

# IF THE *SHOE* FITS: APPLYING PERSONAL JURISDICTION’S STREAM OF COMMERCE ANALYSIS TO E-COMMERCE—A VALUE TEST

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## INTRODUCTION

It has always been difficult for the law to keep up with emerging technology.<sup>1</sup> Internet connectivity has allowed communication and in-

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1. See, e.g., Vivek Wadhwa, *Laws and Ethics Can’t Keep Pace with Technology*, MIT TECH. REV. (Apr. 15, 2014) <https://www.technologyreview.com/s/526401/laws->

teraction in levels previously thought impossible. Decades-old legal jurisprudence has not adequately anticipated these developments, resulting in a state of uncertainty regarding the application of the law to these untapped areas. The pivotal position new technology holds in professional and personal lives obliges the legal community to consider how established substantive and procedural law should be applied to the changing world. Internet-related cases, in particular, pose new and unaddressed issues for American law. The difficulty presents a fundamental schism: is cyberspace a separate place or just an extension of real space?

The biggest challenge for the law is the Internet's potential to cross state and international borders. If a Facebook user in South Carolina sues another user in North Dakota for defamatory statements the latter made on her Facebook page, which forum has jurisdiction over the case—South Carolina or North Dakota? When it comes to issues of personal jurisdiction in particular, the law is unclear about what to make of the Internet. Faced with the challenge of applying long-standing personal jurisdiction principles to a borderless communication medium, courts have crafted different standards likely to result in contradictory findings on almost identical facts.<sup>2</sup>

The doctrine of personal jurisdiction derives from the constitutional requirement that a state or federal court provide due process before it deprives an individual or corporation of liberty or property.<sup>3</sup> Despite this constitutional grounding,<sup>4</sup> the Court has over time expanded, modified, and even rejected its prior holdings regarding personal jurisdiction.<sup>5</sup> Specifically, the Court's stream of commerce jurisprudence is as confusing as it is important. Having provided no clear guidance regarding the scope and meaning of the doctrine, lower courts continue to struggle with its application.

Exacerbating the problems created by this volatility, the Supreme Court has yet to define the parameters of personal jurisdiction vis-à-vis Internet activity.<sup>6</sup> Indeed, lower courts have often fashioned new

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and-ethics-cant-keep-pace-with-technology/; WORLD ECON. FORUM, VALUES AND THE FOURTH INDUSTRIAL REVOLUTION: CONNECTING THE DOTS BETWEEN VALUE, VALUES, PROFIT AND PURPOSE 6 (2016), [http://www3.weforum.org/docs/WEF\\_Values\\_and\\_the\\_Fourth\\_Industrial\\_Revolution\\_WHITEPAPER.pdf](http://www3.weforum.org/docs/WEF_Values_and_the_Fourth_Industrial_Revolution_WHITEPAPER.pdf) (“Given the Fourth Industrial Revolution’s extraordinarily fast technological and social change, relying only on government legislation and incentives to ensure the right outcomes is ill advised. These are likely to be out of date or redundant by the time they are implemented.”)

2. See Section II.B.

3. *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877).

4. See U.S. CONST. amend. V.

5. See Part I.

6. See Section III.B.

standards for personal jurisdiction in their attempt to solve the paradoxical problem of applying a territorial-based doctrine to an online world that defies any such boundaries.<sup>7</sup> The result has been myriad different solutions across lower courts and legal commentators. What happens, then, when a case presents a stream of commerce question in a cause of action arising from Internet activity (an “e-commerce” cause of action)? This Article attempts to provide a definitive answer to this complex question.

This Article argues that the working of new personal jurisdiction “tests” to confront Internet activity is misguided where established doctrine suffices to control the activity at issue. With the rise of e-commerce, the Internet has become an electronic highway, or a virtual “stream” of commerce, and the placement of a product for sale in that stream is no different than its placement in the physical stream of commerce. The proper test for courts facing personal jurisdiction questions in e-commerce cases, therefore, should be Justice O’Connor’s stream of commerce “plus” test.<sup>8</sup> The “plus” in Justice O’Connor’s test should focus on the value of business generated by the defendant in the forum state, an idea brought out by Justice Stevens’s concurrence in *Asahi*.<sup>9</sup> As will be discussed, this is preferable to Justice Brennan’s stream of commerce test from *Asahi*,<sup>10</sup> which would result in assertions of jurisdiction too far-reaching to harmonize with the Court’s personal jurisdiction jurisprudence.

This argument in favor of looking to Justice O’Connor’s “plus” test is a pragmatic one. As the history of the personal jurisdiction doctrine shows, the Supreme Court has reworked its jurisprudence only where its precedent was outdated or otherwise ill-equipped to confront the conduct giving rise to the cause of action. Faced with a workable test from its own jurisprudence, the Court is more likely to resolve the unsettled state of the stream of commerce doctrine in a satisfactory fashion.

By spotlighting the applicability of the stream of commerce doctrine to e-commerce causes of action, this Article attempts to provide a foundation for the application of established, controlling personal jurisdiction doctrine to causes of action arising from Internet activity where the conduct in question is sufficiently similar to its non-virtual counterpart.

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7. See Section III.B.

8. *Asahi Metal Indus. Co.*, 480 U.S. at 112.

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

10. *Id.* at 117 (Brennan, J., concurring in part and in judgment).

This Article proceeds as follows: Part I provides a general overview of the history and roots of the personal jurisdiction doctrine with particular attention to the state of confusion surrounding the stream of commerce theory in the wake of the Court's recent decisions in *Asahi Metal Industry v. Superior Court of California*<sup>11</sup> and *J. McIntyre Machinery v. Nicastro*.<sup>12</sup> Part II discusses the role of e-commerce in contemporary society, its effect on litigation, and under what circumstances lower courts left to their own devices have asserted personal jurisdiction over a defendant based solely on his or her Internet activity. Finally, Part III argues that courts should apply the stream of commerce doctrine in determining whether the assertion of personal jurisdiction in e-commerce causes of action comports with due process.

## I.

### THE PERSONAL JURISDICTION DOCTRINE: ROOTS, HISTORY, AND MAJOR APPROACHES

Personal jurisdiction refers to the power of a court to enter a binding judgment over the parties in a case.<sup>13</sup> The doctrine finds its roots in the Due Process Clause of the Constitution and establishes the geographic limitations on the judicial power of courts.<sup>14</sup> Assertions of jurisdiction over the defendant by this nation's courts must comport with due process in order for a court's judgment to be afforded full faith and credit by other courts in the United States.<sup>15</sup> A court must therefore possess power consisting of personal jurisdiction over a defendant in order to entertain an action and enter a valid and enforceable judgment.

Applying these principles, the Court, since its decision in *Pennoyer v. Neff*, has consistently held that plaintiffs are not free to bring

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11. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112 (1987) (opinion of O'Connor, J.).

12. *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011).

13. *Personal Jurisdiction*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/personal\\_jurisdiction](https://www.law.cornell.edu/wex/personal_jurisdiction) (last visited Oct. 31, 2018).

14. Lindy Burris Arwood, *Personal Jurisdiction: Are the Federal Rules Keeping up with (Internet) Traffic?*, 39 VAL. U. L. REV. 967, 967-68 (2005) (noting that territorial boundaries have traditionally served the basis for personal jurisdiction, and further, that the exercise of personal jurisdiction implicates concerns about state sovereignty and the Due Process Clause).

15. Any deprivation of property by the United States, pursuant to the Fifth Amendment, or by a state, pursuant to the Fourteenth Amendment, must comport with due process; either the success or failure of a lawsuit constitutes such a deprivation. *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877).

suit wherever they choose.<sup>16</sup> Under *Pennoyer*, due process allowed a court to assert jurisdiction over a defendant only if the defendant was found and served in the forum state, or if his property in the state was properly attached before litigation began.<sup>17</sup>

Eventually, the Court recognized that the continued modernization and globalization of the world left the *Pennoyer* doctrine insufficient to address issues that crossed state, and sometimes country, lines. Additionally, the appearance of a new type of defendant, the corporation, proved the in-state service test unworkable.<sup>18</sup> Putting aside any misgivings about the fairness of requiring a defendant in an age of increasing interstate travel to be present in the forum state to satisfy personal jurisdiction, a court can still easily determine whether or not a defendant is served in-state. This is not so for a corporation without a corporeal body. The Court eventually abandoned the *Pennoyer* approach to personal jurisdiction in its seminal decision, *International Shoe Co. v. Washington*.<sup>19</sup>

#### A. *Contemporary Personal Jurisdiction: The International Shoe Test*

The *International Shoe* Court started anew and expanded the jurisdictional reach of a court beyond its state borders.<sup>20</sup> Departing from its previous holding in *Pennoyer v. Neff*, which required that a non-

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16. *Pennoyer* involved a property dispute. To satisfy a judgment against Neff, Mitchell seized land owned by Neff in a preceding suit and then reassigned it to Pennoyer. Neff sued Pennoyer to recover possession of the property, claiming that the original judgment against him was invalid for lack of personal jurisdiction over both him and the land. *Id.* at 720. The Court determined that personal jurisdiction could not be exercised over a non-consenting nonresident who is not served in the state. *Id.* at 733.

17. There were only two exceptions to this rule—suits determining the status of the defendant under the domestic law of the state, and situations in which the defendant consented to jurisdiction. *Id.*

18. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (“Since the corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact, *Klein v. Bd. of Tax Supervisors*, 282 U.S. 19, 24 (1930), it is clear that, unlike an individual, its ‘presence’ without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it.”).

19. The case involved a suit against International Shoe in Washington State court. *Id.* at 312. Notice was served personally on an agent of the defendant within the state and by registered mail to corporate headquarters. *Id.* International Shoe had no office in Washington and made no contracts either for sale or purchase of merchandise there. *Id.* at 313. It maintained no stock of merchandise and made no deliveries of goods in intrastate commerce but did employ salesmen who resided in the state. *Id.*

20. *Id.* at 316.

consenting nonresident be served within the boundaries of the state,<sup>21</sup> the *International Shoe* Court held that a court may assert jurisdiction over a defendant served out of state in certain circumstances:

[D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."<sup>22</sup>

This language, however vague,<sup>23</sup> has since governed the doctrine of personal jurisdiction. It is essentially a test of fairness: Is it fair to subject the defendant to suit in this state in the circumstances of this case? The ambiguous and malleable nature of this test has given way to various interpretations and, as examined in greater detail below, has created disunity among lower courts and the Justices of the Supreme Court themselves.

Since *International Shoe*, the personal jurisdiction inquiry has focused on the contacts between the defendant and the forum state. Whether the contacts are sufficient depends on the "quality and nature" of the defendant's acts "in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure."<sup>24</sup> The relevant considerations to this analysis, for the purposes of this Article, are (1) whether the defendant's contacts with the forum are continuous and systematic as opposed to isolated or sporadic and (2) whether the plaintiff's cause of action is related to the defendant's contacts with the forum.<sup>25</sup>

The *International Shoe* Court created four categories of a defendant's contact using the aforementioned factors. At one end of the spectrum, the easiest case for finding jurisdiction is the one in which "the activities of the corporation [in the forum] have not only been continuous and systematic, but also give rise to the liabilities sued on" (for example, as in *International Shoe*, a corporation with employees acting in the forum state is sued for its failure to contribute to a state-

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21. *Pennoyer*, 95 U.S. at 733.

