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Personal Jurisdiction and the Stream of Commerce Theory: A Reappraisal and a Revised Approach

By Mollie A. Murphy*

Introduction

Since Gray v. American Radiator & Standard Sanitary Corp., American courts have readily asserted jurisdiction over nonresident manufacturers and distributors whose injury-causing products have reached the forum as a result of their purposeful introduction into the "stream of commerce." This stream of commerce concept supports the forum’s exercise of jurisdiction—although the product’s presence there is the immediate result of the independent actions and objectives of intermediaries.

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1 176 N.E.2d 761 (Ill. 1961).

in the distribution chain.\(^3\) Jurisdiction on this basis has been justified by the legal and economic benefits those manufacturers and distributors derive from the indirect sale of their products in the forum\(^4\) and by the belief that due process does not require that these entities be permitted to escape the state's reach "by [the use of intermediaries] or by professing ignorance of the ultimate destination of [their] products."\(^5\)

A common formulation\(^6\) of the theory and its wide acceptance suggest some common understanding of its proper scope and application, as well as uniform results. Yet the lower courts' decisions, surprisingly, indicate uncertainty rather than uniformity.\(^7\) And the Supreme Court's only contribution to the stream of commerce discussion, prior to the 1986 Term, has reinforced rather than reduced the prevailing confusion.\(^8\)

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\(^6\) The courts have articulated the stream of commerce test in terms of defendant's "knowledge," "reason to know," or ability to "foresee" that its product will reach the forum. See Eyerly Aircraft Co. v. Killian, 414 F.2d 591, 596 (5th Cir. 1969) ("The present trend is to hold that a corporation is answerable where it introduces its product into the stream of interstate commerce if it had reason to know or expect that its product would be brought into the state where the injury occurred."); Volkswagenwerk, A.G. v. Klippan, 611 P.2d 498, 500 (Alaska 1980) ("When a manufacturer voluntarily places its product in the general stream of commerce without restriction, the 'minimum contact' requirement is satisfied in all forums where it is foreseeable to the manufacturer that the product may be marketed."); cert. dened sub nom. Klippan v. Volkswagen of America, Inc., 449 U.S. 974 (1980); see also Duple Motor Bodies, Ltd. v. Hollingsworth, 417 F.2d 231 (9th Cir. 1969). Prior to 1987, the Supreme Court similarly referred to the standard in terms of defendant's "expectation." See World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 298 (1980) (stating that a state may constitutionally assert 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").

\(^7\) See infra notes 64-127 and accompanying text.

\(^8\) See Woodson, 444 U.S. at 297-98 (dictum); infra notes 95-127 and accompanying
Asahi Metal Industry Co. v Superior Court,\(^9\) decided in 1987, offered the Supreme Court the opportunity to reassess the constitutional basis of the stream of commerce theory and to define with some precision those circumstances in which the theory provides an appropriate basis for jurisdiction. In this regard, however, Asahi proved to be a disappointment. Not only did the Court fail to resolve the differences among the lower courts, but the Asahi decision revealed sharply divergent views among the justices with respect to the constitutional dimensions of a proper stream of commerce theory.\(^10\)

This Article argues that, while in the short term Asahi serves only to prolong the current confusion, in the long-term the decision should prompt a much needed re-examination of the stream of commerce theory and its constitutional basis. That examination should reveal that the current stream of commerce analysis is inconsistent with the constitutional values protected by personal jurisdiction analysis. As this Article suggests, a stream of commerce theory consistent with those values must acknowledge the existence of sovereignty limitations on a state's authority to assert jurisdiction and require, as a consequence of those limitations, a purposeful connection between the defendant and the forum.

Section I of this Article discusses the Supreme Court's decision in Asahi. Section II traces the development of the stream of commerce theory, from its origin in the 1960s to Asahi, and indicates the problems associated with its application. Section III discusses both the immediate and future impact of Asahi with respect to the stream of commerce theory. Part A describes the lower courts' attempts to apply the stream of commerce theory after Asahi. Part B discusses the values underlying a text; see also Dessem, *Personal Jurisdiction After Asahi: The Other (International) Shoe Drops*, 55 Tenn. L. Rev. 41, 51-57 (1987) (discussing confusion and disagreement of federal courts regarding stream of commerce doctrine after Woodson); Hay, *Judicial Jurisdiction and Choice of Law: Constitutional Limitations*, 59 U. Colo. L. Rev. 9, 18 (1988) (noting lack of clarity in stream of commerce approach envisioned by Court in Woodson); Case Comment, *supra* note 4, at 211-15 (describing division among lower courts in post-Woodson stream of commerce cases).


\(^{10}\) See *infra* notes 11-48 and accompanying text.
constitutional stream of commerce analysis and offers a revised approach that more properly implements those values.

I. THE ASAHI CASE

In 1978, while driving on a California highway, Gary Zurcher lost control of his motorcycle and collided with a tractor rig. Zurcher was severely injured in the collision; his wife, a passenger, was killed. Zurcher filed a products liability action in California state court, alleging that the accident had been caused by the sudden explosion of the rear motorcycle tire and that the tire, tube, and sealant were defective. Among the defendants named in Zurcher's complaint was Cheng Shin Rubber Industrial Co., Ltd. ("Cheng Shin"), the Taiwanese manufacturer of the tube. Cheng Shin, in turn, sought indemnity from its co-defendants and from various third-party defendants, including Asahi Metal Industry Co., Ltd. ("Asahi"), the Japanese manufacturer of the tube's valve assembly. Thereafter, the plaintiff and the defendants settled the primary action, leaving only the third-party claims to be resolved.11

Asahi moved to quash service of summons, claiming that California's assertion of jurisdiction over it would violate due process. Although Asahi's only contact with California arose from its sale of components to Cheng Shin, in Taiwan, that were incorporated in products subsequently sold in California, the trial court denied the motion.12 In so ruling the court relied on the number of valve assemblies sold by Asahi to Cheng Shin during the previous five years, the number of Asahi valve assemblies sold in California,13 the substantial percentage of Cheng Shin's United States sales that occurred in California, and Asahi's awareness that valve assemblies sold to Cheng Shin would be incorporated in products ultimately sold in California.14

13 From 1978 to 1982 Cheng Shin purchased 1,250,000 valve assemblies from Asahi. These sales constituted 1.24 percent and 44 percent of Asahi's 1981 and 1982 sales, respectively. In addition, Asahi also sold its components to other manufacturers that sold tire tubes in California. See Asahi, 107 S. Ct. at 1030.
14 Id.
The appellate court reversed, concluding that the "ultimately realized foreseeability that the product into which [Asahi's] component was embodied would be sold all over the world including California" was not the kind of foreseeability that would satisfy constitutional standards. The California Supreme Court, however, upheld the trial court's conclusion. While acknowledging that "Asahi had no offices, property or agents in California," "solicit[ed] no business and made no direct sales [t]here," the court found that Asahi had purposefully introduced its products into the stream of commerce. According to the court, the Supreme Court had approved jurisdiction under the stream of commerce theory "where the defendant expects its products to be sold in the forum state." This criterion was satisfied in the circumstances before it, the court concluded, because Asahi was aware that its products would be incorporated into products ultimately sold in California. This knowledge, in conjunction with the substantial indirect business Asahi did in California, supplied the forum-defendant contacts sufficient to satisfy the minimum contacts standard.

16 Asahi, 194 Cal. Rptr. at 744. The court further held that it would be "unfair" to require Asahi, a component manufacturer whose sales to Cheng Shin constituted "only a small part of [its] trade," to defend in California. Id.
18 Id. at 549, 216 Cal. Rptr. at 392.
19 Id. at 552, 216 Cal. Rptr. at 394.
20 Id. at 549-50, 216 Cal. Rptr. at 394. The court also found that California's assertion of jurisdiction was "fair" and "reasonable" in light of California's interest in assuring the compliance of foreign manufacturers with the state's safety standards, its interest as the situs of the evidence, and Cheng Shin's interest in suing all cross-defendants in one forum, thereby avoiding possible inconsistent verdicts. Id. at 553, 216 Cal. Rptr. at 395-96.

Justice Lucas dissented from both conclusions. With regard to the stream of commerce issue, he argued that the majority had confused foreseeability with intent. The fact that Asahi could foresee that some of its valves would be sold in California did not constitute its purposeful availing of forum benefits, and the evidence did not indicate any intent by Asahi to serve the California market. In fact, the absence of such intent was apparent from the small percentage of revenues Asahi derived from California sales. Id. at 554-55, 216 Cal. Rptr. at 396-97. Similarly, California's assertion of jurisdiction was "unfair." Any interest California had in the case disappeared once plaintiff had settled and Cheng Shin and Asahi clearly had no expectations that their relationship would be governed by California. Id. at 555, 216 Cal. Rptr. at 397.
Thereafter, the United States Supreme Court granted certiorari to consider whether a manufacturer's "mere awareness" that components "manufactured, sold, and delivered outside the United States would reach the forum state in the stream of commerce constitutes 'minimum contacts' between the defendant and the forum state . . . ,"21 and reversed.22 The Court's decision, however, did not rest on its resolution of the stream of commerce issue. Instead, eight justices23 agreed that, whether or not Asahi had those minimum contacts with the forum that the due process clause requires, California's assertion of jurisdiction in these circumstances would "offend 'traditional notions of fair play and substantial justice.' "24 The Court based its conclusion on an assessment of five factors: the burden that the defendant would face in litigating in the forum, the plaintiff's interest in obtaining effective relief, the interest of the forum state, " 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies' " and " 'the shared interest of the several States in furthering fundamental substantive social policies.' "25

In considering these factors, the Court recognized that litigation in California would impose serious burdens on the defendant, not only because that litigation would be conducted at a substantial distance from Asahi's headquarters, but because Asahi would be forced to defend itself in a foreign legal system. By contrast, the Court found, the interests of Cheng Shin and California were minimal. Cheng Shin was not a California resident but a citizen of Taiwan and the only claim remaining to be resolved involved indemnification between a Japanese and a Taiwanese corporation. The Court found no basis for concluding that the litigation of this claim in California would be more convenient for Cheng Shin. Similarly, given this procedural posture, California had no resident to protect and no other interest
requiring its assertion of jurisdiction. Its interest in ensuring compliance with its safety standards was arguably lessened by the nature of the claim and by the fact that the appropriateness of applying California law to that claim was unclear. That interest was, moreover, adequately served by the pressure purchasers subject to the application of California tort law would apply to their component suppliers.26

Finally, the Court considered the significance of the “inter-state interests” factors in this international context. In such a context, the Court concluded, “the procedural and substantive policies of other nations whose interests are affected by the assertion of jurisdiction by the California court” must be considered.27 Moreover, the Court cautioned, American courts must be wary of imposing “‘our notions of personal jurisdiction,’”28 especially where the defendant’s burden is severe and the interests of the forum and the plaintiff slight.29 In the circumstances here, namely the “international context,” the serious burden thrust on the defendant, and the minimal interests of the plaintiff and forum, California’s exercise of jurisdiction was “unreasonable.”30

Although the above analysis formed the basis of the Court’s decision, the justices nevertheless issued three opinions on the stream of commerce issue. Justice O’Connor, in an opinion joined by Chief Justice Rehnquist, Justice Powell, and Justice Scalia, concluded that the mere act of placing a product in the stream of commerce, even where the defendant is aware that the stream of commerce will sweep its product into the forum, does not constitute the minimum contacts between defendant and forum required by the due process clause of the Fourteenth Amendment.31 The plurality noted that while some courts, like the Supreme Court of California, had interpreted the Court’s comments in World-Wide Volkswagen Corp. v Woodson32 as

26 Id. at 1034.
27 Id. (emphasis in the original).
28 Id. at 1035 (quoting United States v. First Nat’l City Bank, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting)).
29 Id.
30 Id.
31 Id. at 1033.
authorizing an assertion of jurisdiction on that basis, the due process clause required that the connection between defendant and forum arise from "an action of the defendant purposefully directed toward the forum State." The placement of a product into the stream of commerce was not itself such an action nor would the defendant's awareness that its products would ultimately enter the forum in the stream of commerce elevate the constitutional significance of the defendant's action. Instead, the plurality concluded, there must be some "[a]dditional conduct of the defendant [manifesting] an intent or purpose to serve the market in the forum State." The plurality cited as examples of such conduct: advertising in the forum, designing the product for the forum market, establishing channels for the regular provision of advice to forum customers, and marketing the product in the forum through a distributor-agent. Because there was no evidence that Asahi had engaged in any such additional conduct, the plurality found that Asahi lacked those minimum contacts necessary to justify California's exercise of jurisdiction.

A second opinion, written by Justice Brennan and joined by Justices Marshall, White, and Blackmun, rejected the requirement of additional conduct as both unnecessary and a "marked retreat" from Woodson. In Woodson, Justice Brennan argued, the Court had used the stream of commerce situation to illustrate the type of foreseeability relevant to due process. Specifically, the Court had contrasted the foreseeability of litigation in a state in which the defendant's product was regularly sold, which reflected constitutionally sufficient contacts between the defendant and the forum, with the foreseeability of litigation in a state to which a consumer had fortuitously transported the defendant's product, which the Court found to be an insufficient basis for jurisdiction. In addition, Justice Brennan noted, the

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33 Asahi, 107 S. Ct. at 1033 (emphasis in original) (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985)).
34 Id.
35 Id.
36 Id.
37 Id. at 1035 (Brennan, J., concurring in part and in the judgment).
38 Id. at 1036.
39 Id. at 1037.
REAPPRAISAL OF PERSONAL JURISDICTION

Court in this illustration had referred to Gray, "a well-known stream-of-commerce case" in which an Illinois court had asserted jurisdiction over a component manufacturer whose sole contact with the state was that its products were incorporated into a final product sold in Illinois. On this basis, Justice Brennan argued, Woodson must be interpreted as "preserving" the stream of commerce theory.

The Brennan opinion also dismissed the additional conduct requirement as "unnecessary." The defendant who participates in the "regular and anticipated flow of products" to the forum benefits from the retail sale of the ultimate products in the forum, both economically and, indirectly, from the forum's laws regulating commerce—whether or not he engages in "additional conduct." Moreover, Justice Brennan argued, "[a]s long as [he] is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise." In a third opinion, Justice Stevens pointed out that resolution of the stream of commerce issue was unnecessary since the Court's conclusion that California's exercise of jurisdiction would be "unreasonable and unfair" itself required reversal of the state court decision. Having said this, however, Justice Stevens went on to assert that the test formulated by the O'Connor plurality, even if appropriate, had been misapplied. The adequacy of the defendant's contacts with the forum cannot be assessed, he argued, by reference to some "unwavering line" between "mere awareness" and "purposeful availment." Instead, that assessment will be affected by "the volume, the value and the hazardous character of the components." In this case, he suggested, involving a "regular course of dealing that results in deliveries of over 100,000 units annually over a period of

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40 Id.
41 Id.
42 Id. at 1035.
43 Id.
44 Id. at 1038 (Stevens, J., concurring in part and concurring in the judgment).
45 Id.
46 Id.
47 Id.
several years," the defendant’s contacts with the state would be sufficient to satisfy due process demands.

II. THE STREAM OF COMMERCE THEORY: ORIGINS AND DEVELOPMENT

Any understanding of the justices’ divergent views in *Asahi* and the determination of the appropriate scope of a stream of commerce theory must begin with some understanding of the theory’s origin and development. This section discusses the birth of the stream of commerce theory, the legal and economic framework in which it arose, and the development of the theory until the *Asahi* decision. More specifically, this section sets forth the division and confusion arising almost from the theory’s inception and describes the Supreme Court’s role in reinforcing that confusion.

A. *The Supreme Court: Pennoyer Through Hanson*

The stream of commerce theory was an outgrowth of the increasingly interstate character of the economy and the Supreme Court’s adoption of the minimum contacts test as the constitutional measure of a state’s power to assert personal jurisdiction. Until 1945, the limits of that power were fixed by the dual premises of *Pennoyer v. Neff* A state had exclusive jurisdiction over those persons and property within its borders, and conversely, a state had no authority over persons or property outside those boundaries.  

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48 Id. Justice Stevens’ opinion was joined by Justices White and Blackmun, but whether they agreed that resolution of the stream of commerce issue was unnecessary or approved his stream of commerce remarks, or both, is unclear.

49 95 U.S. 714 (1877). *Pennoyer* involved an action to recover possession of a tract of land. In a prior action, J.H. Mitchell, an attorney, had sued Marcus Neff for fees owing for services rendered. Mitchell obtained a default judgment against Neff, which was subsequently satisfied by the sale of land owned by Neff in Oregon. Some years later, Neff brought an action to recover his land from Pennoyer, a subsequent purchaser, on the ground that the first judgment was invalid. Ultimately, the Supreme Court agreed, finding that the Oregon court had lacked both in personam and quasi-in-rem jurisdiction.


50 *Pennoyer*, 95 U.S. at 722.
In the years following *Pennoyer*, the courts found this apparently straightforward standard increasingly difficult to apply. The nation's commerce was evolving into an economy in which the interstate movement of goods and services was commonplace. The growing economy had, in turn, produced a concomitant need for expanded jurisdiction over nonresidents that *Pennoyer*'s territorial-based standard could not fully accommodate. In fact, routine application of the standard had sometimes resulted in unfair and absurd jurisdiction decisions. To bridge the ever-widening gap between the law and commercial economic reality, the courts created certain fictions that allowed them to introduce much-needed flexibility into the jurisdictional standard while remaining ostensibly faithful to *Pennoyer*.

The need for this type of judicial creativity was eliminated when, in 1945, the Supreme Court reformulated its jurisdictional standard in *International Shoe Co. v Washington*. In *International Shoe*, the Court explained that a state's power to assert jurisdiction over a person did not require its physical presence within state boundaries; "presence" was merely a symbol for those in-forum activities of the defendant sufficient to satisfy

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51 The courts were able to achieve some accommodation of interstate interests within the *Pennoyer* framework since the Court had there expressly sanctioned *quasi-in rem* jurisdiction (see *Pennoyer*, 95 U.S. at 720) and had recognized certain exceptions to its territorial precepts, such as the state's ability to require partnerships or associations to consent to forum jurisdiction as a condition of doing business there. See id. at 734-36. Yet as means of reaching nonresidents these concepts were clearly limited. A court's exercise of *quasi-in rem* jurisdiction, for example, depended on the fortuity of the defendant's having assets or property located within the state.


