chose to apply the tests of both plurality decisions in *Asahi*.⁴⁴ Multiple circuits adopted O'Connor's stricter test for stream of commerce personal jurisdiction.⁴⁵ The Brennan

40. *Id.* at 121 (Stevens, J., concurring in part and concurring in the judgment).

41. *Id.* at 122.

42. *See, e.g., Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534, 1548 (11th Cir. 1993) (characterizing the state of personal jurisdiction law as "unsettled"); *Pennzoil Prods. Co. v. Colelli & Assocs., Inc.*, 149 F.3d 197, 205 (3d Cir. 1998) (noting the lack of clear guidance from *Asahi* and the divergent applications of it in circuit courts); *Barone v. Rich Bros. Interstate Display Fireworks Co.*, 25 F.3d 610, 614 (8th Cir. 1994) (holding that *Asahi* merely followed *World-Wide Volkswagen* and did not change the test for stream of commerce personal jurisdiction).

43. *Barone*, 25 F.3d at 614 (holding that *Asahi* did not alter the analysis under *World-Wide Volkswagen* because "*Asahi* stands for no more than that it is unreasonable to adjudicate third-party litigation between two foreign companies in this country absent consent by the nonresident defendant."); *Ruston Gas Turbines*, 9 F.3d at 420 ("*Asahi* does not provide clear guidance on the 'minimum contacts' prong, and therefore we will continue to follow the stream of commerce analysis in *World-Wide Volkswagen*.").

44. *See, e.g., Pennzoil*, 149 F.3d at 207 ("[R]egardless of whether one applies the O'Connor standard or the Brennan standard, Colelli purposely availed itself of the laws of Pennsylvania . . ."); *Dehmlow v. Austin Fireworks*, 963 F.2d 941, 947 (7th Cir. 1992) ("Although this case is being decided on the basis of the more permissive stream of commerce theory, in recognition of the recent split of Supreme Court authority on the issue, we also address Dehmlow's contention that the facts of his case satisfy even the more stringent minimum contacts test set forth in Justice O'Connor's plurality opinion in *Asahi*.").

45. *See Boit v. Gar-Tec Prods., Inc.*, 967 F.2d 671, 683 (1st Cir. 1992) (adopting the O'Connor standard for stream of commerce personal jurisdiction); *Falkirk Mining Co. v. Japan Steel Works, Ltd.*, 906 F.2d 369, 375-76 (8th Cir. 1990) ("appellees' placement of a product into the stream of commerce, without more, does not constitute an act of the defendant purposefully directed toward the forum State."); *Madara v. Hall*, 916 F.2d 1510, 1517 (11th Cir. 1990) (holding that for personal

position has also found support within several circuits.⁴⁶ Finally, some opinions simply dodge the doctrinal question altogether and attempt to resolve the issue on a factual basis.⁴⁷

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

Commentators heavily criticized the confusion surrounding the proper standard for stream of commerce personal jurisdiction after *Asahi*.⁴⁸ Many expressed hope that the Supreme Court would rectify this lingering uncertainty when it accepted certiorari for *J. McIntyre Machinery, Ltd. v. Nicastro*.⁴⁹

J. McIntyre involved a plaintiff who was injured while using a metal-shearing machine manufactured by J. McIntyre Machinery, Ltd.⁵⁰ The injury occurred in New Jersey, but the machine was manufactured in England.⁵¹ Aside from the machine's presence in New Jersey, the plaintiff's factual basis for establishing personal jurisdiction rested on the defendant's activities directed at the United States generally.⁵²

Again, as in *Asahi*, the Supreme Court was not able to articulate a definitive standard for stream of commerce personal jurisdiction and delivered a plurality opinion.⁵³ Although the Court recognized the confused state of the law in this context and the opportunity to correct it,⁵⁴ it was unable to clarify the murky standard.

jurisdiction to exist it must be foreseeable that "defendant's own purposeful acts will have some effect in the forum.").

46. See *Irving v. Owens-Corning Fiberglas Corp.*, 864 F.2d 383, 385–86 (5th Cir. 1989) (rejecting the O'Connor standard and adopting the plurality position that no additional conduct was needed under the stream of commerce doctrine).

47. See *Tobin v. Astra Pharmaceutical Prods., Inc.*, 993 F.2d 528, 542–45 (6th Cir. 1993) (upholding jurisdiction on the facts while not expressly adopting any of the *Asahi* positions on stream of commerce jurisdiction).

48. See *supra* note 18.

49. See *supra* note 22.

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

51. *Id.*

52. The plaintiff relied on three facts to support its assertion of personal jurisdiction. First, an independent company had agreed to sell machines for J. McIntyre in the United States. Second, an official from J. McIntyre had come to the United States to advertise at conventions for the scrap recycling industry. Third, at least one machine, the machine that caused the injury, ended up in New Jersey. *Id.* However, the plurality rejected the plaintiff's factual support for personal jurisdiction, noting that the plaintiff did not allege that J. McIntyre controlled its distributor in the United States, that none of the conventions attended by J. McIntyre officials were in New Jersey, and that the record suggested that only one machine ended up in New Jersey. *Id.*

53. *Id.* at 2785.

54. "The rules and standards for determining when a State does or does not have jurisdiction over an absent party have been unclear because of decades-old questions left open in *Asahi Metal Industry Co. v. Superior Court of Cal., Salano Cty.*" *Id.* "This Court's *Asahi* decision may be responsible in part

A. Justice Kennedy's Opinion

Justice Kennedy's plurality opinion, joined by the Chief Justice and Justices Scalia and Thomas, attempted to at least declare a winner between *Asahi's* competing standards. The opinion argues that because Nicastro did not establish that J. McIntyre "engaged in conduct purposefully directed at New Jersey[,]" it did not meet the purposeful availment test.⁵⁵ This language clearly mirrors the standard proposed by O'Connor in *Asahi*.⁵⁶ In fact, the plurality expressly follows the O'Connor standard instead of the Brennan standard for stream of commerce personal jurisdiction.⁵⁷

However, the plurality does not simply adopt O'Connor's *Asahi* standard by reference. Rather, it continues to argue that the directed-conduct requirement derives from the necessity of consent by the defendant to suit in the forum.⁵⁸ The opinion claims that "[t]he principal inquiry in cases of this sort is whether the defendant's activities manifest an intention to submit to the power of a sovereign."⁵⁹ Justice Kennedy

for [the New Jersey Supreme Court's] error regarding the stream of commerce, and this case presents an opportunity to provide greater clarity." *Id.* at 2786.

55. *Id.* at 2784.

56. "The 'substantial connection,' between the defendant and the forum State necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully directed toward the forum State*." *Asahi*, 480 U.S. at 112 (O'Connor, J., plurality opinion) (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985)) (internal citations omitted).

57. "But Justice Brennan's concurrence, advocating a rule based on general notions of fairness and foreseeability, is inconsistent with the premises of lawful judicial power." *J. McIntyre*, 131 S. Ct. at 2789.

58. *Id.* at 2787–88.

59. *Id.* at 2788. There has been debate about whether state sovereignty is a necessary component of personal jurisdiction determinations. See Terry S. Kogan, *A Neo-Federalist Tale of Personal Jurisdiction*, 63 S. CAL. L. REV. 257, 262–63 (1990) (discussing the importance of sovereignty to personal jurisdiction analysis); Margaret G. Stewart, *A New Litany of Personal Jurisdiction*, 60 U. COLO. L. REV. 5, 18–19 (1980) (arguing that state sovereignty creates constitutional limitations on the exercise of state court jurisdiction that could only be changed by constitutional amendment); John N. Drobak, *The Federalism Theme in Personal Jurisdiction*, 68 IOWA L. REV. 1015, 1065–66 (1983) (arguing that federalism concerns are minimal in personal jurisdiction and the modern theory of personal jurisdiction rightly emphasizes the personal rights of the parties). The dissent in *J. McIntyre* took issue with the plurality's emphasis on sovereignty and pointed out that the Court has expressly held that personal jurisdiction is a function of due process, and not sovereignty concerns. Justice Ginsburg argued that:

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

J. McIntyre, 131 S. Ct. at 2798 (Ginsburg, J., dissenting) (quoting *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 n.10 (1982)) (internal quotation marks omitted). But regardless of the theoretical basis for the personal jurisdiction requirement, it is clear that

argues that the requirement that a defendant “purposefully avai[l] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws,”⁶⁰ is equivalent to manifesting an intention to submit to the power of the forum state.⁶¹ Kennedy’s standard is more demanding than that of O’Connor’s plurality opinion in *Asahi* because it seems to require directed activity that demonstrates consent rather than simply demonstrating fairness.⁶² Both the concurring and dissenting opinions in *J. McIntyre* perceived the more restrictive nature of the plurality’s framework and took issue with the expansion of the directed-conduct requirement.⁶³ For the purposes of this discussion, the important point is that Justice Kennedy views purposeful availment as the means by which one may establish sufficient contacts to satisfy due process.⁶⁴

B. Justice Breyer’s Opinion

Justice Breyer’s concurring opinion, joined by Justice Alito, argues that this case did not present the need to create any new expression of the requirements for stream of commerce personal jurisdiction⁶⁵ and cautions the Court against making unnecessary changes to the rules of jurisdiction without a fuller understanding of the consequences of such a change.⁶⁶ He points out that the plurality’s rule is not easily applicable to modern issues such as the use of the Internet in marketing and selling products.⁶⁷

minimum contacts that satisfy traditional notions of fair play and substantial justice created by purposeful availment of the forum by the defendant will satisfy the requirement. Therefore, despite the apparent tension in the opinions of *J. McIntyre* regarding this issue, the theoretical basis for the personal jurisdiction requirement does not change the analysis of whether certain conduct constitutes purposeful availment via the stream of commerce theory.

