

Replace pp. 756-66 with the following:

**J. McINTYRE MACHINERY, LTD. v. NICASTRO**  
Supreme Court of the United States, 2011  
564 U.S. \_\_\_\_, 131 S.Ct. 2780

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Justice KENNEDY announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, Justice SCALIA, and Justice THOMAS join.

Whether a person or entity is subject to the jurisdiction of a state court despite not having been present in the State either at the time of suit or at the time of the alleged injury, and despite not having consented to the exercise of jurisdiction, is a question that arises with great frequency in the routine course of litigation. The rules and standards for determining when a State does or does not have jurisdiction over an absent party have been unclear because of decades-old questions left open in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987).

Here, the Supreme Court of New Jersey, relying in part on *Asahi*, held that New Jersey's courts can exercise jurisdiction over a foreign manufacturer of a product so long as the manufacturer "knows or reasonably should know that its products are distributed through a nationwide distribution system that might lead to those products being sold in any of the fifty states." *Nicastro v. McIntyre Machinery America, Ltd.*, 987 A.2d 575, 591, 592 (2010). Applying that test, the court concluded that a British manufacturer of scrap metal machines was subject to jurisdiction in New Jersey, even though at no time had it advertised in, sent goods to, or in any relevant sense targeted the State.

That decision cannot be sustained. Although the New Jersey Supreme Court issued an extensive opinion with careful attention to this Court's cases and to its own precedent, the "stream of commerce" metaphor carried the decision far afield. Due process protects the defendant's right not to be coerced except by lawful judicial power. As a general rule, the exercise of judicial power is not lawful unless the defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235 (1958). There may be exceptions, say, for instance, in cases involving an intentional tort. But the general rule is applicable in this products-liability case, and the so-called "stream-of-commerce" doctrine cannot displace it.

I

This case arises from a products-liability suit filed in New Jersey state court. Robert Nicastro seriously injured his hand

while using a metal-shearing machine manufactured by J. McIntyre Machinery, Ltd. (J. McIntyre). The accident occurred in New Jersey, but the machine was manufactured in England, where J. McIntyre is incorporated and operates. The question here is whether the New Jersey courts have jurisdiction over J. McIntyre, notwithstanding the fact that the company at no time either marketed goods in the State or shipped them there. Nicastro was a plaintiff in the New Jersey trial court and is the respondent here; J. McIntyre was a defendant and is now the petitioner.

At oral argument in this Court, Nicastro's counsel stressed three primary facts in defense of New Jersey's assertion of jurisdiction over J. McIntyre.

First, an independent company agreed to sell J. McIntyre's machines in the United States. J. McIntyre itself did not sell its machines to buyers in this country beyond the U.S. distributor, and there is no allegation that the distributor was under J. McIntyre's control.

Second, J. McIntyre officials attended annual conventions for the scrap recycling industry to advertise J. McIntyre's machines alongside the distributor. The conventions took place in various States, but never in New Jersey.

Third, no more than four machines (the record suggests only one), including the machine that caused the injuries that are the basis for this suit, ended up in New Jersey.

In addition to these facts emphasized by petitioner, the New Jersey Supreme Court noted that J. McIntyre held both United States and European patents on its recycling technology. It also noted that the U.S. distributor "structured [its] advertising and sales efforts in accordance with" J. McIntyre's "direction and guidance whenever possible," and that "at least some of the machines were sold on consignment to" the distributor.

In light of these facts, the New Jersey Supreme Court concluded that New Jersey courts could exercise jurisdiction over petitioner without contravention of the Due Process Clause. Jurisdiction was proper, in that court's view, because the injury occurred in New Jersey; because petitioner knew or reasonably should have known "that its products are distributed through a nationwide distribution system that might lead to those products being sold in any of the fifty states"; and because petitioner failed to "take some reasonable step to prevent the distribution of its products in this State."

Both the New Jersey Supreme Court's holding and its account of what it called "[t]he stream-of-commerce doctrine of jurisdiction," were incorrect, however. This Court's *Asahi* decision may be responsible in part for that court's error

regarding the stream of commerce, and this case presents an opportunity to provide greater clarity.

## II

The Due Process Clause protects an individual's right to be deprived of life, liberty, or property only by the exercise of lawful power. Cf. *Giaccio v. Pennsylvania*, 382 U.S. 399, 403 (1966) (The Clause "protect[s] a person against having the Government impose burdens upon him except in accordance with the valid laws of the land"). This is no less true with respect to the power of a sovereign to resolve disputes through judicial process than with respect to the power of a sovereign to prescribe rules of conduct for those within its sphere. See *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 94 (1998) ("Jurisdiction is power to declare the law"). As a general rule, neither statute nor judicial decree may bind strangers to the State.

A court may subject a defendant to judgment only when the defendant has sufficient contacts with the sovereign "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). Freeform notions of fundamental fairness divorced from traditional practice cannot transform a judgment rendered in the absence of authority into law. As a general rule, the sovereign's exercise of power requires some act by which the defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws," *Hanson*, 357 U.S., at 253, though in some cases, as with an intentional tort, the defendant might well fall within the State's authority by reason of his attempt to obstruct its laws. In products-liability cases like this one, it is the defendant's purposeful availment that makes jurisdiction consistent with "traditional notions of fair play and substantial justice."

A person may submit to a State's authority in a number of ways. There is, of course, explicit consent. E.g., *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982). Presence within a State at the time suit commences through service of process is another example. See *Burnham*, *supra*. Citizenship or domicile -- or, by analogy, incorporation or principal place of business for corporations -- also indicates general submission to a State's powers. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, [131 S.Ct. 2846 (2011) -- a companion case]. Each of these examples reveals circumstances, or a course of conduct, from which it is proper to infer an intention to benefit from and thus an intention to submit to the laws of the forum State. Cf. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985). These examples support exercise of the

general jurisdiction of the State's courts and allow the State to resolve both matters that originate within the State and those based on activities and events elsewhere. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414, and n. 9 (1984). By contrast, those who live or operate primarily outside a State have a due process right not to be subjected to judgment in its courts as a general matter.

There is also a more limited form of submission to a State's authority for disputes that "arise out of or are connected with the activities within the state." *International Shoe Co., supra*, at 319. Where a defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws," *Hanson, supra*, at 253, it submits to the judicial power of an otherwise foreign sovereign to the extent that power is exercised in connection with the defendant's activities touching on the State. In other words, submission through contact with and activity directed at a sovereign may justify specific jurisdiction "in a suit arising out of or related to the defendant's contacts with the forum." *Helicopteros, supra*, at 414, n. 8; see also *Goodyear, post*, at ----.