54 326 U.S. 310 (1945).
the due process clause. Accordingly, a state could assert jurisdiction over a defendant not present within the state if the defendant had such minimum contacts with the state that suit there would not "offend 'traditional notions of fair play and substantial justice.'"56

In 1957, the court confirmed the apparent expansiveness of its new jurisdiction test in *McGee v International Life Insurance Co.*57 In *McGee*, the Court sustained California's exercise of jurisdiction over a nonresident insurer whose only contact with the state was the single contract with a California resident, which was the basis of the suit. In reaching its decision the Court noted a "clearly discernible"58 trend toward the liberalization of jurisdiction that the Court attributed, in part, to "the fundamental transformation of our national economy,"59 and the substantial diminution in the burden sustained by a nonresident defendant owing to improved transportation and communication.60

Just one year later, however, in *Hanson v Denckla*,61 the Court sounded a clearly cautionary note. The substitution of the

55 Id. at 316-17.
56 Id. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).
57 355 U.S. 220 (1957). Plaintiff in *McGee* was the beneficiary of an insurance policy purchased by her son. Defendant was a Texas insurance company that had assumed the obligations of the company from which the policy had originally been purchased. Plaintiff's son, a California resident, accepted defendant's offer to insure him and paid premiums to the defendant until his death. When defendant refused to pay the proceeds of the policy to the beneficiary, she brought suit against defendant in California state court. The California court gave judgment for the plaintiff, and the insurance company subsequently challenged the court's power to exercise personal jurisdiction over it.
58 Id. at 222.
59 Id.
60 Id. at 223.
61 357 U.S. 235 (1958). *Hanson* involved a dispute over the right to proceeds from a trust established in Delaware by a Florida resident while domiciled in Pennsylvania. The trust was administered by a Delaware trustee who continued to conduct trust business and to correspond with the settlor regarding that business for several years after her move to Florida. When the settlor died, her will was probated in Florida. Certain of her legatees claimed the right to trust proceeds and sought a declaratory judgment to that effect from a Florida court. The court granted the requested relief but without obtaining personal jurisdiction over the Delaware trustee, deemed an indispensable party. Meanwhile, the executrix of the settlor's estate instituted a parallel action in Delaware state court. The Delaware court refused to award the Florida judgment full faith and credit on the ground that the Florida court lacked jurisdiction over the trustee and ruled that the trust proceeds were properly paid to the trustee and the appointees.
flextile minimum contacts standard for Pennoyer's presence test, it warned, did not signal an end to all restrictions on the personal jurisdiction of state courts. Because the restrictions imposed by the due process clause were "a consequence of territorial limitations on the power of the respective States," as well as a protection against inconvenient litigation, due process required that the defendant have the requisite minimum contacts with the forum, though the defendant's burden of defending there be minimal or non-existent. Moreover, the Court emphasized, such contacts could not be supplied by the "unilateral activity" of others, but must instead arise from "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."63

B. Gray and its Progeny

The problems created by the Pennoyer standard were particularly felt in actions arising out of defective products. Not only were injury-causing goods regularly shipped across state lines, but the distribution systems by which these goods reached a state were becoming substantially more sophisticated, involving numerous intermediaries in various states.

62 Id. at 251.
63 Id. at 253. Applying these principles in Hanson, the Court concluded that Florida could not constitutionally exercise jurisdiction over the Delaware trustee. Although the settlor, as a Florida resident, had corresponded with the trustee with respect to trust administration matters for some years prior to her death and had also exercised her power of appointment regarding the trust in Florida, the Court found these connections with the state insufficient to justify its assertion of jurisdiction. The Court pointed out that, unlike McGee, the trust had no "substantial connection" with the state, since the trust had been established in Delaware, and any connection with Florida arose only after the settlor moved to Florida and began to receive trust income there. Moreover, the Delaware defendant, unlike the defendant in McGee, had performed no acts in the forum that could constitute the requisite minimum contacts. Defendant had neither conducted nor solicited business in Florida, and its correspondence with the settlor and her exercise of the powers of appointment were "unilateral" acts of the settlor, not the defendant. Id. at 252-53.

Justice Black, in dissent, emphasized the Florida court's holding that the appointment was ineffective and concluded that Florida's interest in the validity of the appointment should have been sufficient to sustain its exercise of jurisdiction. Moreover, he argued that assertion of jurisdiction would not have been unfair to the defendant since it chose to maintain its business relationship with the settlor during her residence in Florida. Id. at 258-60 (Black, J., dissenting).
The Supreme Court's creation of the minimum contacts standard plainly offered some relief; courts could assert jurisdiction over nonresident defendants as long as the contacts of those defendants with the forum were sufficient to satisfy the standard. Yet the Court's application of its new test offered little guidance as to the nature of the acts or directness of the connection necessary to constitute such contacts in the products liability context. Particularly disturbing (and confusing) to the lower courts was the Court's apparent contraction, in *Hanson*, of a state's authority to assert jurisdiction over nonresidents. *Hanson*'s emphasis on the defendant's purposeful forum acts threatened to eliminate the state's ability to reach those defendants who did not act directly in the forum.64 Left unanswered was the extent to which *Hanson*, a case involving the validity of a trust, might be legitimately distinguished from the products liability context or, more helpfully, interpreted in a fashion that would enable courts to reach nonresident manufacturers whose injury-causing products entered the forum indirectly.

In 1961, the Illinois Supreme Court addressed this issue in *Gray v American Radiator & Standard Sanitary Corp.*65, the case from which the stream of commerce theory originated. Plaintiff Phyllis Gray, an Illinois resident, had been injured when a water heater she had purchased there exploded, allegedly as a result of a defective valve. The plaintiff brought suit in Illinois state court against the manufacturer of the water heater and Titan Valve Manufacturing Company, the Ohio manufacturer of the allegedly defective valve.

The Illinois Supreme Court sustained the state's assertion of jurisdiction over Titan, although the manufacturer's only apparent contact with Illinois was that a single valve, manufactured and sold in Ohio and incorporated in the water heater in Pennsylvania, had reached an Illinois consumer "in the course of

64 See Currie, *The Growth of the Long-Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. ILL. L.F 533, 548 ("It is certainly a permissible reading of *Hanson* that the defendant or its agent must be physically present in order to 'conduct activities' in the State "); see also Phillips v. Anchor Hocking Glass Corp., 413 P.2d 732, 735-37 (Ariz. 1966) (noting courts' concern with regard to impact of *Hanson*'s purposeful forum acts requirement for products liability cases).

65 176 N.E.2d 761 (Ill. 1961).
The court concluded that such use of the defendant's products was itself sufficient to satisfy the minimum contacts standard; that is, a manufacturer could reasonably be required to defend an action arising out of alleged defects in its products wherever they were used "in the ordinary course of commerce."\(^{67}\)

The basis for this conclusion was notable in three respects. First, in reaching its decision the Illinois court emphasized the trend toward the expansion of jurisdiction and the change in judicial attitudes since the time of *Pennoyer*. The relevant focus in jurisdictional analysis had shifted from notions of territorial or physical power to concepts of adequate notice and the "convenient" forum, the place at which the parties could most conveniently settle their dispute.\(^{68}\) Similarly, the quantity of the defendant's forum contacts was not dispositive of the forum's authority to exercise jurisdiction; rather, a single act or transaction with a "substantial connection" to the forum would support an assertion of jurisdiction.\(^{69}\)

Second, *Gray* noted the importance of recognizing changing realities, both economic and otherwise, in applications of the jurisdiction standard.\(^{70}\) The realities were that improved communications and travel had substantially diminished the burden of defending in a distant forum, and that advanced methods of distribution and doing business "ha[d] largely effaced the economic significance of State lines."\(^{71}\) These advances meant that,

\(^{66}\) *Id.* at 764.
\(^{67}\) *Id.* at 766.
\(^{68}\) *Id.* at 765.
\(^{69}\) *Id.* at 764.
\(^{70}\) The court explained:

Unless they are applied in recognition of the changes brought about by technological and economic progress, jurisdictional concepts which may have been reasonable enough in a simpler economy lose their relation to reality, and injustice rather than justice is promoted. Our unchanging principles of justice, whether procedural or substantive in nature, should be scrupulously observed by the courts. But the rules of law which grow and develop within those principles must do so in the light of the facts of economic life as it is lived today. Otherwise the need for adaptation may become so great that basic rights are sacrificed in the name of reform, and the principles themselves become impaired.

*Id.* at 766.

\(^{71}\) *Id.*
although manufacturers rarely dealt directly with their customers, those manufacturers derived benefits from these expanded distribution systems.\(^72\)

Under these standards, Illinois was an appropriate forum. By selling its products for use in other states, Titan may have directly enjoyed the benefits and protections of Illinois law and, in any event, benefited from the protection that law afforded to the marketing of the hot water heaters in which defendant's valves were incorporated. That such benefits were indirect merely reflected the realities of modern distribution; the indirectness of those benefits in no way lessened their significance to the conduct of defendant's business.\(^73\)

Illinois was also the most convenient forum. The plaintiff was an Illinois resident and had sustained her injury there. Illinois law, the court concluded, would govern the substantive issues and, because Illinois was the place of the injury, witnesses relevant to several important issues were likely to be found there.\(^74\)

Third, and finally, the court was clearly untroubled by the absence of record evidence regarding Titan's intent to market its goods in Illinois or the volume or geographic scope of Titan's business or that of the water heater manufacturer. The court stated that Titan had not asserted that its product's presence in Illinois as a result of its incorporation in a hot water heater was "an isolated instance" and found, without further explanation, that it was "a reasonable inference that [Titan's] commercial transactions, like those of other manufacturers, result in substantial use and consumption in this State."\(^75\) The court then set forth the following "general proposition". "[I]f a corporation elects to sell its products for ultimate use in another State, it is

\(^71\) Id.
\(^72\) Id.
\(^73\) Id. at 766-67.
\(^74\) Id. at 766. In addition, the court stated that defendant's products were "presumably sold in contemplation of use here." Id. Professor Currie has suggested that by this statement the court was not ignoring the absence of proof regarding defendant's contemplation of the use of its products in Illinois. Instead, he indicates, the court was saying that where a manufacturer produces components for water heaters marketed in the United States, that manufacturer should be presumed as a matter of law to have contemplated their use there. Currie, supra note 64, at 552.
not unjust to hold it answerable there for any damage caused by defects in those products. 76

The attractions of Gray's stream of commerce theory were immediately apparent to the lower courts. The theory provided a basis for satisfying the increasing jurisdictional needs created by sophisticated distribution systems while reconciling the potentially conflicting demands of Hanson and McGee.

Unsurprisingly, then, a large number of courts after Gray concluded that jurisdiction could be properly asserted over a manufacturer whose product caused injury in the forum if its presence there was "foreseeable." Under this standard, as liberally interpreted, jurisdiction was upheld not only over manufacturers who intentionally marketed their products in the forum but over manufacturers who merely knew or should have known that their products would or could reach the forum. 77 Similarly, stream of commerce analysis was applied, without distinction or discussion, to component as well as final product manufacturers; after all, Gray itself had involved a component manufacturer, and that court had apparently found that defendant's status offered no basis for restraint. 78 Nor did the courts hesitate, in most cases, to apply the theory to foreign producers. Despite the typically larger burden foreign defendants would bear in defending in an American forum, most courts either ignored that fact or found it non-dispositive of the jurisdiction issue. 79

Gray's tenets were not, however, universally accepted. Some courts refused to permit jurisdiction on the basis of the presence of only a few products in the forum, requiring instead proof that the defendant had received "substantial" benefits from the

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76 Gray, 176 N.E.2d at 766.
77 See Eyerly Aircraft Co. v. Killian, 414 F.2d 591 (5th Cir. 1969); Buckeye Boiler Co. v. Superior Court, 458 P.2d 57, 80 Cal. Rptr. 113 (1969); Winston Indus., Inc. v. Dist. Court, 560 P.2d 572 (Okla. 1977).
Gray's analysis was also rejected by the Eighth Circuit, but on an entirely different ground—that the presence of the injury-causing product in the forum could not be attributed to any intentional act by the defendant.

That Eighth Circuit case, *Hutson v Fehr Bros., Inc.*, was in many ways a typical stream of commerce case. A product sold by an Italian corporation had reached Arkansas through the stream of commerce and there caused injury to the plaintiff. The plaintiff brought suit, in Arkansas, against a number of defendants, including the manufacturer of the product and the Italian corporation that had resold the product. Yet the court refused to sustain Arkansas' assertion of jurisdiction over the Italian corporation on the basis of a stream of commerce theory. While acknowledging the impact of Gray and its followers, the court pointed out that the defendant had not intentionally solicited business in the forum, as required by *Hanson*, or exercised any control over the decision of the British intermediary to market the product in Arkansas.

Perhaps more surprising than the existence of dissent was the confusion and division among those who purported to accept and apply a stream of commerce concept. The general acceptance of the theory, and its expression in a common standard, effectively masked the courts' uncertainty as to the theory's proper scope and application. The courts readily identified the following factors as relevant to stream of commerce analysis: the defendant's role in the distribution system, the defendant's receipt of substantial benefits from the forum, and the defendant's ability to foresee that its products would reach the forum. However, the courts experienced substantial difficulty in determining the relative significance of these factors and their appropriate interplay.

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81 584 F.2d 833 (8th Cir.), cert. denied, 439 U.S. 983 (1978).

82 *Id.* at 837. The *Hutson* court explicitly rejected Arkansas' interest in providing a forum for its injured resident as a basis for jurisdiction in the absence of adequate contacts. The court also emphasized the burden defendant faced in defending itself in litigation in the United States. *Id.*
A number of courts, echoing Gray's expansive view of jurisdiction and focus on convenient forum, interpreted Gray at its broadest. For these courts, the presence of a single injury-causing product in the forum was a sufficient basis for personal jurisdiction over the manufacturer. Like Gray, many of these courts saw jurisdiction theory as moving toward a convenient forum focus. And even those that did not explicitly note this trend often cited the convenience of the forum in support of their finding of jurisdiction.

Moreover, as these courts viewed it, manufacturers naturally seek to market their goods in as many fora as possible and derive economic and legal benefits from that activity. The presence of products in any forum in the United States would, therefore, be both foreseeable and beneficial. Consequently, only if the defendant manufacturer could establish that its product's presence in the forum was "fortuitous" or "unforeseeable" should personal jurisdiction be deemed to violate due process.

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84 See Metal-Matic, 415 P.2d at 619 (noting that despite certain statements in Hanson, "the spirit of Pennoyer is almost buried" and that "[i]t appears that the attractions of the most convenient forum will eventually be the jurisdictional test to be applied"); International Harvester, 459 S.W.2d at 65 (noting emphasis on "adequate notice and opportunity to defend" rather than territorial limitations and citing as the criteria for jurisdiction "the more practical considerations of justice, convenience, and reasonableness in the particular case"); see also Winston Indus., Inc., 560 P.2d at 574 (citing Gray's emphasis on a convenient forum for both parties).


86 See Andersen, 135 N.W.2d at 643; Ehlers, 124 N.W.2d at 827; see also Comment, In Personam Jurisdiction Over Nonresident Manufacturers in Product Liability Actions, 63 Mich. L. Rev. 1028, 1031 (1965):

As far as the manufacturer's economic objectives are concerned, his overriding purpose is to have his product consumed. Where this consumption occurs is relatively insignificant to him. This observation supports the position that the manufacturer can be summoned to defend a cause of action arising out of the use of his product wherever it may be located. Id. (footnote omitted).

87 See, e.g., Buckeye Boiler, 458 P.2d 57, 64, 80 Cal. Rptr. 113, 120 (1969) (burden lies on the defendant manufacturer to show that it has not, "as a matter of commercial actuality," engaged in purposeful activity within the forum state) (quoting Empire Steel Corp. v. Superior Court, 366 P.2d 502, 504, 17 Cal. Rptr. 150, 157 (1961) (emphasis added in Buckeye Boiler)); see also Andersen, 135 N.W.2d at 643 (in which court stated
These cases, however, offered little scope for a determination that the product’s presence was fortuitous. Plainly, the absence of proof that others of the defendant’s products had been sold or used in the forum was not enough. Nor were the courts, in some instances, disturbed by the absence of proof that the injury-causing product itself had reached the forum in the stream of commerce.\textsuperscript{88} Jurisdiction was constitutional as long as the defendant was a manufacturer and unable to show that the distribution of its goods was so confined as to make its product’s presence in the forum completely unforeseeable.

Other courts, however, rejecting the presence of a single product in the forum as an appropriate basis for jurisdiction, adopted a more restrictive approach. These courts required that the plaintiff offer proof of substantial use or purchase of the defendant’s products in the forum or proof that the nature of the distribution system through which the defendant’s products were marketed made substantial use or purchase there foreseeable.\textsuperscript{89} Still other courts, while professing adherence to the single tort concept, in fact took care to base their conclusions of jurisdiction on other defendant-forum contacts (including those

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\textsuperscript{88} See, e.g., \textit{Buckeye Boiler}, 458 P.2d at 65-66, 80 Cal. Rptr. at 121-22. In this case plaintiff, a California resident, was injured at his place of employment when a pressure tank manufactured by defendant exploded. Although there was no evidence of how plaintiff’s employer obtained the tank or that any other such tanks were sold or used in California, the court speculated that defendant could have sold the injury-causing tank directly to plaintiff’s employer or that one of the companies to which defendant sold its products in the eastern United States had resold that tank (and others) for use in California. \textit{See also} Smith v. York Food Mach. Co., 504 P.2d 782 (Wash. 1972) (jurisdiction upheld on basis of stream of commerce theory although the machine in question had been manufactured and sold to a subsidiary, which used it and then resold the machine to the employer of the injured plaintiff).

unrelated to the litigation), as well as on the presence of the injury-causing product there.\textsuperscript{90}

The courts' uncertainty was not limited to the appropriate weight and role of the economic benefits factor. Substantial confusion and disagreement also arose in those situations in which the defendant was not the manufacturer but another actor in the distribution chain and where the product's presence in the forum was attributable to the actions of the plaintiff or one other than a member of the distribution system. Some courts readily concluded that stream of commerce analysis supported jurisdiction over a manufacturer, even where the presence of its product in the forum was due to the act of plaintiff or one outside the distribution chain, as long as that act was foreseeable.\textsuperscript{91} Where the defendant was a local seller, however, the majority of courts refused to subject the seller to jurisdiction outside its local market. That refusal was attributable less to any belief that the movement of the product to the forum was the "unilateral" act of the plaintiff (or third party) than to a

\textsuperscript{90} See Buckeye Boiler, 458 P.2d at 61-62, 80 Cal. Rptr. at 117-18 (concluding that defendant had purposefully availed itself of forum benefits through its direct sales of somewhat similar products to a California customer—whether injury-causing product actually reached the forum through the stream of commerce or was the subject of some isolated forum transaction); see also Eyerly Aircraft, 414 F.2d at 595-98 (in which court suggests that single tort could be sufficient basis for jurisdiction but upholds forum jurisdiction on the basis of defendant's substantial, though unrelated, forum contacts, as well as defendant's introduction of the injury-causing product into the stream of commerce).

\textsuperscript{91} See Duignan, 559 P.2d 750; Feathers v. McLucas, 251 N.Y.S.2d 548 (App. Div. 1964), rev'd on statutory grounds sub nom. Longines-Wittnauer Watch Co. v. Barnes & Remeeke, Inc., 261 N.Y.S.2d 8, 19-24, 209 N.E.2d 68, 76-80, cert. denied sub nom. Estwing Mfg. Co., Inc. v. Singer, 382 U.S. 905 (1965); see also Comment, supra note 86, at 1033-34 (arguing that it is not unfair to require a manufacturer to defend wherever its products are used, even if not distributed in the forum, because "the manufacturer's economic purposes are still being effectuated."