22. *Int'l Shoe Co.*, 326 U.S. at 316.

23. The lone dissenter in *International Shoe*, Justice Hugo Black, anticipated the confusion that would stem from the Court's test, referring to it as "vague Constitutional criteria" that "introduced uncertain elements confusing the simple pattern." *Id.* at 323 (Black, J., dissenting).

24. *Id.* at 319 (majority opinion).

25. *Id.* at 317-19. Other considerations relevant to this analysis are the extent of the inconvenience of defending in a remote forum, *id.* at 317, and whether the defendant has received the benefits and protections of the laws of the state, *id.* at 319.

run unemployment compensation fund).<sup>26</sup> At the other extreme are the cases in which a corporation has “isolated” forum activities that are “unconnected” to the claim.<sup>27</sup> There is no jurisdiction in such a case.<sup>28</sup> By way of illustration, a suit initiated in a New York court for a tort allegedly committed in Florida would render the forum state unconnected to the claim, and such a suit against a defendant whose only connection with New York was his driving through the state once on a road trip would make his contacts with New York “isolated.”

The need for well-developed doctrine arises in the two middle categories: (1) cases in which the contacts in the forum state are extensive but unrelated to the claim, and (2) cases in which the contacts in the forum state are isolated but related to the claim.<sup>29</sup> If a defendant’s contacts fall within the former category, a court turns to a general jurisdiction analysis.<sup>30</sup> If instead a defendant’s contacts with the forum are isolated but related to the claim, a court will conduct a specific jurisdiction analysis.<sup>31</sup> Specific jurisdiction refers to jurisdiction that arises where a defendant has maintained certain minimum contacts with the forum state and those contacts give rise to the cause of action.<sup>32</sup>

The rest of this Article traces the development of the specific jurisdiction doctrine with particular attention paid to the Court’s stream of commerce line of cases. The Article then discusses how lower courts have tackled questions of personal jurisdiction vis-à-vis a defendant’s Internet activity. After advocating for the adoption of stream of commerce analysis to cases predicated on e-commerce disputes, this Article suggests the *Asahi* stream of commerce “plus” test with a focus on the value of sales in the forum state as the most apt method upon which to evaluate assertions of jurisdiction.

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26. *Id.* at 317.

27. *Id.*

28. *Id.*

29. *Id.* at 318.

30. General jurisdiction refers to a court’s ability to hear a cause of action against a particular party, regardless of whether the cause of action has any connection to the forum state, because the defendant’s operations within the forum are so substantial and continuous that suit on grounds entirely distinct from those operations is justified. *Goodyear Dunlop Tires Operations v. Brown*, 564 U.S. 915, 919 (2011). General jurisdiction is not the focus of this Article.

31. *Id.* at 923.

32. *Id.* at 919.

### B. *The Development of Specific Jurisdiction*

What exactly suffices to establish “minimum contacts” continues to elude lower courts and legal scholars, despite the wealth of Supreme Court precedent on specific jurisdiction. Apart from failing to quantify “minimum” or identify what our “traditional notions of fair play and substantial justice” are, the *International Shoe* Court made no effort preliminarily to define what constitutes a “contact.”<sup>33</sup> The Court’s subsequent decisions shed some light on the quantity and types of contacts that will satisfy jurisdiction, but much remains uncertain.

Lower courts struggled with *International Shoe*’s ambiguity until the Court’s next jurisdictional decision in 1957.<sup>34</sup> In *McGee v. International Life Insurance Co.*, the Supreme Court considered whether a single contact was sufficient to support jurisdiction.<sup>35</sup> *McGee* made clear that specific jurisdiction could be based on an isolated contact provided that the contact was related to the cause of action.<sup>36</sup> In doing so, the Court did not deviate from the analysis it laid out in *International Shoe*. In finding the assertion of jurisdiction valid, the Court noted that modern transportation and communication made it much less burdensome for a party sued to defend itself in a state where it conducts business.<sup>37</sup> Thus, *McGee* represented another step in the Court’s continued expansion of the bounds of personal jurisdiction, this time in recognition of a growing and increasingly sophisticated economy more prone to crossing state lines.

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33. See *Int’l Shoe Co.*, 326 U.S. at 316.

34. Robert E. Pfeffer, *A 21st Century Approach to Personal Jurisdiction*, 13 U.N.H. L. REV. 65, 67 (2015).

35. *McGee* involved a suit by the beneficiary of a life insurance policy owned by her deceased son. The defendant insurance company had no office or agent in California and had never conducted any business there except for the one policy at issue that was sold through the mail. The California court exercised specific jurisdiction over the company based on a statute subjecting nonresident corporations to suit on insurance contracts entered into with residents of the state. *McGee* sought to enforce the California court’s judgment in the defendant’s home state of Texas. The Texas courts refused, holding that the judgment was not entitled to full faith and credit because the California court lacked jurisdiction over the insurance company. *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 221–22 (1957).

36. *Id.* at 223.

37. The facts that the contract was delivered in California, the premiums were mailed from there, and the insured was a resident of California sufficed to establish minimum contacts. The Court took into consideration the other factors laid out in *International Shoe* and noted that California residents would be disadvantaged if they were required to leave the state to obtain payment from their insurance company. *Id.* at 223–24.

It was not until the Court's 1958 decision *Hanson v. Denckla* that the meaning of "minimum contacts" was refined.<sup>38</sup> In *Hanson*, the Court held that only those contacts resulting from the defendant's "purposeful availment" of the forum state's legal benefits are relevant to establishing minimum contacts.<sup>39</sup> Purposeful availment requires that "there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."<sup>40</sup>

It is important to note the factual differences between *McGee* and *Hanson*. The "contacts" with the forum states in both cases consisted only of the out-of-state company's business with a resident within the forum state. Jurisdiction comported with due process in *McGee* but not in *Hanson* because of an important distinction. As the *Hanson* Court said in distinguishing *McGee*, the defendant company in *McGee* solicited business in the state of California, whereas in *Hanson*, the defendant's contact with Florida was predicated only on the unilateral act of the plaintiff's move from Pennsylvania to Florida.<sup>41</sup> Inter-state solicitation may satisfy the purposeful availment requirement; a defendant's less deliberate contact with a forum will not.

The doctrine developed little in the time between the Court's decisions in *Hanson* and *World-Wide Volkswagen*. In one interim decision, *Shaffer v. Heitner*, the Court held that (1) all assertions of jurisdiction, whether *in personam*, *in rem*, or *quasi in rem* must be evaluated using the minimum contacts standard,<sup>42</sup> and (2) neither the presence of the nonresident defendants' stock in Delaware nor the fact that they were employed by a Delaware-chartered corporation provided the requisite contacts to establish personal jurisdiction in Delaware.<sup>43</sup> In affirmation of its commitment to the purposeful availment

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38. *Hanson v. Denckla*, 357 U.S. 235 (1958).

39. *Hanson* involved a Delaware bank that acted as trustee for a client who moved from Pennsylvania to Florida and continued to communicate with the bank from Florida. A Florida court entered a judgment against the bank in a suit involving the administration of the client's trust. Because the bank's contacts with Florida resulted from the client's unilateral act of moving to Florida, the Court held that the Florida judgment was invalid. The bank had not purposefully availed itself of Florida's laws. *Id.* at 252-53.

40. *Id.* at 253.

41. *Id.*

42. *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977).

43. *Id.* at 216. Given that the defendants had all purchased stock in the corporation, the *situs* of which was Delaware under Delaware law, and the argument made by Justice Brennan in his dissent that the defendant's choice of incorporation in Delaware is a voluntary association with the state invoking the benefits and protections of its laws, it is difficult to square this decision with the Court's already established doctrine. *Id.* at 227-28 (Brennan, J., concurring in part and dissenting in part). Prior to

principle established in *International Shoe*, the Court in *Shaffer* held that a defendant's ownership of stock in a corporation incorporated within a state, without more, is insufficient to allow that state's courts to exercise jurisdiction over the defendant. Instead, it is "the relationship among the defendant, the forum, and the litigation" that is the "central concern of the inquiry into personal jurisdiction."<sup>44</sup>

The following year, the Court decided that a defendant's acquiescence to his daughter's residence in California with her mother did not constitute the purposeful availment of any benefits of California laws.<sup>45</sup> A father who allowed his children "to spend more time in California than was required under a separation agreement can hardly be said to have 'purposefully availed himself' of the 'benefits and protections' of California's laws."<sup>46</sup> Any financial benefits the defendant father received resulting from decreased child support payments did not result from his daughter's decision to live in California specifically, but from her absence from New York.<sup>47</sup> Contacts sufficient to establish jurisdiction, therefore, were lacking.

In *World-Wide Volkswagen Corp. v. Woodson*, the Court framed the question of purposefulness in terms of a defendant's reasonable expectations.<sup>48</sup> The Court held that the defendant had not purposefully availed itself of the benefits of Oklahoma law by selling an automobile to the plaintiff that the plaintiff later drove though the state of Oklahoma, where it malfunctioned, ignited, and severely burned the family trapped inside.<sup>49</sup> The Court likened the plaintiff's unilateral act of driving his car through Oklahoma to the unilateral act identified in

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*Shaffer*, in rem and quasi in rem jurisdiction were based on a lesser due process standard. In cases of in rem jurisdiction, which refers to the power a court may exercise over property, a court's authority was limited only to cases involving that property. Quasi in rem jurisdiction provided a court with the authority to hear claims against the person, but its judgment could only affect the person's interest in the property serving as the basis for jurisdiction. The *International Shoe* decision did not reach these bases for jurisdiction, and thus did not alter this analysis. It was not until *Shaffer* that the Court held that the minimum contacts standard of *International Shoe* would apply to all assertions of jurisdiction, whether on the bases of the in personam, in rem, or quasi in rem doctrines. Suzanne T. Marquard, *Quasi in Rem on the Heels of Shaffer v. Heitner: If International Shoe Fits . . .*, 46 *FORDHAM L. REV.* 459, 459-461 (1977).

44. *Schaffer*, 433 U.S. at 204.

45. *Kulko v. Superior Court*, 436 U.S. 84, 97 (1978).

46. *Id.* at 94.

47. *Id.* at 95.

48. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98 (1980).

49. *Id.* at 288, 299.