The imprecision arising from *Asahi*, for the most part, results from its statement of the relation between jurisdiction and the "stream of commerce." The stream of commerce, like other metaphors, has its deficiencies as well as its utility. It refers to the movement of goods from manufacturers through distributors to consumers, yet beyond that descriptive purpose its meaning is far from exact. This Court has stated that a defendant's placing goods into the stream of commerce "with the expectation that they will be purchased by consumers within the forum State" may indicate purposeful availment. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298 (1980) (finding that expectation lacking). But that statement does not amend the general rule of personal jurisdiction. It merely observes that a defendant may in an appropriate case be subject to jurisdiction without entering the forum—itsself an unexceptional proposition—as where manufacturers or distributors "seek to serve" a given State's market. *Id.*, at 295. The principal inquiry in cases of this sort is whether the defendant's activities manifest an intention to submit to the power of a sovereign. In other words, the defendant must "purposefully avai[l] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson, supra*, at 253; *Insurance Corp., supra*, at 704-705 ("[A]ctions of the defendant may amount to a legal submission to the jurisdiction of the court"). Sometimes a defendant does so by sending its goods rather than its agents. The defendant's transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum; as a general rule, it is not enough that the defendant might have predicted that its goods will reach the

forum State.

In *Asahi*, an opinion by Justice Brennan for four Justices outlined a different approach. It discarded the central concept of sovereign authority in favor of considerations of fairness and foreseeability. As that concurrence contended, "jurisdiction premised on the placement of a product into the stream of commerce [without more] is consistent with the Due Process Clause," for "[a]s long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise." It was the premise of the concurring opinion that the defendant's ability to anticipate suit renders the assertion of jurisdiction fair. In this way, the opinion made foreseeability the touchstone of jurisdiction.

The standard set forth in Justice Brennan's concurrence was rejected in an opinion written by Justice O'Connor; but the relevant part of that opinion, too, commanded the assent of only four Justices, not a majority of the Court. That opinion stated: "The 'substantial connection' between the defendant and the forum State necessary for a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum State. The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State."

Since *Asahi* was decided, the courts have sought to reconcile the competing opinions. But Justice Brennan's concurrence, advocating a rule based on general notions of fairness and foreseeability, is inconsistent with the premises of lawful judicial power. This Court's precedents make clear that it is the defendant's actions, not his expectations, that empower a State's courts to subject him to judgment.

The conclusion that jurisdiction is in the first instance a question of authority rather than fairness explains, for example, why the principal opinion in *Burnham* [v. Superior Court, 495 U.S. 604 (1990), *infra* p. 799] "conducted no independent inquiry into the desirability or fairness" of the rule that service of process within a State suffices to establish jurisdiction over an otherwise foreign defendant. As that opinion explained, "[t]he view developed early that each State had the power to hale before its courts any individual who could be found within its borders." Furthermore, were general fairness considerations the touchstone of jurisdiction, a lack of purposeful availment might be excused where carefully crafted judicial procedures could otherwise protect the defendant's interests, or where the plaintiff would suffer substantial hardship if forced to litigate in a foreign forum. That such considerations have not been deemed controlling is instructive.

Two principles are implicit in the foregoing. First, personal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis. The question is whether a defendant has followed a course of conduct directed at the society or economy existing within the jurisdiction of a given sovereign, so that the sovereign has the power to subject the defendant to judgment concerning that conduct. Personal jurisdiction, of course, restricts "judicial power not as a matter of sovereignty, but as a matter of individual liberty," for due process protects the individual's right to be subject only to lawful power. But whether a judicial judgment is lawful depends on whether the sovereign has authority to render it.

The second principle is a corollary of the first. Because the United States is a distinct sovereign, a defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State. This is consistent with the premises and unique genius of our Constitution. Ours is "a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it." U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). For jurisdiction, a litigant may have the requisite relationship with the United States Government but not with the government of any individual State. That would be an exceptional case, however. If the defendant is a domestic domiciliary, the courts of its home State are available and can exercise general jurisdiction. And if another State were to assert jurisdiction in an inappropriate case, it would upset the federal balance, which posits that each State has a sovereignty that is not subject to unlawful intrusion by other States. Furthermore, foreign corporations will often target or concentrate on particular States, subjecting them to specific jurisdiction in those forums.

It must be remembered, however, that although this case and *Asahi* both involve foreign manufacturers, the undesirable consequences of Justice Brennan's approach are no less significant for domestic producers. The owner of a small Florida farm might sell crops to a large nearby distributor, for example, who might then distribute them to grocers across the country. If foreseeability were the controlling criterion, the farmer could be sued in Alaska or any number of other States' courts without ever leaving town. And the issue of foreseeability may itself be contested so that significant expenses are incurred just on the preliminary issue of jurisdiction. Jurisdictional rules should avoid these costs whenever possible.

The conclusion that the authority to subject a defendant to judgment depends on purposeful availment, consistent with Justice O'Connor's opinion in *Asahi*, does not by itself resolve many difficult questions of jurisdiction that will arise in particular

cases. The defendant's conduct and the economic realities of the market the defendant seeks to serve will differ across cases, and judicial exposition will, in common-law fashion, clarify the contours of that principle.

### III

In this case, petitioner directed marketing and sales efforts at the United States. It may be that, assuming it were otherwise empowered to legislate on the subject, the Congress could authorize the exercise of jurisdiction in appropriate courts. That circumstance is not presented in this case, however, and it is neither necessary nor appropriate to address here any constitutional concerns that might be attendant to that exercise of power. Nor is it necessary to determine what substantive law might apply were Congress to authorize jurisdiction in a federal court in New Jersey. See *Hanson*, 357 U.S., at 254 ("The issue is personal jurisdiction, not choice of law"). A sovereign's legislative authority to regulate conduct may present considerations different from those presented by its authority to subject a defendant to judgment in its courts. Here the question concerns the authority of a New Jersey state court to exercise jurisdiction, so it is petitioner's purposeful contacts with New Jersey, not with the United States, that alone are relevant.

Respondent has not established that J. McIntyre engaged in conduct purposefully directed at New Jersey. Recall that respondent's claim of jurisdiction centers on three facts: The distributor agreed to sell J. McIntyre's machines in the United States; J. McIntyre officials attended trade shows in several States but not in New Jersey; and up to four machines ended up in New Jersey. The British manufacturer had no office in New Jersey; it neither paid taxes nor owned property there; and it neither advertised in, nor sent any employees to, the State. Indeed, after discovery the trial court found that the "defendant does not have a single contact with New Jersey short of the machine in question ending up in this state." These facts may reveal an intent to serve the U.S. market, but they do not show that J. McIntyre purposefully availed itself of the New Jersey market.