The manufacturer has taken the initiative in marketing his product for public consumption and jurisdiction should be sustained wherever his product causes injury when it is being used for the purpose for which it was designed." (footnote omitted)); cf. Eyerly Aircraft, 414 F.2d 591 (in which court sustained jurisdiction over Oregon manufacturer of amusement rides whose product was sold in Illinois and resold to North Dakota company that took the ride to a number of states, including Texas, where it caused injury; court's holding based on "dual grounds" that defendant had other amusement ride-related contacts with the forum and had introduced its product into the stream of commerce "with reason to know that the ride would probably eventually nomadize through the state." Id. at 597.).
perceived distinction between manufacturers and retailers.\textsuperscript{92} On the other hand, other courts assigned no significance to the defendant's role in the distribution system, concluding that jurisdiction over even local sellers was constitutional as long as the defendant could foresee the presence of its product in the forum.\textsuperscript{93}

Despite the confusion regarding the scope and constitutionality of stream of commerce analysis,\textsuperscript{94} the Supreme Court did not intervene to resolve this or, indeed, any personal jurisdiction issue until 1977. As a result, the courts continued to apply the stream of commerce theory, in uneven though generally expansive fashion, as a basis for jurisdiction.

C. World-Wide Volkswagen Corp. v Woodson: Confusion Reinforced

In the late 1970s the Supreme Court re-entered the personal jurisdiction area, issuing in quick succession a series of jurisdiction decisions that emphasized the constitutional limitations on state court jurisdiction. In its restatement of these limitations, the Court emphatically rejected the "convenient forum" as the

\textsuperscript{92} See Granite States Volkswagen, Inc. v. Dist. Court, 492 P.2d 624 (Colo. 1972); Oliver v. American Motors Corp., 425 P.2d 647 (Wash. 1967); see also Developments in the Law—State-Court Jurisdiction, 73 Harv. L. Rev 909, 929-30 (1960) (suggesting that jurisdiction should be upheld where the defendant is a manufacturer whose goods reach the forum as a result of the distribution system but not where defendant is a retailer whose goods reach the forum because the consumer takes them there; distinction is based on manufacturer's larger scope of business and on greater degree of harm to which the manufacturer subjects forum residents).


\textsuperscript{94} A few courts also found the nature of the product relevant to the jurisdictional inquiry in this context either because the nature of the product made its use in the forum more foreseeable (see, e.g., Eyerly Aircraft, 414 F.2d at 597) or because a lesser volume of "inherently dangerous" products would count more heavily in the minimum contacts calculus. See Velandra, 336 F.2d at 298; see also Pendzimas v. Eastern Metal Prods. Corp., 218 F. Supp. 524, 528 (D. Minn. 1961) (no suggestion that sale of electric fryer to forum wholesaler has serious economic impact or poses physical danger to Minnesota citizens; authority of state to exercise jurisdiction in this context is unlike state's authority with respect to use of forum highways by nonresident drivers of "dangerous instrumentalities").
constitutional basis for jurisdiction and dismissed as well the sufficiency of the defendant's passive receipt of benefits from the forum. Instead, the Court reiterated its analysis in Hanson: the focus of jurisdictional analysis was the defendant's connection with the forum. Moreover, that connection must be established by contacts arising from the defendant's purposeful acts in the forum.

The Court's 1977 and 1978 decisions had no apparent impact on the lower courts' application of stream of commerce

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95 Woodson, 444 U.S. at 294 (due process clause requires relationship between defendant and the forum, even if litigation in the forum is not inconvenient for defendant, forum is most convenient location for litigation, and forum has strong interest in applying its law to the underlying dispute); see also Kulko v. Superior Court, 436 U.S. 84, 92 (1978) (noting that while the plaintiff's and forum's interests were to be considered, focus of jurisdiction analysis is defendant-forum connection).

96 See Shaffer v. Heitner, 433 U.S. 186, 215-16 (1977) (defendants' receipt of benefits establishes only that forum law may apply; "[i]t does not demonstrate that [defendants] have 'purposefully avail[ed]ed themselves] of the privilege of conducting activities within the forum State." (quoting Hanson, 357 U.S. at 253).


98 Shaffer, 433 U.S. 186. Shaffer involved a shareholder's derivative suit in a Delaware state court. Plaintiff there charged that defendants, directors of the corporation of which plaintiff was a shareholder, had breached their fiduciary duties. Jurisdiction over the nonresident defendants was obtained pursuant to a Delaware statute that permitted the sequestering of defendant's property in the state. The Supreme Court held that the sequestered stock did not itself provide an adequate basis for Delaware's assertion of jurisdiction over the directors. Instead, the Court held that all assertions of jurisdiction, whether in personam or in rem, must satisfy the minimum contacts standard. Applying this standard, the Court concluded that defendants lacked the necessary connection with the forum. They had had nothing to do with the state and no reason to expect to be haled into court in Delaware. The fact that Delaware law afforded benefits to corporate directors might justify application of Delaware law to the action but indicated no act by which defendants purposefully availed themselves of those benefits.

99 Kulko, 436 U.S. 84. In Kulko, a California resident brought suit in California seeking custody and child support from her former husband, a resident of New York. Under a previously negotiated agreement, the children had lived with their father in New York during the school year and with their mother during school vacations. The older child subsequently expressed a desire to live with her mother and, her father acquiescing, moved to California. Some time later, the younger child also indicated his desire to live with his mother, and she sent him a plane ticket for that purpose. Thereafter, the mother instituted a custody and support action in California state court. The father challenged the court's authority to assert jurisdiction over him, arguing that he lacked the requisite minimum contacts with California. The Supreme Court agreed. While acknowledging California's substantial interests in the lawsuit and plaintiff's interest in litigating in the forum, the Court found that defendant's acquiescence in his children's desire to live with their mother and any financial benefit he derived from their absence did not constitute purposeful availment of the benefits and protections of the forum.
analysis. These decisions (involving *quasi-in-rem* jurisdiction and child support, respectively) were factually dissimilar from the typical stream of commerce scenario, and the courts drew no larger conclusions from the Court's reaffirmation of *Hanson.*

In 1980, however, the Court addressed a personal jurisdiction issue in the products liability context and, more significantly, specifically considered the appropriate role of foreseeability in personal jurisdiction analysis.

The plaintiffs in *World-Wide Volkswagen Corp v Woodson* had been severely injured when, while driving through Oklahoma, their car was hit from the rear and burst into flames. The plaintiffs brought suit in Oklahoma state court against Audi NSU Auto Union Aktiengesellschaft, the German manufacturer; Volkswagen of America, Inc., the importer; World-Wide Volkswagen Corp., a regional distributor of Audis serving the New York, New Jersey, and Connecticut markets; and Seaway Volkswagen, Inc., the New York dealer from which the plaintiffs had purchased the car. World-Wide Volkswagen and Seaway challenged the Oklahoma court's jurisdiction, arguing that their only contact with Oklahoma was that a car they had sold to the

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100 See Mann, 361 So. 2d at 1023-25 (neither Shaffer nor Kulko reviewed in majority's decision; stream of commerce issue discussed in light of *Gray* and *Duple Motors*); Connelly, 389 N.E.2d at 159-60 (discussing *Shaffer* as confirming the application of *International Shoe* standard as test of jurisdiction and analyzing the stream of commerce issue under *Gray* and *Buckeye Boiler*).

101 *Woodson*, 444 U.S. 286. On that same day, the Court also decided *Rush*, 444 U.S. 320. *Rush* was a tort action brought by a Minnesota resident in Minnesota state court. The action arose out of an automobile accident in which the plaintiff, then an Indiana resident, and the defendant, also an Indiana resident, were involved. Although the defendant had no contacts with Minnesota, the state court exercised jurisdiction over him on the basis of the obligation of his insurer, licensed to do business in Minnesota, to defend. The Supreme Court rejected this type of *quasi-in-rem* jurisdiction as improperly focusing on the contacts among the plaintiff, the insurer, the forum, and the litigation rather than upon the connection among the defendant, forum, and litigation that due process required. *Rush*, 444 U.S. at 332-33. Defendant himself had no contacts with the forum and the fact that defendant's insurer did business there revealed nothing about the defendant's forum contacts. The Court stated: "[The insurer's] decision to do business in Minnesota was completely adventitious as far as [the individual defendant] was concerned. He had no control over that decision, and it is unlikely that he would have expected that by buying insurance in Indiana he had subjected himself to suit in any State to which a potential future plaintiff might decide to move." Consequently, defendant had done nothing that indicated his purposeful availment of forum benefits. *Id.* at 328-29.
plaintiffs in New York had been taken by the plaintiffs to Oklahoma where it exploded.

Applying a stream of commerce analysis, the Oklahoma state courts found this contact a sufficient basis for jurisdiction. According to the Oklahoma Supreme Court, the mobility of the car would make its use in Oklahoma "foreseeable" to the defendants. Moreover, given the retail value of the car and some evidence that the defendants' goods were used "from time to time" in Oklahoma, the defendants had derived substantial revenue from the use of their products there.

The Supreme Court's rejection of this analysis was significant for the future of the stream of commerce theory in a number of respects. First, in setting forth the relevant jurisdictional standard, the Court reiterated that the scope of the state's constitutional power to assert jurisdiction was principally measured by the defendant's minimum contacts with the forum. This minimum contacts standard, the Court explained, performed two "related, but distinguishable, functions" it protected the defendant against distant and inconvenient litigation and "act[ed] to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system."

While acknowledging that the need to protect the defendant against inconvenient litigation had, in this age of advanced communication and travel, substantially diminished, the Court emphasized that continued attention to state lines was impelled by federalism concerns. The Court pointed out that each state, as a sovereign entity, has the power to try certain causes in its courts, and this sovereign power implies a limitation on the sovereign power of its sister states. In light of such federalism concerns, a state could be divested of its power to assert personal jurisdiction although that state might have a substantial interest

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102 In unreported rulings the state district court rejected defendants' claim that the state's exercise of jurisdiction over them was unconstitutional. Defendants then sought a writ of prohibition against the district court in the Supreme Court of Oklahoma. The writ was demed. See Woodson, 585 P.2d at 355; see also Woodson, 444 U.S. at 289 & nn.5-6.

103 Woodson, 585 P.2d at 354.

104 Woodson, 444 U.S. at 291-92.

105 Id. at 292.
Second, the Court attempted to clarify the role of foreseeability within this jurisdictional framework. The Court rejected a defendant's ability to foresee injury in the forum as a basis for jurisdiction, since if jurisdiction were permitted on that basis, the seller would be subject to suit in any state to which the chattel traveled. Instead, "the foreseeability critical to due process analysis [is that the] defendant's conduct and connection with the forum" be such that the defendant should foresee being haled into court there. Such anticipation should arise, the Court stated, where the defendant has "'purposefully avail[ed] itself of the privilege of conducting activities within the forum State.' " Because that activity provides clear notice to the defendant of its amenability to suit there, the defendant may structure its conduct accordingly. The Court explained:

Hence if the sale of a product of a manufacturer or distributor such as Audi or Volkswagen 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 product 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 to its owner or to others. 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. Cf Gray v American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

In Woodson, however, there had been no attempt by either defendant to market its cars in Oklahoma. Instead, jurisdiction was asserted on the basis of "one, isolated occurrence .. the fortuitous circumstance that a single Audi automobile, sold in New York to New York residents, happened to suffer an accident.

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106 Id. at 293-94.  
107 Id. at 297  
108 Id. (quoting Hanson, 357 U.S. at 253).  
109 Id. at 297-98.
while passing through Oklahoma."110 That circumstance could not itself supply the necessary contacts between defendant and forum nor was its significance bolstered by the fact that the defendants could foresee that the purchasers would take the car to Oklahoma; that act was the "unilateral" act of the plaintiffs, not the defendants.111

Similarly, the Court quickly dismissed the plaintiffs' argument that jurisdiction was warranted because the defendants had derived substantial economic benefit from the use of their goods in Oklahoma. Whatever revenue the defendants earned by virtue of the fact that their products were capable of use in Oklahoma was, from a jurisdictional standpoint, irrelevant. Financial benefits accruing from such "collateral" relationships to the forum would not themselves support jurisdiction but must, instead, "stem from a constitutionally cognizable contact."112

Justices Brennan, Marshall, and Blackmun, in dissent, argued that Oklahoma's assertion of jurisdiction was constitutional because the defendants had deliberately injected into the stream of commerce a product that, by its very nature, gave the defendants notice that they would be subject to suit outside their market area.113 The defendants had acted purposefully in choosing to affiliate themselves with a nationwide network for marketing and servicing automobiles and derived substantial benefits, such as the maintenance of an interstate highway system, from states outside their market area that enhanced the value of defendants' business.114 Moreover, the dissenters found no constitutional basis for the majority's apparent distinction between

110 Id. at 295.
111 Id. at 298.
112 Id. at 298-99.
113 Id. at 306-07 (Brennan, J., dissenting); id. at 314-15 (Marshall, J., dissenting); id. at 318 (Blackmun, J., dissenting). The majority had rejected, for jurisdictional purposes, any distinction between an automobile and other chattels on the basis of the automobile's "unique" mobility or its character as a "dangerous instrumentality." The Court explained: "The 'dangerous instrumentality' concept was apparently never used to support personal jurisdiction; and to the extent it has relevance today it bears not on jurisdiction but on the possible desirability of imposing substantive principles of tort law such as strict liability." Id. at 297 n.11.
114 Id. at 306-07 (Brennan, J., dissenting); id. at 314-15 (Marshall, J., dissenting); id. at 318-19 (Blackmun, J., dissenting).
foresightable use and foreseeable resale, or its distinction between a defendant manufacturer and defendant retailer.

An added dimension to Justice Brennan's dissent was his attack on the minimum contacts standard, both as protecting against state overreaching—a function he rejected—and as an appropriate determinant of the fairness of the forum. In Justice Brennan's opinion, the extreme defendant focus characterizing the minimum contacts standard was no longer necessary. A proper jurisdiction standard must, instead, attempt to assess the actual burden that the defendant would experience in defending in the forum and must look not only to the defendant's interests but also to those of the forum and other parties to the litigation.

Woodson did little to resolve and perhaps much to increase existing confusion regarding the stream of commerce theory. In part this was due to Woodson's apparent approval of the stream of commerce theory without an accompanying definition of its proper scope and, in part, because the basis of the Woodson decision itself was ambiguous. As a result, Woodson's primary impact was not on the substance of the stream of commerce theory but on the form in which it was articulated and applied.

Thus, courts applying stream of commerce analysis after Woodson emphasized the significance of defendant's role in the distribution system. As the courts interpreted Woodson, the greater amenability of manufacturers and primary distributors to jurisdiction was warranted because, unlike the actors at the

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115 Id. at 306-07 & nn.10-12 (Brennan, J., dissenting); id. at 315-16 (Marshall, J., dissenting); id. at 318-19 (Blackmun, J., dissenting).
116 Id. at 307 n.12 (Brennan, J., dissenting).
117 Id. at 299-301 (Brennan, J., dissenting).
end of the distribution chain, manufacturers and primary distributors derived benefits from a larger number of fora. As one court explained:

Such manufacturers and distributors purposely [sic] conduct their activities to make their product available for purchase in as many forums as possible. For this reason, a manufacturer or primary distributor may be subject to a particular forum’s jurisdiction where a secondary distributor and retailer are not, because the manufacturer and primary distributor have intended to serve a broader market and they derive direct benefits from serving that market.\(^\text{119}\)

The courts similarly emphasized the significance of defendant’s “expectation” that the product defendant placed in the stream of commerce would reach the forum. It was that expectation that put defendant on notice of its amenability to suit in the forum and, correspondingly, gave it the ability to control that amenability\(^\text{120}\) Yet, this “expectation” differed not at all from the courts’ interpretation of foreseeability prior to Woodson. As before, the defendant need not have intended to market its goods in the forum; it was sufficient that it knew or should have known the product would reach the forum.\(^\text{121}\) Under this standard, a defendant who was aware of the scope of its distributor’s market—within which the forum was included—or even


\(^{120}\) See Plant Food Co-op v. Wolfkill Feed & Fertilizer Corp., 633 F.2d 155, 156-57, 159 (9th Cir. 1980) (defendant’s knowledge of product’s destination enabled defendant to control its amenability to jurisdiction); Charles Gendler & Co. v. Telecom Equip. Corp., 508 A.2d 1127, 1138 (N.J. 1986); Myers, 600 F Supp. at 986; see also Nelson by Carson, 717 F.2d at 1126 (indicating as “critical” to personal jurisdiction analysis that defendant know or be aware that its product would reach the forum).

\(^{121}\) One court explicitly concluded that there was no meaningful distinction between “know” and “should have known” in determining whether the defendant has purposefully availed itself of the privilege of conducting activities in the forum. See Oswalt v. Scripto, Inc., 616 F.2d 191, 200 (5th Cir. 1980).
merely that the product could be distributed in the forum was subject to jurisdiction.122

Woodson further confused the stream of commerce issues by failing to clarify the basis of the particular question it purported to address. Was the presence of the Robinson's Audi in Oklahoma "fortuitous" because the stream of commerce terminated with the ultimate purchase? Or did the Court base its finding on the absence of proof that a number of defendants' Audis had reached Oklahoma? In light of that ambiguity, some courts concluded that Woodson rejected jurisdiction in which only use, rather than resale, in the forum was foreseeable.123 Other courts concluded that jurisdiction was appropriate as long as the forum was within the scope of defendant's foreseeable market, whether or not it reached the forum by the acts of one outside the distribution chain.124 Similarly, some courts refused
to sustain the forum's assertion of jurisdiction where only a few of defendant's products had been sold or resold in the forum, concluding that these forum sales were insufficiently "substantial" or "regular" to satisfy the minimum contacts standard.

And perhaps most curiously, the Eighth Circuit continued along its separate path. Apparently ignoring Woodson's stream of commerce dicta, the Eighth Circuit upheld a district court's refusal to assert jurisdiction over a Japanese component manufacturer whose component products regularly reached the United States and, presumably, the forum. Although the district court acknowledged that manufacturer's ability to foresee its products' presence in the forum, the court concluded that that foreseeability could not sustain jurisdiction where the product was placed in the American stream of commerce by the final product manufacturer rather than by the component manufacturer and where, as in Hutson, defendant lacked any intent to serve the forum market.

Livestock Co., 585 F. Supp. 627, 629 (D. Nev. 1984) (in which court upheld jurisdiction over Oklahoma seller of cattle despite the fact that the seller's activities occurred solely in Oklahoma and seller had no knowledge of the cattle's Nevada destination; court concluded that defendant should have reasonably anticipated that some of the livestock it sold would reach Nevada since cattle are customarily shipped great distances, and it was in defendant's economic interest to serve the market for livestock outside Oklahoma).