60. *Hanson*, 357 U.S. at 253.

61. *See supra* note 59.

62. *See supra* notes 29–31.

63. *J. McIntyre*, 131 S. Ct. at 2793 (Breyer, J., concurring); *id.* at 2798–99 (Ginsburg, J., dissenting).

64. For all the complexity that has developed in this area of law, it is surprising how succinctly this central point may be made. Justice Kennedy states simply, “In products-liability cases like this one, it is the defendant’s purposeful availment that makes jurisdiction consistent with ‘traditional notions of fair play and substantial justice.’” *Id.* at 2787 (plurality opinion).

65. *Id.* at 2791 (Breyer, J., concurring).

66. “I think it unwise to announce a rule of broad applicability without full consideration of the modern-day consequences.” *Id.*

67. *Id.* at 2793 (“The plurality seems to state strict rules that limit jurisdiction where a defendant does not ‘inten[d] to submit to the power of a sovereign’ and cannot ‘be said to have targeted the forum.’ But what do those standards mean when a company targets the world by selling products from its Web site? And does it matter if, instead of shipping the products directly, a company consigns the products through an intermediary (say, Amazon.com) who then receives and fulfills the orders? And

However, while explaining that he also rejects the broad interpretation of stream of commerce jurisdiction advocated by the New Jersey Supreme Court, Justice Breyer expresses a version of the O'Connor standard as his understanding of the current law.⁶⁸ Like the plurality opinion, Justice Breyer's opinion explicitly rejects the type of foreseeability test advocated by Justice Brennan in *Asahi*.⁶⁹ It argues that a foreseeability test does not satisfy the requirement for minimum contacts and purposeful availment.⁷⁰ Thus, the opinion contends, a test based solely on foreseeability would abandon the currently accepted inquiry of whether, in light of the defendant's contacts with the forum and the nature of the litigation, it is fair to subject the defendant to suit in the forum.⁷¹ Justice Breyer notes that while a foreseeability based rule might seem fair in the context of a large international firm such as J. McIntyre, the rule may be "fundamentally unfair" to smaller firms seeking to do business in the United States.⁷² He argues that such a test would create undue burdens on such companies.⁷³

C. Justice Ginsburg's Dissent

Justice Ginsburg's dissent, joined by Justices Sotomayor and Kagan, rejects the plurality's consent-based test as too restrictive.⁷⁴ The dissent expresses particular concern about the ease with which a manufacturer might be able to avoid the majority of forums by simply designating a

what if the company markets its products through popup advertisements that it knows will be viewed in a forum? Those issues have serious commercial consequences but are totally absent in this case." (alterations in original) (internal citations omitted)).

68. *Id.* at 2792.

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

70. "I cannot reconcile so automatic a rule with the constitutional demand for 'minimum contacts' and 'purposeful[ly] avail[ment],' each of which rest upon a particular notion of defendant-focused fairness." *Id.* at 2793 (quoting *World-Wide Volkswagen*, 444 U.S. at 269) (alterations in original).

71. *J. McIntyre*, 131 S. Ct. at 2793.

72. "It may be fundamentally unfair to require a small Egyptian shirt maker, a Brazilian manufacturing cooperative, or a Kenyan coffee farmer, selling its products through international distributors, to respond to products-liability tort suits in virtually every State in the United States, even those in respect to which the foreign firm has no connection at all but the sale of a single (allegedly defective) good." *Id.* at 2794.

73. *Id.* (Ginsburg, J., dissenting) ("And a rule like the New Jersey Supreme Court suggests would require every product manufacturer, large or small, selling to American distributors to understand not only the tort law of every State, but also the wide variance in the way courts within different States apply that law.").

74. *Id.* at 2798–99.

nation-wide “middleman” distributor, as J. McIntyre did in this case.⁷⁵ Justice Ginsburg argues that to allow such manufacturers to escape personal jurisdiction in much of the country, despite the fact that they are clearly marketing throughout the entire United States, would undermine the fairness of the judicial system.⁷⁶ Finally, Justice Ginsburg suggests that the question of whether specific jurisdiction exists should be decided on the basis of “considerations of litigational convenience and the respective situations of the parties.”⁷⁷

D. Analysis

Including both the plurality and concurring opinions, a majority of the Justices in *J. McIntyre* explicitly rejected the Brennan-type foreseeability test. Furthermore, the dissent’s stream of commerce jurisdiction analysis, although broader than the plurality’s, relies on “litigational convenience and the respective situations of the parties.”⁷⁸ Thus, none of the opinions in *J. McIntyre* follow the foreseeability-based Brennan standard. Despite the lack of a majority holding, the opinions in *J. McIntyre* taken as a whole send a strong signal that Brennan’s foreseeability test as expressed in *Asahi* is no longer a viable theory upon which courts should decide issues of stream of commerce personal jurisdiction. Although some commentators have recently argued for the merits of Brennan’s

75. “[T]he splintered majority today ‘turn[s] the clock back to the days before modern long-arm statutes when a manufacturer, to avoid being haled into court where a user is injured, need only Pilate-like wash its hands of a product by having independent distributors market it.’” *Id.* at 2795 (alterations in original) (quoting Russell J. Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U. C. DAVIS L. REV. 531, 555 (1995)).

76. *Id.* at 2801–02 (“Courts, both state and federal, confronting facts similar to those here, have rightly rejected the conclusion that a manufacturer selling its products across the USA may evade jurisdiction in any and all States, including the State where its defective product is distributed and causes injury. They have held, instead, that it would undermine principles of fundamental fairness to insulate the foreign manufacturer from accountability in court at the place within the United States where the manufacturer’s products caused injury.”).

77. *Id.* at 2804 (“Litigational considerations include ‘the convenience of witnesses and the ease of ascertaining the governing law.’”) (quoting von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1168–69 (1966)); *id.* (“As to the parties, courts would differently appraise two situations: (1) cases involving a substantially local plaintiff, like Nicasastro, injured by the activity of a defendant engaged in interstate or international trade; and (2) cases in which the defendant is a natural or legal person whose economic activities and legal involvements are largely home-based, i.e., entities without designs to gain substantial revenue from sales in distant markets.”) (citing von Mehren & Trautman, 79 HARV. L. REV. at 1167–69).

78. *J. McIntyre*, 131 S. Ct. at 2804.

approach,⁷⁹ the opinions in *J. McIntyre* are difficult to reconcile with a rule based on stream of commerce and foreseeability alone.

Similarly, a majority of the Justices rejected the plurality's more restrictive consent-based test.⁸⁰ Seemingly, the Court has not materially changed the law of stream of commerce personal jurisdiction in any way. However, accepting the Court's suggestion that, of the two standards expressed in *Asahi*, the O'Connor standard is favored,⁸¹ that standard seems to be a productive place to begin when seeking a plausible solution to the uncertainty surrounding this area of law.

VI. THE IMPACT OF *J. MCINTYRE*

Predictably, commentators have been unimpressed with the Supreme Court's efforts in *J. McIntyre*. The Court in *J. McIntyre* largely disappointed those who had hoped for clarification of the law of stream of commerce personal jurisdiction.⁸² As an initial matter, the fact that, as in *Asahi*, the Court did not produce a majority opinion leaves an inherent uncertainty in how courts will apply the decision prospectively. Furthermore, most of the Justices subscribed to opinions that did not directly follow or build on the previous opinions in *Asahi*.⁸³

Justice Kennedy's theory of stream of commerce personal jurisdiction represents a dramatic departure from the O'Connor standard expressed in *Asahi*. Kennedy grounds his opinion in the concept of the limited sovereignty of the states rather than a defendant-focused fairness

79. See, e.g., Matthew R. Huppert, *Commercial Purpose as Constitutional Purpose: Reevaluating Asahi Through the Lens of International Patent Litigation*, 111 COLUM. L. REV. 624, 669 (2011).