It is notable that the New Jersey Supreme Court appears to agree, for it could "not find that J. McIntyre had a presence or minimum contacts in this State—in any jurisprudential sense—that would justify a New Jersey court to exercise jurisdiction in this case." The court nonetheless held that petitioner could be sued in New Jersey based on a "stream-of-commerce theory of jurisdiction." As discussed, however, the stream-of-commerce metaphor cannot supersede either the mandate of the Due Process Clause or the limits on judicial authority that Clause ensures. The New Jersey Supreme Court also cited "significant policy reasons" to justify its holding, including the State's "strong interest in protecting its citizens from defective products."

That interest is doubtless strong, but the Constitution commands restraint before discarding liberty in the name of expediency.

\* \* \*

Due process protects petitioner's right to be subject only to lawful authority. At no time did petitioner engage in any activities in New Jersey that reveal an intent to invoke or benefit from the protection of its laws. New Jersey is without power to adjudge the rights and liabilities of J. McIntyre, and its exercise of jurisdiction would violate due process. The contrary judgment of the New Jersey Supreme Court is Reversed.

Justice BREYER with whom Justice ALITO joins, concurring in the judgment.

The Supreme Court of New Jersey adopted a broad understanding of the scope of personal jurisdiction based on its view that "[t]he increasingly fast-paced globalization of the world economy has removed national borders as barriers to trade." I do not doubt that there have been many recent changes in commerce and communication, many of which are not anticipated by our precedents. But this case does not present any of those issues. So I think it unwise to announce a rule of broad applicability without full consideration of the modern-day consequences.

In my view, the outcome of this case is determined by our precedents. Based on the facts found by the New Jersey courts, respondent Robert Nicaastro failed to meet his burden to demonstrate that it was constitutionally proper to exercise jurisdiction over petitioner J. McIntyre Machinery, Ltd. (British Manufacturer), a British firm that manufactures scrap-metal machines in Great Britain and sells them through an independent distributor in the United States (American Distributor). On that basis, I agree with the plurality that the contrary judgment of the Supreme Court of New Jersey should be reversed.

In asserting jurisdiction over the British Manufacturer, the Supreme Court of New Jersey relied most heavily on three primary facts as providing constitutionally sufficient "contacts" with New Jersey, thereby making it fundamentally fair to hale the British Manufacturer before its courts: (1) The American Distributor on one occasion sold and shipped one machine to a New Jersey customer, namely, Mr. Nicaastro's employer, Mr. Curcio; (2) the British Manufacturer permitted, indeed wanted, its independent American Distributor to sell its machines to anyone in America willing to buy them; and (3) representatives of the British Manufacturer attended trade shows in "such cities as Chicago, Las Vegas, New Orleans, Orlando, San Diego, and San Francisco." In my view, these facts do not provide contacts between the British firm and the State of New Jersey

constitutionally sufficient to support New Jersey's assertion of jurisdiction in this case.

None of our precedents finds that a single isolated sale, even if accompanied by the kind of sales effort indicated here, is sufficient. [In *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), the Court held that a single sale to a customer who takes a product to the forum state was not sufficient. In Justice Breyer's opinion, the various opinions in *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987), had "strongly suggested that a single sale of a product in a State does not constitute an adequate basis for asserting jurisdiction over an out-of-state defendant, even if that defendant places his goods in the stream of commerce fully aware (and hoping) that such a sale will take place."]

Here, the relevant facts found by the New Jersey Supreme Court show no "regular ... flow" or "regular course" of sales in New Jersey; and there is no "something more," such as special state-related design, advertising, advice, marketing, or anything else. Mr. Nicastro, who here bears the burden of proving jurisdiction, has shown no specific effort by the British Manufacturer to sell in New Jersey. He has introduced no list of potential New Jersey customers who might, for example, have regularly attended trade shows. [That he might have made additional showings, such as the size and scope of New Jersey's scrap-metal business mentioned in Justice Ginsburg's dissent, is not relevant; plaintiff bears the burden of establishing jurisdiction, and the Court should take the facts precisely as the New Jersey courts stated them.]

I would not go further. Because the incident at issue in this case does not implicate modern concerns, and because the factual record leaves many open questions, this is an unsuitable vehicle for making broad pronouncements that refashion basic jurisdictional rules.

The plurality seems to state strict rules that limit jurisdiction where a defendant does not "inten[d] to submit to the power of a sovereign" and cannot "be said to have targeted the forum." But what do those standards mean when a company targets the world by selling products from its Web site? And does it matter if, instead of shipping the products directly, a company consigns the products through an intermediary (say, Amazon.com) who then receives and fulfills the orders? And what if the company markets its products through popup advertisements that it knows will be viewed in a forum? Those issues have serious commercial consequences but are totally absent in this case.

But though I do not agree with the plurality's seemingly strict no-jurisdiction rule, I am not persuaded by the absolute

approach adopted by the New Jersey Supreme Court and urged by respondent and his *amici*. Under that view, a producer is subject to jurisdiction for a products-liability action so long as it "knows or reasonably should know that its products are distributed through a nationwide distribution system that *might* lead to those products being sold in any of the fifty states." In the context of this case, I cannot agree.

[The absolute rule in favor of jurisdiction would undermine the purposeful availment requirement, which rests upon "a particular notion of defendant-focused fairness."] A rule like the New Jersey Supreme Court's would permit every State to assert jurisdiction in a products-liability suit against any domestic manufacturer who sells its products (made anywhere in the United States) to a national distributor, no matter how large or small the manufacturer, no matter how distant the forum, and no matter how few the number of items that end up in the particular forum at issue. What might appear fair in the case of a large manufacturer which specifically seeks, or expects, an equal-sized distributor to sell its product in a distant State might seem unfair in the case of a small manufacturer (say, an Appalachian potter) who sells his product (cups and saucers) exclusively to a large distributor, who resells a single item (a coffee mug) to a buyer from a distant State (Hawaii). I know too little about the range of these or in-between possibilities to abandon in favor of the more absolute rule what has previously been this Court's less absolute approach.

Further, the fact that the defendant is a foreign, rather than a domestic, manufacturer makes the basic fairness of an absolute rule yet more uncertain. I am again less certain than is the New Jersey Supreme Court that the nature of international commerce has changed so significantly as to require a new approach to personal jurisdiction.