See Dalmau Rodriguez v. Hughes Aircraft Co., 781 F.2d 9 (1st Cir. 1986); Chung v. NANA Dev. Corp., 783 F.2d 1124 (4th Cir. 1986), cert. denied, 479 U.S. 948 (1986); see also Shanks v. Westland Equip. & Parts Co., 668 F.2d 1165, 1167 (10th Cir. 1982) (in which court distinguished the regular entry of defendant's products into the forum from the fortuitous presence of a single auto in Woodson); cf. Max Daetwyler Corp. v. Meyer, 762 F.2d 290, 298-300 & n.12 (3d Cir. 1985), cert. denied, 474 U.S. 980 (1985) (minimum contacts standard not met on basis of "sporadic" and "intermittent" forum sales of foreign defendant's products by independent American distributor; court suggests that a "tolerance for broad jurisdiction" is less reasonable where plaintiff, as well as defendant, is a "multistate actor," and where the cause of action (patent infringement), unlike the products liability context, reflects no "localized harm").

See Humble v. Toyota Motor Co., 727 F.2d 709 (8th Cir. 1984) (per curiam). Defendant was a Japanese company that manufactured car seats and their component parts. These products were sold to Toyota Motor Company, in Japan, for incorporation into its automobiles. Many of these cars, containing defendant's products, were shipped to the United States and distributed through Toyota subsidiaries and distributors, as well as through independent distributors and dealers. One such car, purchased by plaintiffs, was involved in an accident in Iowa. Plaintiffs subsequently brought suit there against a number of defendants in the distribution chain, including the automobile seat manufacturer.

III. The Stream of Commerce Theory After Asahi: A Reassessment and Suggested Revised Approach

A. Asahi's Immediate Impact

The immediate effect of Asahi could well be minimal. The Court's emphasis on the international context and, more significantly, on the absence of a forum plaintiff, distinguish Asahi from the typical stream of commerce scenario. In fact, some lower courts have been quick to dismiss Asahi's relevance on this basis, either noting the absence of international interests or, if present, finding them substantially outweighed by the interests of the forum and its resident plaintiff.

Moreover, even to the extent lower courts purport to give more substantial attention to Asahi, the justices' stream of commerce opinions offer little guidance and, indeed, tend to increase the existing confusion. Not only do the opinions suggest two, and possibly three, definitions of an appropriate stream of commerce theory, they raise, and leave unresolved, two subsidiary issues: the constitutional distinction, if any, between foreseeable purchase and foreseeable use and the constitutional significance of the nature of the product concerned.

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129 See Mason v. F. Li Li Luigi, 832 F.2d 383 (7th Cir. 1987), discussed infra notes 146-57 and accompanying text; Hall v. Zambelli, 669 F Supp. 753 (S.D. W Va. 1987), discussed infra notes 138-45 and accompanying text; see also McBead Drilling Co. v. Kremco, Ltd., 509 So. 2d 429 (La. 1987) (discussed infra note 145) (noting absence of Asahi's "unique burdens" where defendant was not alien); Peterson, supra note 118, at 52 (suggesting that Asahi's precedential impact may be limited for these reasons).
130 See Hall, 669 F Supp. at 756; McBead, 509 So. 2d at 432 & n.6. Although in Woodson the dissenting justices criticized the majority for drawing just such a distinction, Justice Brennan now argues that Woodson did not create a use/purchase distinction but one based on regular versus isolated use. See Asahi, 107 S. Ct. at 1037 n.3 (Brennan, J., concurring in part and in the judgment): "But I do not read the decision in Woodson to establish a per se rule against the exercise of jurisdiction where the contacts arise from a consumer's use of the product in a given State, but only a rule against jurisdiction in cases involving 'one, isolated occurrence [of consumer use, amounting to] the fortuitous circumstance'" (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295 (1980)).
131 See Morris v. SSE, Inc., 843 F.2d 489, 494 & n.10 (11th Cir. 1988), discussed infra notes 158-73 and accompanying text. As previously noted, the Court in Woodson specifically rejected the relevance of the nature of the product to the jurisdiction
Though generally agreeing that the Supreme Court has further "muddied the [stream of commerce] waters,"\textsuperscript{132} the lower courts have reached different conclusions regarding their obligations in a stream of commerce situation after \textit{Asahi}. Some courts have applied Brennan's analysis because in the absence of a clear Supreme Court position on the stream of commerce issue, circuit precedent, typically espousing the theory expressed by Justice Brennan, so requires\textsuperscript{133} or because the lower court believes that, despite the lack of consensus in \textit{Asahi}, the Supreme Court's prior precedent, primarily \textit{Woodson}, supports the Brennan standard.\textsuperscript{134} Other courts have applied the "narrower"\textsuperscript{135} O'Connor standard, at least for purposes of deciding the particular case, on the theory that if that standard is met, the broader Brennan standard is also necessarily satisfied.\textsuperscript{136} Finally, lacking

determination. \textit{Woodson}, 444 U.S. at 296 n.11; see supra note 113. In citing the factor as relevant to a stream of commerce theory, Justice Stevens has reopened the question of the significance of the dangerous instrumentality concept. For a discussion of Justice Stevens' opinion, see supra notes 44-48 and accompanying text.

\textsuperscript{132} \textit{Hall}, 669 F Supp. at 754; accord \textit{Bearry v. Beech Aircraft Corp.}, 818 F.2d 370, 375 (5th Cir. 1987) ("The dimension of the 'stream of commerce' doctrine now divides the Supreme Court."); \textit{Andrews Univ. v. Robert Bell Indus., Ltd.}, 685 F Supp. 1015, 1019 (W.D. Mich. 1988) ("[T]he \textit{Asahi} court was deeply split with respect to what constitutes minimum contacts under the so-called 'stream of commerce' analysis.").

\textsuperscript{133} See \textit{AG-Chem. Equip. Co. v. Avco Corp.}, 666 F Supp. 1010, 1015 (W.D. Mich. 1987) ("Until the Supreme Court resolves the debate as to what constitutes minimum contacts under the stream-of-commerce theory, it is incumbent upon this court to follow the lead of Justice Brennan and the Sixth Circuit."); cf. \textit{Andrews Univ.}, 685 F Supp. at 1019 (suggesting that Sixth Circuit has, in fact, adopted the O'Connor standard).

\textsuperscript{134} See \textit{Hall}, 669 F Supp. at 755-56. It has also been suggested that the Brennan position may be supported by five of the justices. \textit{Batton v. Tennessee Farmers Mut. Co.}, 736 P.2d 2, 7 (Ariz. 1987); cf. \textit{Morris}, 843 F.2d at 493 n.5 (noting Justice Stevens' apparent assumption "arguendo" of correctness of O'Connor position while not "discount[ing] the correctness of the broader Brennan test").

Commentators have reached a similar conclusion. See \textit{Dessem}, supra note 8, at 63-64 (stating that "the Court apparently is prepared to endorse a fairly liberal stream of commerce doctrine"); see also \textit{Peterson}, supra note 118, at 53 (noting probabilities that in usual stream of commerce situation, Brennan standard will prevail).

\textsuperscript{135} See \textit{Morris}, 843 F.2d at 493 n.5.

\textsuperscript{136} See id. In addition, one court has interpreted \textit{Asahi} as adopting the O'Connor standard and, applying that standard, found sufficient "additional conduct" to sustain jurisdiction. That court, in \textit{Bohannon v. Honda Motor Co.}, 682 F Supp. 42 (D. Kan. 1988), stated that in \textit{Asahi} the Supreme Court "reasoned that something more was required than an awareness by defendant that its products would enter the forum state in the stream of commerce. The defendant must take some action 'purposefully directed'
any guidance from the Court, the lower courts have continued
to supply their own answers to the subsidiary questions and to
define their role, if any, in the stream of commerce calculus.  

A discussion of some of the recent lower court decisions will
serve to illustrate the courts’ attempts to reconcile the, at best,
conflicting signals sent by the Court.

In *Hall v. Zambelli*, a West Virginia resident was injured
when fireworks exploded prematurely during a fireworks display
The resident brought suit in West Virginia against the Pennsyl-
vania business displaying the fireworks and the Japanese man-
ufacturer of the allegedly defective shell, Onda Enterprises, Inc.
(“Onda”). Onda challenged West Virginia’s assertion of jurisd-
cction, claiming that its only contact with the state was that its
product, sold to a Pennsylvania company in Pennsylvania, had
caused injury in West Virginia. In addition, Onda disclaimed
any knowledge of the particular display from which plaintiff’s
injury arose.

The West Virginia court, after a careful examination of
*Asahi*, concluded that its exercise of jurisdiction over Onda was
consistent with *Asahi* and the requirements of due process. While
acknowledging that the justices’ opinions “arguably leave in
doubt the continued viability of the stream-of-commerce theory
[,] nevertheless the Supreme Court’s endorsement of the theory
in [Woodson] taken together with the lack of consensus in *Asahi*
convinces this Court that the theory continues to have preceden-
tial value.”

A second court has interpreted *Asahi* as renouncing the stream of commerce theory
but held, in the particular case, that the additional conduct required by Justice O’Con-
nor’s standard was unnecessary to sustain the forum’s assertion of jurisdiction in light
of the state’s strong interest in the lawsuit and the hazardous nature of the product
173.

137 See *O’Neil*, 682 F Supp. at 717-18; *Hall*, 669 F Supp. at 756-57; *McBead*, 509
So. 2d at 431-33.
139 Id. at 754-55.
140 Id. at 756; see also *Wessinger v. Vetter Corp.*., 685 F Supp. 769, 777 (D. Kan.
The *Hall* court also distinguished the case before it from *Asahi*, noting initially the shortness of the "stream." *Hall* was not a case in which a component part ultimately reached some remote and unanticipated market, but one in which the defendant sold a finished product directly to an identified customer.\(^{141}\) Onda, the court determined, was well aware of the scope of its purchaser's operations and thus could expect to be haled into courts outside Pennsylvania.\(^{142}\) Second, the plaintiff was a resident of the forum, and the accident out of which the claim arose occurred there. Unlike the *Asahi* situation, West Virginia had a substantial interest in the litigation and the plaintiff an interest in a West Virginia forum.\(^{143}\)

Finally, the court rejected a foreseeable use-foreseeable purchase distinction. The fact that the product's presence in West Virginia was attributable to the independent act of the Pennsylvania corporation rather than Onda was of no constitutional significance. This case was distinguishable from *Woodson*, the court concluded, because of the interdependent relationship between Onda and its purchaser and the consequent economic benefit Onda derived from the Pennsylvania company's display of its products. The court explained: "The more markets Zambelli, the fireworks displayer, served, the more markets Onda, the fireworks manufacturer, served."\(^{144}\) Conversely, the court concluded, the "economic posture" of the retail dealer in *Woodson* was not in any way "enhanced" by the purchaser's travel through Oklahoma.\(^{145}\)

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1987) (reaching similar conclusion with regard to theory's validity in light of the fact that the justices in *Asahi* were "evenly divided" and of the strong support for the theory among courts and commentators).

\(^{141}\) Id. at 756-57.

\(^{142}\) Id. at 757.

\(^{143}\) Id.

\(^{144}\) Id. at 756.

\(^{145}\) Id. The court in *McBead*, 509 So. 2d 429, also considered the relevance of the fact that defendant-manufacturer's product had not arrived in the forum through the stream of commerce but had been taken there by the purchaser. As in *Hall*, the *McBead* court refused to find any constitutional significance in this fact and based its refusal on the differences between the local retailer in *Woodson* and a manufacturer. While it might be "basically unfair" to require a local retailer to answer in a remote state for injury arising from alleged design or manufacturing defects, the court saw no unfairness in requiring the manufacturer to answer for those defects in any jurisdiction where its
In a second case, Mason v. F. Lii Luigi, the Seventh Circuit purported to apply a stream of commerce analysis while virtually ignoring the stream of commerce opinions in Asahi. In Mason, an Illinois resident injured by an allegedly defective machine brought suit in Illinois against the Italian manufacturer of the machine. The manufacturer had no direct contacts with Illinois, and its only indirect business in the forum consisted of machines sold to the plaintiff's employer by a Maryland corporation acting as the defendant's United States distributor. In addition to the presence of its machines in Illinois, the defendant had also sent an employee to Illinois to assist the Illinois employer in setting up and servicing the machines. Moreover, the defendant had specifically designed the machine for the Illinois employer.

In light of these facts, the Seventh Circuit's decision that Illinois could constitutionally assert jurisdiction over the Italian partnership is not surprising. The defendant had clearly placed its products, including the alleged injury-causing machine, in the stream of commerce with the knowledge that they would reach Illinois, thus satisfying the Brennan standard. More importantly, however, in sending an agent to assist the employer and designing the product specifically for the Illinois forum, the defendant manifested an intent to market its products there that

product caused damage. McBead, 509 So. 2d at 432. Moreover, the court contrasted the strength of the forum's interest in the manufacturer's case with the relatively smaller interest of the forum when the local retailer was involved. Id. McBead gave little consideration to Asahi's impact, merely stating that the justices disagreed with regard to the dimensions of the stream of commerce theory and emphasizing the insufficient relationship among the California forum, the Japanese defendant and the indemnification issue. Id. at 433 n.7; cf. Smith v. Dainchi Kinzoku Kogyo Co., 680 F. Supp. 847, 852-53 (W.D. Tex. 1988) (Japanese manufacturer whose product reached California through distribution chain was not subject to jurisdiction in Texas where product, transported there by purchaser-employer, caused injury to Texas employee. Court, citing Woodson, 444 U.S. at 298, concluded that because the retailer served only the states of California, Arizona, and Nevada, Japanese manufacturer had no expectation that its products would be purchased or used by Texas consumers, and that employer's taking product to Texas was its unilateral act.).

See supra notes 37-43 and accompanying text.
satisfied the requirements of the more stringent standard advocated by Justice O'Connor. Yet the court did not discuss *Asahi* with regard to the stream of commerce issue. Instead, the court immediately undertook to distinguish this case from *Asahi*, stating that while the defendant, as a foreign business, would suffer "unique burdens" in defending in Illinois, the interests of the forum and the plaintiff here, unlike those of the forum and the plaintiff in *Asahi*, were significant. The claim before it was not a collateral action between foreign corporations but a claim involving an injury to an Illinois resident in Illinois.

After noting these distinctions, the court concluded that Illinois' assertion of jurisdiction was constitutional because the defendant had delivered its product into the stream of commerce with the expectation of its purchase in the forum. The court cited as support for its conclusion *Woodson* and *Gray* The court also stated, without elaboration, that the defendant had purposefully availed itself of the benefits of the forum through the activities of its employee and the Maryland corporation. Yet that statement, like the court's application of a stream of commerce analysis, was supported by a citation to *Woodson* rather than *Asahi*; in fact, the court's only reference to the justices' stream of commerce discussion in *Asahi* was a note that four justices had cited *Gray* with approval.

In a third case, *Morris v SSE, Inc.*, the Eleventh Circuit applied the O'Connor standard, "the narrowest of the three Asahi views," for "the limited purpose" of resolving the case before it. *Morris* involved a parachuting accident in Alabama that resulted in the death of a Mississippi resident. The dece-

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150 See id. at 1033; supra notes 31-36 and accompanying text.
151 Mason, 832 F.2d at 386 (quoting *Asahi*, 107 S. Ct. at 1034).
152 Id. at 385-86.
153 Id. at 386.
154 Id.
155 The court emphasized that the Maryland corporation was not an independent distributor but rather the export manager for F Li Luig. Id. at 385, 386.
156 Id. (citing *Woodson*, 444 U.S. at 297-98).
157 Id. at 386 n.4.
158 843 F.2d 489 (11th Cir. 1988).
159 Id. at 493 n.5.
dent's estate brought a wrongful death action, alleging that death had been caused by an automatic activation device manufactured by SSE, Inc. ("SSE"), a Pennsylvania company with headquarters in New Jersey. SSE challenged the court's jurisdiction, claiming that it lacked the necessary contacts with Alabama.\footnote{Id. at 490. Plaintiff had originally brought suit in federal district court in Mississippi. Following defendant's motion to dismiss, the case was transferred to the Southern District of Alabama.}

The court's use of the stream of commerce theory to support its dismissal of SSE's challenge was, in some respects, puzzling. The court acknowledged and specifically relied upon a direct contact between the defendant and forum out of which the cause of action allegedly arose. The defendant had, at the request of an Alabama parachuting corporation, inspected and repaired the actual injury-causing device, and then returned it directly to the Alabama business. Moreover, the plaintiff alleged that the accident was caused, in part, by the defendant's negligent repair of that device.\footnote{Id. at 491.}

Yet the court chose not to rely solely on this direct contact but looked as well to the defendant's indirect forum contacts.\footnote{Id. at 493-94.} The scope of those indirect contacts, however, was unclear. Record evidence indicated that SSE sold its products exclusively through distributors in California, Illinois, and New York, and dealers in unspecified states.\footnote{Id. at 491.} There was apparently no evidence of sales to dealers in Alabama nor even of the regular use of defendant's products in the state.\footnote{Id. After the events relevant to this lawsuit occurred, defendant entered into a dealership agreement with an Alabama business (although with regard to a different product). During the two and one-half year period of the agreement's existence defendant transacted sales in the amount of $450 with the Alabama company. \textit{Id.}} Also unknown was the manner in which the particular injury-causing device reached Alabama from Michigan, where it had been sold.\footnote{Id. at 493-94; \textit{see also Asahi}, 107 S. Ct. at 1033; \textit{supra} notes 31-36 and accompanying text.}

Despite this absence of record evidence, the court concluded that jurisdiction was permissible under the stream of commerce theory proposed by Justice O'Connor.\footnote{Id.} In the court's opinion,
SSE not only placed its products in a nationwide stream of commerce, but it sought to serve an Alabama market. This intent was manifested, according to the court, in SSE's repair of the allegedly injury-causing device, defendant's advertisement of its products in Alabama, and the hazardous nature of those products. The court concluded that SSE's repair of the product and its return of the product to the Alabama store were equivalent to SSE's designing the product for the forum state rather than the result of a unilateral act by the Alabama business. After all, SSE chose to repair the device sent to it by the Alabama corporation and to return the device to Alabama. The court further held that SSE's advertisements in national trade journals could constitute advertising in the forum since it could reasonably be inferred that such magazines had appeared in Alabama, and SSE had not argued to the contrary.

Finally, and most interesting, the court cited Justice Stevens' hazardous nature factor as further support for its conclusion. The court reasoned that parachuting was a dangerous activity, that the defendant's product was a component of the decedent's parachuting system and, thus, SSE's device was a "hazardous product." Since SSE was aware that the Alabama store to which it returned the device was a parachute jumping operation, SSE knew that it was sending a hazardous product into Alabama. Although the court conceded that Stevens' "volume" and "value" factors did not support jurisdiction—only one transaction involving the state had occurred and the value of the repairs totaled only $123.21—the court concluded that its determination was, nonetheless, valid since Stevens' standard did not require the presence of all three factors.