*Hanson*.<sup>50</sup> Mere foreseeability that the car might somehow find its way into Oklahoma would not suffice to establish purposeful availment because “the mere likelihood that a product will find its way into the forum State” is always foreseeable.<sup>51</sup> The foreseeability that is relevant, the Court said, is whether the defendant reasonably anticipated being haled into court in the forum state.<sup>52</sup> The Due Process Clause “gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.”<sup>53</sup> Where a defendant “purposefully avails itself of the privilege of conducting activities within the forum State,” it has “clear notice” that it is subject to suit there.<sup>54</sup> The Court went on to make an important distinction between mere foreseeability and the purposeful behavior that predicates the “reasonable anticipation” of being haled into court:

[I]f 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.<sup>55</sup>

This examination of the Court’s specific jurisdiction jurisprudence indicates that the constitutionality of personal jurisdiction depends on “the relationship among the defendant, the forum,” and the lawsuit.<sup>56</sup> What suffices to establish minimum contacts will vary based on the facts of the case, but there must be some act by which the defendant has purposefully availed himself of the benefits of the forum.<sup>57</sup> “Purposeful availment” requires conduct by the defendant that could be reasonably expected to result in contacts between the defendant and the forum state specifically.<sup>58</sup> A defen-

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50. *Id.* at 298. In *Hanson*, defendant’s only contacts with the forum state resulted from plaintiff’s relocation to that forum state. See *Hanson v. Denckla*, 357 U.S. 235, 252 (1958).

51. *World-Wide Volkswagen Corp.*, 444 U.S. at 297.

52. *Id.*

53. *Id.*

54. *Id.* (citing *Hanson*, 357 U.S. at 253).

55. *Id.*

56. *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977).

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

58. In a 1984 libel case, the defendant’s only contacts with the forum state consisted of monthly circulations of 15,000 copies of its nationally published magazine. “Where, as in this case, respondent *Hustler Magazine, Inc.*, has continuously and de-

dant<sup>59</sup> must take affirmative<sup>60</sup> action that creates contacts, whether indirect or direct,<sup>61</sup> with the forum state.

### C. *Entering Muddy Waters: The Stream of Commerce Doctrine*

The foregoing discussion has traced the history of the personal jurisdiction doctrine and the development of the purposeful availment requirement. As discussed above, purposeful availment is a means by which a defendant demonstrates minimum contacts with a particular forum. This Section will discuss the stream of commerce theory of jurisdiction, by which the Court has interpreted purposeful availment to include a defendant's act of placing products in the stream of commerce.<sup>62</sup>

The Court first announced the stream of commerce doctrine in *World-Wide Volkswagen v. Woodson* in order to analyze the assertion of jurisdiction over a nonresident manufacturer whose product entered the forum state through channels of commerce.<sup>63</sup> Stream of commerce refers to distribution networks that manufacturers use to "serve, di-

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liberately exploited the New Hampshire market, it must reasonably anticipate being haled into court there in a libel action based on the contents of its magazine." *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 (1984). The Court went on to say, "[t]here is no unfairness in calling it to answer for the contents of that publication wherever a substantial number of copies are regularly sold and distributed." *Id.* Though instructive mainly in its establishment of the relevant factors to be used in assessing personal jurisdiction over a contracts dispute, the Court's decision in *Burger King v. Rudzewicz* is also informative. The case involved a contract negotiated in Michigan and cleared with Burger King headquarters in Florida that obligated Rudzewicz to make payments to Burger King in Florida. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 466–67 (1985). The contract also provided that any disputes would be governed by Florida law. *Id.* at 465–66. The Court held that although Rudzewicz had no physical contacts with Florida and dealt only with the Michigan office, he "most certainly knew he was affiliating himself with an enterprise based primarily in Florida." *Id.* at 480. This contact did not result by accident or coincidence, as the defendant's contacts with Oklahoma in *World-Wide*. Defendant had reason to expect to be sued in Florida, which is adequate to satisfy the purposeful availment requirement. *Id.*

59. Unilateral actions by the plaintiff do not suffice to create contacts. *World-Wide Volkswagen Corp.*, 444 U.S. at 298.

60. Passive acquiescence without more does not create contacts. *See Kulko v. Superior Court*, 436 U.S. 84, 94 (1978).

61. A defendant's contacts need not be directly related to the forum state in order for it to reasonably expect to be subject to suit there. *Burger King Corp.*, 471 U.S. at 479.

62. The Court's stream of commerce decisions in *Asahi* and *Nicastro* leave intact step two of the personal jurisdiction analysis: the reasonableness test set forth by *World-Wide Volkswagen*. *See infra* note 68. The stream of commerce theory is meant as an avenue to satisfy the first step: minimum contacts.

63. *World-Wide Volkswagen Corp.*, 444 U.S. at 298.

rectly or indirectly, the market for their product in other States.”<sup>64</sup> The Court explained that due process would allow a forum state to assert jurisdiction over a nonresident manufacturer when that manufacturer “delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.”<sup>65</sup> Indirect or direct actions to serve the forum state’s market put a defendant on reasonable notice that he may be haled into that forum state’s courts.<sup>66</sup> The Court did not qualify what quality or quantity of contacts with the stream of commerce would suffice to cause a nonresident defendant to reasonably anticipate being haled into another state’s courts.<sup>67</sup>

The Court’s first attempt to clarify the standard to use in stream of commerce cases failed to establish a uniform and definitive doctrine.<sup>68</sup> In *Asahi*,<sup>69</sup> the Court announced three competing tests for de-

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64. *Id.* at 297.

65. *Id.* at 298.

66. *Id.* at 297.

67. Because defendant World-Wide Volkswagen did not attempt to sell or advertise in Oklahoma, the Court found that it had made no efforts, either direct or indirect, to serve the state’s market. Thus, it could not reasonably anticipate being subject to suit in Oklahoma, and any assertion of jurisdiction over World-Wide Volkswagen in Oklahoma did not comport with due process. The Court therefore had no reason to clarify the quantity or quality of contacts needed. *Id.* at 298.

68. See generally *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987); Kristen R. Baker, *Product Liability Suits and the Stream of Commerce after Asahi: World-Wide Volkswagen Is Still the Answer*, 35 TULSA L.J. 705, 712–30 (2000) (summarizing the varied approaches used by the different circuit courts in applying the stream of commerce analysis in cases involving nonresident defendants).

69. *Asahi* involved a products liability suit over a defective tire against Cheng Shin in California state court. Cheng Shin filed a cross-complaint for indemnification from *Asahi*, a Japanese company from which it bought parts it later incorporated into its tires. *Asahi* was aware of Cheng Shin’s sales in the United States but disputed the California court’s jurisdiction. 480 U.S. at 106–107. Although the Court was unable to articulate a uniform test for application of the stream of commerce doctrine, a majority of the Court concluded that assertion of jurisdiction, regardless of whether or not *Asahi* purposefully availed itself of any rights or protections of California laws, would offend “traditional notions of fair play and substantial justice,” and was therefore unconstitutional. *Id.* at 113. The Court cited the factors identified by the Court in *World-Wide Volkswagen*, now referred to as “the reasonableness test”: “the burden on the defendant, the interests of the forum state, the plaintiff’s interest in obtaining relief, the interstate judicial system’s interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies.” *Id.* The plurality opinion focused on the unique burdens that would be placed upon *Asahi* if it were required to litigate in California, and the minimal interest the state of California had in adjudicating Cheng Shin’s cross-claim, which involved no California resident. *Id.* at 114. This was the first time the Court declared that purposeful availment on its own would not suffice to establish jurisdiction. In effect, a two-pronged test was established. After determining that a defendant has minimum contacts with the forum state, a court must then evaluate

termining what constituted sufficient minimum contacts: (1) Justice O'Connor's stream of commerce "plus" test;<sup>70</sup> (2) Justice Brennan's "pure" stream of commerce test;<sup>71</sup> and (3) Justice Stevens's volume, value, and hazardous nature test.<sup>72</sup>

The Justice O'Connor "stream of commerce 'plus'" group contended that "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."<sup>73</sup> Instead, minimum contacts by the defendant are demonstrated by actions of the defendant purposefully directed toward the forum.<sup>74</sup> In other words, placement into the stream of commerce "plus" something else is required.<sup>75</sup> This "something else" can include "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 beyond that, Justice O'Connor provided no framework for analysis.<sup>76</sup>

In contrast, Justice Brennan argued for a pure stream of commerce analysis.<sup>77</sup> Purposeful availment under Justice Brennan's theory is satisfied by the mere placement of a product into the stream of commerce with knowledge that the product will eventually be used in the forum state.<sup>78</sup> The possibility of such a lawsuit, therefore, "cannot

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whether jurisdiction would nonetheless violate *International Shoe's* minimum requirements of fair play and substantial justice. *Id.*

70. *Id.* at 112 (opinion of O'Connor, J.).

71. *Id.* at 117 (Brennan, J., concurring in part and in judgment).

72. "Whether or not this conduct rises to the level of purposeful availment requires a constitutional determination that is affected by the volume, the value, and the hazardous character of the components." *Id.* at 122 (Stevens, J., concurring in part and in judgment).

73. *Id.* at 112 (opinion of O'Connor, J.).

74. *Id.*

75. Justice O'Connor reasoned that because Cheng Shin, and not Asahi, had sent Asahi's products into California, Asahi had not purposefully availed itself of any rights of protections in the state of California, and jurisdiction was thus unconstitutional. *Id.*

76. *Id.*

77. *Id.* at 117 (Brennan, J., concurring in part and in judgment).

78. Justice Brennan distinguished *World-Wide* on the basis that in *World-Wide*, the plaintiff's unilateral action brought the good to the forum state, whereas here in *Asahi*, the good reached California through an established chain of distribution. Asahi's awareness that Cheng Shin's system of distribution would carry its product into California sufficed to establish jurisdiction over Asahi by a California court. *Id.* at 121-22.

come as a surprise.”<sup>79</sup> Such a standard is fair, Justice Brennan argued, because a lawsuit in these circumstances does not present “a burden for which there is no corresponding benefit.”<sup>80</sup> A defendant who places his product into the stream of commerce benefits both directly from the retail sale of the product in the forum state and indirectly from the state laws that enable that sale.<sup>81</sup>

Finally, Justice Stevens advocated basing the constitutional analysis on “the volume, the value and the hazardous character of the components” of the product at issue.<sup>82</sup> According to Justice Stevens, whether the assertion of jurisdiction is valid depends on the number of sales made within the forum state, the value of those sales, and the hazardous nature of the products sold, rather than the nature of the defendant’s acts. Justice Stevens did not elaborate on this standard.<sup>83</sup> He believed Justice O’Connor’s and Justice Brennan’s detailed opinions on the minimum contacts standard unnecessary. Because the assertion of personal jurisdiction over Asahi was unconstitutional under the “reasonable” factors set forth in *World-Wide*, that alone sufficed to warrant reversal in his opinion.<sup>84</sup>

The Court’s most recent decision on the stream of commerce doctrine further muddied the already muddy waters.<sup>85</sup> The Court was once again unable to reach consensus and issued three separate opinions in *J. McIntyre Machinery, Ltd. v. Nicastro*.<sup>86</sup> *Nicastro* involved a products liability action that arose after a metal-cutting machine severed four fingers from the plaintiff’s hand.<sup>87</sup> The machine was manufactured by McIntyre, a United Kingdom corporation with its principal place of business in Nottingham, England.<sup>88</sup> McIntyre UK’s business was conducted and heavily marketed in the United States by its U.S. distributor, McIntyre Machinery America, an Ohio-based corporation.<sup>89</sup> McIntyre UK did not own McIntyre America, but McIntyre America implemented “advertising and sale efforts in accordance with [McIntyre UK’s] direction and guidance whenever possible.”<sup>90</sup> Both corporations attended trade conventions and conferences throughout

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79. *Id.* at 117.