\* \* \* [M]anufacturers come in many shapes and sizes. It may be fundamentally unfair to require a small Egyptian shirt maker, a Brazilian manufacturing cooperative, or a Kenyan coffee farmer, selling its products through international distributors, to respond to products-liability tort suits in virtually every State in the United States, even those in respect to which the foreign firm has no connection at all but the sale of a single (allegedly defective) good. And a rule like the New Jersey Supreme Court suggests would require every product manufacturer, large or small, selling to American distributors to understand not only the tort law of every State, but also the wide variance in the way courts within different States apply that law. See, e.g., Dept. of Justice, Bureau of Justice Statistics Bulletin, Tort Trials and Verdicts in Large Counties, 2001, p. 11 (reporting percentage of plaintiff winners in tort trials among 46 populous counties, ranging from 17.9% (Worcester, Mass.) to 69.1% (Milwaukee, Wis.)).

I would adhere strictly to our precedents and the limited facts found by the New Jersey Supreme Court. And on those grounds, I do not think we can find jurisdiction in this case. Accordingly, though I agree with the plurality as to the outcome of this case, I concur only in the judgment of that opinion and not its reasoning.

Justice GINSBURG, with whom Justice SOTOMAYOR and Justice KAGAN join, dissenting.

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

Under this Court's pathmarking precedent in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and subsequent decisions, one would expect the answer to be unequivocally, "No." But instead, six Justices of this Court, in divergent opinions, tell us that the manufacturer has avoided the jurisdiction of our state courts, except perhaps in States where its products are sold in sizeable quantities. Inconceivable as it may have seemed yesterday, the splintered majority today "turn[s] the clock back to the days before modern long-arm statutes when a manufacturer, to avoid being haled into court where a user is injured, need only Pilate-like wash its hands of a product by having independent distributors market it." Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. Davis L.Rev. 531, 555 (1995).

## I

On October 11, 2001, a three-ton metal shearing machine severed four fingers on Robert Nicastro's right hand. Alleging that the machine was a dangerous product defectively made, Nicastro sought compensation from the machine's manufacturer, J. McIntyre Machinery Ltd. (McIntyre UK). Established in 1872 as a United Kingdom corporation, and headquartered in Nottingham, England, McIntyre UK "designs, develops and manufactures a complete range of equipment for metal recycling." The company's product line, as advertised on McIntyre UK's Web site, includes "metal shears, balers, cable and can recycling equipment, furnaces, casting equipment and ... the world's best aluminum dross processing and cooling system." McIntyre UK holds both

United States and European patents on its technology.

The machine that injured Nicastro, a "McIntyre Model 640 Shear," sold in the United States for \$24,900 in 1995, and features a "massive cutting capacity." According to McIntyre UK's product brochure, the machine is "use[d] throughout the [w]orld." McIntyre UK represented in the brochure that, by "incorporat[ing] off-the-shelf hydraulic parts from suppliers with international sales outlets," the 640 Shear's design guarantees serviceability "wherever [its customers] may be based." The instruction manual advises "owner[s] and operators of a 640 Shear [to] make themselves aware of [applicable health and safety regulations]," including "the American National Standards Institute Regulations (USA) for the use of Scrap Metal Processing Equipment."

Nicastro operated the 640 Shear in the course of his employment at Curcio Scrap Metal (CSM) in Saddle Brook, New Jersey. "New Jersey has long been a hotbed of scrap-metal businesses . . ." See Drake, *The Scrap-Heap Rollup Hits New Jersey*, Business News New Jersey, June 1, 1998, p. 1. In 2008, New Jersey recycling facilities processed 2,013,730 tons of scrap iron, steel, aluminum, and other metals—more than any other State—outpacing Kentucky, its nearest competitor, by nearly 30 percent. Von Haaren, Themelis, & Goldstein, *The State of Garbage in America*, BioCycle, Oct. 2010, p. 19.

CSM's owner, Frank Curcio, "first heard of [McIntyre UK's] machine while attending an Institute of Scrap Metal Industries [(ISRI)] convention in Las Vegas in 1994 or 1995, where [McIntyre UK] was an exhibitor." ISRI "presents the world's largest scrap recycling industry trade show each year." The event attracts "owners [and] managers of scrap processing companies" and others "interested in seeing—and purchasing—new equipment." According to ISRI, more than 3,000 potential buyers of scrap processing and recycling equipment attend its annual conventions, "primarily because th[e] exposition provides them with the most comprehensive industry-related shopping experience concentrated in a single, convenient location." Exhibitors who are ISRI members pay \$3,000 for 10' x 10' booth space.

McIntyre UK representatives attended every ISRI convention from 1990 through 2005. These annual expositions were held in diverse venues across the United States; in addition to Las Vegas, conventions were held 1990–2005 in New Orleans, Orlando, San Antonio, and San Francisco. McIntyre UK's president, Michael Pownall, regularly attended ISRI conventions. He attended ISRI's Las Vegas convention the year CSM's owner first learned of, and saw, the 640 Shear. McIntyre UK exhibited its products at ISRI trade shows, the company acknowledged, hoping to reach "anyone interested in the machine from anywhere in the United States."

Although McIntyre UK's U.S. sales figures are not in the

record, it appears that for several years in the 1990's, earnings from sales of McIntyre UK products in the United States "ha[d] been good" in comparison to "the rest of the world." (Letter from Sally Johnson, McIntyre UK's Managing Director, to Gary and Mary Gaither, officers of McIntyre UK's exclusive distributor in the United States (Jan. 13, 1999)). In response to interrogatories, McIntyre UK stated that its commissioning engineer had installed the company's equipment in several States—Illinois, Iowa, Kentucky, Virginia, and Washington.

From at least 1995 until 2001, McIntyre UK retained an Ohio-based company, McIntyre Machinery America, Ltd. (McIntyre America), "as its exclusive distributor for the entire United States."<sup>2</sup> Though similarly named, the two companies were separate and independent entities with "no commonality of ownership or management." In invoices and other written communications, McIntyre America described itself as McIntyre UK's national distributor, "America's Link" to "Quality Metal Processing Equipment" from England.

In a November 23, 1999 letter to McIntyre America, McIntyre UK's president spoke plainly about the manufacturer's objective in authorizing the exclusive distributorship: "All we wish to do is sell our products in the [United] States -- and get paid!" Notably, McIntyre America was concerned about U.S. litigation involving McIntyre UK products, in which the distributor had been named as a defendant. McIntyre UK counseled McIntyre America to respond personally to the litigation, but reassured its distributor that "the product was built and designed by McIntyre Machinery in the UK and the buck stops here—if there's something wrong with the machine." Answering jurisdictional interrogatories, McIntyre UK stated that it had been named as a defendant in lawsuits in Illinois, Kentucky, Massachusetts, and West Virginia. And in correspondence with McIntyre America, McIntyre UK noted that the manufacturer had products liability insurance coverage.