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167 Morris, 843 F.2d at 493-94.
168 Id. at 494.
169 Id. at 495.
170 Id. at 494.
171 Id. (citing Asahi, 107 S. Ct. at 1038 (Stevens, J., concurring in part and concurring in the judgment)).
172 Id.
173 Id. at 494 n.10. The significance of this "hazardous nature" element is also apparent in a case in which a Rhode Island court applied the stream of commerce theory to sustain its jurisdiction over generators of hazardous waste whose "products" caused environmental harm in Rhode Island. In Violet v. Picillo, 613 F Supp. 1563 (D.R.I.
Yet, beyond the resulting confusion and unanswered ques-
tions, the justices' opinions may exercise a more subtle influence
over lower-court applications of the stream of commerce theory.
The O'Connor plurality indicates, for the first time, serious
doubt that foreseeability of the product's presence in the forum
is a sufficient basis for jurisdiction; instead, the defendant's
affiliation with the forum must arise from defendant's intent to
market its products there.\footnote{See \textit{Asahi}, 107 S. Ct. at 1033.}
Moreover, though the Brennan and Stevens opinions reject an intent requirement, they urge a stream of
commerce approach that emphasizes "regular" and "anticipated" sales\footnote{See \textit{id. at} 1035 (Brennan, J., concurring in part and in the judgment); \textit{id. at} 1038 (Stevens, J., concurring in part and concurring in the judgment) (whether placing product into stream of commerce constitutes purposeful availment depends on volume, value and hazardous character of product).} to the forum as the basis for jurisdiction rather
than the single tort theory upon which some earlier stream of
commerce cases relied.\footnote{See \textit{supra} note 83 and accompanying text.} In light of these opinions, the courts
may choose independently to limit their jurisdictional reach un-
der the stream of commerce theory, requiring that the defen-

1985), defendant corporations and institutions had contracted with other companies,
operating in more than one state, for the disposal of certain waste products. The
defendants had no knowledge or expectations with regard to where the wastes would be
taken, merely paying for their disposal. The district court, comparing these corporations
to manufacturers in the typical stream of commerce scenario, concluded that these
companies had chosen to transfer the burden of transporting and locating their waste
to a third party operating interstate and that they had benefited from that transfer of
responsibility. If defendants had wanted to avoid amenability to jurisdiction in Rhode
Island, they could have handled the waste themselves or, through contract, selected or
participated in the selection of the disposal site. \textit{Id. at} 1577-78. Moreover, the court
emphasized that the products placed into this nationwide stream of commerce were
"volatile and dangerous substances." Where such products were involved, the court
concluded, a lesser showing of contacts would sustain jurisdiction. \textit{Id. at} 1577.

Objections to the court's jurisdiction were renewed by one of the defendants after
trial. The court reconsidered these objections in \textit{O'Neil}, 682 F Supp. 706, but, after
reviewing \textit{Asahi} and relevant First Circuit precedent, reiterated the conclusions it had
reached in \textit{Violet}. Although the court interpreted \textit{Asahi} as "renouncing" the stream of
commerce doctrine, \textit{id. at} 716-17, it held that jurisdiction was constitutional in light of
Rhode Island's "compelling" interest in the lawsuit. \textit{Id. at} 717-18. Citing Justice Stevens,
the court again emphasized the fact that the products at issue here were "inherently
dangerous" toxic substances rather than ordinary products. Moreover, the court found
that the significance of these forum contacts was enhanced by the fact that the nonres-
ident generators operated in a nationally regulated industry. \textit{Id. at} 718.
Dant’s connection with the forum be established by evidence of a substantial volume of sales to the forum and by evidence of the defendant’s intent to market its goods there.

Whether or not this result will come to pass must await the development of a more substantial body of stream of commerce opinions. Some courts have already recognized the potential for the elimination of the stream of commerce theory originating in *Gray* or at least the Court’s imposition of some limitation on the theory, and one court has explicitly noted the apparent restriction of the theory to “regular and extensive sales.” Yet the impact of that recognition, if any, remains unclear. The few cases in which these limitations might have suggested caution have not typically resulted in the court’s staying its jurisdictional reach.

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177 See *Hall*, 669 F. Supp. at 755; *O’Neil*, 682 F. Supp. at 717
179 See id. at 1095. (“Four justices adopted the more liberal stream of commerce theory, but noted in their concurring opinion ‘[t]he 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.’”) (quoting *Asahi*, 107 S. Ct. at 1035 (Brennan, J., concurring in part and in the judgment)).
180 See, e.g., *Morris*, 843 F.2d 489. A few courts have exercised greater caution in cases in which some features of the typical stream of commerce scenario are lacking. See, e.g., *Andrews Univ.*, 685 F. Supp. 1015 (in which district court found that Canadian manufacturer of boiler was not subject to jurisdiction in Michigan when defective boiler had been sold to Canadian company and resold by it to Michigan purchaser; court concluded that defendant lacked minimum contacts with the forum, apparently because there was no evidence that the second Canadian company had acted as defendant’s agent or distributor); *Wiles v. Morita Iron Works Co.*, ___ N.E.2d ___ (Ill. 1988) (in which court held that Japanese manufacturer was not subject to jurisdiction in Illinois where allegedly defective machine had been sold, in Japan, to plaintiff’s employer and transported by the employer to Illinois; court emphasized the “unilateral” nature of the employer’s act and the “isolated” nature of the transaction: defendant had no knowledge that the employer, a New Jersey corporation, would take the machine to its Illinois plant and defendant, primarily a manufacturer of machines used to make springs for automobiles, had manufactured and sold only nine such machines, four of them to plaintiff’s employer).

Interestingly, an Ohio district court, in *Sturgill v. Chema Nord Delekemi Nobel Indus.*, 687 F. Supp. 351 (S.D. Ohio 1988), recently refused to exercise jurisdiction over a Swedish chemical manufacturer whose allegedly defective product had injured an Ohio resident. Although defendant regularly sold its products to American companies in several states, it made no sales, directly or indirectly, to Ohio purchasers. The court rejected plaintiff’s stream of commerce claim that jurisdiction was warranted on the ground that it was foreseeable that defendant’s product would eventually be used in
B. Long-Term Implications

More significantly, Asahi should prompt a long-overdue assessment of the proper scope and role of the stream of commerce concept in personal jurisdiction. Since a determination of that role necessarily depends on the jurisdictional values that the theory is intended to implement, such an assessment should begin with the identification and clarification of the constitutional limits on a state’s authority to assert jurisdiction. In that regard, this section will consider, and reject, the convenent forum concept that influenced Gray and certain of its followers. As this section will establish, jurisdiction analysis must, instead, recognize the existence of sovereignty limits and the consistency of the Court’s “purposeful” connection requirement with those limitations. Finally, this section will discuss the failure of the justices’ stream of commerce positions to accommodate this analysis, and propose a revised approach to stream of commerce analysis that properly reflects these sovereignty limits.

1. Sovereignty Limitations and the Fallacies of a Convenience Theory

The nature and sources of the constitutional limitations on a state’s authority to assert jurisdiction have been vigorously debated for years. Some commentators assert that the due process clause is the sole constitutional limitation on personal jurisdiction and that the clause protects only the defendant’s interest

Ohio: “[T]he issue is not whether defendant Eka Nobel should have foreseen that its product would end up in Ohio, because the product may end up anywhere in the world, but rather whether defendant Eka Nobel has had sufficient contact with Ohio that it should reasonably anticipate being haled into court in Ohio.” Id. at 354; cf. Bean Dredging Corp. v. Dredge Technology Corp., 744 F.2d 1081, 1082-83 (5th Cir. 1984); Giotis v. Apollo of the Ozarks, Inc., 800 F.2d 660, 667 (7th Cir. 1986), cert. denied, 479 U.S. 1092 (1987).

181 See Wilmack, Inc. v. Second Judicial Dist. Court, 635 P.2d 296, 297 (Nev. 1981) (indicating, with citation to Metal-Matic, the existence “at one time” of “a strong jurisprudential trend emphasizing convenience of forum over all other jurisdictional considerations”); Perschbacher, Minimum Contacts Reapplied: Mr. Justice Brennan Has It His Way in Burger King Corp. v. Rudzewicz, 1986 ARIZ. ST. L.J. 585, 594 (noting commentators’ predictions, after McGee, that jurisdiction and venue principles would coalesce).
For some of those commentators "fairness" is assessed in convenience terms. That is, jurisdictional analysis is properly concerned only with whether litigation in the forum is unduly burdensome and that determination is made on the basis of the actual litigation burden borne by the defendant or some balancing of the relative conveniences of the parties and, possibly, the forum.

The Supreme Court has often described the due process clause as protecting the defendant from "inconvenience" litigation. And the Court has explicitly acknowledged that the plaintiff's and the forum's interests, as well as the burden on the defendant, play some role, although secondary, in the jurisdictional calculus. Yet the Court has never regarded convenience

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183 See Redish, supra note 182, at 1138-42 (stating that the forum's assertion of jurisdiction is unconstitutional only if the court finds first, that defendant would suffer "meaningful inconvenience" if forced to defend in the forum and second, that a consideration of the parties' relative burdens and the state's interest in the controversy do not indicate that the forum should be allowed to assert jurisdiction despite that inconvenience); see also Whitten, supra note 182, at 846. Professor Whitten concludes that the forum may always exercise jurisdiction over a nonresident defendant unless that defendant can show that defending in the forum would be so burdensome, relative to the burden of defending at home or in a more convenient forum, that defendant would be effectively deprived of an opportunity to defend the lawsuit.

Other commentators have similarly advocated a venue-type analysis for personal jurisdiction. See Hazard, Interstate Venue, 74 Nw. U.L. Rev 711 (1979); Ehrenzweig, From State Jurisdiction to Interstate Venue, 50 Or. L. Rev 103 (1971).

184 See, e.g., Woodson, 444 U.S. at 291-92 (minimum contacts standard acts, in part, to protect defendant from litigation in an inconvenient forum); see also McGee v. International Life Ins. Co., 355 U.S. 220, 223-24 (1957) (noting that the inconvenience defendant would suffer from defending in the forum would not constitute denial of due process); International Shoe Co. v. Wash., 326 U.S. 310, 317 (1945) (stating that inconvenience to defendant caused by litigation away from home is relevant to determination that forum's assertion of jurisdiction is consistent with due process).

185 Prior to 1980, the relevance of these factors to jurisdiction analysis was unclear. Compare McGee, 355 U.S. at 223-24 (emphasizing California's interest in the litigation and significance of burden on plaintiff if forced to litigate in a distant forum) with Kulko v. Superior Court, 436 U.S. 84, 92 (1978) (interests of forum and plaintiff to be
or venue considerations as the primary measure of a state’s right to assert jurisdiction. Instead, the Court has traditionally assessed the “fairness” of the forum’s jurisdiction on the basis of a constitutionally adequate connection between the defendant and the forum, as tested by the minimum contacts standard.186

Moreover, the Court has explicitly, albeit unevenly, indicated that its minimum contacts standard is more than a reflection of its opinion of the proper measure of the defendant’s litigation burden. According to the Court, the limitations on a state’s authority to exercise jurisdiction include a structural or territorial element that demands constitutionally adequate “ties” between

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186 See Burger King, 471 U.S. at 474; Kulko, 436 U.S. at 91-92; Hanson, 357 U.S. at 251, 254; see also Lewis, supra note 182, at 708 (noting that International Shoe standard does not directly measure the fairness of the forum according to its convenience for the defendant but looks instead to forum-defendant contacts); Stein, Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction, 65 Tex. L. Rev. 689, 704-05, 708 n.90 (1987) (stating that convenience considerations have never divested a court of jurisdiction when other justifications supported jurisdiction nor conferred jurisdiction in the absence of those other justifications, and noting that the Court's jurisdictional standard does not assess the actual litigation burdens defendant would bear if forced to defend in the forum).
the defendant and the forum. In *Hanson*, for example, the Court stated that due process requires satisfaction of the minimum contacts standard, though the defendant's burden of defending in the forum be nonexistent, because the restrictions imposed by the due process clause are "a consequence of territorial limitations on the power of the respective States," as well as a protection against inconvenient litigation. And in *Woodson*, the Court stated both that the minimum contacts requirement encompassed a concern for the defendant's protection against inconvenient litigation and an interest in preventing a state's overreaching the limits imposed by its status as a member of the federal system and, significantly, that the forum might be constitutionally inadequate despite its desirability from a convenience standpoint. In short, the Court has not only failed to view personal jurisdiction in convenience terms, it has also identified limitations that would preclude the adoption of a convenience-based jurisdictional analysis.

Yet the Court's recognition of this territorial or structural component has been neither consistent nor clear. Nor has the Court clearly identified the source of these limitations or their significance for personal jurisdiction analysis. The Court in *Hanson* did not elaborate upon its statement, and the role of territorial limitations, other than as support for a minimum contacts theory, was not articulated. Moreover, the importance of that statement was apparently minimized in the Court's subsequent opinion in *Shaffer v Heitner*, where Justice Marshall observed that the *Hanson* statement "simply makes the point that the States are defined by their geographical territory."
In *Woodson* the Court made some attempt to remedy these deficiencies. It stated that the sovereignty of each state imposes a limitation on the sovereignty of other states and that that limitation was "express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment." In addition, the Court emphasized the significance of that limitation, asserting that "the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment"—although that forum offered the most convenient location, defendant suffered little or no inconvenience in defending there, and the state had a substantial interest in the litigation. Again, however, the Court failed to specify the manner in which these limitations would operate within a personal jurisdiction analysis.

*Woodson*'s articulation of federalism concerns as a factor in jurisdiction analysis provoked a rash of scholarly criticism. Commentators argued that the due process clause is the only source of limitations on the state's assertion of jurisdiction and that the clause protects "persons" rather than states. This extension of due process protection to states' interests is, critics asserted, unsupported by the text of the Constitution, by history, or on policy grounds. Moreover, such extension is unnecessary; where federalism concerns are entitled to protection, they are explicitly and properly entrusted to other portions of the Con-

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193 *Woodson*, 444 U.S. at 293.
194 Id. at 294 (citing *Hanson*, 357 U.S. at 251, 254).
195 The Court decided *Woodson* on the basis of the minimum contacts test and did not indicate how its application of that test accommodated the previously identified interstate federalism interests. *See* Braveman, *Interstate Federalism and Personal Jurisdiction*, 33 SYRACUSE L. REV 533, 534 (1984) ("The Court's opinion speaks only in empty slogans about sovereignty and is silent on the contours of the new doctrine."); *see also* Ripple & Murphy, *supra* note 52, at 75 ("Having emphasized the role of interstate federalism, the Court gives only the vaguest idea of what this emphasis will mean in concrete application."). But *see Jay*, *supra* note 118, at 441 (arguing that minimum contacts analysis is "directed entirely toward the 'sovereignty' limitation").
196 *See* Braveman, *supra* note 195; *Lewis*, *supra* note 182; *Redish*, *supra* note 182; *Weintraub*, *supra* note 118.
197 *See* Lewis, *supra* note 182, at 700-01, 735; *Redish*, *supra* note 182, at 1120, 1129-33; *see also* Braveman, *supra* note 195, at 541-43.
198 *Redish*, *supra* note 182, at 1120-29.
Finally, commentators argued that Woodson's analysis posed substantial problems for future use of the widely accepted concepts of consent and waiver. If sovereignty interests are implicated in the jurisdiction analysis, individuals cannot consent to a forum's assertion of jurisdiction because an individual has no power to waive sovereign rights. A mere two years after Woodson was decided, the Court appeared to retreat from its statements in Woodson. In Insurance Corp. of Ireland v Compagnie des Bauxites de Guinee the Court explained those statements, describing the restriction on a state's power, not as a product of interstate federalism concerns, but as "ultimately a function of the individual liberty interest preserved by the Due Process Clause." That clause, the Court observed, "is the only source of the personal jurisdiction requirement[,] and the Clause itself makes no mention of federalism concerns." Moreover, the Court acknowledged the fundamental inconsistency of its federalism concept with traditional notions of waiver, concluding that if federalism interests could independently restrict a state's authority to exercise jurisdiction, the personal jurisdiction requirement could not be waived.

Commentators interpreted CBG as repudiating Woodson's federalism theme and rejoiced but generally did not explore any further implications of the Court's statements. Nor has the

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199 See Redish, supra note 182, at 1123 ("The primary constitutional provision dealing with problems of interstate friction is the full faith and credit clause"); accord Stebbins, supra note 185, at 115; cf. Lewis, supra note 182, at 736 ("[R]espect for the sovereign rights of the states should be enforced through the development of meaningful restrictions on choice of law under the full faith and credit clause.").

200 See Braveman, supra note 195, at 554; Lewis, supra note 182, at 726; see also Weintraub, supra note 118, at 504.


202 Id. at 703 n.10.

203 Id.

204 Id.

205 See Lewis, supra note 182, at 726-27, 739-42; Perschbacher, supra note 181, at 617; Weintraub, supra note 118, at 486; cf. Drobak, The Federalism Theme in Personal Jurisdiction, 68 IOWA L. REV 1015 (1983) (arguing that federalism theme remains in personal jurisdiction analysis after CBG, but concluding that theme is preserved only as a by-product of the protection afforded the individual defendant).
Court, in subsequent cases, elaborated upon these statements. While reiterating CBG's characterization of restrictions on state power as a function of the individual's liberty interest, the Court has offered no further explanation of the impact of those restrictions for personal jurisdiction theory. As a result, the Court has left unresolved whether its apparent rejection of Woodson's federalism theme is a rejection as well of a territorial or structural restriction on a state's right to assert jurisdiction. As others have recognized, the conclusion that federalism concerns are irrelevant to personal jurisdiction analysis does not compel a similar conclusion with regard to territorial restrictions. The existence of sovereignty limitations on a state's authority to assert jurisdiction is readily supported whether on the basis of structural considerations or the due process clause itself. In

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207 CBG, 456 U.S. at 702-03.

208 In CBG, Justice Powell, concurring in the judgment, expressed concern that the Court's apparent abandonment of sovereignty limitations on the exercise of jurisdiction would dictate a similar abandonment of the minimum contacts standard. According to Justice Powell, the majority's rejection of minimum contacts as a sovereignty limitation meant that personal jurisdiction for the first time would be defined solely by "abstract notions of fair play," id. at 714 (Powell, J., concurring in the judgment), thereby effecting a substantial change in the law. The majority denied this conclusion and, indeed, since CBG the minimum contacts standard has remained the "touchstone" of personal jurisdiction analysis. Burger King, 471 U.S. at 474. Yet the Court has said nothing further about what impact its recasting of the nature of defendant's interest may have on that analysis.