80. *J. McIntyre*, 131 S. Ct. at 2798–99.

81. *Id.* at 2789, 2792.

82. See, e.g., Todd David Peterson, *The Timing of Minimum Contacts After Goodyear and McIntyre*, 80 GEO. WASH L. REV. 202, 224 (2011) (“Unfortunately, *McIntyre* not only fails to resolve the debate about the meaning of *Asahi* and the viability of a stream-of-commerce argument, it arguably will create further confusion among the already befuddled lower courts.”); Borchers, *supra* note 23, at 1245–46 (“The Supreme Court performed miserably. Its opinion in *J. McIntyre* . . . is a disaster. As in its 1987 *Asahi* decision, the Court produced no majority opinion, but the plurality opinion attempted to roll back the clock by a century or more and re-ground personal jurisdiction in a dubious sovereignty theory that the Court had apparently rejected several times before.”); Megan M. La Belle, *The Future of Internet-Related Personal Jurisdiction After Goodyear Dunlap Tires v. Brown and J. McIntyre v. Nicastro*, 15 No. 7 J. INTERNET L. 3, 7 (2012) (“Unfortunately, *Goodyear* and *McIntyre* failed to resolve certain outstanding questions related to personal jurisdiction, such as the split in *Asahi* between Justices O'Connor and Brennan. Moreover, *Goodyear* and *McIntyre* raise a whole host of new issues about the future of the personal jurisdiction doctrine.”).

83. *J. McIntyre*, 131 S. Ct. at 2789 (plurality opinion; *id.* at 2791 (Breyer, J., concurring); *id.* at 2804 (Ginsburg, J., dissenting).

analysis.⁸⁴ His theory equates purposeful availment with actual consent of the defendant to submit to the power of the sovereign.⁸⁵ This formulation strangely resembles the sort of implied consent theory used to establish extraterritorial personal jurisdiction prior to *International Shoe*.⁸⁶ As the *J. McIntyre* dissent noted, such analysis is an anachronism.⁸⁷

Justice Ginsburg's dissent, on the other hand, advocates a more open-ended test based on "considerations of litigational convenience and the respective situations of the parties."⁸⁸ Such a standard does allow for a thorough investigation of the fairness and reasonableness of personal jurisdiction in each case, but lacks the predictability desired by courts and litigants. Each court would be left to judge the fairness of personal jurisdiction in each case without any rubric to guide the inquiry. Certainly there is precedent that courts might look to for past rulings on the fairness of personal jurisdiction in various situations, but the great diversity of factual scenarios that courts face will ensure that such precedent would rarely provide guidance that is directly on point with a pending case. Thus, there would be no reliable scheme to which potential defendants could look when ordering their affairs to be reasonably assured that they would or would not be subject to personal jurisdiction in a given forum.

Although Kennedy's and Ginsburg's opinions interact with *Asahi*, they do not build on it. Rather, they attempt to extend or modify the law as it was expressed in *Asahi*.⁸⁹ The result is further uncertainty about how to apply not only the multiple opinions expressed in *Asahi*, but also the competing rationales put forth by the court in *J. McIntyre*. Furthermore, the plurality opinion in *J. McIntyre* first introduced the concept of implied consent to the discussion, adding to the confusion that courts already face when navigating *Asahi*'s competing standards. Although these opinions recognize a need for something new in this area of law, they were unable to agree upon what that something should look like.

84. *Id.* at 2789–90 (plurality opinion).

85. *Id.* at 2788 ("The principal inquiry in cases of this sort is whether the defendant's activities manifest an intention to submit to the power of a sovereign. In other words, the defendant must 'purposefully avail[] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'") (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

86. *See, e.g., Hess v. Pawloski*, 274 U.S. 352 (1927) (holding that a state statute that implied consent to suit in the state on the part of non-resident drivers who used the roads within the state was constitutional).

87. *J. McIntyre*, 131 S. Ct. at 2794–95 (Ginsburg, J., dissenting).

88. *Id.* at 2804.

89. *See supra* notes 57–63, 74–77 and accompanying text.

Justice Breyer's concurring opinion rejected other opinions' attempts to modify the current law regarding stream of commerce personal jurisdiction.⁹⁰ Due to the nature of the question and the deficiency of the factual record, Breyer's opinion advocated following precedent in the particular case of *J. McIntyre*.⁹¹ However, Breyer also recognized that existing law may not be particularly well-suited to deal with the modern realities of national and international trade.⁹² Despite the possible benefits of judicial restraint, Justice Breyer's opinion is disappointing in that it does not confront the need for a more definite standard regarding stream of commerce.

VII. CONTINUING UNCERTAINTY UNDER THE O'CONNOR STANDARD

Even if one takes *J. McIntyre* to signal of full-scale adoption of the O'Connor standard,⁹³ there are still many difficulties associated with stream of commerce jurisdictional analysis under that standard. The plurality opinion expressly recognized these difficulties.⁹⁴ Even where courts have accepted that personal jurisdiction requires some additional forum-directed conduct on the part of the defendant, there is little consensus as to what will satisfy that requirement.

There are categories of conduct that courts have widely accepted as establishing minimum contacts within the O'Connor standard. Classic examples of O'Connor's directed activity include designing a product for a particular forum, advertising the product in the forum, and retaining a distributor to specifically serve the forum.⁹⁵

90. *J. McIntyre*, 131 S. Ct. at 2792-93 (Breyer, J., concurring) ("Because the incident at issue in this case does not implicate modern concerns, and because the factual record leaves many open questions, this is an unsuitable vehicle for making broad pronouncements that refashion basic jurisdictional rules.").

91. *Id.* at 2792.

92. *Id.* at 2791 ("I do not doubt that there have been many recent changes in commerce and communication, many of which are not anticipated by our precedents. But this case does not present any of those issues. So I think it unwise to announce a rule of broad applicability without full consideration of the modern-day consequences.").

93. In fact, only the concurring opinion advocates deciding these questions based on the standard put forward by Justice O'Connor in *Asahi*. *Id.*

94. *Id.* at 2790 (plurality opinion) ("The conclusion that the authority to subject a defendant to judgment depends on purposeful availment, consistent with Justice O'Connor's opinion in *Asahi*, does not by itself resolve many difficult questions of jurisdiction that will arise in particular cases. The defendant's conduct and the economic realities of the market the defendant seeks to serve will differ across cases, and judicial exposition will, in common-law fashion, clarify the contours of that principle.").

95. *Asahi Metal Indus. Co. v. Sup. Ct. of Cal.*, 480 U.S. 102, 112 (1987) (O'Connor, J., plurality opinion) ("Additional conduct of the defendant may indicate an intent or purpose to serve the market

*Vermeulen v. Renault, U.S.A., Inc.*⁹⁶ provides an example of a case that contained contacts clearly sufficient to satisfy the O'Connor standard. The suit was filed in the Superior Court of Fulton County, Georgia for damages arising from an automobile accident.⁹⁷ The defendants removed the suit to the United States District Court for the Northern District of Georgia, relying on diversity jurisdiction.⁹⁸ The foreign manufacturer defendant, a French state-owned company, moved to dismiss for lack of personal jurisdiction.⁹⁹ The district court granted the motion to dismiss, but the Eleventh Circuit reversed.¹⁰⁰

The court in *Vermeulen*, while noting the unsettled nature of the law regarding stream of commerce personal jurisdiction, determined that even under the most stringent standard expressed by the Supreme Court in *Asahi*, personal jurisdiction existed in this case.¹⁰¹ The court relied on multiple instances of the defendants' conduct that fit within the examples O'Connor provided in her *Asahi* opinion.¹⁰² First, the court noted that the defendants had modified its vehicles "specifically to accommodate the American market."¹⁰³ Second, the court highlighted the fact that the

in the forum State, for example, *designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advise to customers in the forum State, or marketing the products through a distributor who has agreed to serve as the sales agent in the forum State.*"

96. 985 F.2d 1534 (11th Cir. 1993).

97. *Id.* at 1541.

98. *Id.*

99. *Id.*

100. *Id.* at 1553.

101. *Id.* at 1548 ("As is evident from the foregoing discussion, the current state of the law regarding personal jurisdiction is unsettled. Because jurisdiction in the United States over RNUR in this case, however, is consistent with due process under the more stringent 'stream of commerce plus' analysis adopted by the *Asahi* plurality, we need not determine which standard actually controls this case.").