Over the years, McIntyre America distributed several McIntyre UK products to U.S. customers, including, in addition to the 640 Shear, McIntyre UK's "Niagara" and "Tardis" systems, wire strippers, and can machines. In promoting McIntyre UK's products at conventions and demonstration sites and in trade journal advertisements, McIntyre America looked to McIntyre UK for direction and guidance. To achieve McIntyre UK's objective, i.e., "to sell [its] machines to customers throughout the United

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<sup>2</sup> McIntyre America filed for bankruptcy in 2001, is no longer operating, and has not participated in this lawsuit. After "the demise of ... McIntyre America," McIntyre UK authorized a Texas-based company to serve as exclusive United States distributor of McIntyre UK shears.

States," "the two companies [were acting] closely in concert with each other." McIntyre UK never instructed its distributor to avoid certain States or regions of the country; rather, as just noted, the manufacturer engaged McIntyre America to attract customers "from anywhere in the United States."

In sum, McIntyre UK's regular attendance and exhibitions at ISRI conventions was surely a purposeful step to reach customers for its products "anywhere in the United States." At least as purposeful was McIntyre UK's engagement of McIntyre America as the conduit for sales of McIntyre UK's machines to buyers "throughout the United States." Given McIntyre UK's endeavors to reach and profit from the United States market as a whole, Nicaastro's suit, I would hold, has been brought in a forum entirely appropriate for the adjudication of his claim. He alleges that McIntyre UK's shear machine was defectively designed or manufactured and, as a result, caused injury to him at his workplace. The machine arrived in Nicaastro's New Jersey workplace not randomly or fortuitously, but as a result of the U.S. connections and distribution system that McIntyre UK deliberately arranged.<sup>3</sup> On what sensible view of the allocation of adjudicatory authority could the place of Nicaastro's injury within the United States be deemed off limits for his products liability claim against a foreign manufacturer who targeted the United States (including all the States that constitute the Nation) as the territory it sought to develop?

## II

A few points on which there should be no genuine debate bear statement at the outset. First, all agree, McIntyre UK surely is not subject to general (all-purpose) jurisdiction in New Jersey courts, for that foreign-country corporation is hardly "at home" in New Jersey. See *Goodyear Dunlop Tires Operations, S.A. v. Brown*, post, [564 U.S. \_\_\_, 131 S.Ct. 2846 (2011)]. The question, rather, is one of specific jurisdiction, which turns on an "affiliatio[n] between the forum and the underlying controversy." *Goodyear Dunlop*, post, at ---- (quoting von Mehren

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<sup>3</sup> McIntyre UK resisted Nicaastro's efforts to determine whether other McIntyre machines had been sold to New Jersey customers. McIntyre did allow that McIntyre America "may have resold products it purchased from [McIntyre UK] to a buyer in New Jersey," but said it kept no record of the ultimate destination of machines it shipped to its distributor. A private investigator engaged by Nicaastro found at least one McIntyre UK machine, of unspecified type, in use in New Jersey. But McIntyre UK objected that the investigator's report was "unsworn and based upon hearsay." Moreover, McIntyre UK maintained, no evidence showed that the machine the investigator found in New Jersey had been "sold into [that State]."

& Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L.Rev. 1121, 1136 (1966) (hereinafter von Mehren & Trautman).

Second, no issue of the fair and reasonable allocation of adjudicatory authority among States of the United States is present in this case. New Jersey's exercise of personal jurisdiction over a foreign manufacturer whose dangerous product caused a workplace injury in New Jersey does not tread on the domain, or diminish the sovereignty, of any sister State. Indeed, among States of the United States, the State in which the injury occurred would seem most suitable for litigation of a products liability tort claim. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (if a manufacturer or distributor endeavors to develop a market for a product in several States, it is reasonable "to subject it to suit in one of those States if its allegedly defective [product] has there been the source of injury"); 28 U.S.C. § 1391(a)-(b) (in federal-court suits, whether resting on diversity or federal-question jurisdiction, venue is proper in the judicial district "in which a substantial part of the events or omissions giving rise to the claim occurred").

Third, the constitutional limits on a state court's adjudicatory authority derive from considerations of due process, not state sovereignty. \* \* \* But see ante, at ---- (plurality opinion) (asserting that "sovereign authority," not "fairness," is the "central concept" in determining personal jurisdiction).

Finally, in *International Shoe* itself, and decisions thereafter, the Court has made plain that legal fictions, notably "presence" and "implied consent," should be discarded, for they conceal the actual bases on which jurisdiction rests. "[T]he relationship among the defendant, the forum, and the litigation" determines whether due process permits the exercise of personal jurisdiction over a defendant, and "fictions of implied consent" or "corporate presence" do not advance the proper inquiry.

Whatever the state of academic debate over the role of consent in modern jurisdictional doctrines, the plurality's notion that consent is the animating concept draws no support from controlling decisions of this Court. Quite the contrary, the Court has explained, a forum can exercise jurisdiction when its contacts with the controversy are sufficient; invocation of a fictitious consent, the Court has repeatedly said, is unnecessary and unhelpful. See, e.g., *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (Due Process Clause permits "forum ... to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there"); *McGee v. International Life Ins.Co.*, 355 U.S. 220, 222 (1957) ("[T]his Court [has] abandoned 'consent,' 'doing business,' and 'presence' as the standard for measuring the extent of state judicial power over [out-of-state]

corporations.").

### III

This case is illustrative of marketing arrangements for sales in the United States common in today's commercial world. A foreign-country manufacturer engages a U.S. company to promote and distribute the manufacturer's products, not in any particular State, but anywhere and everywhere in the United States the distributor can attract purchasers. The product proves defective and injures a user in the State where the user lives or works. Often, as here, the manufacturer will have liability insurance covering personal injuries caused by its products. See Cupp, *Redesigning Successor Liability*, 1999 U. Ill. L.Rev. 845, 870-871 (noting the ready availability of products liability insurance for manufacturers and citing a study showing, "between 1986 and 1996, [such] insurance cost manufacturers, on average, only sixteen cents for each \$100 of product sales").

When industrial accidents happen, a long-arm statute in the State where the injury occurs generally permits assertion of jurisdiction, upon giving proper notice, over the foreign manufacturer. \* \* \* Or, the State might simply provide, as New Jersey does, for the exercise of jurisdiction "consistent with due process of law." N.J. Ct. Rule 4:4-4(b)(1) (2011).

The modern approach to jurisdiction over corporations and other legal entities, ushered in by *International Shoe*, gave prime place to reason and fairness. Is it not fair and reasonable, given the mode of trading of which this case is an example, to require the international seller to defend at the place its products cause injury? Do not litigational convenience and choice-of-law considerations<sup>11</sup> point in that direction? On what measure of reason and fairness can it be considered undue to require McIntyre UK to defend in New Jersey as an incident of its efforts to develop a market for its industrial machines anywhere and everywhere in the United States? Is not the burden on McIntyre UK to defend in New Jersey fair, i.e., a reasonable cost of transacting business internationally, in comparison to the burden on Nicastro to go to Nottingham, England to gain recompense for an injury he sustained using McIntyre's product at his workplace in Saddle Brook, New Jersey?