209 The demise of the federalism theme is no longer as certain as it once appeared. See Lewis, supra note 182, at 739-42. The Court has continued to cite the forum state interest and the interstate systems' interests in furthering shared substantive policies and the efficient resolution of the controversy as factors relevant to the jurisdiction analysis. Moreover, Asahi has made clear that these factors may play a significant role in that analysis, at least in certain situations. Asahi, 107 S. Ct. at 1034-35; see Beary, 818 F.2d at 377; cf. Maltz, Unraveling the Conundrum of the Law of Personal Jurisdiction: A Comment on Asahi Metal Industry Co. v. Superior Court of California, 1987 DUKE L.J. 669, 688-90 (arguing that Asahi "implicitly confirms the demise" of Woodson's federalism analysis since, if such concerns were important in jurisdiction analysis, aliens would presumably receive less protection, a presumption inconsistent with Asahi's analysis). The identification of those situations and the extent to which those factors will prove influential, however, remain to be determined.

210 See Beary, 818 F.2d at 373-74; Brilmayer, supra note 118, at 85; Drobak, supra note 205; Stein, supra note 186, at 705-14; Wasburd, Territorial Authority and Personal Jurisdiction, 63 WASH. U.L.Q. 377 (1985).
our system, states are sovereigns with certain attributes of sovereignty, including the right to try cases in their courts. That sovereignty, however, is limited. States are, and historically have been, sovereign with respect to a particular territory (and the people, property, and events therein), and their right to assert sovereign prerogatives is necessarily limited by that fact and by the existence of other, co-equal sovereigns. Moreover, a state’s assertion of jurisdiction is an exercise of its sovereign power. After all, that state claims the right to compel the defendant to litigate a particular action in its courts or suffer the consequences of default. As an assertion of sovereign power, then, a state’s exercise of jurisdiction is, like other assertions of sovereignty, limited.\textsuperscript{211}

Moreover, recognizing the existence of sovereignty limitations is not inevitably inconsistent with the view that the due process clause protects the liberty interests of individuals rather than states. While a state’s illegitimate assertion of power may or may not intrude on another state’s sovereignty, it clearly infringes the due process interests of the individual. As some have suggested, the “fairness” assured the defendant by the due process clause presupposes adjudication of the defendant’s substantive rights by a legitimate sovereign.\textsuperscript{212} When a state asserts jurisdiction over a nonresident in excess of its sovereign power it acts without authority and, thus, in violation of defendant’s due process interests.\textsuperscript{213}

Similarly, recognition of these territorial or structural limitations on state sovereignty does not endanger accepted notions of consent and waiver in the personal jurisdiction context. Under the theory outlined above, the protection afforded by these limitations runs to the individual, and the interest protected is his right to be free from an unrelated sovereign.\textsuperscript{214} Moreover, a

\textsuperscript{211} See Weisburd, supra note 210, at 383-402; see also Stein, supra note 186, at 706, 743-46.

\textsuperscript{212} See Currie, supra note 64, at 534 (noting that personal jurisdiction limitations protect defendant against the unfairness of being compelled to defend himself in a state with which he has no relevant connections); Drobak, supra note 205, at 1046-47; Stein, supra note 186, at 706, 711; Weisburd, supra note 210, at 411.

\textsuperscript{213} See Stein, supra note 186, at 707, 711; Weisburd, supra note 210, at 411.

\textsuperscript{214} See Stein, supra note 186, at 712-13 (noting that CBG held that “the right to resist unauthorized jurisdiction ultimately rested with the individual and not with other
conclusion that sovereignty limitations necessarily preclude the operation of waiver and consent theories wrongly assumes that such limitations implicate the same interests, with the same consequences, whatever the context. The power to compel the defendant to answer in the forum is not, however, the forum's power to adjudicate the lawsuit.\textsuperscript{215} As Professor Weisburd points out, in violating subject matter jurisdiction rules, the court seeks to control categories of activities beyond its competence. Such violations, which ignore the limitations society has placed on the court's authority, constitute attacks on the foundations of government and inflict systemic harm. Waiver of these violations would not only countenance the flouting of the rules society has established for the court's existence but would also require societal consent since it is society's interests that are implicated.\textsuperscript{216}

In contrast, a court that violates personal jurisdiction restrictions causes harm at a less fundamental level. The court seeks only to control persons beyond the scope of its power, and the resulting harm inures to them alone. Because violations of personal jurisdiction rules threaten this narrower group of interests, the dangers they pose to basic governmental limitations are far less substantial. Accordingly, they may be waived by the identifiable individuals whose rights are implicated.\textsuperscript{217}

2. \textit{Sovereignty Limitations and the Purposeful Availment Standard: A Reconciliation}

The immediate consequence of recognizing sovereignty limitations on the exercise of personal jurisdiction is the rejection

\textsuperscript{215} See \textit{Bearry}, 818 F.2d at 373, in which Judge Higginbotham observed:

\begin{quote}
The restriction on state sovereign power limits the power of a state to \textit{compel} a citizen of a sister state to submit to its process. This restriction does not affect the subject matter jurisdiction of the state's courts—the power to \textit{adjudicate} the matter once consent is given. Accordingly, non-residents may consent to litigation in a foreign state without raising federalism concerns. To hold otherwise either confuses the distinction between the power to compel and the power to adjudicate or disregards our federalist structure.
\end{quote}

\textsuperscript{216} Weisburd, \textit{supra} note 210, at 414-15.

\textsuperscript{217} \textit{Id.}
of a convenience-based analysis. If sovereignty limitations exist, a state's assertion of personal jurisdiction cannot be justified merely by the absence of a "meaningful" litigation burden or upon some weighing of the relative inconveniences to the parties; instead, that assertion must acknowledge, and reflect, the limited scope of the state's sovereign power. Yet the conclusion that state lines are more than a convenient measure of litigational burdens more clearly indicates what jurisdiction is not than what it is; there remains the task of defining the limits those lines establish for personal jurisdiction analysis.

Because a state's sovereign power extends to persons, property, and events within its boundaries, it has been argued that the state's right to exercise jurisdiction should be related to its internal regulatory authority. The nature of that relationship has been variously described, although typically in functional terms. Thus, jurisdiction is viewed as a means to a regulatory end or as enabling the state to apply its substantive law to the underlying dispute. The forum's assertion of jurisdiction then becomes appropriate when it promotes the forum's regulatory interest or when the forum is warranted in applying its substantive law. In any event, the proper focus of the jurisdictional inquiry, according to this view, is the forum's regulatory interest in the dispute.

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218 See id. at 402-05 (arguing that "a state's authority is limited to controlling transactions, things and people connected with its territory" and that a state's right to assert jurisdiction, like other assertions of state sovereignty, is similarly limited); see also Stein, supra note 186, at 738-45 (concluding that state may not assert jurisdiction when that assertion is unconnected to state's interest in regulating forum events); Brilmayer, supra note 118, at 86, 88 (stating that forum's assertion of jurisdiction may be justified on the basis of state's right to regulate forum activities).

219 See Brilmayer, supra note 118, at 83-88; see also Stein, supra note 186, at 750-52.

220 See Stebbins, supra note 185, at 122, 124-25.

221 See Stein, supra note 186, at 750-52.

222 See Stebbins, supra note 185, at 124-25. Of course, as Professor Stebbins has recognized, these conclusions to some extent merely shift the ground of inquiry. Answers must still be supplied with respect to the circumstances in which the forum legitimately applies its law, id. at 126, or, alternatively, when the exercise of jurisdiction "promotes" a state's legitimate regulatory interest. Stein, supra note 186, at 738-60. Professor Stein has similarly concluded that jurisdiction is appropriate when the state may legitimately apply its own law to the underlying dispute. Stein, supra note 186, at 752-53.
The Supreme Court's personal jurisdiction analysis has not traditionally centered on the existence of some regulatory connection as the basis of a state's right to assert jurisdiction. Indeed, the Court has been at some pains to distinguish the personal jurisdiction inquiry from choice of law analysis, to which the Court points as the proper province of the forum's regulatory concerns. Instead, jurisdiction theory has focused on the presence or absence of a voluntary, beneficial relationship between the defendant and forum. That is, not only must the defendant have minimum contacts with the forum, but those contacts must reflect the defendant's "purposeful availment" of the benefits and protections of the forum.

The Court has never fully explained the nature of this purposeful availment requirement, instead issuing somewhat cryptic pronouncements to describe what the standard demands. Thus, the relevant contacts must be those of the defendant, rather than the "unilateral" acts of another. Moreover, the acts must be

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222 See, e.g., Kulko, 436 U.S. at 98:
But while the presence of the children and one parent in California arguably might favor application of California law in a lawsuit in New York, the fact that California may be "the center of gravity" for choice-of-law purposes does not mean that California has personal jurisdiction over the defendant. (quoting Hanson, 357 U.S. at 254); see also Shaffer, 433 U.S. at 215. But see Welkowitz, Beyond Burger King: The Federal Interest in Personal Jurisdiction, 56 FORDHAM L. REV. 1, 32 & n.188 (1987) (suggesting that Burger King and Asahit offer some evidence of the Court's movement toward consideration of choice of law interests in personal jurisdiction analysis).

In addition, while the Court has formally acknowledged some role for forum interest in the jurisdictional calculus, that role has generally been a secondary one. See supra note 185; see also Kulko, 436 U.S. at 92 (noting that the interests of the forum and the plaintiff are to be considered in determining the forum's right to exercise jurisdiction, but that the "essential" criterion to that determination is the quality and nature of the defendant's activity); Lewis, The "Forum State Interest" Factor in Personal Jurisdiction Adjudication: Home-Court Horses Hauling Constitutional Carts, 33 MERCER L. REV 769, 770-71 (1982) (concluding that forum state interest has never, in itself, "tipped the scales in favor of jurisdiction. Nor has its absence impelled the Court to deny" otherwise justifiable assertions of jurisdiction.); cf. Stein, supra note 186, at 733-34 (noting Court's disavowal of forum interest as proper element of jurisdiction analysis and contemporaneous reluctance to divorce analysis from state's power to assert its authority).

224 See Burger King, 471 U.S. at 474-75 (quoting Hanson, 357 U.S. at 253); Woodson, 444 U.S. at 297; Stein, supra note 186, at 717-33.

225 See Woodson, 444 U.S. at 298; Rush v. Savchuk, 444 U.S. 320, 332-33 (1980); Hanson, 357 U.S. at 253-54.
"purposeful;" the defendant's receipt of forum benefits, without
more, cannot supply the requisite connection between the defen-
dant and the forum.226

The Court's adoption of a purposeful availment standard is,
at least as an historical matter, unsurprising. Prior to *International
Shoe*, the courts had applied theories of consent, presence,
and doing business in order to assert jurisdiction over nonresi-
dents within the analytical framework of *Pennoyer* 227 Conse-
quently, the concept of a voluntary affiliation with the forum
and the idea that defendant be amenable to jurisdiction as a
*quid pro quo* for the benefits derived from activities there were
jurisdictional constructs with which the courts had substantial
experience.

Less clear, perhaps, is why the Court has continued to apply
a purposeful availment standard. It has been, after all, some
years since the *International Shoe* decision, and any transitional
stage has long since passed. If the historical perspective offers
the only justification for the standard, perhaps it is, as Justice
Brennan has suggested, an anachronism, an "outmoded" juris-
dictional model that has no relevance to current jurisdictional
realities.228

The Court has not, however, purported to base its purposeful
availment requirement on history alone. Rather, the Court has
elaborated, albeit sparingly, a constitutional justification for the
standard—identifying notice and predictability interests to which
the standard affords protection. In *Woodson*, perhaps the Court's
most elaborate explanation of the purposeful availment require-
ment, the Court stated that the due process clause "gives a
degree of predictability to the legal system that allows potential
defendants to structure their primary conduct with some mini-
mum assurance as to where that conduct will and will not render

226 See, e.g., *Shaffer*, 433 U.S. at 215-16; see also *Woodson*, 444 U.S. at 298-99.
227 See supra notes 51-53 and accompanying text; see also *Kurland*, supra note 53,
at 574-86 (discussing doctrines of consent, presence and doing business and their appli-
cation by the courts).
228 *Woodson*, 444 U.S. at 307-13 (Brennan, J., dissenting) (arguing that extreme
defendant focus of minimum contacts standard no longer necessary or useful in light of
modern commercial, transportation and communication realities). *See supra* notes 113-17 and accompanying text.
Consequently, the defendant's contacts with the forum must be such that the defendant can foresee being haled into court there. The purposeful availment standard promotes that expectation because a defendant that has purposefully availed itself of the opportunity to act in the forum has clear notice, from those acts, of its amenability there to suit. On the basis of this notice, the defendant can choose to avoid amenability by withdrawing from the forum, or it can insure against the cost of litigation there. 229

These statements have been quickly dismissed as "meaningless" or, at best, "circular." A defendant will expect to be haled into court whenever and wherever the Court indicates its behavior will subject it to jurisdiction. 230 The Court's statements do not, therefore, indicate in what circumstances a defendant's activities should render it amenable to jurisdiction in a particular forum and thus, in themselves, fail to provide meaningful content to the purposeful availment standard. 231 Moreover, and significantly, in its explanation and justification of the purposeful availment standard, the Court has nowhere defined the relevance of its standard to a jurisdictional analysis reflecting sovereignty limitations. If the focus of the jurisdictional inquiry should be whether the state has any business regulating the forum activity or effect, as some have urged, a standard based on the defendant's voluntary, beneficial relationship with the forum seems ill-suited to the task. 232

229 Woodson, 444 U.S. at 297
230 Id., see also Burger King, 471 U.S. at 472.
231 See Perschbacher, supra note 181, at 604; Redish, supra note 182, at 1134; Stein, supra note 186, at 701; see also Jay, supra note 118, at 443.
232 See Stein, supra note 186, at 701-02 ("Predictability might be an important element of 'fair play and substantial justice,' but in the absence of a more developed theory of why individuals expect to be subject to jurisdiction, the formulation is incomplete and cannot be used to distinguish predictable from unpredictable assertions of jurisdiction.").
233 See Stein, supra note 186, at 733-38 (arguing that the purposeful availment standard improperly determines the legitimacy of forum's assertions of jurisdiction by existence of consensual relationship rather than by the strength of the state's regulatory claim); Weisburd, supra note 210, at 405-06 (arguing that purposeful availment requirement is inconsistent with territorial sovereignty model; state has authority to assert jurisdiction whenever there occurs within the forum an event creating an occasion for regulation by the state and requirement of intentional contacts is unconnected to the
These apparently disparate notions of sovereignty limitations and "purposeful availment" have been reconciled in a control-based theory advanced by Professor Brilmayer. Like other commentators recognizing sovereignty limits on jurisdiction, Professor Brilmayer acknowledges that a state may justify its assertion of jurisdiction on the basis of its right to regulate activities or events within the forum. Yet there are limits to the assertions of jurisdiction that justification will support.

Initially, she points out, the exercise of jurisdiction with regard to a forum event is, in reality, an attempt to determine the rights and liabilities of persons with respect to that event. Consequently, the occurrence of a forum event or activity does not itself permit the state to exercise jurisdiction over the defendant. Instead, a state may require a nonresident to defend a claim in these circumstances only if the defendant is somehow "responsible" for the forum occurrence.

Responsibility is readily attributed, according to Professor Brilmayer, when the event the state seeks to regulate is the defendant's forum conduct (or that of its agent), or when the defendant has intentionally caused a forum effect. A more difficult attribution issue is presented, however, when the forum effect that the state seeks to regulate was unintended, as in Woodson. The defendants there had not deliberately marketed

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issue of regulability); cf. Stebbins, supra note 185, at 129-30 (asserting that Court's current purposeful availment standard does not properly assess forum's right to assert jurisdiction or apply its substantive law).

234 Professor Brilmayer asserts that while a state may readily require its citizens to defend in its courts, imposition of jurisdiction costs on nonresidents must be justified. Brilmayer, supra note 118, at 85-86. The state may invoke a regulatory justification if its imposition of these costs is premised on the defendant's "related" contacts with the forum. As she explains, related contacts are those forum occurrences that, when defined in terms of substantive relevance, are "exactly those already defined as a proper subject for regulation under the applicable substantive law." Id. at 86.

In contrast to this regulatory or territorial aspect of a state's sovereignty, a state may seek to assert jurisdiction on the basis of the defendant's systematic, unrelated contacts with the forum. This aspect of state sovereignty, "self-governance," is based on the premise that this defendant-forum connection indicates that the individual or corporate defendant is enough of an insider that, like other citizens of the state, he may invoke the state's political processes if he objects to the burdens the state imposes. Id. at 86-87.

235 Id. at 88-89.

236 Id. at 89.
the injury-causing product in the forum; indeed, the product's presence there was due solely to the decision (and action) of the plaintiffs.\textsuperscript{237}

Professor Brilmayer argues that a state's assertion of jurisdiction in these circumstances, that is, on the basis of an unintended effect, is inconsistent with the sovereign limitations on personal jurisdiction. In the products liability context, for example, a defendant that has some ability to control the location of its products can withdraw from the forum if the costs of operating there are greater than the benefits it receives from those operations. That ability to withdraw, in turn, restrains the forum from imposing unreasonable jurisdictional costs on the defendant since, typically, the state will not want to discourage the defendant from marketing its products in the state. If the defendant has no control over the location of its products, however, it cannot withdraw from the forum in the event its activities there become too costly. Hence, there is no effective check on the forum's willingness to assert jurisdiction.\textsuperscript{238}

The presence of such a check is significant. The state has an interest in providing a convenient forum for its residents. In the absence of any countervailing considerations, such as the risk that the defendant will withdraw, the state will have every reason to provide that forum. At the same time, in the absence of the ability to withdraw, there are no assurances that the costs of litigating in the forum do not exceed the benefits derived therefrom.\textsuperscript{239} Consequently, any excess costs are imposed on nonresident consumers, persons outside the legitimate scope of the state's sovereign power.\textsuperscript{240}

\textsuperscript{237} Id. at 89-91.
\textsuperscript{238} Id. at 95-96.
\textsuperscript{239} Professor Brilmayer contends that there is no basis for inferring that any benefits defendant derived from this forum activity were so substantial, even with the jurisdictional costs, that defendant could be "presumed to have agreed to take his chances." Id. at 96.
\textsuperscript{240} Id. at 95-96. Professor Brilmayer contrasts the unappropriateness of "strict liability" jurisdiction with the forum's right to adopt and apply substantive strict liability. She notes with regard to the latter that a state may choose to shift the loss from a particular plaintiff to enterprises better able to bear the loss, and, thus, eventually to all consumers of the products of those enterprises, without violating due process. This reallocation of the loss from an individual to all consumers, however, is consistent with
This control theory is attractive for a number of reasons. First, and most significantly, it reconciles the purposeful avail-
ment standard with a jurisdictional analysis that reflects sovereignty limitations on a state’s authority to exercise jurisdiction. The defendant’s purposeful conduct provides an effective check on the state’s incentive to overreach the boundaries of its sov-
eign power, as well as serving the traditional liberty interests of notice and predictability. Second, the theory provides some

the state’s authority to govern its citizens. Moreover, because a state’s decision to impose

strict liability affects the instate business activities of both residents and nonresidents, the state has substantial incentive to consider carefully the consequences arising from

that decision. Id.