102. It is interesting to note that this in some ways resembles one of the rare cases mentioned by the *J. McIntyre* plurality in which the United States is the sovereign that is relevant in determining if there are minimum contacts. See *J. McIntyre Mach. Ltd. v. Nicastro*, 131 S. Ct. 2780, 2789–90 (2011) (plurality opinion). Although the *J. McIntyre* plurality discussed a situation where stream of commerce would support United States jurisdiction but not jurisdiction in any state and the jurisdiction in *Vermeulen* was statutorily based, the similarities are worth noting. *Vermeulen*, while presenting a different factual scenario, does offer an example of stream of commerce analysis with the United States as the relevant forum. The *Vermeulen* court premised jurisdiction on an exception to sovereign immunity provided by the Foreign Sovereign Immunities Act of 1976 and, thus, independently federal. *Vermeulen*, 985 F.2d at 1543. This was the basis for determining minimum contacts vis-à-vis the United States as opposed to the State of Georgia. When determining jurisdiction in standard diversity-based removal cases, courts apply the minimum contacts analysis with regard to the original forum state rather than the United States. See, e.g., *Boit v. Gar-Tec Products, Inc.*, 967 F.2d 671, 673–74 (1st Cir. 1992).

103. *Vermeulen*, 985 F.2d. at 1549.

defendant advertised its products within the United States.¹⁰⁴ Third, the court found that the defendants “established channels for providing regular advice to customers in the United States.”¹⁰⁵ Finally, the court observed that the defendants “created and controlled the distribution network that brought its products into the United States.”¹⁰⁶ The court found that these contacts were “sufficiently related to appellant’s cause of action to confer specific jurisdiction upon the United States.”¹⁰⁷ The four contacts examined by the court match the examples given by Justice O’Connor in *Asahi* exactly.¹⁰⁸ In such a case, there is little doubt that the defendant has purposefully availed itself of the forum; but most cases do not fit so neatly within O’Connor’s framework.

At the other extreme, it is well established that simply selling a product to a distributor that the defendant knew or reasonably should have known would distribute the product in the forum will not support the existence of personal jurisdiction.¹⁰⁹ In *Boit v. Gar-Tec Products, Inc.*,¹¹⁰ the First Circuit considered whether it had jurisdiction over a defendant corporation from a foreign state where the defendant’s only contact with the forum was that a national distributor had allegedly sold the defendant’s product in the forum.¹¹¹ The court held that such an isolated contact with the forum did not support personal jurisdiction because the defendant had not directed any conduct specifically at the forum state.¹¹²

Similarly, *Falkirk Co. v. Japan Steel Works, Ltd.*¹¹³ involved a suit in North Dakota for damages arising from an allegedly defective cam manufactured by a Japanese company.¹¹⁴ Again, the sole contact between the defendant and the forum state was that its product had been sold to the plaintiff in the forum through an independent distributor.¹¹⁵ The Eighth

104. *Id.*

105. *Id.*

106. *Id.* at 1550.

107. *Id.*

108. *Asahi Metal Indus. Co. v. Sup. Ct. of Cal.*, 480 U.S. 102, 112 (1987) (O’Connor, J., plurality opinion).

109. *See, e.g., Boit v. Gar-Tec Products, Inc.*, 967 F.2d 671, 673–74, 683 (1st Cir. 1992); *Falkirk Mining Co. v. Japan Steel Works, Ltd.*, 906 F.2d 369 (8th Cir. 1990).

110. *Boit*, 967 F.2d at 673–74.

111. *Id.* at 671.

112. *Id.* at 683 (“There is no evidence in the record that Gar-Tec intended to serve the market in Maine. For example, there is no evidence that Gar-Tec designed the product for Maine, advertised in Maine, established channels for providing regular advice to customers in Maine, or marketed the product through a distributor who had agreed to serve as a sales agent in Maine.”).

113. 906 F.2d 369 (8th Cir. 1990).

114. *Id.* at 371–72.

115. *Id.* at 375.

Circuit held that this was insufficient grounds to establish the existence of personal jurisdiction.¹¹⁶ The court reasoned that “[l]ike the nonresident defendant in *Asahi*, appellees’ placement of a product into the stream of commerce, without more, does not constitute an act of the defendant purposefully directed toward the forum State.”¹¹⁷

Between the two extremes represented by the foregoing cases, there remains great confusion about what constitutes purposeful availment when applying the O’Connor standard for stream of commerce personal jurisdiction. Two areas where this confusion is particularly pronounced are: the limits of the rule that a distributor insulates a defendant from suit in a given forum and cases involving activity that is directed to the United States as a whole. The following section will examine representative cases for each of these scenarios in order to more fully understand the difficulties that they present to a court in conducting a stream of commerce personal jurisdiction analysis.

VIII. THE LIMITS OF THE INSULATING EFFECT OF DISTRIBUTORS

One of the most common obstacles faced by plaintiffs attempting to establish a court’s personal jurisdiction over a foreign defendant is that the product entered the forum through a distributor. Often, courts see the distributor as an independent actor who brings the product into the forum without the participation of the defendant manufacturer.¹¹⁸ However, courts have also crafted exceptions to this general rule.

One such exception stems from contact with end-user customers within the forum. In *Pennzoil Products Co. v. Colelli & Associates, Inc.*,¹¹⁹ the defendant sold allegedly defective solvents to a distributor who then sold them to the plaintiff.¹²⁰ However, in this case, unlike many cases involving distributors, the court determined that the manufacturer did have minimum contacts with the forum.¹²¹ The Third Circuit based their finding of minimum contacts on the fact that the defendant interacted with the plaintiff.¹²² These interactions, the court held, demonstrated an intent to

116. “Unless it can be shown that appellees purposefully directed their activities toward North Dakota, the mere fact that Marion brought two of the cams it purchased from Japan Steel into North Dakota does not justify the exercise of personal jurisdiction over appellees.” *Id.* at 375–76.

117. *Id.* at 376.

118. *See, e.g.*, *Boit v. Gar-Tec Products, Inc.*, 967 F.2d 671, 683 (1st Cir. 1992).

119. 149 F.3d 197 (3d Cir. 1998).

120. *Id.* at 199–200.

121. *Id.* at 207.

122. *Id.* at 206 (“Colelli’s actions clearly conformed to Justice O’Connor’s definition of ‘additional conduct.’ Sending solvent samples to Pennzoil’s laboratories demonstrated an intent to

design the product for the forum and the establishment of channels for providing advice to customers in the forum.¹²³ Thus, “Colelli’s actions clearly conformed to Justice O’Connor’s definition of ‘additional conduct.’”¹²⁴ These minimum contacts were present despite the fact that the defendant utilized a distributor and did not directly sell the products in the forum.¹²⁵

Pennzoil stands in contrast to the Fifth Circuit’s holding in *Seiferth v. Helicopteros Atuneros, Inc.*¹²⁶ *Seiferth* was an action brought by the estate of a worker who died when a platform on a helicopter designed by one of the defendants broke.¹²⁷ Although the designer of the platform transported the platform to the forum state and inspected the platform,¹²⁸ the court held that his contacts were not sufficiently related to the cause of action to establish personal jurisdiction over a defective-design claim.¹²⁹ The court reasoned that licensing a design was not the same as placing a product in the stream of commerce.¹³⁰ The court, however, did hold that there was personal jurisdiction for negligence-based claims against the designer that related to his actual conduct within the forum.¹³¹

In contrast to the Third Circuit’s analysis in *Pennzoil*,¹³² the Fifth Circuit in *Seiferth* was unwilling to attach jurisdictional significance to the defendant’s direct contact with the customer in the forum, which involved the very product that gave rise to the cause of action. Like the defendant in *Pennzoil*, the designer in *Seiferth* did not directly sell its product to the plaintiff but did work with the customer to encourage the purchase and use

‘design’ a product which could be used to serve the Pennsylvania refinery market. Furthermore, the record indicates that Cam Colelli had a number of telephone conversations with lab personnel at Pennzoil’s refinery to discuss testing procedures and methodology. Thus, Cam Colelli had established ‘channels for providing regular advice to’ Pennzoil’s personnel in Pennsylvania.”)

123. *Id.*

124. *Id.*

125. “Although Pennzoil was not technically a ‘customer’ of Colelli’s (since Colelli did not sell solvents directly to Pennzoil), Colelli was obviously motivated by the fact that Pennzoil operated one of the two major refineries in the state to which the Ohio producers sent sixty percent of their crude oil.” *Id.* at 206–07.

126. 472 F.3d 266 (5th Cir. 2006).

127. *Id.* at 269–70.

128. *Id.* at 269.

129. *Id.* at 275.

130. “The stream-of-commerce theory does not provide a basis for jurisdiction, because Camus did not place a product into the stream, but merely licensed a design to Air 2.” *Id.*

131. “Camus transported the work platform to Mississippi and inspected it there. . . . This is sufficient to find that the claims of failure to warn, negligence, and negligence *per se* arise out of Camus’s Mississippi contacts.” *Id.* at 276.