80. *Id.*

81. *Id.*

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

83. *Id.*

84. *Id.* at 121.

85. *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011).

86. *Id.*

87. *Id.* at 894 (Ginsburg, J., dissenting).

88. *Id.*

89. *Id.* at 878 (plurality opinion); *Id.* at 896 (Ginsburg, J., dissenting)

90. *Id.* at 879 (plurality opinion) (internal quotation marks omitted).

the United States, and the plaintiff's employer purchased the defective machine that gave rise to this suit at one such trade convention after having spoken to McIntyre UK representatives.<sup>91</sup> McIntyre UK challenged the New Jersey Superior Court's determination that Justice O'Connor's stream of commerce "plus" test was satisfied by the facts of this case.<sup>92</sup> The Superior Court held that because McIntyre UK knew that McIntyre America distributed its products through a nationwide distribution system that targeted every state, including New Jersey, it should therefore expect that one of its machines might cause injury in New Jersey.<sup>93</sup> The Supreme Court of New Jersey affirmed.<sup>94</sup>

The Supreme Court reversed.<sup>95</sup> The plurality reasoned that a forum state could exercise personal jurisdiction over a nonresident defendant only when that defendant engages in conduct specifically targeting the forum state.<sup>96</sup> Although *World-Wide Volkswagen* held that a defendant's placement of goods in the stream of commerce with the expectation that the goods would be purchased by consumers in the forum state may suffice to establish purposeful availment, that decision "does not amend the general rule of personal jurisdiction."<sup>97</sup> In conducting a stream of commerce analysis, the "principal inquiry" is "whether the defendant's activities manifest an intention to submit to the power of a sovereign."<sup>98</sup> The plurality rejected the contention that targeting the entire United States suffices to establish jurisdiction in New Jersey with no additional evidence that the defendant targeted New Jersey specifically.<sup>99</sup> Under the plurality's view, it is a defendant's actions, not its expectations, that are relevant to the minimum contacts inquiry.<sup>100</sup> Because McIntyre UK engaged in no conduct that

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91. *Id.* at 886; *Nicastro v. McIntyre Mach. Am., Ltd.*, 987 A. 2d 575, 578 (N.J. 2010).

92. *Nicastro*, 564 U.S. at 878–79.

93. *Id.* at 879.

94. *Nicastro*, 987 A. 2d at 591–92, 594.

95. *Nicastro*, 564 U.S. at 887.

96. *Id.* at 883.

97. *Id.* at 882.

98. *Id.*

99. *Id.* at 884–85.

100. *Id.* at 885. This is a rejection of Justice Brennan's "pure" stream of commerce test from his concurrence in *Asahi*, which focuses on the expectations of the defendant. *Id.*

specifically targeted New Jersey,<sup>101</sup> the plurality held the assertion of personal jurisdiction by New Jersey over McIntyre UK invalid.<sup>102</sup>

Justice Ginsburg reached the opposite conclusion: that New Jersey's exercise of personal jurisdiction over McIntyre UK did not violate due process.<sup>103</sup> She argued that McIntyre UK did take purposeful steps to reach customers because it regularly attended trade conventions in the United States and engaged in business with McIntyre America that enabled the distribution of its products throughout the country.<sup>104</sup> The machine at issue did not end up in New Jersey "randomly or fortuitously, but as a result of the U.S. connections and distribution system that McIntyre UK deliberately arranged."<sup>105</sup> McIntyre UK thus had the requisite minimum contacts needed for the New Jersey state courts to assert personal jurisdiction over the company.<sup>106</sup>

To Justice Ginsburg, the practical meaning of the plurality's holding is that a manufacturer selling its products across the United States might evade jurisdiction in any and even all states, including the state where its defective product caused an injury.<sup>107</sup> Such an outcome would "undermine principles of fundamental fairness."<sup>108</sup> The plurality's application of the reasoning of *Asahi* was misguided, Justice Ginsburg argued, because McIntyre UK's engagement of and control of the distributor differentiated it from the facts underlying *Asahi*.<sup>109</sup>

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101. The plurality relied on these facts: McIntyre America distributed only four machines in New Jersey; McIntyre UK never attended a trade show in New Jersey; McIntyre UK had no property, offices, or employees in New Jersey; and McIntyre UK never advertised or paid taxes in New Jersey. *Id.* at 886.

102. *Id.* at 887. The Court conceded that New Jersey's interest in protecting its citizens from defective products is important but explained that such interests do not override judicial authority limitations put in place by the Constitution. *Id.*

103. *Id.* at 910 (Ginsburg, J., dissenting).

104. *Id.* at 897–98.

105. *Id.* at 898.

106. *Id.*

107. *Id.* at 906.

108. *Id.* Justice Ginsburg noted that lower federal and state courts faced with similar factual circumstances do not allow defendants such as McIntyre UK to escape jurisdiction. Justice Ginsburg also questioned the plurality's reliance on the fact that McIntyre sold only a few machines in the state of New Jersey. In footnote 15, she noted that each machine was worth approximately \$24,900, and thus each represented a major sale to the company. The Supreme Court, she argued, would have likely found that a corporation that sold \$24,900 in flannel shirts in the forum state would be subject to lawsuits there. *Id.* at 908 n.15.

109. *Id.* at 908. In contrast to McIntyre UK, *Asahi* did no business in the forum state. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112 (1987). It had no office, agents, employees, or property in the forum state, and did not advertise or solicit business there. *Id.* It did not create, control, or employ the distribution system that brought its products to the forum state. *Id.* *Asahi* merely manufactured the tire valves

Justice Breyer concurred in the judgment to reverse the New Jersey Supreme Court's finding of jurisdiction, but disagreed fundamentally with the plurality's reasoning because he believed (1) the Court should not fashion a new standard for personal jurisdiction because the facts of this case did not implicate novel jurisdictional issues "not anticipated by [the Court's] precedents,"<sup>110</sup> (2) a single isolated sale cannot establish minimum contacts,<sup>111</sup> and (3) the plaintiff could not prove that McIntyre UK established minimum contacts with the forum state under either the stream of commerce "plus" or the pure stream of commerce tests from *Asahi*.<sup>112</sup> Applying the stream of commerce test, Justice Breyer concluded that the plaintiff failed to show that McIntyre UK had made any "specific effort . . . to sell in New Jersey."<sup>113</sup> Nor did the plaintiff identify any "New Jersey customers who might . . . have regularly attended trade shows."<sup>114</sup> Applying the pure stream of commerce test, Justice Breyer found that the plaintiff could not even show that McIntyre UK "delivered its goods in the stream of commerce with the expectation that they would be purchased by New Jersey users."<sup>115</sup>

Justice Breyer was critical of both the dissent's "absolute approach," which he argued was too broad in allowing every state to assert jurisdiction against any "manufacturer who [sold] its products . . . 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,"<sup>116</sup> and the plurality's "strict no-jurisdiction" test which placed too high a burden for proving that a defendant targeted a specific forum.<sup>117</sup> He wrote:

[W]hat do those standards mean when a company targets the world by selling products from its Web site? And does it matter if, instead

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at issue in the facts of that case, which it sold to several tire manufacturers including Cheng Shin Rubber Industrial Co., which incorporated the tire valves into its tires, some of which it sold in California. *Id.* at 106. The sales to Cheng Shin took place in Taiwan, and the tire valves were shipped from Japan to Taiwan upon completion of the orders. *Id.*

110. *Nicastro*, 564 U.S. at 887 (Breyer, J., concurring in judgment).

111. *Id.* at 888.

112. *Id.* at 888–89.

113. *Id.* at 889.

114. *Id.*

115. *Id.* (internal quotation marks omitted).

116. *Id.* at 890–91. Justice Breyer was concerned that this standard may be fair in cases with large manufacturers but would be unfair in cases involving a small producer, such as a Kenyan coffee bean farmer who sells her products to a distributor that goes on to sell her goods in another state. *Id.* at 892.

117. *Id.* at 890.

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?<sup>118</sup>

Justice Breyer refused to adopt any change to the current personal jurisdiction doctrine on the facts of the case.<sup>119</sup>

#### D. *Stream of Commerce: Where We Stand*

The result of the stream of commerce line of cases, notably *Nicastro*, is troubling. The illogical reasoning embraced by the plurality in *Nicastro*,<sup>120</sup> by which it is possible for a corporation to purposefully avail itself of the United States market as a whole without being found to have purposefully availed itself of a particular state, will allow corporations to escape liability in United States altogether. This holding is particularly disconcerting in the age of the Internet, through which it is possible for a company to target the nation's markets as a whole while not having a physical presence in any state. And even if a company does have a physical presence or is incorporated in a particular state, the plurality's test, despite being one of specific jurisdiction, allows for a scenario in which it is only possible to sue such a company in its home state.

The approaches taken by the plurality and dissent in *Nicastro* in analyzing McIntyre's sales in New Jersey also leave uncertain the proper minimum contacts analysis. What quantity of machines must a retailer sell in the forum state in order to establish minimum contacts with that state? How should "quantity" be measured? The plurality based their inquiry on the number of sales made in the forum state and found in part that because McIntyre UK had made only a few sales in New Jersey, it did not have enough minimum contacts to justify the assertion of jurisdiction.<sup>121</sup> Justice Ginsburg's dissent, on the other hand, adopted a test based on the value of each product sold in the forum state.<sup>122</sup> She noted that the approximate value of a McIntyre

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118. *Id.*

119. *Id.* at 892–93.

120. According to Greg Saetrum, before *Nicastro*, many legal scholars considered the notion that a manufacturer could target the U.S. market as a whole without targeting the individual states a logical impossibility. Greg Saetrum, *Righting the Ship: Implications of J. McIntyre v. Nicastro and How to Navigate the Stream of Commerce in its Wake*, 55 ARIZ. L. REV. 499, 512 (2013).

121. *Nicastro*, 564 U.S. at 886.

122. *Id.* at 908 n.15.

machine was \$24,900, not an insignificant amount.<sup>123</sup> Justice Ginsburg cited three cases in which courts found the assertion of personal jurisdiction to comport with due process over defendants who sold \$24,900 worth of flannel shirts, \$24,900 of cigarette lighters, and \$24,900 of wire-rope splices.<sup>124</sup> Justice Ginsburg contended that the Court would undoubtedly find personal jurisdiction proper in each of these cases.<sup>125</sup> As indicated in the *Nicastro* opinions, the application of plurality's method over the dissent's, or vice versa, can lead to different results on the same facts.

Additionally, and as Adam Steinman notes in his examination of the *Nicastro* decisions, Justice Breyer failed to acknowledge the significant tension created by his concurrence and *McGee v. International Life Insurance Co.*, a case involving a single sale in the forum state.<sup>126</sup> In finding jurisdiction proper, the *McGee* Court based its holding on the notion that a manufacturer that sells its products in a state has derived certain benefits from that state and is thus subject to suit in that state.<sup>127</sup> Breyer's, as well as the plurality's, reliance on the low number of sales in New Jersey<sup>128</sup> is all the more confusing given *McGee*'s precedent.