McIntyre UK dealt with the United States as a single market. Like most foreign manufacturers, it was concerned not with the

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<sup>11</sup> Historically, "tort cases were governed by the place where the last act giving rise to a claim occurred—that is, the place of injury." Even as many jurisdictions have modified the traditional rule of *lex loci delicti*, the location of injury continues to hold sway in choice-of-law analysis in tort cases.

prospect of suit in State X as opposed to State Y, but rather with its subjection to suit anywhere in the United States. As a McIntyre UK officer wrote in an e-mail to McIntyre America: "American law—who needs it?!" (e-mail dated April 26, 1999 from Sally Johnson to Mary Gaither). If McIntyre UK is answerable in the United States at all, is it not "perfectly appropriate to permit the exercise of that jurisdiction ... at the place of injury"? See Degnan & Kane, *The Exercise of Jurisdiction Over and Enforcement of Judgments Against Alien Defendants*, 39 *Hastings L.J.* 799, 813-815 (1988) (noting that "[i]n the international order," the State that counts is the United States, not its component States, and that the fair place of suit within the United States is essentially a question of venue).

In sum, McIntyre UK, by engaging McIntyre America to promote and sell its machines in the United States, "purposefully availed itself " of the United States market nationwide, not a market in a single State or a discrete collection of States. McIntyre UK thereby availed itself of the market of all States in which its products were sold by its exclusive distributor. "Th[e] 'purposeful availment' requirement," this Court has explained, simply "ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts." *Burger King*, 471 U.S., at 475, 105 S.Ct. 2174. Adjudicatory authority is appropriately exercised where "actions by the defendant himself " give rise to the affiliation with the forum. How could McIntyre UK not have intended, by its actions targeting a national market, to sell products in the fourth largest destination for imports among all States of the United States and the largest scrap metal market?

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

#### IV

[Justice Ginsburg distinguished this case from prior cases the Court had decided, urging that none of the Court's prior cases required the conclusion that jurisdiction was absent in the "now-prevalent pattern presented here -- a foreign-country manufacturer enlisting a U.S. distributor to develop a market in the United States for the manufacturer's products."

In *World-Wide Volkswagen v. Woodson*, the objecting defendants were a New York dealer and a three-state distributor

with activities limited to New York, Connecticut, and New Jersey. Neither the national distributor nor the German manufacturer objected to jurisdiction in the Oklahoma courts, and "the Court's opinion indicates that an objection by the manufacturer or national distributor would have been unavailing."

In *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987), all that remained by the time the case got to the Supreme Court was a dispute between a foreign plaintiff from Taiwan and a foreign defendant from Japan about indemnification for amounts paid in settlement of a claim by an American injured in California while using a Japanese-manufactured motorcycle. The Court was unanimous on the bottom-line judgment that, in these circumstances, the exercise of jurisdiction was not reasonable, and the duelling opinions of Justices O'Connor and Brennan about the purposeful availment analysis were not necessary. The objecting defendant there did not seek out U.S. customers, and engaged no distributor to market its products in this country. "To hold that *Asahi* controls this case would be dead wrong." Justice Ginsburg elaborated on this point in a footnote:

"The plurality notes the low volume of sales in New Jersey. A \$24,900 shearing machine, however, is unlikely to sell in bulk worldwide, much less in any given State. By dollar value, the price of a single machine represents a significant sale. Had a manufacturer sold in New Jersey \$24,900 worth of flannel shirts, see *Nelson v. Park Industires, Inc.*, 717 F.2d 1120 (CA 7 1983), cigarette lighters, see *Oswalt v. Scripto, Inc.*, 616 F.2d 191 (CA5 1983), or wire-rope splices, see *Hedrick v. Daiko Shoji Co.*, 715 F.2d 1355 (CA9 1983), the Court would presumably find the defendant amenable to suit in that State."

Justice Ginsburg also argued that the decision against jurisdiction "puts United States plaintiffs at a disadvantage in comparison to similarly situated complainants elsewhere in the world." Under EU regulations, for example, jurisdiction is commonly upheld in the place where the harmful event occurred.]

V

The commentators who gave names to what we now call "general jurisdiction" and "specific jurisdiction" anticipated that when the latter achieves its full growth, considerations of litigational convenience and the respective situations of the parties would determine when it is appropriate to subject a defendant to trial in the plaintiff's community. See von Mehren & Trautman 1166-1179. Litigational considerations include "the convenience of witnesses and the ease of ascertaining the governing law." As to the parties, courts would differently appraise two situations: (1) cases involving a substantially local plaintiff, like *Nicastro*, injured by the activity of a

defendant engaged in interstate or international trade; and (2) cases in which the defendant is a natural or legal person whose economic activities and legal involvements are largely home-based, i.e., entities without designs to gain substantial revenue from sales in distant markets.<sup>18</sup> As the attached appendix of illustrative cases\* indicates, courts presented with von Mehren and Trautman's first scenario -- a local plaintiff injured by the activity of a manufacturer seeking to exploit a multistate or global market -- have repeatedly confirmed that jurisdiction is appropriately exercised by courts of the place where the product was sold and caused injury.

\* \* \*

For the reasons stated, I would hold McIntyre UK answerable in New Jersey for the harm Nicaastro suffered at his workplace in that State using McIntyre UK's shearing machine. While I dissent from the Court's judgment, I take heart that the plurality opinion does not speak for the Court, for that opinion would take a giant step away from the "notions of fair play and substantial justice" underlying *International Shoe*.

#### NOTES AND QUESTIONS

1. In *Asahi v. Superior Court*, 480 U.S. 102 (1987), a Californian was injured in California when the tire on his motorcycle blew out on a freeway. He sued Honda, which made the motorcycle, and Cheng Shin Rubber Industry Co., a Taiwanese company that manufactured the tube in the tire that blew out. Cheng Shin in turn filed an indemnity claim against Asahi Metal Industry Co. of Japan, which had for several years supplied Cheng Shin with between 100,000 and 500,000 valves per year to incorporate in its tires. Cheng Shin also bought valves from other suppliers, but claimed that the valve on the offending tire was from Asahi, and was defective. Asahi claimed that the valve on that tire was not one of its products. Its sales to Cheng Shin accounted for approximately 1% of its income. Its president submitted an affidavit after it was sued asserting that he never imagined that selling valves to Cheng Shin could lead to his being sued in California.