132. *Pennzoil*, 149 F.3d at 206–07.

of the product.¹³³ The Fifth Circuit found that the stream of commerce theory was not applicable because the designer had merely licensed the design to the company that sold the platform to the plaintiff.¹³⁴ The importance of this distinction is not readily apparent. The application of the stream of commerce theory has not been limited only to products liability cases.¹³⁵ Furthermore, products liability cases are often based upon allegations of defective design, and it seems formalistic to recognize a rule that stream of commerce personal jurisdiction may only apply in those cases where the designer and manufacturer are the same entity. Using the principles applied by the Third Circuit in *Pennzoil*, one can make a strong case that the designer's conduct in *Seiferth* indicated that he was designing the product for use by a specific customer in the forum market.

Perhaps the Fifth Circuit was persuaded by the more isolated nature of the transaction in *Seiferth*. The designer seemingly only had contact with the plaintiffs in the forum regarding the platform.¹³⁶ The defendant in *Pennzoil*, by contrast, was designing its product for a continuing and significant market represented by the plaintiff.¹³⁷ This line of reasoning, however, ignores the fact that some industries are geared toward a small number of transactions. It seems unrealistic to think that a defendant who is a helicopter platform designer must have extensive contacts regarding its design in the forum in order to establish extra-territorial personal jurisdiction. It is very unlikely that such a defendant would have more than a handful of contacts in any given forum because of the limited market for helicopter platforms. This situation mirrors that of *J. McIntyre* in that the defendant sold a small number of relatively large and expensive machines for which there would not be a large market.¹³⁸ Such a basis for treating defendants in these industries differently rests on formalistic notions of the stream of commerce connections rather than on the underlying fairness of the exercise of personal jurisdiction.

More importantly, these cases demonstrate the difficulty faced by courts and potential defendants trying to discern a consistent and reliable standard from these precedents. Courts recognize that the use of a distributor alone will not shield a defendant from suit in the forum where

133. *See id.*

134. *Seiferth*, 472 F.3d at 275.

135. *See, e.g.*, *CompuServe, Inc v. Patterson*, 89 F.3d 1257, 1265 (6th Cir. 1996) (applying the stream of commerce theory to licensed software).

136. *Seiferth*, 472 F.3d at 269–70.

137. *Pennzoil*, 149 F.3d at 206–07.

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

the defendant has other contact with the forum. It is not clear, however, what type and amount of conduct is necessary to overcome the insulating effect of a distributor.

IX. NATIONALLY DIRECTED CONDUCT

Often, conduct by a defendant will be directed at the United States generally rather than at any specific state. The distinctions between markets within the individual states of the United States are often not important to a manufacturer. Despite this commercial reality, the evolution of the stream of commerce theory of personal jurisdiction has made state boundaries important.¹³⁹ There is concern by some, including the dissent in *J.McIntyre*, that companies may take advantage of courts' state-by-state stream of commerce personal jurisdiction analysis to avoid suit by generalizing their contacts with the United States to limit the forums in which they may be sued.¹⁴⁰

The Sixth Circuit, in *Tobin v. Astra Pharmaceutical Products, Inc.*,¹⁴¹ faced such a circumstance. The case involved a products liability action against a foreign manufacturer of pharmaceuticals.¹⁴² After originally being haled into state court, the defendants removed the case to federal district court, where the case was dismissed for lack of personal jurisdiction.¹⁴³ The court of appeals reversed, finding personal jurisdiction under a stream of commerce theory.¹⁴⁴

The *Tobin* court examined the nationally directed conduct of the defendant while considering whether purposeful availment existed.¹⁴⁵ The court held that the defendant had availed itself of all of the states in the

139. *See id.* at 2789–90.

140. Justice Ginsburg specifically refers to this situation. She asks rhetorically whether a foreign industrialist that is indifferent as to where its product sells within the United States but wants to avoid products-liability litigation may escape personal liability by engaging a distributor to ship its machines into the United States:

Under this Court's pathmaking precedent in *International Shoe Co. v. Washington* and subsequent decisions, one would expect the answer to be unequivocally, "No." But instead, six Justices of this Court, in divergent opinions, tell us that the manufacturer has avoided the jurisdiction of our state courts, except perhaps in States where its products are sold in sizable quantities.

Id. at 2794–95 (Ginsburg, J., dissenting) (internal citations omitted).

141. 993 F.2d 528 (6th Cir. 1993).

142. *Id.* at 532.

143. *Id.*

144. *Id.* at 544–45.

145. *Id.* at 544.

union by seeking to service markets within the entire United States.¹⁴⁶ Important to the court's reasoning was the fact that the defendant maintained some element of control over the United States distributor's compliance with all applicable FDA regulations and information submitted to the FDA.¹⁴⁷ This requirement also granted the defendant control over the wording of the information included with the medicine, as it had to be FDA approved.¹⁴⁸ The opinion stressed that seeking FDA approval was a directed effort to gain access to all states in the United States.¹⁴⁹ Furthermore, the court argued that by engaging a nationwide distributor, the defendant had availed itself of all of the states.¹⁵⁰

This analysis stands in stark contrast to the state-specific analysis expressed by the plurality in *J. McIntyre*.¹⁵¹ There the plurality focused only on the defendant's activity that was specifically directed at the forum state.¹⁵² The Court in *J. McIntyre* specifically distinguished the United States as a separate sovereign that must be considered apart from the individual states when determining personal jurisdiction.¹⁵³ In *Tobin*, on the other hand, the Sixth Circuit determined that actions taken toward the United States generally could establish minimum contacts in all states, despite a lack of forum-specific directed activity.¹⁵⁴

J. McIntyre did not resolve this interpretive fork in the road, given the Court's plurality opinion and the plaintiff's failure to argue the

146. *Id.* ("Duphar was not simply placing its product into the stream of commerce. Duphar purposefully availed itself of the privilege of conducting business in all states, including the state of Kentucky. As we have stated many times before, '[p]urposeful availment by the defendant of the privilege of acting in, or causing consequences in, the forum state 'is the *sine qua non* of *in personam* jurisdiction.'" (alterations in original).

147. "Duphar intended to keep tight control over the information given to the FDA and over any changes in the wording of the package insert." *Id.* at 543.

148. *Id.*

149. "Duphar maintains that FDA approval was merely a prerequisite for placing the product into the stream of commerce. Duphar confuses the stream of commerce concept. Duphar's direct efforts in obtaining FDA approval allowed Duphar to avail itself of the vast, lucrative markets of each state in the United States." *Id.*

150. *Id.* at 543-44 ("Duphar made a *deliberate decision* to market ritodrine in all 50 states, including Kentucky, the forum state. . . . Duphar did not, for example, seek a 'New England regional distributor' or a distributor for specific states. It sought and obtained a distributor to market its product in each and every state.").

151. *J. McIntyre Mach. Ltd. v. Nicastro*, 131 S. Ct. 2780, 2789 (plurality opinion).

152. *Id.* ("[P]ersonal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis. The question is whether a defendant has followed a course of conduct directed at the society or economy existing within the jurisdiction of a given sovereign, so that the sovereign has the power to subject the defendant to judgment concerning that conduct.").

153. "Because the United States is a distinct sovereign, a defendant may in principle be subject to the jurisdiction of the courts of the United States but not any particular State." *Id.*

154. *Tobin*, 993 F.2d at 543-44.

defendant's nationwide contacts. Although some may find comfort in the doctrinal simplicity of the plurality's analysis, the standard expressed by the plurality does create the possibility for safe harbors that foreign manufacturers may resort to in order to avoid suit within the United States. The dissent in *J. McIntyre* recognized this problem.¹⁵⁵ In many cases, especially those with foreign defendants, this result could bar plaintiffs from bringing their suit entirely because of the extra cost and difficulty associated with pursuing their claim in the defendant's home country.