As its introduction in the *World-Wide Volkswagen* opinion shows, the stream of commerce theory arose from the need to establish a personal jurisdiction standard in products liability cases in which manufacturers came into direct contact with the forum state only through intermediaries, such as distributors and retailers,<sup>129</sup> a situation that had become increasingly common;<sup>130</sup> the expansion of modern-day commerce was growing at the expense of in-store shopping.<sup>131</sup> Given the importance of the stream of commerce theory, the Court's failure to define a particular standard is troublesome, espe-

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123. *Id.*

124. *Id.*

125. *Id.*

126. *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957); Adam N. Steinman, *The Lay of the Land: Examining the Three Opinions in J. McIntyre Machinery, Ltd. v. Nicastro*, 63 S.C. L. REV 481, 508 (2012).

127. *McGee*, 355 U.S. at 223.

128. *Nicastro*, 564 U.S. at 886 (plurality opinion); *id.* at 888–89 (Breyer, J., concurring). Justice Breyer, in his concurrence, contends 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.” *Id.* at 888 (Breyer, J., concurring).

129. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298 (1980).

130. *Id.* at 293.

131. *Id.* (noting the “great increase in the amount of business conducted by mail across state lines”).

cially with the increasing usage of and dependence on online shopping.<sup>132</sup>

The rest of this Article discusses the prevalence of Internet-based shopping in the United States and lower courts' attempts to determine the appropriate circumstances under which the assertion of personal jurisdiction over a defendant for Internet activity in a distant forum will comport with due process. This Article advocates for the adoption of the stream of commerce theory of personal jurisdiction to causes of action arising from online shopping, and for promulgation of Justice O'Connor's "stream of commerce 'plus'" test as the standard for analyzing stream of commerce questions of personal jurisdiction,<sup>133</sup> the "plus" factor focusing on the value to the defendant of his or her activity in the forum state.<sup>134</sup>

## II.

### THE INTERNET AND PERSONAL JURISDICTION

For years, territorial boundaries limited a court's ability to assert personal jurisdiction. A court could subject a defendant to suit only in the geographic territory in which the defendant was physically present.<sup>135</sup> The Court abandoned this line of reasoning in *International Shoe*, in which it laid the foundation for modern day personal jurisdiction jurisprudence, by recognizing that technological advances in transportation and communications had enabled individuals and businesses to impact jurisdictions well outside the states they called home.<sup>136</sup> The Court has continued to refine and evolve the personal jurisdiction doctrine, where appropriate, in order to keep pace with rapidly developing technology.<sup>137</sup>

The advent of the Internet is the latest of technological advances to require courts to reevaluate the relevance and equity of settled doctrine. The Internet has no boundaries; it is a free and open system and a true global community. Its distinct effect of eviscerating geographic boundaries has been particularly challenging to courts in their assertions of personal jurisdiction, a doctrine that by definition depends on territorial limits.<sup>138</sup>

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132. See Section II.A.

133. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112 (1987).

134. *Id.* at 122 (Stevens, J., concurring in part and in the judgement).

135. *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877).

136. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

137. See the development of the personal jurisdiction doctrine traced in Section I.

138. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980) ("The Due Process Clause of the Fourteenth Amendment limits the power of a state court to render a valid personal judgment against a nonresident defendant.").

The typical personal jurisdiction case in the Internet context is as follows: proprietors of websites or Internet-based services set up on-line platforms they know to be accessible nationally, but upon being sued, assert that they do not have sufficient contacts within the forum state to subject them to litigation in that state.<sup>139</sup> As the impact and use of the Internet has continued to grow exponentially, lower courts have grappled with the challenge of applying the traditional principles of personal jurisdiction to individuals and businesses based solely on their Internet activities.<sup>140</sup> In the current context, the need for an established precedent is paramount, and it is only a matter of time before the Supreme Court is forced to rule on this issue. This Part discusses the unique jurisdictional issue posed by Internet and electronic commerce cases.

### A. *The Growth of the Internet and E-Commerce*

The Internet has proven itself an extraordinarily powerful and effective tool that boasts an astounding network of users. The number of Internet users has increased tenfold from 1999 to 2013, and this number will continue to rise.<sup>141</sup> Today, approximately 40% of the world population has an Internet connection,<sup>142</sup> compared to 1% in 1995.<sup>143</sup> The United States ranks second in the number of Internet users in the world, with 279,834,232 users in the year 2015, making up 86.75% of this country's population.<sup>144</sup>

Retailers have been quick to exploit the size and popularity of the Internet to establish virtual platforms in order to generate business.<sup>145</sup> E-commerce, colloquially known as “online shopping,” refers to “the buying and selling of goods and services, or the transmitting of funds

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139. *See, e.g.*, *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1121, 1126–27 (W.D. Pa. 1997); *Inset Sys., Inc. v. Instruction Set*, 937 F. Supp. 161, 164–65 (D. Conn. 1996).

140. *See* Section II.B.

141. INTERNET LIVE STATS, <http://www.Internetlivestats.com/> (last visited Dec. 13, 2018).

142. The number of Internet users across the world today is about 4,046,179,175; this figure is constantly increasing. *Id.* (last visited Dec. 15, 2018).

143. *Id.*

144. A “user” is an individual who has access to the Internet within the home where the individual resides. These figures do not represent frequency of use, but only access.

145. E-commerce expert Gary Hoover's research demonstrates that the growth of e-commerce companies has skyrocketed in the last fourteen years. Kaleigh Moore, *Ecommerce 101 + the History of Online Shopping: What the Past Says About Tomorrow's Retail Challenges*, BIGCOMMERCE: ECOMMERCE BLOG, <https://www.bigcommerce.com/blog/ecommerce/> (last visited Oct. 31, 2018).

or data, over an electronic network (most often the Internet)".<sup>146</sup> Consumers buy these goods or services either directly from the retailer that manufactures or produces the good, or through an online intermediary such as Amazon or eBay. Though e-commerce does not account for all Internet usage, it certainly contributes to a substantial part of it. Web sales in the United States totaled \$453.46 billion in 2017 according to Commerce Department estimates; this figure represents 13% of total retail sales in 2017 after factoring out the sale of items not normally purchased online, such as fuel, automobiles, and food items.<sup>147</sup> Currently, an astounding 96% of Americans shop online; and given that millennials shop online more frequently than other generations, these figures are likely to continue to grow.<sup>148</sup> The use of the Internet to shop for good and services has become so commonplace that it has been referred to metaphorically as an "online shopping mall" or "online supermarket."<sup>149</sup>

Perhaps most indicative of the surge in e-commerce is the advent of "Cyber Monday," a name created by marketing companies<sup>150</sup> to refer to the Monday after Thanksgiving. Cyber Monday is the online version of "Black Friday," whereby retailers offer holiday sales on their websites to entice consumers to purchase through the Internet. Total digital sales on Cyber Monday in 2017 surpassed \$6 billion.<sup>151</sup>

The online retail marketplace has grown at an exceptional rate, and as the number of these interactions increase, so too will the number of disputes. Online torts will be committed, online contracts will be breached, and online crimes will be perpetrated. The tough question is not which of these activities is or should be made illegal, but in which courts these illegalities will be tried. This Article addresses spe-

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146. Margaret Rouse, *What is E-Commerce (Electronic Commerce or EC)?*, TECHTARGET, <https://searchcio.techtarget.com/definition/e-commerce> (last visited Oct. 31, 2018).

147. Stefany Zaroban, *U.S. E-Commerce Sales Grow 16.0% in 2017*, DIGITAL COMMERCE 360: INTERNET RETAILER (Feb. 16, 2018), <https://www.digitalcommerce360.com/article/us-ecommerce-sales/>.

148. As of 2017, 67% of millennials shop online, while 72% of seniors continue to shop in-store. Leanna Kelly, *How Many People Shop Online? [Infographic]*, CPC-STRATEGY: BLOG (May 25, 2017), <https://www.cpcstrategy.com/blog/2017/05/ecommerce-statistics-infographic/>.

149. LANCE ROSE, NETLAW: YOUR RIGHTS IN THE ONLINE WORLD 58, 124 (1995).

150. Jessika Toothman, *How Cyber Monday Works*, HOWSTUFFWORKS, <https://money.howstuffworks.com/personal-finance/budgeting/cyber-monday1.htm> (last visited Oct. 11, 2018).

151. Michael Wood, *With an Increase in Online Shopping, Prepare for an Increase in Data Breaches*, FORBES (Feb. 24, 2018, 12:17 PM), <https://www.forbes.com/sites/allbusiness/2018/02/24/with-an-increase-in-online-shopping-prepare-for-an-increase-in-data-breaches/#5ee9aa1ee67b>.

cifically the exercise of personal jurisdiction over causes of actions stemming from e-commerce transactions.<sup>152</sup>

It is clear that the Internet has changed forever the way we do business. It is an international system, allowing millions of people to interact and exchange information wherever they are in the world. It has been aptly described as an "electronic highway,"<sup>153</sup> "consisting of many streets leading to places where a user can find information."<sup>154</sup> This metaphor is reflective of the "expansiveness of the Internet," and "the ability for a user to reach another person or database instantly despite great physical distances."<sup>155</sup> "These communications can occur almost instantaneously, and can be directed either to specific individuals, to a broader group of people interested in a particular subject, or to the world as a whole."<sup>156</sup> The Supreme Court has yet to address the implications of the Internet for the personal jurisdiction doctrine, but it is clear that the porous boundaries of cyberspace raise tough questions about the relevance of current jurisdictional jurisprudence. As the Sixth Circuit noted, "The Internet represents perhaps the latest and greatest manifestation of these historical, globe-shrinking trends. It enables anyone with the right equipment and knowledge . . . to operate an international business cheaply, and from a desktop."<sup>157</sup>

### B. *Personal Jurisdiction and the Internet: A Survey of Lower Courts*

That lower courts have failed to establish a consistent doctrine to discern the effect of the Internet on personal jurisdiction is not a surprise. Left only with a volatile jurisprudential history and recent Supreme Court decisions placing much of that history in a state of utter confusion,<sup>158</sup> lower courts dealing with this novel question have varied widely in their analysis of the personal jurisdiction question in causes of action arising from online conduct.

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152. This Article does not purport to discuss or offer a solution to online intentional torts, online contract breaches, or any other online activity not representing an e-commerce business transaction as defined in this Article, or advertisements or communications giving rise thereto.

153. ROSE, *supra* note 149, at 239.

154. Edias Software Int'l v. Basis Int'l, 947 F. Supp. 413, 419 (D. Ariz. 1996).

155. *Id.*

156. Am. Civil Liberties Union v. Reno, 929 F. Supp. 824, 831 (E.D. Pa. 1996).

157. CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1262 (6th Cir. 1996).

158. The Court's decisions in *Asahi* and *Nicastro* are confusing not only in their stream of commerce analysis, but also in their effects on the minimum contacts and purposeful availment analyses as well, as noted in Section II.D of this Article.