By the time the case got to the Supreme Court, the

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<sup>18</sup> Assigning weight to the local or international stage on which the parties operate would, to a considerable extent, answer the concerns expressed by Justice Breyer.

\* Justice Ginsburg provided an Appendix to her opinion describing 12 cases "upholding exercise of personal jurisdiction over an alien or out-of-state corporation that, through a distributor, targeted a national market." --Eds.

California motorcyclist had settled and all that remained was the indemnity claim by a Taiwanese company against a Japanese company. All nine Justices agreed that the due process requirement of reasonableness precluded continued exercise of jurisdiction over that claim. Justice O'Connor spoke of the "unique burdens placed upon one who must defend oneself in a foreign legal system." Justice Brennan agreed that "[t]his is one of those rare cases" in which reasonableness was not satisfied.

Justices O'Connor and Brennan were sharply divided, however, about whether jurisdiction failed the purposeful availment test. Justice Brennan relied on a stream-of-commerce theory. Justice O'Connor insisted that should not suffice:

The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State. But a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.

Assuming, *arguendo*, that respondents have established Asahi's awareness that some of the valves sold to Cheng Shin would be incorporated into tire tubes sold in California, respondents have not demonstrated any action by Asahi to purposefully avail itself of the California market. Asahi does not do business in California. It has no office, agents, employees, or property in California. It does not advertise or otherwise solicit business in California. It did not create, control, or employ the distribution system that brought its valves to California. There is no evidence that Asahi designed its product in anticipation of sales in California.

Does Justice Kennedy's opinion in *Nicastro* adopt the same standard as Justice O'Connor endorsed? Could Justice O'Connor's standard be satisfied by the facts in *Nicastro*?

2. To a certain extent, *Nicastro* repeats the division in *Asahi*, this time in the contrasting views of Justice Kennedy and Justice Ginsburg. Which approach to purposeful availment *should* the Court adopt?

Regarding Justice Kennedy's view, consider *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939 (4th Cir.1994), in which the court held jurisdiction improper under *Asahi*. Plaintiff's late husband had smoked cigarettes manufactured by Lorillard, Inc. He died of mesothelioma, a form of cancer caused by exposure to asbestos fibers. In the 1950's Lorillard, a New York company with plants in New Jersey and Kentucky, entered into an arrangement with defendant, a Massachusetts company, to develop a "Micronite Filter" for cigarettes using asbestos fibers. They jointly owned the resulting patent, and defendant sold some 10 billion asbestos-containing filters to Lorillard during the 1950's knowing that they would be incorporated into cigarettes and sold throughout the country. The court concluded that this collaborative arrangement between defendant and Lorillard was not in any way directed toward Maryland, where plaintiff's husband lived and bought the cigarettes that plaintiff claimed caused his mesothelioma. Accordingly, jurisdiction was improper (*id.* at 945):

To permit a state to assert jurisdiction over any person in the country whose product is sold in the state simply because a person must expect that to happen destroys the notion of individual sovereignties inherent in our system of federalism. Such a rule would subject defendants to judgment in locations based on the activity of third persons and not the deliberate conduct of the defendant, making it impossible for defendants to plan and structure their business contacts and risks.

Would Justice Kennedy preclude jurisdiction anywhere outside Massachusetts in *Lesnick*? Is the broad stream-of-commerce standard adopted by Justice Ginsburg a better choice? How suitable would it be for the Egyptian shirt maker, the Brazilian manufacturing cooperative, or the Kenyan coffee farmer mentioned by Justice Breyer? And how should this standard be applied to a maker of components rather than the end product? In *Asahi*, for example, *Asahi* made valves that it sold to Cheng Shin, which in turn made inner tubes it sold to Honda, which put them on motorcycles it sold around the world. Could *Asahi* have done anything to prevent its products from arriving in California? Suppose it has insisted that Cheng Shin guarantee that none of its products would be sold in California. Would Cheng Shin want to buy from *Asahi* and try to honor that promise? Could it, given that the ultimate distribution was by Honda, not Cheng Shin? In *Parry v. Ernst Home Center Corp.*, 779 P.2d 659 (Utah 1989), plaintiff was injured in Utah using a tool manufactured in Japan by Hirota, a Japanese company. Hirota had sold the tool to an exporter for sale in the United States, and it had been sold to plaintiff's daughter in Idaho. The court found that jurisdiction over Hirota was improper because it had not undertaken any of the "additional conduct" Justice O'Connor identified as necessary to justify liability. See also *Boit v. Gar-Tec Products, Inc.*, 967

F.2d 671 (1st Cir.1992) (plaintiffs could not sue Indiana manufacturer of tool in Maine for damages sustained there due to alleged defect in tool, which plaintiffs bought through a specialty tool catalogue).

3. In *Asahi*, Justice Stevens joined neither the O'Connor nor the Brennan opinion, saying that "I would be inclined to conclude that a regular course of dealing that results in deliveries of over 100,000 unites annually over a period of several years would constitute purposeful availment' even though the item delivered into the forum was a standard product marketed throughout the world." After the Court's decision in *Asahi*, the lower courts continued to divide about how it should be applied, as Justice Kennedy notes. See, e.g., *Jackson v. Tanfoglio Giuseppe, S.R.I.*, 613 F.3d 579, 585 (5th Cir. 2010), in which the court adheres to what it calls a "relatively expansive" theory that calls only for "mere foreseeability" that the defendant might be haled into court, and not that it may have "purposefully directed" its activities to the forum. Justice Kennedy described *Nicastro* as "an opportunity to provide greater clarity." Did the Court succeed? The day after it decided this case, the Court vacated and remanded in at least one case, directing that the lower court decide again in a way consistent with *Nicastro*? Will that often be easy to do?

4. Justice Breyer says that "[n]one of our precedents finds that a single isolated sale, even if accompanied by the kind of sales effort indicated here, is sufficient." In *World-Wide Volkswagen*, the Court spoke of whether a manufacturer "seeks to serve" a given state. Could that include the actions of defendant in *Nicastro* in relation to New Jersey? Justice Breyer seems to think that a "regular flow" or "regular course" should be required. Is that consistent with *McGee v. International Life Ins. Co.*, supra p. 707?

5. Both *Asahi* and *Nicastro* were products liability suits. Would refusal to uphold jurisdiction in such cases frustrate the goals of tort law? Long ago, privity requirements prevented suits by injured consumers against product manufacturers, but tort law changed. Ever since *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916) and *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960) abandoned the privity requirement for negligence and products liability suits, consumers have had a substantive method for seeking recovery from manufacturers of defective products. Does *Asahi* impose an inappropriate jurisdictional hurdle in their way? See Wiseman, *Reconstructing the Citadel: The Advent of Jurisdictional Privity*, 54 Ohio St. L. Rev. 403, 443 (1993) ("The synergy developed between the law of products liability, as codified in the Restatement [of Torts], and personal jurisdiction \* \* \* has now been not so neatly undone by a plurality of the Supreme Court in *Asahi*.").