The alternative position also has a strong point, in that the imposition of an easy standard for directed activity would impose burdens on small manufacturers who simply sell their products to a distributor. The Sixth Circuit in *Tobin* focused on the defendant's efforts to obtain FDA approval and to engage a distributor that would serve the entire United States.¹⁵⁶ In such a circumstance, the imposition of jurisdiction hardly poses an undue burden on the manufacturer. When a manufacturer makes a large-scale intentional effort to gain entry into the national U.S. market, efforts to distinguish between activities directed at any specific state would be artificial and unnecessarily formalistic. However, as Justice Breyer's concurring opinion in *J. McIntyre* recognized, the large scale of some operations could mask the difficulties that smaller manufacturers would face under a lower standard for directed activity.¹⁵⁷

X. PROPOSAL

Given the great diversity in rationales and interpretations that the United States Courts of Appeals have applied to the Supreme Court's decisions relating to stream of commerce theory of personal jurisdiction,

155. The dissent notes that a foreign manufacturer seeking to take advantage of the market in the United States, but would prefer to avoid products liability litigation there, might engage a U.S. distributor to that end. *J. McIntyre*, 131 S. Ct. at 2794–95 (Ginsburg, J., dissenting). Justice Ginsburg argues that under current precedent, this arrangement would not allow the manufacturer to avoid suit, but that “six Justices of this Court, in divergent opinions, tell us that the manufacturer has avoided the jurisdiction of our state courts, except perhaps in States where its products are sold in sizeable quantities.” *Id.* at 2795. This decision, she argues, “turn[s] the clock back to the days before modern long-arm statutes when a manufacturer, to avoid being haled into court where a user is injured, need only Pilate-like wash its hands of a product by having independent distributors market it.” *Id.* (quoting Weintraub, *supra* note 75, at 555) (internal quotation marks omitted).

156. See *Tobin*, 993 F.2d at 543.

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

there is a clear need for a more definite standard. As personal jurisdiction is rooted in the constitutional guarantees of due process,¹⁵⁸ the rules controlling whether jurisdiction exists should be applied uniformly throughout the country. “The Due Process Clause, by ensuring the ‘orderly administration of the laws,’ gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.”¹⁵⁹ Unfortunately, the jurisprudence relating to stream of commerce personal jurisdiction has not lived up to this standard. This section offers a guiding principle that seeks to simplify stream of commerce personal jurisdiction as well as a series of proposed rules to provide concrete examples of the principle in action.

A. Refocusing on Purpose and Intent

Purposeful availment is the cornerstone of the stream of commerce theory of personal jurisdiction.¹⁶⁰ Despite the confusing and contentious nature of the various opinions in both *Asahi* and *J. McIntyre*, all of those opinions accept that purposeful availment is necessary to satisfy *International Shoe*’s minimum contacts test in the stream of commerce context.¹⁶¹ The central importance of purposeful availment began with the Court’s pronouncement in *Hanson* that purposeful availment of the laws of the forum state is a necessary component to the exercise of extraterritorial personal jurisdiction.¹⁶² All the opinions in *Asahi* accepted purposeful availment as the element of personal jurisdiction that the stream of commerce theory addresses. Justice O’Connor argued that purposeful availment must arise from the defendant’s actions that create a

158. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980).

159. *Id.* at 297 (quoting *Int’l Shoe Co. v. Wash.*, 326 U.S. 310, 319 (1945)) (internal citations omitted).

160. See *J. McIntyre*, 131 S. Ct. at 2787 (plurality opinion) (“In products-liability cases like this one, it is the defendant’s purposeful availment that makes jurisdiction consistent with ‘traditional notions of fair play and substantial justice.’”); *World-Wide Volkswagen*, 444 U.S. at 297 (“When a corporation ‘purposefully avails itself of the privilege of conducting activities within the forum State,’ it has clear notice that it is subject to suit there”) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1927)) (internal citation omitted); *Asahi Metal Indus. Co. v. Sup. Ct. of Cal.*, 480 U.S. 102, 112 (1987) (O’Connor, J., plurality opinion) (“The ‘substantial connection’ between the defendant and the forum State necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully directed toward the forum State.*”) (internal citation omitted).

161. See *Asahi*, 480 U.S. at 105; *id.* at 112 (O’Connor, J., plurality opinion); *id.* at 119 (Brennan, J., concurring in part and concurring in the judgment); *J. McIntyre*, 131 S. Ct. at 2787 (plurality opinion).

162. *Hanson*, 357 U.S. at 253.

substantial connection with the forum state.¹⁶³ Justice Brennan's analysis found purposeful availment of the forum's laws when the defendant had placed the product in the stream of commerce with the knowledge that it will arrive in the forum state.¹⁶⁴ Justice Stevens's concurring opinion argued that whether a defendant had purposefully availed itself of the forum is "a constitutional determination that is affected by the volume, the value, and the hazardous character of the components."¹⁶⁵ Despite the differing rationale expressed in the case, the central question in each opinion is whether the defendant's conduct constituted purposeful availment of the benefits and protections of the forum.

Similarly, all the opinions in *J. McIntyre* rely on purposeful availment as the central question in the stream of commerce personal jurisdiction analysis. With Justice Kennedy's consent-based test for stream of commerce jurisdiction, purposeful availment acts as the means by which a defendant submits to the power of the sovereign.¹⁶⁶ Justice Breyer's concurring opinion largely follows Justice O'Connor's rationale from *Asahi*, finding the issue of purposeful availment through directed activities to be the determinative factor for whether jurisdiction existed.¹⁶⁷ Justice Ginsburg's dissent also gave importance to the issue of purposeful availment. She argued that because *J. McIntyre* had availed itself of the

163. O'Connor first noted that the Court had reaffirmed *Hanson's* purposeful availment requirement in *Burger King Corp. v. Rudzewicz*, which held that "minimum contacts must have a basis in 'some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'" *Asahi*, 480 U.S. at 109 (O'Connor, J., plurality opinion) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)). Purposeful availment exists when such availment creates contacts that "proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State." *Id.* (quoting *Burger King*, 471 U.S. at 475). What O'Connor advocates in *Asahi* is that the substantial connection between the defendant and the forum State "must come about by *an action of the defendant purposefully directed toward the forum State*." *Asahi*, 480 U.S. at 112.

164. *Id.* at 117 (Brennan, J., concurring in part and concurring in the judgment) ("A defendant who has placed goods in the stream of commerce benefits economically from the retail sale of the final product in the forum State, and indirectly benefits from the State's laws that regulate and facilitate commercial activity. These benefits accrue regardless of whether that participant directly conducts business in the forum State, or engages in additional conduct directed toward that State.")

165. *Id.* at 122 (Stevens, J., concurring in part and concurring in the judgment).

166. "As a general rule, the sovereign's exercise of power requires some act by which the defendant 'purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'" *J. McIntyre*, 131 S. Ct. at 2787 (plurality opinion) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

167. Breyer argues that the plaintiff had not met his burden of establishing a factual basis for personal jurisdiction. He found that the plaintiff had not "shown that the British Manufacturer 'purposefully avail[ed] itself of the privilege of conducting activities' within New Jersey, or that it delivered its goods in the stream of commerce 'with the expectation that they will be purchased' by New Jersey users." *Id.* at 2792 (Breyer, J., concurring) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 297-98 (1980)).

entire United States market, it had availed itself of each individual State's market, as well.¹⁶⁸

The wide acceptance of the importance of the purposeful availment requirement in these cases indicate its central role in the stream of commerce theory of personal jurisdiction. It is through such purposeful availment that the defendant creates the necessary minimum contacts to support extraterritorial personal jurisdiction.¹⁶⁹

Purposeful availment speaks to intent. When a manufacturer's product is sold in a forum, the manufacturer has in some sense indirectly availed itself of the benefits and protections of the laws of the forum.¹⁷⁰ Yet, the minimum contacts test of *International Shoe* requires more. Without requiring purpose or intent on the part of the manufacturer, a defendant could be called into court in any state where its product happened to cause an injury. *World-Wide Volkswagen* recognized the unfairness of subjecting a defendant to jurisdiction based upon the actions of other actors.¹⁷¹ If the defendant intended to access the markets in a particular forum, however, contacts are created that "proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State."¹⁷²

It has not been controversial that stream of commerce jurisdiction requires some form of intent on the part of the defendant to access the market in the forum. In one sense, the law of stream of commerce jurisdiction is relatively simple; it requires purposeful availment, which in turn requires intent on the part of the defendant to access the market in the forum. Confusion arises when courts attempt to determine which facts demonstrate such intent. Justice O'Connor distilled intent from a defendant's additional activities directed specifically at the forum.¹⁷³

168. *J. McIntyre*, 131 S. Ct. at 2801 (Ginsburg, J., dissenting) ("In sum, McIntyre UK, by engaging McIntyre America to promote and sell its machines in the United States, 'purposefully availed itself' of the United States market nationwide, not a market in a single State or a discrete collection of States. McIntyre UK thereby availed itself of the market of all States in which its products were sold by its exclusive distributor.").

169. "[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson*, 357 U.S. at 253 (citing *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 319 (1945)).

170. It was this indirect availment of the forum's laws that Justice Brennan relied upon in his *Asahi* opinion. He argued that a manufacturer that places a product into the stream of commerce "indirectly benefits from the State's laws that regulate and facilitate commercial activity." *Asahi*, 480 U.S. at 117 (Brennan, J., concurring in part and concurring in the judgment).