The easy case arises when a company doing business over the Internet operates a physical location in the United States and is sued in that jurisdiction. In cases like these, courts need only apply a general jurisdiction analysis. Such a company may be sued for any reason in any jurisdiction where it is incorporated or has its principal place of business.<sup>159</sup> The fact that the cause of action arises from online conduct is of no significance to this analysis.

The issue in most such cases, however, arises in instances where specific jurisdiction is called into question; the defendant is not incorporated or headquartered in the forum and does not have systematic and continuous contacts in the forum.<sup>160</sup> Therefore, a court may assert personal jurisdiction over the defendant only if the defendant possesses minimum contacts with the forum state. However, the ease with which such contacts are created across multiple jurisdictions over the Internet has raised a real risk of creating borderless jurisdiction, a notion that is fundamentally at odds with the doctrine of personal jurisdiction, which continues to assume that territorial boundaries, and more specifically state boundaries, are real and meaningful.

In answering the question of how to determine when personal jurisdiction may be asserted over a defendant of this kind, the courts have developed a few distinct approaches. The first approach, formulated in *Inset Systems, Inc. v. Instruction Set*, is extremely broad, validating the assertion of personal jurisdiction based only on the availability of a defendant's website in the forum state.<sup>161</sup> The Western District of Pennsylvania, in *Zippo Manufacturing Co. v. Zippo Dot Com*, provided a much more detailed test that analyzed the type of contact generated by the defendant's presence in the forum state based on the website's interactivity.<sup>162</sup> But while, unlike *Inset*, the *Zippo* analysis provides a framework with which to fairly limit the jurisdictions in which a defendant may be sued, the test leaves other important barometers unanswered, such as the level of interactivity necessary to establish jurisdiction. Although the *Zippo* test has gained acceptance

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159. *Goodyear Dunlop Tires Operations v. Brown*, 564 U.S. 915, 924 (2011).

160. *See, e.g., Inset Sys., Inc. v. Instruction Set*, 937 F. Supp. 161, 164 (D. Conn. 1996) (where the Defendant Instruction Set was a Massachusetts corporation with a principal place of business in Massachusetts, did not conduct business in the forum state, and neither maintained an office in the forum State nor had any employees there).

161. *Id.* at 165.

162. *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1125–27 (W.D. Pa. 1997).

in a greater number of jurisdictions,<sup>163</sup> neither it nor the *Inset* test has sufficiently addressed or resolved the core issue.

### 1. *Inset Systems, Inc. v. Instruction Set*

Courts began struggling with how to treat the Internet in regard to personal jurisdiction in the early 1990s. The *Inset* case involved a suit filed in Connecticut against Instruction Set (ISI), a Massachusetts corporation that provided computer technology and support to organizations around the world.<sup>164</sup> Instruction Set had no employees or offices in Connecticut, and conducted no regular business there.<sup>165</sup> The plaintiff, Inset, possessed a trademark on the word “inset” and sued defendant ISI for using “INSET.COM” as its Internet domain address and “1-800-US-INSET” as its telephone number; both the website and telephone number were used by ISI to advertise its goods and services.<sup>166</sup> Citing the minimum contacts and purposeful availment standards from *International Shoe* and *Hanson v. Denckla*, respectively, the court determined that because ISI directed its advertising activities via the Internet and telephone number to every state in the United States, ISI purposefully availed itself of the privilege of doing business in Connecticut and was therefore subject to suit by a Connecticut court.<sup>167</sup>

The *Inset* court thus established an extraordinarily broad approach to Internet jurisdiction cases. This holding stands in direct contrast to the plurality’s mode of analysis in *Nicastro*, requiring that a defendant purposely direct its activities to the forum state in particular in order to be subject to suit there.<sup>168</sup> The *Inset* court made no finding that ISI had purposefully targeted its services at the forum state, but rather based jurisdiction on ISI’s exploitation of the United States market as a whole.<sup>169</sup> There is nothing purposefully directed at Connecticut in the setup of a website and telephone number that, once created, become immediately accessible everywhere. This discussion does not contend that ISI did not avail itself of the privileges of Connecticut law, only that it did not purposefully do so. Indeed, the state

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163. TiTi Nguyen, *A Survey of Personal Jurisdiction Based on Internet Activity: A Return to Tradition*, 19 BERKELEY TECH. L.J. 519, 529 (2004) (collecting and citing cases).

164. *Inset Sys.*, 937 F. Supp. at 162.

165. *Id.* at 162–63.

166. *Id.* at 163.

167. *Id.* at 164–65.

168. *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 884 (2011).

169. *Inset Sys.*, 937 F. Supp. at 165 (finding that ISI has “directed its advertising activities . . . toward not only the state of Connecticut, but to all the states”).

of Connecticut and its inhabitants quite possibly never crossed the minds of any ISI executives.

To establish jurisdiction in Internet cases, requiring a defendant's activities to consciously target the forum is more harmonious with the Court's purposeful availment precedent than not imposing such a requirement. Because of the ease with which websites are created, the creation of a website makes it automatically accessible everywhere, without the creator having to select the jurisdictions in which to make his or her website available for viewing. The Court's purposeful availment standard requires more than just default accessibility in the forum state.<sup>170</sup>

Several other courts, like the *Inset* Court, have also concluded that the use of the Internet and maintenance of a webpage alone can suffice to establish purposeful availment,<sup>171</sup> but because of the unprecedented broadness of the test and the absurd results that might follow, many courts have instead opted to differentiate between "active" and "passive" online presence.<sup>172</sup> This line of reasoning holds the mere establishment of a website to be a "passive act," which alone cannot justify an assertion of jurisdiction.<sup>173</sup>

## 2. Zippo Manufacturing Co. v. Zippo Dot Com

Other courts have devised a distinction between active and passive online presence in order to grapple with this conundrum and have determined that the mere use of the Internet, without more, is a "passive" action that fails to constitute purposeful availment.<sup>174</sup> In one of

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170. This assumes that such conduct does not include advertisement by email, which can be found to be purposeful.

171. *See* *Playboy Enters., Inc. v. Chuckleberry Publ'g, Inc.*, 939 F. Supp. 1032, 1044 (S.D.N.Y. 1996) (finding that an Internet webpage can serve as an advertisement by which a corporation can distribute its images throughout the United States and that by inviting United States Internet users to view these images, the corporation is allowing their distribution within the United States); *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328, 1333 (E.D. Mo. 1996) ("Through its website, [the defendant] has consciously decided to transmit advertising information to all internet users, knowing that such information will be transmitted globally. Thus, [the defendant]'s contacts are of such a quality and nature, albeit a very new quality and nature for personal jurisdiction jurisprudence, that they favor the exercise of personal jurisdiction over defendant.").

172. *See* Eric C. Hawkins, Note, *General Jurisdiction and Internet Contacts: What Role, If Any, Should the Zippo Sliding Scale Test Play in the Analysis?*, 74 *FORDHAM L. REV.* 2371, 2371 (2006) (noting that the Zippo "sliding scale" test of interactivity has emerged as "the most popular framework for analyzing Internet contacts").

173. *See* *Bensusan Rest. Corp. v. King*, 937 F. Supp. 295, 301 (S.D.N.Y. 1996) (concluding that "[c]reating a site, like placing a product into the stream of commerce, . . . is not an act purposefully directed toward the forum state").

174. *Id.*

the earlier cases decided on the basis of this distinction, *Bensusan Restaurant Corp. v. King*, the Southern District of New York refused to find that the mere accessibility of a Missouri music club's website in New York satisfied purposeful availment.<sup>175</sup> Bensusan operated a jazz club, "The Blue Note," in New York City, and sued the defendant owner of a music club, also called "The Blue Note," in Missouri for posting on its website a logo substantially similar to Bensusan's logo.<sup>176</sup> The court, citing *Asahi*, held that exercise of jurisdiction over the defendant in New York would not comport with due process:

King has done nothing to purposefully avail himself of the benefits of New York. King, like numerous others, simply created a Web site and permitted anyone who could find it to access it. Creating a site, like placing a product into the stream of commerce, may be felt nationwide—or even worldwide—but, without more, it is not an act purposefully directed toward the forum state.<sup>177</sup>

In a similar vein, many courts have adopted the *Zippo* "Sliding Scale" test.<sup>178</sup> In *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, a federal court in Pennsylvania determined that "the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet."<sup>179</sup> The *Zippo* test is generally accepted by federal courts as the standard for determining personal jurisdiction in Internet cases.<sup>180</sup> The scale is as follows:

At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise personal jurisdiction. The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined

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175. *Id.* at 300.

176. *Id.* at 297–98.

177. *Id.* at 301.

178. *See Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997); Nguyen, *supra* note 163.

179. *See Zippo Mfg. Co.*, 952 F. Supp. at 1124.

180. Nguyen, *supra* note 163.

by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.<sup>181</sup>

The test thus creates three categories of websites: (1) websites for conducting business over the Internet; (2) websites where users exchange information with the host websites; and (3) “passive” websites that merely present information.<sup>182</sup>

Though more precise and targeted than the *Inset* test, the *Zippo* test is not without its flaws. First, while the results of the test are clear on the margins—on websites that are highly active within a jurisdiction or websites that are purely informational with no element of interactivity—the middle ground is less clear; the test does not indicate how a court is to determine how much interactivity will suffice to establish jurisdiction.<sup>183</sup> And second, while *Zippo* purports to reject the notion of universal jurisdiction set forth by *Inset*,<sup>184</sup> the test does nothing to limit the number of fora in which a defendant can potentially be subject to suit. This latter factor is particularly problematic, given how widely accessible the Internet has become.<sup>185</sup> In addition to skirting the fairness concerns that form the bedrock of personal jurisdiction doctrine, the possibility of universal jurisdiction, whereby a defendant may be subject to jurisdiction in the court of every state based on vague notions of the “interactivity” of a defendant’s website, “would have a devastating impact on those who use this global service.”<sup>186</sup> Finally, the *Zippo* rule has often been criticized as outdated

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181. *Zippo Mfg. Co.*, 952 F. Supp. at 1124 (citations omitted).

182. *Id.*

183. Other proposed solutions to e-commerce disputes suffer from the same lack of specificity. See e.g., Anne McCafferty, Note, *Internet Contracting and E-Commerce Disputes: International and U.S. Personal Jurisdiction*, 2 GLOBAL BUS. L. REV. 95, 118-20 (2011). McCafferty proposes implementation of a statutory standard for the assertion of personal jurisdiction in e-commerce cases. *Id.* In her suggested language, she would require that the “contacts made by the defendant via the Internet” be “active in nature rather than merely passive,” and goes on to define “active” contacts as those involving “(1) directing electronic activity into a state within the U.S., (2) with the intent of engaging in business or other interactions within the State.” *Id.* at 119. Under this proposal, an e-retailer that sets up a website that is accessible and allows purchases in a particular state and later ships ordered products to that state, but does not purposely target that state, cannot be held liable. It is further unclear what it means to “direct electronic activity” into a state, in a world in which websites are accessible anywhere and at any time.