6. How should *Nicastro* be applied in cases where the out-of-state defendant advertises in the state inviting residents to sample its wares elsewhere? Usually such cases involve a plaintiff injured at defendant's distant establishment. In *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 380-87 (9th Cir.1990), rev'd on other grounds, 499 U.S. 585 (1991), plaintiffs from the state of Washington booked a Carnival cruise that began in Los Angeles through a travel agent near their home. (The Supreme Court's approach to this case is considered below. See *Forum Selection Clauses*, infra p. 824) After being injured during the cruise, plaintiffs sued in their home state. Carnival Lines was not registered to do business in Washington, and owned no property and maintained no office there. Its ships had never called at Washington ports. It did, however, advertise its cruises in local Washington newspapers and provide brochures to local travel agents for distribution to potential customers. It also periodically held seminars for travel agents in the state to inform them about its cruises and encourage them to sell tickets. It paid travel agents a 10% commission for selling tickets. Slightly over 1% of its cruise business was derived from residents of Washington.

The Ninth Circuit upheld jurisdiction, using a three-part analysis. First, it concluded that defendant's act of soliciting business in Washington should be considered purposeful availment to the extent it resulted in transaction of business with residents. Second, the court held that the claim arose out of the defendant's solicitation of business in Washington even though the claim was for negligence on the ship in international waters off Mexico. The court used a "but for" analysis, concluding that the plaintiffs would not have bought a ticket on defendant's cruise but for its solicitation activities directed at Washington travel agents. Finally, drawing on the "presumption of reasonableness" it found in *Burger King Corp. v. Rudzewicz*, supra p. 743, the court held that defendant had not presented a compelling case that the exercise of jurisdiction would be unreasonable.

Contrast *Nowak v. Tak How Investments, Ltd.*, 94 F.3d 708 (1st Cir.1996), a suit filed in Massachusetts to recover for the drowning of a Massachusetts resident at the Hong Kong Holiday Inn, which was operated by defendant. Defendant had no other business activities besides operation of that hotel, but it had advertised the hotel in some publications that circulated in Massachusetts. The court did not treat this advertising activity as sufficient, and rejected the Ninth Circuit's "but for" causation standard, favoring a proximate causation standard:

First, proximate or legal cause clearly distinguishes between foreseeable and unforeseeable risks of harm. Foreseeability is a critical component of the due process inquiry, particularly in evaluating purposeful availment,

and we think it also informs the relatedness prong. \* \* \* Adherence to a proximate cause standard is likely to enable defendants better to anticipate which conduct might subject them to a state's jurisdiction than a more tenuous link in the chain of causation. \* \* \*

A "but for" requirement, on the other hand, has in itself no limiting principle; it literally embraces every event that hindsight can logically identify in the causative chain. True, as the Ninth Circuit has noted, courts can use the reasonableness prong to keep Pandora's jar from opening too wide. But to say that the harm that might be done by one factor can be prevented by another is not, after all, an affirmative justification for the former.

Under this standard, the court concluded that jurisdiction was proper because this guest was in Hong Kong due to special rates that were offered to her husband's employer to persuade the employer to have employees stay at this hotel. The court added that "we intend to emphasize the importance of proximate causation, but to allow a slight loosening of that standard when circumstances dictate." It also noted that "it will not always be easy to apply this flexible approach to the particular circumstances, but that is a function of the complexity of this area of the law." Which approach is most in keeping with *Nicastro*?

7. It appears that in *Asahi* the entire Court agreed that allowing the case to proceed against *Asahi* would have violated the reasonableness prong of the jurisdictional inquiry. Was jurisdiction over *Asahi* in California more unreasonable than jurisdiction over *Hustler* in New Hampshire in *Keeton v. Hustler Co.* (supra p. 738 n. 1)? Should the fact that *Asahi* was a foreign corporation a decisive matter? Would the reasonableness prong have been satisfied for Cheng Shin's indemnity claim against *Asahi* if the plaintiff motorcyclist had not settled? Wouldn't California jurisdiction have been reasonable for a claim by the motorcyclist against *Asahi*?

One consideration stressed in the Court's reasonableness analysis is the fact that *Asahi* is a foreign company. Is the Court's application of the reasonableness prong peculiarly applicable to defendants from other countries? Are all other countries the same for this purpose? In *Aristech Chem. Intern. Ltd. v. Acrylic Fabricators Ltd.*, 138 F.3d 624 (6th Cir.1998), a suit against a Canadian company, the district court in Kentucky found that purposeful availment was satisfied and that the claim arose out of the contacts, but that the exercise of jurisdiction would be unreasonable. The court of appeals disagreed and reversed (*id.* at 628):

The Supreme Court has warned that the burden of

mounting a defense in a foreign legal system is "unique" and should be afforded "significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders." But we think a Canadian defendant such as AFL bears a substantially lighter burden than does a Japanese defendant—or, for that matter, most other foreign defendants. First, only a short plane flight separates Ontario from Kentucky. \* \* \* Moreover, a Canadian defendant litigating in the United States finds a judicial system "rooted in the same common law traditions as that of Canada."

How should this analysis be done for a UK company like the defendant in *Nicastro*?

8. How should jurisdiction be handled under *Nicastro* in a case like *Calder v. Jones* (supra p. 736)? Note Justice Kennedy's "exceptions \* \* \* in cases involving an intentional tort."

9. Justice Kennedy also seems to distinguish between contacts with the United States as a whole and contacts with a given state, implying that contacts with the country might be sufficient even if there were no sufficient with any given state. Assuming there were no such contacts with any single state in *Nicastro*, could jurisdiction in America be sustained under an amendment to Rule 4(k)(2) as follows:

- (2) **Federal Claims Outside State-Court Jurisdiction.** ~~For a claim that arises under federal law,~~ s Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if:
- (A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and
  - (B) exercising jurisdiction is consistent with the United States Constitution and laws.

Would such an amendment, if effective, be desirable? See also Rule 4(f). During oral argument in *Nicastro*, counsel for defendant asserted that plaintiff could have sued defendant in Ohio, where the "independent" company distributing its products had its offices. Absent that concession, would jurisdiction there have been proper?

10. Justice Breyer cautions that the case before the Court does not involve "modern-day consequences" and "modern concerns," which seem to include the challenge of fashioning jurisdictional rules that will work fairly regarding Internet-based transactions. We turn to that challenge now.