171. In fact, the court rejected such a basis for jurisdiction, even when it is foreseeable by the defendant that the customer would likely take the product into another state. *World-Wide Volkswagen*, 444 U.S. at 296-97.

172. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985).

173. *See Asahi*, 480 U.S. at 108-12 (O'Connor, J., plurality opinion).

Justice Brennan was satisfied with foreseeability as a measure of intent.¹⁷⁴ Later, in *J. McIntyre*, Justice Kennedy required conduct purposefully directed at the forum.¹⁷⁵ Justice Breyer's opinion sought similar directed conduct.¹⁷⁶ Even Justice Ginsburg's dissent, which focused on litigational considerations,¹⁷⁷ discussed the intent of the defendant to access the United States as a single market.¹⁷⁸

Ultimately, then, what the Justices have had such a difficult time agreeing on is the manner of proof sufficient to demonstrate the defendant's intent to access the market as a means of establishing purposeful availment. As the Court described in *Hanson*, the standard for extraterritorial jurisdiction is purposeful availment that creates minimum contacts with the forum that satisfy traditional conceptions of fair play and substantial justice.¹⁷⁹ Neither *Asahi* nor *J. McIntyre* has changed this standard.¹⁸⁰ The relevant question, then, is simply whether the defendant has manifested intent to purposefully avail itself of the forum market.

Despite the simplicity of the question, courts have had difficulty answering it consistently. Much of the problem has been that, as discussed above, the Justices have focused on issues of proof rather than the doctrine itself. While it is necessary when establishing stream of commerce personal jurisdiction to prove facts that support a finding that the defendant intended to avail itself of the forum market, such a finding is inherently discretionary. In *Asahi*, Justice Brennan was satisfied with foreseeability as a proxy for intent,¹⁸¹ while Justice O'Connor required some additional conduct.¹⁸²

If *J. McIntyre* has clarified anything, it is that the Court now accepts Justice O'Connor's position in this controversy.¹⁸³ But, the more important point is that underlying the decisions in both *Asahi* and *J. McIntyre* is the notion that the plaintiff must show that the defendant intended to access the forum market. It is this central question that is at the root of stream of commerce personal jurisdiction. While proof of such intent will vary from

174. See *id.* at 117, 120 (Brennan, J., concurring in part and concurring in the judgment).

175. See *J. McIntyre*, 131 S. Ct. at 2790 (plurality opinion).

176. See *id.* at 2792 (Breyer, J., concurring).

177. See *id.* at 2804 (Ginsburg, J., dissenting).

178. See *id.* at 2801–02.

179. See *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

180. See, e.g., *Barone v. Rich Bros. Interstate Display Fireworks Co.*, 25 F.3d 610, 614 (8th Cir. 1994).

181. See *Asahi*, 480 U.S. at 116–17 (Brennan, J., concurring in part and concurring in the judgment).

182. See *id.* at 112 (O'Connor, J., plurality opinion).

183. See *supra* Part V.D.

case to case,¹⁸⁴ courts and litigators should recognize that Justice O'Connor's forum-directed activity is a means to an end: it serves to show intent in support of a finding of purposeful availment.¹⁸⁵ Foreseeability may not be sufficient to demonstrate such intent, but the proof required in Justice O'Connor's standard is not limited to the narrow categories of conduct suggested in *Asahi*.¹⁸⁶ Rather, Justice O'Connor's opinion simply requires that the connection between the defendant and the forum State to "come about by *an action of the defendant purposefully direction toward the forum state.*"¹⁸⁷

Thinking about the forum-directed conduct requirement in this way allows for less complex rules relating to the standard for purposeful availment. This simplicity is achieved by keeping in mind that the question to be answered is whether the defendant intended to access the forum market and that evidence of such intent is not limited to the categories enumerated in *Asahi*. Such intent establishes a purpose on the part of the defendant to avail itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.¹⁸⁸ This conception of the forum-directed conduct standard allows courts to apply stream of commerce personal jurisdiction in cases where there is intent to access the markets *without* the classic forum-directed conduct enumerated by Justice O'Connor in *Asahi*, while at the same time protecting defendants' constitutional due process rights where there is no purposeful availment of the forum state.

B. Proposed Rules

In order to make sense of the Supreme Court's stream of commerce jurisprudence, lower courts should refocus on the central requirement that plaintiffs demonstrate a defendant's intent to access the forum market. As discussed above, this principle is consistent with *Asahi* and *J. McIntyre*, but the application of such a principle remains to be determined. The rules suggested below seek to give concrete form to this principle in a manner that creates predictable results for determining whether personal jurisdiction exists under the stream of commerce theory.

184. Justice O'Connor did enumerate certain examples of conduct that would satisfy the purposeful availment requirement, but this list was not intended to be exclusive. *See Asahi*, 480 U.S. at 112.

185. *See id.*

186. *See id.*

187. *Id.*

188. *See Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

1. Distributors

The commercial practice of distributing one's goods into the various markets in the United States using a third-party distributor is at the heart of the stream of commerce issue. If a defendant in a product liability suit or its agent sold a product directly in the forum that later causes an injury, there would be little need for the stream of commerce theory. As many of the cases cited above reveal, however, an independent distributor often shields a manufacturer from personal jurisdiction despite clear intent to market its product within the forum.¹⁸⁹

The varying size of potential defendants is an important consideration in the Supreme Court's opinions discussing this issue. The concurring opinion in *J. McIntyre* expresses the concern that an easy standard for stream of commerce personal jurisdiction would place an unfair burden on smaller commercial enterprises.¹⁹⁰ The concern is that a small manufacturer might sell its product to an independent distributor, retaining no control over the distribution of the product, and still be called into court in a distant and unfamiliar forum.¹⁹¹ Most of the Justices in *J. McIntyre* seem to agree that personal jurisdiction over a very small manufacturer in a distant forum based solely on such foreseeability is fundamentally unfair.¹⁹²

The plight of the small manufacturer imagined by the Justices, however, is a simplified scenario constructed to demonstrate the unwanted effects a simple foreseeability test for stream of commerce personal jurisdiction could have on smaller businesses. In reality, there are defendants of all sizes and levels of sophistication. Personal jurisdiction over a large multi-national manufacturer that has employed an independent distributor in order to sell its product within the forum does

189. See, e.g., *Boit v. Gar-Tec Products, Inc.*, 967 F.2d 671, 683 (1st Cir. 1992); *Falkirk Mining Co. v. Japan Steel Works, Ltd.*, 906 F.2d 369, 371–76 (8th Cir. 1990).

190. See *J. McIntyre Mach. Ltd. v. Nicastro*, 480 U.S. 2780, 2794 (2011) (Breyer, J., concurring).

191. *Id.*

192. Both the plurality opinion and the concurring opinion cite this scenario as a major failing of the Brennan-type foreseeability test. See *supra* 157; *J. McIntyre*, 131 S. Ct. at 2790 (“It must be remembered, however, that although this case and *Asahi* both involve foreign manufacturers, the undesirable consequences of Justice Brennan’s approach are no less significant for domestic producers. The owner of a small Florida farm might sell crops to a large nearby distributor, for example, who might then distribute them to grocers across the country. If foreseeability were the controlling criterion, the farmer could be sued in Alaska or any number of other States’ courts without ever leaving town.”).

not raise the same issues of fairness.¹⁹³ Thus, the distinction seems to arise from differing levels of resources and sophistication between large and small enterprises. However, these differences are based on generalities. There is no inherent reason that a small business would possess a less sophisticated distribution scheme than a larger business. Although resources and scale may be factors in such a scheme, a small business is still capable of seeking out and employing a distributor in order to widen its market exposure.

Whether distributors create a barrier between a manufacturer and the personal jurisdiction in the forum should depend on the relationship between the distributor and the manufacturer. Purposeful availment relates to the intent of the defendant, and it is that intent that should control these disputes.¹⁹⁴ When a manufacturer engages a distributor with the intent to access a specific market, there is purposeful availment of the market's forum.

Intent is a factual question, and it is the plaintiff's evidentiary burden to establish this fact in support of its assertion of the forum's jurisdiction. There are obvious scenarios in which this burden would be difficult to meet because of the abstract nature of the concept of intent. However, proof of intent would often be available in the form of distribution contracts, records of negotiations, patterns in business practice, and records relating to distribution planning.

193. *E.g.*, "What might appear fair in the case of a large manufacturer which specifically seeks, or expects, an equal-sized distributor to sell its product in a distant State might seem unfair in the case of a small manufacturer . . ." *J. McIntyre*, 131 S. Ct. at 2793.

194. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98 (1980) ("[I]f the sale of a product of a manufacturer or distributor . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its products in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury . . ."). Although the Court spoke of isolated occurrences, it seems that the efforts of the defendant rather than the scope of its operation is the important factor. Isolated occurrence may refer to the type of after-market activities at issue in *World-Wide Volkswagen*, which could bring a product into the forum without any effort or intent by the defendant. This interpretation is further supported by the Court's broader formulation of the stream of commerce theory that immediately followed the previous quote: "The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." *Id.* at 297-98. Furthermore, the Court's reliance on the defendant's expectations rather than what was foreseeable to the defendant supports the contention that intent is the determinative factor.

2. *Direct Non-Sales Contacts with the Forum*

Using only the foregoing framework for determining whether stream of commerce personal jurisdiction exists when a distributor is involved, one can envision a scheme that would enable manufacturers to avoid personal jurisdiction. A manufacturer could simply employ distributors with the capability to distribute anywhere the manufacturer might want to market its goods but retain no control and secure no representations by the distributor as to where the goods would actually be disseminated. Furthermore, the manufacturer could promote the product actively in desirable markets in order to increase demand and influence the distributor to market the product in that forum. In fact, the distribution scheme used by J. McIntyre was very similar to this scenario. The company used a closely related but separate corporation called McIntyre America to distribute its products nationwide.¹⁹⁵ This scheme allows the manufacturer to escape jurisdiction when it clearly manifests intent to serve the forum market.

In such a situation, Justice O'Connor's forum-directed activity standard still applies independently of the distributor framework discussed above. As O'Connor recognized in *Asahi*, when a manufacturer directly designs, promotes, or tests a product for a specific market, purposeful availment is satisfied.¹⁹⁶ These types of contacts demonstrate the manufacturer's intent to avail itself of the forum.¹⁹⁷

3. *National Availment*

The issue of national availment is perhaps the most troubling under the Supreme Court's jurisprudence for stream of commerce personal jurisdiction as expressed in *J. McIntyre* and *Asahi*. Following the plurality and concurrence in *J. McIntyre*, it seems that a defendant may avoid personal jurisdiction in a forum by arranging for a distributor to sell its product throughout the United States, rather than in specific states.¹⁹⁸ The

195. *J. McIntyre*, 131 S. Ct. at 2796 (Ginsburg, J., dissenting).

196. *Asahi Metal Indus. Corp. v. Sup. Ct. of Cal.*, 480 U.S. 102, 112 (1987) (O'Connor, J., plurality opinion).

197. *Id.*

198. *J. McIntyre*, 131 S. Ct. at 2790 (plurality opinion) (finding that despite the employment of a distributor for the United States market, the plaintiff did "not show that J. McIntyre purposefully availed itself of the New Jersey Market."); *id.* at 2792 (Breyer, J., concurring) ("Here, the relevant facts found by the New Jersey Supreme Court show no 'regular . . . flow' or 'regular course' of sales in New Jersey; and there is no 'something more,' such as a special state-related design, advertising, advice, marketing, or anything else.") (alterations in original).

plurality in *J. McIntyre* accepted this result as a function of the federal structure of the United States.¹⁹⁹ The opinion asserted that if a defendant directed its conduct nationally, it would constitute purposeful availment that could create minimum contacts with the United States but not the individual states within the United States.²⁰⁰ The dissent in *J. McIntyre* rejected the proposition that directing activity to the entire nation does not constitute minimum contacts in the individual states.²⁰¹ Justice Ginsburg argued that such a nationwide exposure to personal jurisdiction was consistent with the purposeful availment requirement.²⁰²

The *J. McIntyre* plurality's result is at odds with the purposeful availment standard, which links the manufacturer's intent with the imposition of personal jurisdiction.²⁰³ As the *J. McIntyre* dissent recognized,²⁰⁴ if a manufacturer employs a distributor to serve the entire United States, it demonstrates a clear intent to avail itself of the markets in each state within the United States.²⁰⁵ Accordingly, when a defendant has placed its product in the stream of commerce with the intent that it be sold throughout the United States and without distinction between any of the individual states, each state may exercise personal jurisdiction over that

199. *Id.* at 2789 (plurality opinion).

200. *Id.* ("Because the United States is a distinct sovereign, a defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State. This is consistent with the premises and unique genius of our Constitution.").

201. *J. McIntyre*, 131 S. Ct. at 2801 (Ginsburg, J., dissenting).

202. *Id.* ("Adjudicatory authority is appropriately exercised where 'actions by the defendant himself' give rise to the affiliation with the forum. How could McIntyre UK not have intended, by its actions targeting a national market, to sell products in the fourth largest destination for imports among all State of the United States and the largest scrap metal market?") (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)) (internal citation omitted).

203. *See supra* Part X.A.

204. *J. McIntyre*, 131 S. Ct. at 2801.

205. It is in this context that the debate concerning the importance of federalism and state sovereignty concerns personal jurisdiction. The plurality in *J. McIntyre* seems to contend that because each state is sovereign, a defendant must manifest consent to the jurisdiction of each of those states independently. *See J. McIntyre*, 131 S. Ct. at 2789 (plurality opinion). The dissent rejected such a scheme on the basis that personal jurisdiction is rooted in due process and not issues of state sovereignty and federalism. *J. McIntyre*, 131 S. Ct. at 2799 (Ginsburg, J., dissenting) ("Whatever the state of academic debate over the role of consent in modern jurisdictional doctrines, the plurality's notion that consent is the animating concept draws no support from controlling decisions of this Court. Quite the contrary, the Court has explained, a forum can exercise jurisdiction when its contacts with the controversy are sufficient; invocation of a fictitious consent, the Court has repeatedly said, is unnecessary and unhelpful."). This debate could be important in the jurisdictional analysis of a suit brought in a forum unrelated to the injury complained of but where the defendant has equally targeted the forum's market. Such a suit would be possible under a theory of nationwide purposeful availment, and there is some precedent for finding jurisdiction in that context. *See Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 (1984). But when the suit is brought in the forum where the defendant has caused its products to be distributed and where the injury takes place, nationwide purposeful availment should be sufficient to support personal jurisdiction based on a stream of commerce theory.

defendant. If a defendant seeks to exploit the markets in every possible forum within the United States, it should hardly be objectionable that it could be sued in any forum in the United States.²⁰⁶

4. *Independent Reasonableness Test*

The stream of commerce theory serves to establish purposeful availment by a defendant of a particular forum where it has not directly acted in the forum. But purposeful availment is not the only requirement for the establishment of personal jurisdiction. One must remember that the establishment of minimum contacts is not a dispositive test for personal jurisdiction. Even where a court finds that minimum contacts exist, other factors may make the exercise of personal jurisdiction unreasonable.²⁰⁷ Courts may consider such factors as the burden on the defendant, the interest of the forum state in the dispute, the plaintiff's interest in a convenient forum, and the judicial interest in efficient resolution of controversies.²⁰⁸

Although Justice Brennan recognized the importance of this rule as a limitation on stream of commerce jurisdiction in his *Asahi* concurrence, the plurality and concurrence in *J. McIntyre* ignored the relationship between reasonableness and stream of commerce.²⁰⁹ Because of this independent reasonableness requirement for personal jurisdiction, the potential unwanted effects that concerned the *J. McIntyre* plurality and concurrence need not destroy the rule. Even where a small manufacturer has created minimum contacts by selling to a large national distributor locally, other considerations under the traditional notions of fair play and

206. The Supreme Court recognized a weaker form of this proposition in *Keeton* in the context of a claim arising from the content of a nationally distributed magazine. "Respondent produces a national publication aimed at a nationwide audience. There is no unfairness in calling it to answer for the contents of that publication wherever a substantial number of copies are regularly sold and distributed." *Keeton*, 465 U.S. at 781. Of course the difficulty with the Court's formulation is in determining how many magazines constitutes a "substantial number" and how often they must be marketed in a forum to be deemed "regularly sold and distributed." But if purposeful availment is the standard that must be met, the scope of distribution should not be dispositive. If a defendant has made a directed effort to distribute its product in a forum but has only sold a few units, it has no less purposefully availed itself of the forum than if it had sold thousands of units. If the intent of a manufacturer is to sell its product in a forum and the manufacturer succeeds even once, there is purposeful availment.

207. "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.'" *Burger King*, 471 U.S. at 476 (quoting *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 320 (1945)).

208. *Id.* at 477.

209. See Borchers, *supra* note 23, at 1256–58.

substantial justice will protect the defendant from an unreasonable exercise of personal jurisdiction.²¹⁰

XI. CONCLUSION

Much of the jurisprudence surrounding stream of commerce personal jurisdiction has been confused by the conflation of the standard for such jurisdiction and the methods for proving facts to meet that standard. By refocusing on the centrality of purposeful availment as shown through the intent of the defendant, courts can simplify the law of stream of commerce jurisdiction and provide more consistent results.

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210. *See id.* at 1257.

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