184. Dennis T. Yokoyama, *You Can’t Always Use the Zippo Code: The Fallacy of a Uniform Theory of Internet Personal Jurisdiction*, 54 DEPAUL L. REV. 1147, 1160 (2005).

185. See *supra* Section II.A.

186. *Playboy Enters., Inc. v. Chuckleberry Publ’g, Inc.*, 939 F. Supp. 1032, 1039-40 (S.D.N.Y. 1996); see also *Millennium Enters., Inc. v. Millennium Music, LP*, 33 F. Supp. 2d 907, 922 (D. Or. 1999) (noting that such expansive jurisdiction may have the

and now irrelevant; the Internet has changed dramatically since *Zippo* was decided in 1997, and most websites today employ at least some degree of interactivity with viewers.<sup>187</sup>

### III.

#### APPLYING THE *SHOE*

The growing disunity in the approaches to analyzing personal jurisdiction over online retailers and other Internet users means that the Court will soon have to provide instruction on this matter. A defendant's placing of a product or service on his or her website is akin to placing it into the physical stream of commerce of any jurisdiction in which the defendant's website is accessible, and the Court should hesitate to invent a new test when traditional principles sufficiently address the issue at bar: to wit, if the *Shoe* fits, wear it.

This, in turn, requires that the Court clarify its stream of commerce analysis. After discussing the merits and flaws of both the stream of commerce "plus" and "pure" stream of commerce modes of analysis, this Article advocates for the adoption of a stream of commerce "plus" analysis, centered around the value of the defendant's business in the forum state as the "plus" factor.

#### A. *The Internet as a Digital Highway*

As evidenced by the case law, personal jurisdiction jurisprudence is an evolving and malleable body of law, and the Court has certainly not been reluctant to reassess, redefine, and add to its established analysis.<sup>188</sup> Much of this evolution is due to advances in technology that rendered established precedent inadequate to confront the new jurisdictional questions posed by globalization and the evisceration of national borders.<sup>189</sup>

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effect of "dramatically chilling what may well be the most participatory marketplace of mass speech that this country—and indeed the world—has yet seen" (quoting *Dig. Equip. Corp. v. AltaVista Tech., Inc.*, 960 F. Supp. 456, 463 (D. Mass. 1997) (internal quotation marks omitted)).

187. Nguyen, *supra* note 163, at 537 (2004) (arguing that *Zippo*'s interactivity test has diminished analytical use because of how websites have evolved since that case was decided); Yokoyama, *supra* note 184, at 1167.

188. See the history of personal jurisdiction traced in Part II of this Article.

189. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.

Perhaps because the Court has responded to these developments by expanding the doctrine of personal jurisdiction to encompass new jurisdictional questions as they arise, lower courts have felt authorized to do so as well. As noted in Section III.B of this Article, they have crafted their own analyses to determine the effect of the Internet on personal jurisdiction. While this Article does not purport to question the virtue of the *Inset* and *Zippo* tests and their progeny to all jurisdictional disputes over online conduct, it does reject both tests in causes of action arising specifically from e-commerce. Instead, e-commerce cases should be decided by the Court's stream of commerce precedents.<sup>190</sup>

The Court should adopt the prudence Justice Breyer exercised in his *Nicastro* concurrence<sup>191</sup> and refrain from fashioning a new standard to deal with e-commerce cases or endorsing one of the aforementioned standards lower courts have employed. Arguing that the facts of *Nicastro* did not justify the creation of a new approach, Justice Breyer

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McGee v. Int'l Life Ins. Co., 355 U.S. 220, 222–23 (1957); see also J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 887 (2011) (Breyer, J., concurring) (explaining that the Court's precedents may not always adequately anticipate changes in "commerce and communication"); see also Shaffer v. Heitner, 433 U.S. 186, 202 (1977) ("The advent of automobiles, with the concomitant increase in the incidence of individuals causing injury in States where they were not subject to *in personam* actions under *Pennoyer*, required further moderation of the territorial limits on jurisdictional power.").

190. Other proposed solutions are misguided in their application of well-established theories of personal jurisdiction and raise more questions than they answer. See, e.g., Kevin F. King, *Personal Jurisdiction, Internet Commerce, and Privacy: The Perseus Legal Consequences of Modern Geolocation Technologies*, 21 ALB. L.J. SCI. & TECH. 61, 64 (2011). King argues that a court applying the *Zippo* test should consider a site's use of (or failure to use) geolocation tools. Geolocation tools, software capable of deducing the geolocation of a device connected to the Internet, can be used to screen out users from a defendant's site. *Id.* at 87–88. King's proposal improperly shifts the burden from showing that the defendant targeted the jurisdiction to demonstrating that the defendant avoided contact with a jurisdiction. The problem with this approach is that it holds that a defendant's passivity should subject it to jurisdiction, an idea incompatible with this country's personal jurisdiction jurisprudence. Other scholars have proposed allowing e-retailers to escape jurisdiction by posting forum selection notices on their websites. See Sarah K. Jezairian, *Lost in the Virtual Mall: Is Traditional Personal Jurisdiction Analysis Applicable to E-Commerce Cases?*, 42 ARIZ. L. REV. 965, 988–89 (2000) (arguing that imposing a forum notice requirement in conjunction with the application of *Zippo* would be a more workable judicial doctrine than *Zippo* acting alone). Such an approach safeguards only the most meticulous Internet user who takes the time to read the notice and may serve to create contracts of adhesion created by parties with unequal bargaining power. See, e.g., *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 598–601 (1991) (Stevens, J., dissenting) (analogizing a cruise line's forum selection clause to the kinds of contracts of adhesion that are unenforceable at common law).

191. *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 887 (2011) (Breyer, J., concurring).

joined neither the *Nicastro* plurality nor dissent, contending instead that the Court's precedents were sufficient to address the question posed in *Nicastro*.<sup>192</sup> He cautioned:

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.<sup>193</sup>

The Court has expanded or reworked its personal jurisdiction jurisprudence only when necessary, either to refine an earlier standard to resolve uncertainty or to fashion a new standard in order to accommodate major technological development.<sup>194</sup> It is compelling to treat the Internet as such a development; it has dramatically revolutionized the way the modern world communicates, shares information, and does business. But many forms of online activity, especially as they relate to e-commerce, are no different than their non-virtual counterparts; they are just easier. Indeed, set-up of an online retail platform undoubtedly requires the same thought-processes as that of a physical location in terms of what to sell and how to market it. Less capital and very little, if any, extra time is expended;<sup>195</sup> the only additional step is the mere click of a mouse. Just as a corporation places its products into the stream of commerce through its use of the physical channels of commerce, an individual or business that places a product for sale online takes advantage of the virtual channels of commerce, the "digital highways" of the "online shopping mall."

Stream of commerce "refers to the movement of goods from manufacturers through distributors to consumers."<sup>196</sup> Because e-commerce, the virtual counterpart of the situation explained by this definition, has become extremely popular and lucrative in modern society,<sup>197</sup> the "stream of commerce" metaphor should now be expanded to include e-business as part of that "stream." When Home Depot, with the knowledge that any consumer anywhere can purchase its products anytime, uploads onto its e-shop a photo of a saw and an "add to cart" option that triggers the "shopping cart" software from which the consumer can complete his or her purchase, Home Depot has effectively placed that saw into the stream of commerce. The

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192. *Id.*

193. *Id.*

194. See the history traced in Part II of this Article.

195. *E-Commerce: Advantages and Disadvantages*, ACCION, <https://us.accion.org/resource/e-commerce-advantages-and-disadvantages/> (last visited Oct. 31, 2018).

196. *Nicastro*, 564 U.S. at 881 (plurality opinion).

197. See Section II.A.

mere posting of a product online for immediate purchase is the placement of that product in the stream of commerce.

It is important to the jurisdictional analysis that online retailers possess little control or managerial oversight over the shipment of their products because it makes their activity that much less targeted to a particular forum. Many online retailers, by the very nature of their business, employ shipping companies such as FedEx or UPS to do most of the logistical work, including retrieving the packages from the retailers for mailing. Shipping labels are printed automatically with the address the online consumer provided. Shipping costs are either charged directly to consumers or incorporated into the initial pricing of the product. There is very little, if any, conscious activity directed at the shipment of a purchased product to its final destination.

To fully complete the analogy between the physical and electronic streams of commerce, consider the word “distributor” as used in the *Nicastro* plurality’s definition of the “stream of commerce.” A distributor is an intermediary entity between the seller and buyer of a product. In the e-commerce context, this role is satisfied by the Internet service provider. The functionality provided by an Internet service provider<sup>198</sup> makes the distribution of a retailer’s products through the Internet possible; it is of the same utility to an online retailer as distributor Cheng Shin was to Asahi,<sup>199</sup> and an online retailer does not “create, control, or employ”<sup>200</sup> this system. So factually similar are these situations that it is plausible to define e-commerce as “the movement of goods from [online] manufacturers through [Internet service] distributors to consumers.”<sup>201</sup> The Court created the stream of commerce conception of minimum contacts specifically to address facts like this. Invention of a new standard would run afoul of this precedent.

### B. *Filtering the Stream*

In order for courts to apply the stream of commerce analysis to jurisdictional questions in e-commerce-related suits, the Court must instruct as to the proper inquiry. The splintered decisions in *Asahi* left the stream of commerce doctrine in a state of substantial confusion,<sup>202</sup> and although the Court attempted to settle the law in *Nicastro*, persist-

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198. Typical services include Internet access and transit, domain name registration, and web hosting.

199. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987).

200. *Id.* at 112.

201. *Nicastro*, 564 U.S. at 881 (plurality opinion).

202. *See* Sections I.C. and I.D.

ing uncertainty and disagreement again precipitated a fractured Court and no controlling opinion. Justice O'Connor's stream of commerce "plus" mode of analysis from *Asahi* is both the test best suited to resolving stream of commerce and e-commerce jurisdictional disputes<sup>203</sup> and the test most congruent with the Court's personal jurisdiction precedents. However, Justice O'Connor's review remains misguided in what form the "plus" analysis should take.<sup>204</sup> This Article proposes that in settling jurisdictional questions in causes of action arising from e-commerce, the "plus" analysis must be a consideration of the value of the defendant's business in the forum state as a percentage of its overall business, or in the case of retailers that do business internationally, the value of the defendant's business in the forum state compared to the value of its business in the United States as a whole.

### 1. *Stream of [E-]Commerce "Plus"*

The *Asahi* rift resulted from a fundamental disagreement about the required level of cognizance of a product's distribution pathways and ultimate destination that a defendant must possess in order for the assertion of jurisdiction to be valid. Although Justice Brennan relied on several accurate principles in forming his conclusion, his pure stream of commerce test is ultimately ill-advised and incongruent with the Court's jurisprudence. Justice Brennan is correct that "[a] defendant who has placed goods in the stream of commerce benefits economically from the retail sale of the final product in the forum State, and indirectly benefits from the State's laws that regulate and facilitate commercial activity."<sup>205</sup> "These benefits accrue regardless of whether that participant directly conducts business in the forum State, or engages in additional conduct directed toward that State."<sup>206</sup> The problem with his approach, however, is the failure to account for the Court's precedent noting that the mere accretion of benefits in a forum does not always indicate that a defendant purposefully availed himself of those benefits.<sup>207</sup> A defendant must intend to secure the benefits

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203. Though the principles espoused in this Article in favor of the stream of commerce "plus" test apply to both traditional stream of commerce facts and e-commerce facts, this Article does not examine in detail its application to traditional stream of commerce causes of action and proposes its implementation only in the e-commerce context.