Professor Stebbins challenges this distinction between the cost allocation conse-
quences of substantive strict liability and those of jurisdictional strict liability, arguing

that Professor Brilmayer’s theory would allow extra-territorial cost spreading of sub-
stantive liability costs only when the defendant is a resident manufacturer or a nonres-
ident manufacturer subject to general jurisdiction. Stebbins, supra note 185, at 131
n.319.

I do not read Professor Brilmayer as precluding a state’s application of its sub-
stantive law over nonresidents in specific jurisdiction situations. What she suggests is

that a state may legitimately choose to spread the costs of substantive strict liability
pursuant to its authority to govern its citizens and regulate events and transactions within
its boundaries. To the extent there are extraterritorial consequences to this cost-shifting,
they are merely incidental to the state’s exercise of its core authority. Moreover, because

a state’s decision to adopt substantive strict liability will necessarily affect residents as
well as nonresidents, its ramifications will be carefully considered.

In the jurisdiction context, however, a state has no similar countervailing interests
that will restrain its assertions of jurisdiction over the nonresident. The state always has
an incentive to provide a convenient forum for a resident plaintiff and to shift jurisdic-
tional costs to nonresidents. Thus, absent defendant’s ability to withdraw, there are no
restraints on a state’s incentive to overreach and no guarantee that costs are not
necessarily shifted to consumers outside the scope of a state’s legitimate power. Id.

241 Professor Weisburd also rejects this cost allocation argument. He contends that
losses will be shifted primarily to out-of-state consumers whenever the defendant does
only a little business in the forum. In this situation, he argues, the contacts of those
nonresident consumers with the forum are probably nonexistent whether defendant’s
contacts are fortuitous or intentional. Consequently, under Professor Brilmayer’s theory,
states would always be precluded from asserting jurisdiction over businesses that sell
most of their products outside the forum. Weisburd, supra note 210, at 406 n.111.

This objection misses the point. A defendant that has some ability to control the
location of its product may, even if it does only a little business in the forum, assess
the costs and benefits of those activities and, possibly, pass along those costs to resident
consumers or, if the benefits prove insufficient, withdraw from the forum. These options
operate as a restraint on a state’s willingness to exceed its sovereign reach. Absent that
restraint, a state has no incentive not to assert jurisdiction, and there is no guarantee
that the costs of the forum’s assumption of jurisdiction are not necessarily passed on to
nonresident consumers.
meaningful content to the Court's purposeful availment standard. As properly interpreted, that standard precludes jurisdiction on the basis of unintended effects and, in the products liability context, requires that a defendant have some control over the location of its products. This control requirement offers a more objective measure of the defendant's amenability to jurisdiction than the foreseeability standard with which the courts have struggled. Moreover, because that requirement enhances the defendant's ability to assess and control the consequences of its acts, it better serves the notice and predictability interests typically recognized as within the scope of due process protection.

Yet, the brighter line that the control requirement appears to offer can be illusory. Although it is relatively clear that the defendant controls the location of its products when it deliberately sends the product into the forum, or intentionally exploits the forum market, the control question becomes somewhat murkier in other situations. In one typical stream of commerce situation, for example, the manufacturer sells its products to unrelated distributors that market the products according to their desires and marketing objectives. The manufacturer may or may not know, to a greater or lesser extent, of these objectives. In another situation (such as Woodson) the product reaches the forum solely by virtue of the purchaser's act. To what extent does the manufacturer or retailer in these situations "control" or, conversely, lack control over the presence of its products in the forum?

242 Cf. Stebbins, supra note 185, at 129-30 (suggesting that a foreseeability standard is not inherently inconsistent with defendant's need to predict the risk of jurisdiction in the forum; rather, confusion created is the result of the Court's formulation of the standard in Woodson).

243 Compare, e.g., Nelson by Carson v. Park Indus., Inc., 717 F.2d 1120 (7th Cir. 1983), cert. denied, 465 U.S. 1024 (1984) (in which defendant manufacturer knew that products it sold to an import buyer would be resold to a retail chain operating nationwide) with Bean Dredging, 744 F.2d 1081 (in which manufacturer of castings sold its products to distributors without any knowledge of the final products for which they were intended or their destination but in which manufacturer was generally aware that its component products could end up anywhere in the United States) and Violet, 613 F Supp. 1563 (in which defendants were wholly unaware of where disposal companies might dispose of their wastes but knew that those companies operated in more than one state).
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The answer is not immediately apparent. At one level, control is clearly lacking in both situations since the location of the product is dictated by the independent decisions of others. On the other hand, it could be argued that control is plainly apparent in both situations since the manufacturer could limit the distribution of its products by a particular distributor or simply refuse to sell to a distributor known to market in a particular forum, and (in the second situation) a retailer could refuse to sell the product to a purchaser the retailer knows will take the product outside the forum.\textsuperscript{244}

A conclusion that the manufacturer in the first scenario has control over the location of its products and that, in the second situation, the retailer or manufacturer does not, makes sense on both intuitive and practical levels. Manufacturers in this first scenario typically have the power to limit the distribution of their products by contract. Moreover, the manufacturer clearly derives at least indirect benefit from its distributor's activities in the forum, despite the independent nature of the distributor's marketing decisions. In the second scenario, the retailer and manufacturer typically exercise no control over the destination of the product after its purchase.\textsuperscript{245} Of course, the retailer could inquire as to the purchaser's intent with respect to the product's location and base its decision to sell the product on the information obtained. However, that process is likely to operate

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\textsuperscript{244} The manufacturer in this second situation, unlike the retailer, generally has no opportunity to refuse to sell the product since the manufacturer usually does not deal directly with the purchaser.

\textsuperscript{245} See Violet, 613 F Supp. at 1571-72 (recognizing distinction on this basis); see also Sedelson, A Supreme Court Conclusion and Two Rationales that Defy Comprehension: Asahi Metal Indus. Co., Ltd. v. Superior Court of California, 53 BROOKLYN L. REV. 563, 576-78 (1987) (distinguishing the two situations on the basis of manufacturer's ability to negotiate limitations on movement of its products or rights of indemnification); Louis, The Grasp of Long Arm Jurisdiction Finally Exceeds Its Reach: A Comment on World-Wide Volkswagen Corp. v. Woodson and Rush v. Savchuk, 58 N.C.L. REV 407, 426 (1980) (To defendant, movement of product after retail sale is "adventitious, uncontrollable and not beneficial"). But see Woodson, 444 U.S. at 307 n.12 (Brennan, J., dissenting) ("The manufacturer in Gray had no more control over which States its goods would reach than did [the regional distributor and retailer] in this case."); Jay, supra note 118, at 444 (questioning the ability of the manufacturer to influence the distribution process, especially when the product it sells is a small part of a more complex device).
imperfectly and would impose a substantial burden and consequent costs on the retailer's operation of its business. Moreover, the retailer, or manufacturer, derives little or no benefit from the purchaser's act of removing the product to the forum that might justify the retailer's adopting such a process to avoid amenability to jurisdiction there.  

More importantly, however, these distinctions with respect to control are consistent with Professor Brilmayer's cost allocation explanation. The manufacturer that intentionally markets its products in the forum offers the perfect illustration of the control theory. This manufacturer has maximum control over the location of the products and thus the greatest ability to assess the costs of its operations in relation to the benefits derived from the forum. If the costs exceed the benefits the manufacturer can readily withdraw from the forum.

A manufacturer that does not intend to exploit the forum market but merely knows or is generally aware of the markets of the distributors to which it sells plainly has less control with regard to the location of its products. Its distance from the immediate decisionmaking authority (which lies with the distributor or a final product manufacturer) results not only in a diminished ability to assess the costs and benefits of forum distribution, but also in a decreased ability to effect a withdrawal from the forum. As a result, the effectiveness of withdrawal as a check on the forum's improper assertion of jurisdiction is similarly diminished. At the same time, however, that effectiveness is not eliminated. The manufacturer, after all, retains some

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246 For example, the purchaser might honestly believe at the time of purchase that he would use the product in the place of purchase but later decide to take it elsewhere, where it causes injury, or the purchaser, knowing that the defendant will refuse to sell the product to him if he intends to take it out of state, could simply lie about its intended destination.

247 See Sousa v. Ocean Sunflower Shipping Co., 608 F. Supp. 1309, 1314 (N.D. Cal. 1984); Dayton, Personal Jurisdiction and the Stream of Commerce, 7 Rev Litigation 239, 270 (1988). But see Jay, supra note 118, at 446 ("It makes little difference to the [manufacturer] that the consumer is the one carrying the goods to other places; if anything, the company gains from wider exposure of its product.").

ability to structure distribution of its products, albeit with less precision, through contractual arrangements with the distributor.249

The third situation, in which the product's presence in the forum is directly attributable to the purchaser rather than to any member of the distribution chain, clearly suggests the absence of control. Unlike the manufacturer in the second scenario, the retailer or manufacturer has no realistic method of structuring its conduct to avoid jurisdiction in the forum. The nature of the retailer-consumer relationship is typically episodic, and the retailer has no right to restrict the purchaser's use of the products after purchase. As a consequence of the retailer's (or manufacturer's) effective inability to withdraw from the forum, the state is insufficiently restrained from asserting jurisdiction at the expense of nonresidents and in violation of the boundaries of its sovereign power.250

Finally, this control theory clarifies the role of foreseeability in jurisdiction analysis. Under this approach, foreseeability is

249 In Kawasaki Steel Corp. v. Middleton, 699 S.W.2d 199, 201 (Tex. 1985), for example, defendant sold its products to independent trading companies that subsequently sold those products in Texas. Although defendant had not retained the contractual power to dictate the destination of its products, defendant derived substantial benefits from the forum (between 40 and 48 million dollars worth of its steel reached the forum) and defendant was well aware of the distribution area since it routinely confirmed the content and destination of each order placed with the trading companies. This knowledge would allow defendant to make a cost-benefit assessment with respect to the forum and, thus, to make an informed decision with respect to whether its activities there were sufficiently profitable to warrant remaining in the forum. But see Jay, supra note 118, at 444 (noting that while there are times when a manufacturer in a Gray situation can exercise control over its products, the more usual situation is one in which defendants are "neither certain of the volume of their products in the forum, nor able to influence the distribution process." (footnote omitted)).

250 The theoretical right to refuse to sell compels no different conclusion. To the extent manufacturers in the second situation may be required to employ more drastic steps to avoid jurisdiction, i.e., by contracting to restrict the scope of distribution, it is arguably justifiable because that restriction is, at some level, commercially practicable and because those manufacturers enjoy the benefits of the distributor's activities. Retailers or manufacturers in the Woodson scenario, however, not only derive little or no benefit from the movement of the product from the place of purchase to the forum but to the extent there are some indirect or "collateral" benefits arising in that context, they are more difficult to assess. Moreover, the costs and manageability problems inherent in requiring a retailer to employ such a procedure to escape jurisdiction could substantially undermine the viability of the retailer's operations and interfere with the flow of interstate commerce.
only relevant to the extent it indicates defendant’s ability to control the location of its products.\(^{251}\) Other commentators acknowledging sovereignty limitations have challenged this conclusion (and the limitations imposed by \textit{Woodson}) as unduly restrictive of the state’s authority to exercise jurisdiction. They do not argue that defendant’s conduct-based expectations should play no role in jurisdiction analysis;\(^{252}\) and indeed, they suggest that jurisdiction is appropriate whenever the forum has a regulatory interest in the lawsuit and the forum activity or effect to be regulated is “foreseeable”\(^{253}\) or “reasonably foreseeable.”\(^{254}\) Rather, these commentators reject the point at which the boundary of the state’s power vis-à-vis the defendant is drawn.

Yet, as Professor Brilmayer has shown, drawing this line at the defendant’s negligent conduct is not inconsistent with a jurisdictional theory recognizing sovereignty limitations. The defendant’s ability to control the location of its product and, thus, to avoid amenability to jurisdiction, operates as an effective check on a state’s willingness to overreach the bounds of its sovereign power. In contrast, a foreseeability of effect test allows the forum impermissibly to shift the costs of jurisdiction to nonresident consumers.

Nor does this control theory ignore the state’s regulatory interests, for they are reflected in the nature of the contacts that

\(^{251}\) Brilmayer, \textit{supra} note 118, at 112.

\(^{252}\) See Stebbins, \textit{supra} note 185, at 129-31; Stein, \textit{supra} note 186, at 749-50. Professor Stebbins agrees that personal jurisdiction analysis should enable defendant to predict, with some accuracy, when its actions will subject it to jurisdiction in the forum, although she argues that a foreseeability of effects test, rejected by the Court in \textit{Woodson}, would serve that need. Under Professor Stein’s theory, foreseeability is relevant because if the forum event or occurrence is unforeseeable, the state’s exercise of jurisdiction will either fail to achieve the desired regulatory objective, since defendant will not alter its conduct in response to the assertion of jurisdiction, or the state will achieve its objective but at the expense of other states’ sovereignty rights, since defendant will be required to alter its conduct generally to avoid further state regulation. \textit{But see} Weisburd, \textit{supra} note 200, at 405-07 (arguing that jurisdiction may be exercised over persons causing unintended and even unforeseen effects as long as the state could regulate that forum effect).

\(^{253}\) See Stein, \textit{supra} note 186, at 749-50.

\(^{254}\) See Stebbins, \textit{supra} note 185, at 126-33. Professor Stebbins would apply a two-part standard to determine a forum’s authority to assert jurisdiction: “1) was it [reasonably] foreseeable that defendant’s conduct, even if untainted by negligence would lead to the alleged effects?; 2) if not, was it [reasonably] foreseeable that negligence or other defendant misfeasance would produce the alleged effects?” \textit{Id.} at 130 (brackets in original).
are counted for purposes of assessing jurisdiction.\textsuperscript{255} When a state asserts a regulatory justification for its assertion of jurisdiction, its right to exercise jurisdiction is based on the existence of defendant's related contacts with the forum. If, as is typically the case, "relatedness" is defined in terms of substantive relevance, "forum contacts that are related to the dispute are exactly those already defined as a proper subject for regulation under the applicable substantive law"\textsuperscript{256} Thus, although the state's regulatory interest does not directly measure its authority to assert jurisdiction, that interest does influence the jurisdiction analysis because it indicates which facts are related.\textsuperscript{257}

Finally, a jurisdiction standard incorporating a control requirement offers a clearer guide to potential defendants who wish to determine, and to act upon, their potential amenability to jurisdiction. Under this standard, defendants may predict jurisdictional consequences from their own actions, with fewer opportunities for surprise arising from after-the-fact judgments as to what they should have foreseen. Consequently, due process interests of notice and predictability are better served.

3. Sovereignty Limitations and a Proposed Restructuring of the Stream of Commerce Theory

The courts' application of the stream of commerce theory has been characterized by interrelated themes of fairness and

\textsuperscript{255} Brilmayer, \textit{supra} note 118, at 105-07. In a discussion of interest analysis as an alternate method of analyzing personal jurisdiction, Professor Brilmayer notes the problem of defining a "legitimate" state interest and suggests that to the extent that interest includes a state's special interest in regulating particular substantive conduct, that interest is protected by the "related contacts" concept.

\textsuperscript{256} \textit{Id.} at 86.

\textsuperscript{257} \textit{Id.} at 106-07 Unlike some who accept sovereignty limits but criticize the purposeful availment standard, I am not yet persuaded that a state should have the authority to assert jurisdiction whenever its regulatory interest would warrant the application of forum law. While there is a substantial overlap between the choice of law and personal jurisdiction inquiries, and the interests they protect, choice of law analysis directly addresses the state's right to promote its legitimate regulatory ends. Consequently, although the boundary of state power drawn by the control theory limits (in some degree) the state's authority to use jurisdiction as a means of achieving these ends, the theory offers a better accommodation of the relevant interests. Not only does a control criterion afford a check on state overreaching and provide greater certainty in the jurisdiction analysis, but the state's core regulatory authority is (or should be) adequately protected in the constitutional choice of law analysis.
convenience. A defendant that places its product into the stream of commerce may be subjected to jurisdiction in the forum both because the multistate actor, the defendant, is better able than the localized plaintiff to bear the costs of distant litigation, and because the forum is typically the location of the injury and, thus, convenient from a litigational standpoint. Similarly, it is "fair" to require the defendant rather than the plaintiff to bear the burden of litigation because the defendant "chooses" to operate on a multistate level and derives benefits from those multistate operations.

As established in Part III.B.1., however, the stream of commerce theory cannot be justified by convenience considerations alone, since a convenience analysis does not adequately reflect the limitations on the state's sovereign authority. Nor can a rationale based on some balancing of the equities itself sustain the theory. Rather, a stream of commerce theory provides an appropriate basis for jurisdiction only if it recognizes the defendant's right to be free from assertions of jurisdiction by an

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258 See Gray, 176 N.E.2d at 765-67; Metal-Matic Inc. v. Eighth Judicial Dist. Court, 415 P.2d 617, 619 (Nev. 1966); see also International Harvester Co. v. Hendrickson Mfg. Co., 459 S.W.2d 62, 65 (Ark. 1970) ("the standard of 'fair play and substantial justice' is not to be utilized solely for the benefit of non-resident defendants, but rather it is an equal guarantee to consumer-plaintiffs of a just, convenient and reasonable forum in which to try their suit."); Pennsalt Chemical Corp. v. Crown Cork & Seal Co., 426 S.W.2d 417, 421 (Ark. 1968) ("much consideration must be given to the forum which is more convenient and to the facilities of modern transportation and communication.").

259 See, e.g., Gray, 176 N.E.2d at 766; Svendsen v. Questor Corp., 304 N.W.2d 428, 431 (Iowa 1981); Andersen v. National Presto Indus., Inc., 135 N.W.2d 639, 643 (Iowa 1965); see also DeJames v. Magnificence Carriers, Inc., 654 F.2d 280, 285 (3d Cir. 1981) (noting that jurisdiction under the stream of commerce theory is premised on legal and economic benefits manufacturer enjoys from extended, though indirect, forum sales and belief that fairness does not require insulation of the manufacturer from the forum's long-arm reach merely because the products entered the forum through an intermediary), cert. denied, 454 U.S. 1085 (1981); Currie, supra note 64, at 555 (balance of equities favors suit by plaintiff in his state where plaintiff is stay-at-home injured by goods shipped by defendant into the forum); von Mehren & Trautman, Jurisdiction to Adjudicate: A Suggested Analysis, 79 Harv. L. Rev. 1121, 1167-69 (1966) (urging that traditional preference accorded defendants in jurisdictional analysis be reversed when, as in a typical stream of commerce situation, defendant engages in multistate conduct, while plaintiff's conduct is essentially local); Case Comment, supra note 4, at 208 ("It is more equitable to require a distant defendant to litigate in the forum where the allegedly tortious consequences of its activities occurred than to require an injured plaintiff to file suit in a distant state far from the locus of the injury.").
unrelated sovereign and the existence of sovereignty limitations and, accordingly, requires that the defendant have some ability to control the location of its product. As this section makes clear, these requirements mandate a rejection of the two principal stream of commerce models discussed in *Asahi* and a restructuring of the theory in a manner that, to some degree, reflects Justice Stevens' comments on the stream of commerce concept.