204. See Section I.C.

205. *Asahi Metal Indus. Co.*, 480 U.S. at 117 (Brennan, J., concurring in part and in judgment).

206. *Id.*

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

and privileges of the forum state; his activity must have been conducted with that purpose. If accrued benefits themselves sufficed to establish personal jurisdiction, the *Hanson* Court's use of the word "purposely" was both superfluous and irresponsibly misleading. Such a reading of the *Hanson* opinion would be absurd, as the *Hanson* Court anchored "purposeful" conduct as a prerequisite to jurisdiction when it distinguished the case at hand from *McGee*.<sup>208</sup> Jurisdiction was proper in *McGee* because the *McGee* defendant solicited business in the forum state, a purposeful activity.<sup>209</sup> The *Hanson* defendant did not, so jurisdiction was improper.<sup>210</sup>

Like the broad application fashioned by the *Inset* court,<sup>211</sup> the pure stream of commerce test fails to capture only those retailers who deliberately direct their online activities to a forum state. As noted earlier, websites can be created and made available to anyone, anywhere. All that is required is the click of a button. The creator need not think about the forum state in question, let alone purposefully direct any activity to that state. And like the *Zippo* test, the pure stream of commerce test does not identify any way to limit the number of fora in which a defendant may be subject to litigation. To propose that a retailer who operates a website automatically accessible across the United States should be forced to defend a suit anywhere in the United States is unthinkable. It would leave online retailers in a state of uncertainty; they would be unable to plan for litigation in any particular forum because they would be subject to suit in all fora. Such a conception of personal jurisdiction would erode the foundations upon which the doctrine is based by forcing defendants to litigate away from their home base at great cost and inconvenience and in jurisdictions in which they have undertaken no action to purposefully avail themselves of the rights and privileges of those jurisdictions.

The stream of commerce "plus" test, by contrast, successfully incorporates into the analysis the purposeful availment requirement so easily dispensed by the "pure" test. It requires conduct directed purposely at the forum state: "[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum state."<sup>212</sup> Because an e-shop is automatically omnipresent upon creation, it alone cannot indicate intent to

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208. *Id.* at 252–53.

209. *Id.* at 251.

210. *Id.* at 253.

211. *See supra* Section II.B.

212. *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 112 (1987) (opinion of O'Connor, J.).

serve any particular forum. It is clear that something more is required in the e-commerce context. The difficult question is what this “something more,” or the “plus,” should be.

Justice O'Connor indicated factors she believed relevant to establishing purposeful availment: “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.”<sup>213</sup>

But there are three problems with using these factors in the context of e-commerce. First, they do not anticipate every situation. A defendant may not have designed the product specifically for, or advertised, established customer service channels, or employed anyone in the forum state, but may still have reasonably anticipated that its product would find its way there. An absence of these factors should not automatically lead to the conclusion that the defendant had no intention to serve the forum state. Second, they create the same problem in the e-commerce context that e-commerce itself creates: a defendant's online posting of an advertisement, automatically accessible everywhere, should not suffice to establish intent to serve any forum, in the same way the defendant's creation of an e-shop alone should not suffice. Third, these factors fail to limit the number of jurisdictions in which a defendant may be amenable to suit. Imagine that a retailer provides a phone number to its customers; in other words, it has “establish[ed] channels for giving advice in the forum State.”<sup>214</sup> Anyone in the United States can call this phone number—does this mean that any state in the country may now assert jurisdiction over the defendant? Such a thought seems inconceivable. We must consider other options for satisfying the “plus” requirement.

## 2. *Justice Stevens Weighs In: Value as “Plus”*

Of the three *Asahi* concurrences, Justice Stevens's opinion is most intriguing despite traditionally receiving the least attention by courts and legal scholars. It is unclear upon what precedents he based his unique “volume, value, and hazardous nature” standard,<sup>215</sup> but it is clear that this analysis applied to stream of commerce cases alone is problematic. Applying this test, Justice Stevens would conceivably hold that a defendant who places only one non-hazardous product into

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213. *Id.*

214. *Id.*

215. *Id.* at 122 (concurring in part and in judgment).

the stream of commerce cannot be subject to suit in the forum in which that product inadvertently causes injury, even if the defendant knew or intended for his or her product to end up in that forum. Such an approach is not only unfair to potential plaintiffs, but it also fails to defer to the Court's precedents identifying the expectations of the defendant as the crux of the stream of commerce minimum contacts analysis.

But perhaps Justice Stevens was onto something. These three factors can in fact be indicative of a defendant's reasonable expectation that his product will end up in the forum state or cause injury there, but they cannot be relied upon to always predict both. For example, the hazardous nature of the product in question might speak to a defendant's reasonable expectation that his product would cause injury but gives no indication as to the jurisdictions in which the defendant knew or expected injuries to occur. Volume tells us far less. A defendant may make five hundred sales in Texas, but this should not suffice to establish purposeful availment if his sales in Florida exceed twenty thousand. Nor should it be the case that a defendant escapes jurisdiction in a state where he sells ten products at \$100,000 each but is liable in a state where he sells five thousand products at \$2 each. A volume test would cause this illogical result.

The value factor, on the other hand, will always be probative on the issue of a defendant's purposeful availment of the benefits of a distant forum. The monetary or other nonfinancial worth to a defendant of his sales in a forum state evinces the importance to the defendant of that state and, logically, defendant's cognizance and regard to its activities there. Take, for example, Company X. If 20% of Company X's online sales are made to Long Island consumers, Company X should reasonably expect many of its products to end up in New York. It follows from this that the company would reasonably anticipate being haled into court there.<sup>216</sup> On the other hand, if 0.01% of their online sales are made to Oklahoma consumers, it is quite reasonable that initiation of a suit in an Oklahoma court against Company X would come as a surprise; Company X would not reasonably expect to be haled into court in Oklahoma, a prerequisite for the valid assertion of jurisdiction there.

A value test has other merits. Unlike Justice O'Connor's factors, this test will always be employable in the e-commerce context, irrespective of business size, location, or product type. There will always be some value to a defendant of its business in a forum state, whether

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216. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297–98 (1980).

it is 0% or 100%. Additionally, because most businesses monitor their sales diligently and regularly, an online retailer brought to court cannot argue ignorance of his business success in the forum. Value numbers are also telling of a defendant's intent to serve a particular forum state, as differentiated from a defendant's expectations. If Company X knows that 20% of its e-sales are made to Long Island consumers, it may decide that the wisest business option is to market and/or design its products in a way it feels will appeal to Long Islanders.<sup>217</sup> This would support a finding of purposeful availment. A value test therefore incorporates the factors identified by Justice O'Connor while making up for the deficiencies those factors considered alone would create in the e-commerce context.

For foreign retailers or domestic retailers that conduct business internationally, the considered value should not be the percentage of defendant's online sales in the forum state, but instead, courts should consider the percentage of defendant's total United States e-sales that are made in the forum state. A Japanese company that makes only 2% of its total e-sales in Florida, for example, should not evade jurisdiction in Florida if its total United States e-sales account for 2.1% of its entire e-business. In this hypothetical, the state of Florida alone provides for the overwhelming majority of defendant's American e-sales—approximately 95%—making this strong evidence of the defendant's intent to serve Florida and expectations to be held accountable there. The assertion of jurisdiction by a Florida court, therefore, would comport with due process.

Value as the "plus" factor in the stream of commerce "plus" test is a fair and consistent way to determine whether an online retailer has purposefully availed itself of the benefits and privileges of the forum state. Therefore, in e-commerce cases, the assertion of personal jurisdiction is proper where a defendant online retailer has placed its products into the electronic stream of commerce and conducts a consequential percentage of its overall e-business in the forum state such that it can reasonably expect its products to enter the forum state and give rise to injury there. As the Court has noted, because personal jurisdiction analyses are always fact-specific, the appropriate standard is whether or not the defendant conducts a consequential percentage of business in the forum state as opposed to any exact quantitative threshold. The precise question is whether the defendant's business in the forum state is substantial enough to be of consequence to the de-

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217. Such an intent, however, may not always be clear or present. A value test may merely reveal such intent.

fendant; substantiality is shown when a defendant retailer changes the way it conducts business to cater to the forum state, or when the value of the defendant retailer's business in the forum state is otherwise significant enough to put the defendant on notice that business in the forum is of import to it. This number does not have to be large to suffice; this is a case-specific inquiry.

It is also important to note that this analysis considers only e-sales; any sales made by mail order, in-store, or through any other mechanism may not be considered. Specific jurisdiction requires a claim to arise out of or be related to a defendant's contacts. As such, in e-commerce causes of actions, the relevant contacts are only the defendant's e-commerce related activities, i.e., its electronic sales to the forum state.

Finally, businesses successful in many jurisdictions need not have cause for concern. This proposed analysis leaves intact the second step of stream of commerce analysis the *Asahi* Court recognized: "the reasonable test." Consideration afforded to the factors of the reasonable test, provided that the most heavily weighted factor remains the burden on the defendant of litigating away from home, should suffice to protect nationally successful online retailers from onerous litigation in distant fora.

#### CONCLUSION

Improvements in technology and reductions in barriers to communication with the introduction of the Internet have required the Court to frequently rework its personal jurisdiction analysis in order to accommodate for these developments. In many ways, the Internet is an unparalleled phenomenon that necessitates the creation of new laws and regulations. But this country's courts should remain wary about issuing new rules for the Internet before sufficiently determining that established precedent remains outdated or inapplicable to the online world.

This is a particularly important concern in personal jurisdiction jurisprudence, where the Court, though repeatedly refining the doctrine since *International Shoe*,<sup>218</sup> has not wrought changes unless necessary. The Internet, though undoubtedly the greatest technological development of modern time, does not require courts to fashion new personal jurisdiction analyses in every instance. In the e-commerce case specifically, Internet activity merely mirrors its non-virtual counterpart, accomplishing far more with far less effort. The Internet is the

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218. *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

new virtual “stream of commerce,” and the assertion of personal jurisdiction over defendants vis-à-vis their online business activity will be proper where a defendant has placed his product into this electronic stream and conducts a consequential percentage of its overall e-business in the forum state such that he can reasonably expect his product to enter the forum state and give rise to injury there. Because doing business over the Internet, the “digital highway,” is akin to the physical placement of a product in the stream of commerce, the Court should not deviate from the stream of commerce doctrine in analyzing jurisdictional questions posed by e-commerce causes of action—as they say, if the *Shoe*<sup>219</sup> fits, wear it.

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219. *Id.*