The courts have traditionally approved jurisdiction under the stream of commerce theory in each of the three scenarios outlined in Part III.B.2. In the first situation, where the defendant manufacturer has deliberately attempted to exploit the forum market, the Court's purposeful availment standard is easily satisfied. The manufacturer in this context has intentionally sought a connection with the forum, and its purposeful activities there both benefit the defendant and put it on notice of the possibility of suit there arising from an injury caused by its products. Moreover, jurisdiction is also plainly consistent with sovereignty limitations. The defendant is clearly responsible for the presence of its products in the forum, and if the benefits from its activities there prove insufficient to justify the burden imposed by the state's assertion of jurisdiction, the defendant may elect to discontinue marketing its products there.

In the second scenario, as in *Asahi*, the defendant's products reach the forum as a result of the independent distribution schemes of others. Although the defendant in these situations has no intent to market its products in the forum, or immediate control over their location there, it does have some knowledge or awareness that the products will or may reach the forum. In addition, the defendant receives substantial economic and legal benefits from the distribution efforts of others in the forum.

This scenario is not as plainly consistent with the traditional purposeful availment standard. The defendant's receipt of substantial, though indirect, benefits from the forum efforts of others clearly satisfies the beneficial aspect of the standard. To

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conclude that the purposeful element is also satisfied, however, requires a more generous interpretation of the term "purposeful." In these situations any truly purposeful contact with the forum is the distributor's or retailer's—entities that in this context do not act at the direction or desire of the manufacturer.

Despite the somewhat attenuated nature of the defendant's "purposefulness," the courts have readily attributed these forum contacts to the defendant—first, on the basis of a presumed intent of manufacturers to market their products in as many fora as possible and second, because the defendant is deemed to have "permitted" its products to be distributed in the forum. This latter conclusion is based on the belief that the defendant's ability to foresee the product's presence in the forum allows it to structure its conduct. A defendant desiring to avoid jurisdiction in the forum may, despite its lack of immediate control over the distribution of its product, restrict that distribution.

The conclusion that the distribution of the defendant's product in the forum is a result of the defendant's "choice" is, of course, somewhat misleading. As previously suggested, a manufacturer in this situation not only has no control over the independent marketing decisions of its purchasers or its purchasers' purchasers, but as a practical matter may not have any knowledge of those purchasers' markets. Indeed, the defendant's knowledge or awareness and its ability to control its product's destination vary widely within this scenario, not only because of the differences with regard to a defendant's actual knowledge of its product's location, but also because of the differences in the defendant's position in the distribution chain. Thus, on one hand, the defendant may be a final product manufacturer op-

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261 See Nelson by Carson, 717 F.2d at 1125-26; Andersen, 125 N.W.2d at 643; Ehlers v. United States Heating & Cooling Mfg. Corp., 124 N.W.2d 824, 827 (Minn. 1963); see also Comment, supra note 86, at 1031; Jay, supra note 118, at 445 n.99 (arguing that nature of the manufacturing enterprise requires wide distribution and denying business interest in distribution controls).

erating in a short distribution chain with actual knowledge, although no immediate control, over its product’s location.²⁶³ On the other hand, the defendant might be a component manufacturer only vaguely aware or completely unaware of its product’s ultimate destination.²⁶⁴ Perhaps most likely, the defendant’s circumstances will place it somewhere between these extremes. That is, the defendant’s ability to withdraw from the forum will be diminished by its distant position in the distribution chain²⁶⁵ or because it has some knowledge of its distributors’ markets, but substantially less precise information with regard to the product’s eventual location.²⁶⁶

Whatever the specific scenario, the manufacturer’s choices in this context are limited. The manufacturer may determine the geographic scope of its purchasers’ markets and avoid amenability to jurisdiction in the forum by curtailing the distribution of its products. Or it may insure against the risk of distant litigation. That these defendants often have only limited knowledge of their purchasers’ distribution plans and enjoy a more limited ability to avoid jurisdiction has not traditionally disturbed the courts, apparently because of the substantial benefits these manufacturers obtain from the multistate distribution of their products.

Yet, as discussed in Part III.B.2., these limitations on defendant’s choices are not without consequences from a state sovereignty perspective. As the defendant becomes further removed from the decision to market its goods in the forum, it necessarily loses some of its ability to control its amenability to jurisdiction, and, thus, to check state overreaching.²⁶⁷ At the same time, because the defendant can, at some broader level, use contractual arrangements to avoid jurisdiction in the forum, it retains some ability to withdraw. This more limited ability affords some check, albeit of diminished effectiveness, on a state’s willingness to overstep the bounds of its legitimate sovereign power.²⁶⁸

²⁶³ See Nelson by Carson, 713 F.2d 1120.
²⁶⁴ See Bean Dredging, 744 F.2d 1081; Violet, 613 F Supp. 1563.
²⁶⁵ See Asahí, 702 P.2d 543, 216 Cal. Rptr. 385; State ex rel. Hydraulic Servocontrols Corp. v. Dale, 657 P.2d 211 (Or. 1982).
²⁶⁷ See Bean Dredging, 744 F.2d 1081; Asahí, 702 P.2d 543, 216 Cal. Rptr. 385.
²⁶⁸ See, e.g., Nelson by Carson, 717 F.2d 1120.
In the third scenario, the defendant is subject to jurisdiction in the forum solely because use of its product by the ultimate purchaser there was foreseeable. Although *Woodson* has substantially eliminated assertions of jurisdiction over the retailer in these situations, courts have been considerably less reluctant to assert that authority over manufacturers. The Ninth Circuit, for example, sustained the jurisdiction of an Oregon district court over a Japanese splice manufacturer that had sold a splice to the owner of an oceangoing vessel. A longshoreman, injured by the allegedly defective splice while the vessel was docked in Oregon, brought suit there against the Japanese manufacturer. Although the manufacturer’s only contact with Oregon was its product’s presence there, jurisdiction was upheld because defendant knew that the vessel would travel to the western United States and, thus, could foresee that its product would be “used” in Oregon.

An assertion of jurisdiction in this situation is inconsistent with the Court’s purposeful availment standard. Again, the defendant has not attempted to market its products in the forum or, indeed, anywhere outside its place of manufacture. At most, one could argue that because the defendant knew that its product would be used outside Japan, the defendant’s sale to the ship owner constituted a voluntary affiliation with international commerce rather than with the forum. Nor, unlike the second scenario, did the defendant derive economic benefit from Oregon. The defendant sold its product to an ultimate purchaser in Japan; there was no subsequent resale in a region from which

269 Hedrick v. Daiko Shoji Co., 715 F.2d 1355 (9th Cir. 1983).

270 *Id.* at 1358-59; see also Giotis, 800 F.2d at 667-68 (manufacturer and distributor subject to jurisdiction in the forum although, apparently, their products were not distributed there and the injury-causing product reached forum through act of purchaser; court concluded that distributor advertised nationally and, thus, forum was within the scope of its marketing efforts, there was no evidence that defendants were unaware of the scope of those efforts and defendants, as “upstream” actors in the distribution chain, benefited from those efforts); cf. Sousa, 608 F. Supp. at 1314 (concluding that jurisdiction over Japanese shipbuilder in circumstances similar to *Hedrick* could not be justified under stream of commerce theory; shipbuilder had not sought to market its product in forum and shipowner to whom defendant sold the ship in Japan was not “distributor” for the purpose of delivering defendant’s product into the forum).
defendant could be said to have obtained even indirect benefit. In short, the apparent basis for Oregon’s assertion of jurisdiction was simply the foreseeability of injury there or the defendant’s status as a manufacturer. In the latter instance, the implicit assumption is that the manufacturer is better able and more properly subject to the burdens of distant litigation than the individual plaintiff—an assumption reminiscent of convenience considerations rather than sovereignty limitations.

That the forum’s exercise of jurisdiction in this situation is inconsistent with sovereignty limitations is clear. The defendant lacks any ability to control the post-purchase location of its product and, thus, any ability to withdraw from the forum in the event forum costs outweigh whatever benefits the defendant derives from its products’ presence there. As a result, there exists no effective restraint on the forum’s illegitimate exercise of jurisdiction.

It is apparent from the above discussion that neither the stream of commerce theory advocated by Justice Brennan nor that asserted by Justice O’Connor properly reflects the sovereignty limitations on a state’s authority to assert jurisdiction. Justice Brennan’s theory is troubling for two reasons. First, it would permit a forum’s assertion of jurisdiction in the third scenario, an assertion generally inconsistent with sovereignty limits on the states’ jurisdictional power. Second, by endorsing the stream of commerce theory as traditionally formulated, with-

271 See Sousa, 608 F Supp. at 1314 (in which the court concluded that defendant did not derive any economic benefit in California from sale of ship to ultimate purchaser in Japan; although it might “indirectly benefit from the international market for Japanese steel and United States lumber because this trade increases the demand for vessels capable of transporting these products [...] such derivative economic benefits [would] not support jurisdiction.”). But see Jay, supra note 118, at 446 (arguing that defendant in these circumstances benefits from the exposure of its products in the forum).

272 One possible exception to this conclusion is the situation presented in Hall, 669 F Supp. 753 (see supra notes 138-45 and accompanying text), in which there is a direct relationship between the manufacturer and the purchaser, the ultimate purchaser is a commercial actor rather than a typical consumer, and the nature of the business is such that the ultimate purchaser does not consume but in effect “distributes” the product for “consumption” by others. These factors suggest not only a direct (rather than collateral) beneficial relationship, but also a relationship in which the manufacturer could seek to limit its amenability to jurisdiction by contractual arrangements.
out further guidance, Justice Brennan merely perpetuates the confusion that has characterized the theory's application.

Justice O'Connor's theory, on the other hand, offers several attractions. In the first instance, a standard that requires the manufacturer's intent to market in the forum is easier to apply. It plainly reflects the type of purposeful, beneficial relationship between the forum and the defendant that the Court has traditionally required. Furthermore, it focuses on the defendant's specific intent to serve the forum market, rather than on "foreseeability," a term that has greatly contributed to the confusion apparent in stream of commerce cases.273 Second, and significantly, the standard is consistent with due process limitations on state sovereignty. The defendant's amenability to jurisdiction would no longer be subject to the independent marketing decisions of unrelated purchasers and distributors but would be, instead, a matter completely within the defendant's control. The defendant could structure its conduct with substantial assurance as to where that conduct would subject it to jurisdiction, and its ability to withdraw from the forum would provide an effective restraint on that state's overreaching of its legitimate power. Moreover, the standard would plainly preclude the forum's assertion of jurisdiction in the third scenario.

Yet, adopting the O'Connor standard is also problematic. If the state's authority to assert jurisdiction depends on the defendant's intent to exploit the forum market, as the O'Connor standard requires, the forum may not exercise jurisdiction in the second scenario. Of course, drawing the sovereignty boundary at this point would ensure the defendant the greatest control over its amenability and provide the most effective check on the state's incentive to exceed its sovereign authority. However, this intent requirement would also prevent the states' exercise of jurisdiction in circumstances similar to Gray—circumstances in which jurisdiction has traditionally been held to be "fair" and

273 But see Dessem, supra note 8, at 68-69 (asserting that intent requirement would "further complicate an already complex determination"). Cf. Seidelson, supra note 245, at 572-78 (arguing that function of due process in jurisdictional context appears to be prevention of surprise to defendant and that "additional conduct" requirement does not serve that function).
Moreover, adoption of such a requirement would suggest that sovereignty restrictions demand the most effective check on state overreaching and would ignore the significant, if more limited, effectiveness of the check constituted by the ability of many defendants in these situations to withdraw from the forum. In sum, a complete prohibition on the forum’s exercise of jurisdiction in the situations within this second category unduly restricts the scope of the state’s sovereign power.

A conclusion that the O’Connor standard is too restrictive and the Brennan standard impermissibly broad, however, only partially defines the scope of an appropriate stream of commerce theory. A theory that properly reflects the control requirement must clearly permit the forum to assert jurisdiction over a defendant that intentionally markets its products in the forum and, just as clearly, prohibit most assertions of jurisdiction over a defendant whose product reaches the forum only because the purchaser takes it there. In addition, that theory must allow assertions of jurisdiction when, although the defendant has not deliberately sought a forum market, the product has reached the forum in the regular course of distribution.

Two standards potentially satisfy these criteria. The first would permit the forum to exercise jurisdiction over the defendant whenever it knows or can foresee that its product will reach the forum through the operation of the distribution system; that is, the product’s presence there is not solely attributable to the act of the purchaser or one outside the distribution chain. This standard would preclude jurisdiction in the third scenario while sustaining all assertions of jurisdiction in the first and second scenarios. Permitting the forum to assert jurisdiction in all situations encompassed within the second scenario not only avoids the problem of distinguishing among the degrees of the defendant’s knowledge or awareness with respect to the marketing of its product, thereby offering some “bright-line” guidance to the

274 Indeed, the O’Connor standard would apparently prevent a forum’s exercise of jurisdiction over any component manufacturer since those manufacturers typically do not intend to market their products outside the place of purchase. See also Weintrob, Asahu Sends Personal Jurisdiction Down the Tubes, 23 Tex. INT’L L.J. 55, 66-67 (1988) (suggesting that O’Connor opinion indicates intent to exempt component manufacturers from jurisdiction).
courts, but is also consistent with the courts' traditional rulings in these circumstances. Moreover, this position is arguably consistent with the control rationale since, despite the variations with regard to the defendant's knowledge or distance from the marketing decision, the defendant ultimately has some recourse to contractual arrangements by which it may limit its amenability to jurisdiction in the forum.

A second standard would employ a sliding scale approach to determine the forum's authority to assert jurisdiction in the stream of commerce context. Thus, where the defendant has complete control over its product's location in the forum, the defendant would be properly subject to jurisdiction there for litigation arising out of that contact. As the defendant's ability to control the location of its products becomes more limited, however, due to the defendant's distance from the marketing decision, a state's right to assert jurisdiction would depend on other indicia of the defendant's notice of amenability to suit and its ability to withdraw from the forum. This assessment need not require abstract distinctions. Instead, evidence of an ongoing relationship between the defendant and the distribution system through which products reach the forum, and defendant's receipt of substantial economic benefits from the products' presence in the forum could provide objective support for a conclusion that the defendant was sufficiently able to withdraw from the forum. Finally, where the product's presence in the forum is

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275 As suggested in Part II (and earlier in this section), the courts typically have sustained the forum's exercise of jurisdiction as long as it was "foreseeable" that the manufacturer's products would or could reach the forum. They have made no distinctions based on the defendant's actual knowledge or ability to control the distribution of their products. See supra notes 77-79, 120-22, 261-66 and accompanying text.

276 Other commentators, in somewhat different contexts, have also suggested the relevance of these factors in a stream of commerce analysis. See Dessem, supra note 8, at 75-77 (arguing that due process is satisfied whenever defendant is aware that its products have entered the forum and Justice Stevens' factors of "volume" and "value" indicate that defendant is serving the forum market); Case Comment, supra note 4, at 224-26 (proposing a two-step analysis that would permit jurisdiction if defendant has actual or constructive knowledge of forum sales. In determining whether knowledge should be imputed to the defendant, courts should look to such factors as the quantity and continuity of forum sales, forum revenue and market share and, with respect to component manufacturers, the course of dealing and length of relationship with the final product manufacturer).
outside the defendant's control, jurisdiction would be inappropriate.

Under this approach, a defendant that intentionally markets its goods in the forum would be subject to jurisdiction there for injuries caused in the forum by its products. Conversely, a defendant whose product entered the forum only because the purchaser or one outside the distribution chain took it there, would normally be beyond the forum's legitimate jurisdictional reach. Finally, the state's right to exercise jurisdiction over those whose products reach the forum through regular distribution channels would depend on the defendant's ability to control that result. The defendant could not claim immunity from jurisdiction solely on the basis of an absence of a specific intent to market its goods in the forum. But where that defendant's lack of knowledge regarding its product's destination or distance from the actual decision to market that product in the forum suggests the defendant's inability to control its product's location, jurisdiction will be appropriate only if other factors suggest notice and ability to withdraw from the forum.

Unlike the first standard, this approach is potentially more difficult to apply because it attempts to recognize the variations among the situations within the second scenario that influence the effectiveness of a restraint on state overreaching. However, that recognition can be achieved, albeit imperfectly, by looking to objective criteria already familiar to the courts. Moreover, this standard more clearly reflects the rationale underlying the control requirement.

While not eliminating all uncertainty from the application of a stream of commerce analysis, a sliding scale approach does offer a number of advantages over either the approach espoused by Justice Brennan or that proposed by Justice O'Connor. First, the approach is designed to implement the constitutional values relevant to personal jurisdiction analysis. By requiring that the defendant have some ability to control its product's presence in the forum, this standard recognizes, and assures respect for, sovereignty limitations on the authority of a state to assert jurisdiction.

In addition, the approach provides a more workable standard. In determining the defendant's amenability to jurisdiction, the courts will be asked to make judgments similar to those they
have made for some time—that is, the extent to which the defendant is responsible for its product's presence in the forum and, in some cases, the benefits that the defendant has derived from that forum presence. Yet, the problems that the courts have encountered in applying that standard should be minimized because that determination will be made within a proper theoretical framework. More specifically, by using this framework, the courts could avoid the confusion engendered by unguided reliance on the term "foreseeability." Foreseeability in this context is relevant only to the extent it indicates the defendant's control over the location of its product. In those situations in which the product's presence is merely foreseeable and the defendant has, in fact, no control over that result, the forum's assertion of jurisdiction will be inappropriate.

CONCLUSION

The courts' historic acceptance of a stream of commerce concept and their invocation of a common formula have, for too long, hidden the confusion and division characterizing applications of the stream of commerce theory. The courts' confusion is attributable, in part, to the ambiguities in Gray itself but also, and more significantly, to the courts' uncertainty regarding the constitutional values that underlie the theory. While Asahi failed to resolve the courts' uncertainty, it performed a useful service by making clear the existence of sharply divergent views. This division among the justices, in turn, should prompt a re-examination of the stream of commerce analysis and an identification and clarification of the constitutional values that analysis purports to serve.

This Article argues that the Court should reaffirm the existence of sovereignty limitations on the states' authority to assert jurisdiction and clarify the implications of those limits for personal jurisdiction analysis. This Article concludes that recognizing these limits requires a restructuring of the stream of commerce theory and suggests a revised approach that not only reflects the

277 See Brilmayer, supra note 118, at 112.
relevant constitutional values but also affords a more workable standard than that currently applied by the courts.